Federal Register

11–26–08 Wednesday
Vol. 73 No. 229 Nov. 26, 2008

United States
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(ISSN 0097-6326)

Federal Register

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Pages 71909–72302

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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701 and 705

RIN 3133–AC98

The Low-Income Definition

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is amending the definition of "low-income members" to use median family income (MFI) to determine if a credit union qualifies for a low-income designation and eligible for assistance from the Community Development Revolving Loan Fund (CDRLF). The amendment will eliminate the confusion associated with adjusting median household income in metropolitan areas with higher costs of living. Additionally, it will better align NCUA criteria for a low-income credit union (LICU) designation with the criteria for the addition of an underserved area to a federal credit union (FCU) field of membership and certification as a Community Development Financial Institution (CDFI).

DATES: The rule is effective January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Moisette Green, Staff Attorney, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428, or telephone: (703) 518–6540.

SUPPLEMENTARY INFORMATION:

Background

The Federal Credit Union Act (Act) authorizes the NCUA Board (Board) to define "low-income members" so that credit unions with a membership consisting of predominantly low-income members can benefit from certain statutory relief and receive assistance from the CDRLF. 12 U.S.C. 1752(5), 1757a(b)(2)(A), 1757a(c)(2)(B), 1772c–1. NCUA currently defines "low-income members" in parts 701 and 705 of its regulations generally as meaning members whose annual household income falls at or below 80% of the national median household income and provides a differential for certain geographic areas with higher costs of living. 12 CFR 701.34(a)(2), 705.3(a)(1). Federally insured, state-chartered credit unions (FISCUs) may also receive a LICU designation if they meet the qualifications in § 701.34(a); state regulators make or remove the designation on the basis provided in § 701.34(a) with the concurrence of the appropriate NCUA regional director. 12 CFR 741.204(b). Therefore, references in this preamble to FCUs includes FISCUs to the extent that state law permits a LICU designation and permits FISCUs with the LICU designation to accept nonmember accounts and secondary capital as contemplated by NCUA regulations. 12 CFR 741.204(b)–(d).

In April 2008, NCUA proposed revising the definition of "low-income members" in §§ 701.34(a)(2) and 705.3(a)(1) to base the determination on MFI or median earnings for individuals instead of median household income. 73 FR 22836 (April 28, 2008). For metropolitan areas, the proposal defined "low-income members" as those living in a geographic area where the income is at or below 80% of either the metropolitan area or national metropolitan area income standard, whichever is greater. For members living outside a metropolitan area, the proposal defined low-income members as those living in a geographic area where the income is at or below 80% of either the statewide, non-metropolitan area or national, non-metropolitan area median family income, whichever is greater. The proposed rule also contained grandfather provisions and appeal procedures for FCUs that no longer qualify for a LICU designation.

Comments

NCUA received comments from three credit unions, six trade associations, and one individual. Of those who commented on the rule generally, all but one supported using the MFI standard. Eight commenters had additional suggestions. One commenter suggested NCUA should ensure LICUs are actually serving low-income members instead of changing the low-income rule.

Three commenters suggested clarifying the rule so that members who do not live in a low-income area, but are low-income, are included in the definition of "low-income members." As discussed below, the final rule provides that NCUA will estimate member earnings based on data from the U.S. Census Bureau about the geographical area where members live, but permits FCUs to present actual member income information, for example, from loan applications or a survey.

One commenter stated it was unclear from which sources NCUA would obtain the MFI and median earnings for individuals and questioned the reliability of Census Bureau data. The final rule includes the Web site address for the Census Bureau where the data is available. The American FactFinder on the Census Bureau's webpage, *http://factfinder.census.gov/home/saff/main.html?_lang=en*, provides statistics and data from the decennial census and other annual surveys. Decennial census statistics for MFI are currently recorded in table P77 for each geographic area, and table P85 records the median earnings for individuals. The Census Bureau also collects information on the U.S. population, employment, and housing annually through the American Community Survey (ACS). MFI statistics collected through the ACS are reported in table B19113. Table B20002 records median earnings for individuals. NCUA will use the decennial census or ACS data, whichever is most beneficial to an FCU, when determining whether it qualifies for a LICU designation. When ACS data is not available for a geographic area, decennial census data will be used. Regarding the reliability of the data, the Census Bureau is charged with collecting information on the U.S. population, employment, and housing. *See* 13 U.S.C. 41. The final rule better aligns the low-income definition with the criteria for underserved areas and CDFIs, which rely on data from the Census Bureau. 12 U.S.C. 1759(c)(2); 12 CFR 1805.201. Therefore, the Board believes the Census Bureau is the appropriate source for data about MFI and median earnings for individuals.

Three commenters recommended NCUA develop a process to permit FCUs to qualify using other criteria,

such as unemployment rates. In line with its statutory authority to designate low-income credit unions, the Board believes the criteria should be based on income. 12 U.S.C. 1752(5), 1757a(b)(2)(A), 1757a(c)(2)(b). Additionally, the Board notes the parallel relationship between member income and unemployment rates.

Two commenters were concerned the rule would require credit unions to reapply for the LICU designation annually and stated NCUA should assist CUs to obtain the data necessary to qualify as a LICU. As explained below, under the final rule, credit unions are not required to apply for a LICU designation. Instead, based on data obtained through examinations, a regional director will notify an FCU that it qualifies for a low-income designation, and FCUs that accept the designation will continue to have the designation, without any need to re-apply, as long as they meet the rule's criteria.

Five commenters stated NCUA should permit current LICUs to maintain the designation permanently and only apply the new rule to new LICU designations. One commenter suggested the five-year grandfather period is insufficient because secondary capital investments are usually for a seven-to ten-year term. The Board does not believe the LICU designation should be permanent because LICUs need to continue to be serving low-income members to fulfill the Act's intent. Nevertheless, the Board appreciates the need for transition periods. Current LICUs that do not meet the criteria of the final rule or those that lose the designation after initially qualifying will not immediately lose their designation. They will have five years to meet the LICU criteria or otherwise comply with the Act and NCUA regulations. The final rule also permits a regional director to extend the adjustment period when an FCU has secondary capital or nonmember deposit accounts with a maturity beyond the five-year grandfather provision.

One commenter was concerned there may be unintended adverse consequences if the rule is finalized and suggested NCUA monitor the rule's effect on LICUs. NCUA staff has analyzed the impact the final rule will have on current LICUs and potential designees and determined more FCUs will likely qualify for the low-income designation under this final rule than under the current rule. Further, with the possible exception of one or two FCUs, the Board does not anticipate the final rule will adversely affect current LICUs. Additionally, this commenter stated LICUs losing the designation because of the change in income standard should have the right to appeal the removal to the Board. An FCU may appeal to the Board a regional director's determination that it no longer meets the criteria for a LICU designation, but not the loss of the LICU designation because of the change in the income standard.

One commenter raised a concern that the rule does not adequately address LICUs that are not geographically based, e.g., single common bond CUs, multiple common bond CUs. Under the final rule, FCUs can qualify for a LICU designation under the new procedure regardless of their charter type.

A commenter suggested NCUA consult with state supervisory authorities on implications of the regulation. The final rule does not change the state supervisory authorities' procedures for designating LICUs.

Another commenter suggested NCUA coordinate this rule with recently proposed amendments to NCUA's Chartering and Field of Membership Manual regarding underserved areas to ensure consistency and facilitate outreach to underserved areas and low-income members. 73 FR 34366 (June 17, 2008). As explained in the preamble to the proposed rule, NCUA is amending the low-income definition to, among other reasons, better align NCUA criteria for a low-income designation with the criteria for the addition of an underserved area to an FCU field of membership and certification as a CDFI. *See* 73 FR 22836 (April 28, 2008).

Under the current rule, NCUA uses median household income to determine if a credit union qualifies for the LICU designation, and this is inconsistent with the field of membership (FOM) provisions and criteria for CDFI certification. Multiple common-bond FCUs may add an underserved area to their FOMs if, among other requirements, the area meets the definition of an "investment area," as defined in § 103(16) of the Community Development Banking and Financial Institutions Act of 1994. 12 U.S.C. 1759(c)(2)(A)(i); NCUA Chartering and Field of Membership Manual, Chapter 3, II.A., Interpretive Rulings and Policy Statement (IRPS) 03–1, 68 FR 18334 (April 15, 2003) (as amended by IRPS 06–1, 71 FR 36667 (June 28, 2006)). Treasury Department regulations, implementing the Community Development Banking and Financial Institution Act of 1994, include an MFI at or below 80 percent of the MFI for corresponding metropolitan area as a factor supporting the determination that an area is an investment area. 12 CFR 1805.201(b).

Additionally, The Treasury Department's CDFI Fund, through monetary awards and other benefits, helps promote access to capital and local economic growth in urban and rural low-income communities across the nation. Qualifying credit unions obtain assistance from the CDFI Fund to offer financial services to and further economic development of low-income members. The CDFI Fund uses MFI to implement the Community Development Banking and Financial Institutions Act of 1994, as described above.

The use of MFI as a standard to determine low-income status will bring uniformity and consistency to the regulations, and should eliminate industry confusion regarding the low-income designation and application for an underserved area. Additionally, because credit unions may apply for financial assistance from the CDFI Fund, the Board believes it would be beneficial to align the low-income formula with the CDFI Fund criteria. This would reduce the regulatory burden on credit unions attempting to qualify for the advantages of receiving a LICU designation and benefits from the CDFI Fund.

Two commenters suggested the Board should expand the rule to enable more FCUs to serve low-income and underserved people. As noted above, the final rule will likely allow more FCUs to obtain the low-income designation. The Board notes the rule does not limit service to low-income or underserved people, and all FCUs are encouraged to serve low-income and underserved people within their applicable fields of membership, regardless of whether they receive a LICU designation.

The Final Rule

In order for an FCU to qualify as a LICU, a majority of its actual members must meet the definition of "low-income members." The final rule amends the definition of low-income members and clarifies the procedures for designating an FCU as a LICU and removing the designation.

Under the final rule, low-income members are those who earn 80% of the metropolitan area MFI or less. NCUA will make the determination of whether a majority of an FCU's members are low-income based on data it obtains during the examination process. This will involve linking member address information to publicly available information from the U.S. Census

Bureau to estimate member earnings.[1] Using automated, geo-coding software, NCUA will use member street addresses collected during FCU examinations to determine the geographic area [2] and metropolitan area [3] for each member account. NCUA will then use income information for the geographic area from the Census Bureau and assign estimated earnings to each member. Using this method, if a majority of an FCU's members have estimated earnings equal to or less than 80% of the MFI for the metropolitan area, the FCU will qualify for a LICU designation.

To ensure all eligible FCUs qualify for the LICU designation under the new procedure, median earnings for individuals may be substituted for MFI, and non-metropolitan area MFI data will be used when a member lives outside a metropolitan area. NCUA recognizes this approach means different MFI levels will apply in different parts of the country. This approach recognizes the concept of low-income as related to the cost of living and salaries in geographic areas. The Census Bureau, however, provides national statistics in addition by geographical areas and, to ameliorate potential disparity among geographic areas, the rule provides an FCU will also qualify for a LICU designation if a majority of its members are considered low-income when compared to the national metropolitan MFI.

The rule also provides an alternative basis for an FCU to qualify for a LICU designation. An FCU may be able to demonstrate the actual income of its members based on data it has, for example, from loan applications or surveys of its members. An FCU may qualify as a LICU if it can establish a majority of its members meet the low-income formula. For example, an FCU with 1,000 members may be able to show the actual income of 501 or more of its members is equal to or less than 80% of the MFI for the metropolitan area(s) where they live. As a practical matter, the Board thinks few FCUs will need this option because NCUA's approach of matching member residential information with Census Bureau income information will provide an estimate very close to members' actual income.

The proposed rule stated that a regional director "will designate" an FCU as a LICU "if a majority of its membership qualifies as low-income members" but did not indicate how an FCU would be informed of the designation, how an FCU would indicate that it wanted the designation, or whether an FCU could refuse the designation. The final rule clarifies that a regional director will notify an FCU that it qualifies, and an FCU will then have 30 days to notify the regional director that it wants to receive the designation. Thus, the final rule permits an FCU to refuse a low-income designation simply by opting not to notify the regional director that it wants to receive the designation. The final rule does not require state supervisory authorities to change the process or procedures they currently use for FISCUs to receive the LICU designation from state regulators.

Additionally, the final rule clarifies the process for removing a low-income designation. If a regional director determines an FCU no longer meets the criteria for the LICU designation, the regional director will notify the FCU in writing. The FCU will have five years after the date of the notice to either requalify as a LICU or come into compliance with regulations applicable to credit unions that do not have a low-income designation. If an FCU does not requalify and has secondary capital or nonmember deposit accounts with a maturity that extends beyond the five-year adjustment period, a regional director may give the credit union additional time to satisfy the terms of any account agreements.

An FCU may appeal to the Board a regional director's determination that it no longer meets the criteria for the LICU designation. The rule states an appeal must be filed within 60 days of the date of the regional director's notice. An FCU will submit its appeal through the appropriate regional office. On appeal, the Board will determine whether the regional director correctly applied the regulatory criteria. An FCU may not, however, appeal the loss of the LICU designation to the Board solely because of the change in the income standard in this rule.

In addition to streamlining the proposed rule based on the comments, the final rule also revised some of the provisions in the proposal for clarity. The proposed rule noted, with a cross-reference to § 701.32, that LICUs may receive shares from nonmembers. The final rule has eliminated this statement as unnecessary. The proposed rule also defined the term "geographic areas" and defined low-income members in terms of meeting the MFI criteria on the basis of earnings or the geographic areas where members live. The final rule has deleted the definition of geographic areas as unnecessary. As proposed, the alternatives of earning or residence were, in effect, redundant. As provided in the final rule, the LICU designation is based on calculating members' estimated earnings based on where they live, using data from the Census Bureau, and defining geographic areas in the rule is unnecessary as this is part of the data available from the Census Bureau.

Finally, the final rule makes a conforming amendment to § 705.3 and clarifies that FCUs qualifying for the low-income designation under § 701.34 may apply for assistance from the CDRLF. Part 705 and § 701.34 continue to apply to state-chartered credit unions in accordance with § 741.204. As stated above, there is no change in the process or procedures for FISCUs.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any regulation may have on a substantial number of small entities. 5 U.S.C. 603(a). For purposes of this analysis, NCUA considers credit unions having under $10 million in assets small entities. Interpretive Ruling and Policy Statement 03–2, 68 FR 31949 (May 29, 2003). As of December 31, 2007, out of approximately 8,410 federally insured credit unions, 3,599 had less than $10 million in assets.

This final rule directly affects all low-income credit unions, of which there are approximately 1,087. NCUA estimates approximately 692 low-income credit unions are small entities. Therefore, NCUA has determined this final rule will have an impact on a substantial number of small entities.

NCUA has determined, however, the economic impact on entities affected by the final rule will not be significant. The rule aligns criteria for a low-income designation with the criteria for the

[1] Using Census Bureau reports, NCUA can obtain income information for various types of geographic areas, including a "census block." A census block is the smallest geographic area for which the Census Bureau collects and tabulates decennial census data and is an area bounded on all sides by visible features, such as streets, roads, streams, and railroad tracks, and by invisible boundaries, such as city, town, township, and county limits, property lines, and short, imaginary extensions of streets and roads. A census block may be the size of a city block, or many square miles of territory in rural areas.

[2] A "geographic area" is any State, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, the Virgin Islands, or any territory of the United States or a geographic unit that is a county or equivalent area, a unit of a local government, incorporated place, census tract, census block, Zip Code Tabulation Area, block group, or Native American, American Indian, or Alaskan Native area, as such units are defined or reported by the U.S. Census Bureau.

[3] A "metropolitan area" is an area designated by the Office of Management and Budget pursuant to 31 U.S.C. 1104(d), 44 U.S.C. 3504(c), and Executive Order 10253, 16 FR 5605 (June 13, 1951) (as amended).

addition of an underserved area to a federal credit union field of membership under Interpretive Rulings and Policy Statement (IRPS) 03–1, 68 FR 18334 (April 15, 2003) (as amended by IRPS 06–1, 71 FR 36667 (June 28, 2006)) and certification as a CDFI. The final rule establishes one income standard for determining a low-income designation, underserved areas, and investment areas. It also eliminates the confusion within the credit union industry due to the use of different income standards. NCUA believes the final rule reduces the regulatory burden for LICUs and minimizes any economic impact. Additionally, the final rule contains a five-year period for affected LICUs to make necessary operational adjustments. Accordingly, the Board certifies this rule does not have a significant economic impact on a substantial number of small entities.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, Public Law 104–121, provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedures Act. 5 U.S.C. 551. The Office of Information and Regulatory Affairs, an office within OMB, has determined that, for purposes of SBREFA, this is not a major rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, NCUA may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The final rule now provides for FCUs, once they are notified that they qualify for the low-income designation, to notify the appropriate regional director that they wish to accept the designation. Although, in the past, FCUs have requested the designation from regional offices, the regulation did not address application procedures. The final rule, like the proposed, provides that NCUA will make the determination without requiring FCUs to apply. As FCUs will, however, be required to notify regional directors that they wish to accept the designation, NCUA believes this notification is a "collection of information" within the meaning of section 3502(3) of the PRA. Additionally, FCUs that do not receive notification from the regional director but believe they qualify for the LICU designation may submit information to demonstrate they meet the criteria. NCUA believes this voluntary submission is also an information collection. NCUA has submitted the requirements of the information collections contained in the final rule to OMB for review and approval under section 3507 of the PRA and § 1320.11 of OMB's implementing regulations. 5 CFR 1320.11. OMB approval is pending.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The final rule will not have substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

NCUA has determined that this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

List of Subjects

12 CFR Part 701

Credit unions, Federal credit unions, Low income, Nonmember deposits, Secondary capital, Shares.

12 CFR Part 705

Community development, Credit unions, Loans, Low income, Technical assistance.

By the National Credit Union Administration Board, on November 20, 2008.

Mary F. Rupp,

Secretary of the Board.

■ For the reasons stated above, NCUA amends 12 CFR parts 701 and 705 as follows:

PART 701—ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS

■ 1. The authority for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1757, 1765, 1766, 1781, 1782, 1787, 1789; Title V, Pub. L. 109–351, 120 Stat. 1966.

■ 2. Amend § 701.34 by revising paragraph (a) to read as follows:

§ 701.34 Designation of low-income status; Acceptance of secondary capital accounts by low-income designated credit unions.

(a) *Designation of low-income status.*

(1) Based on data obtained through examinations, a regional director will notify a federal credit union that it qualifies for designation as a low-income credit union if a majority of its membership qualifies as low-income members. A federal credit union that wishes to receive the designation will notify the regional director in writing within 30 days of receipt of the regional director's notification.

(2) Low-income members are those members who earn 80% or less than the median family income for the metropolitan area where they live or national metropolitan area, whichever is greater. A regional director may use total median earnings for individuals instead of median family income if it is more beneficial to a federal credit union when determining if the credit union qualifies for a low-income credit union designation. A regional director will use the statewide or national, non-metropolitan area median family income instead of the metropolitan area or national metropolitan area median family income for members living outside a metropolitan area. Member earnings will be estimated based on data reported by the U.S. Census Bureau for the geographic area where the member lives. The term "low-income members" also includes those members enrolled as students in a college, university, high school, or vocational school.

(3) Federal credit unions that do not receive notification that they qualify for a low-income credit union designation but believe they qualify may submit information to the regional director to demonstrate they qualify for a low-income credit union designation. For example, federal credit unions may provide actual member income from loan applications or surveys to demonstrate a majority of their membership is low-income members.

(4) If the regional director determines a low-income designated federal credit union no longer meets the criteria for the designation, the regional director

will notify the federal credit union in writing, and the federal credit union must, within five years, meet the criteria for the designation or come into compliance with the regulatory requirements applicable to federal credit unions that do not have a low-income designation. The designation will remain in effect during the five-year period. If a federal credit union does not requalify and has secondary capital or nonmember deposit accounts with a maturity beyond the five-year period, a regional director may extend the time for a federal credit union to come into compliance with regulatory requirements to allow the federal credit union to satisfy the terms of any account agreements. A federal credit union may appeal a regional director's determination that the credit union no longer meets the criteria for a low-income designation to the Board within 60 days of the date of the notice from the regional director. An appeal must be submitted through the regional director.

(5) Any credit union with a low-income credit union designation on January 1, 2009 will have five years from that date to meet the criteria for low-income designation under paragraph (a)(1) of this section, unless the regional director determines a longer time is required to allow the low-income credit union to satisfy the terms of a secondary capital or nonmember deposit account agreement.

(6) *Definitions.* The following definitions apply to this section:

Median family income and *total median earnings for individuals* are income statistics reported by the U.S. Census Bureau. The applicable income data can be obtained via the American FactFinder on the Census Bureau's webpage at *http://factfinder.census.gov/home/saff/main.html?_lang=en.*

Metropolitan area means an area designated by the Office of Management and Budget pursuant to 31 U.S.C. 1104(d), 44 U.S.C. 3504(c), and Executive Order 10253, 16 FR 5605 (June 13, 1951) (as amended).

* * * * *

PART 705—COMMUNITY DEVELOPMENT REVOLVING LOAN FUND FOR CREDIT UNIONS

■ 3. The authority for part 705 continues to read as follows:

Authority: 12 U.S.C. 1772c–1; 42 U.S.C. 9822 and 9822 note.

■ 4. Amend § 705.3 by revising paragraph (a) to read as follows:

§ 705.3 Definitions.

(a) The term "low-income members" means those members defined in § 701.34 of this chapter.

* * * * *

[FR Doc. E8–28076 Filed 11–25–08; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM396 Special Conditions No. 25–376–SC]

Special Conditions: Boeing Model 767–300 and –300F Series Airplanes; Interaction of Systems and Structures

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Boeing Model 767–300 and –300F airplane as modified by Aviation Partners Boeing Supplemental Type Certificate (STC). The modified airplane has novel or unusual design features involving installation of blended winglets and a speedbrake wing-load-alleviation system. This system reduces loading on the wing. The applicable airworthiness regulations for the Boeing Model 767–300 and –300F do not contain adequate or appropriate safety standards for systems which alleviate loads on structures. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the applicable airworthiness standards.

DATES: The effective date of these special conditions is November 14, 2008. We must receive your comments by January 12, 2009.

ADDRESSES: Comments on this proposal may be mailed in duplicate to: Federal Aviation Administration, Transport Airplane Directorate, Attention: Rules Docket (ANM–113), Docket No. NM396, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; or delivered in duplicate to the Transport Airplane Directorate at the above address. All comments must be marked Docket No. NM396. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Ian Won, FAA, Airframe & Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2145; facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA has determined that notice and opportunity for prior public comment is impracticable because these procedures would significantly delay certification of the airplane and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public-comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance; however, the FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning these special conditions. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We consider all comments we receive on or before the closing date for comments. We consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want the FAA to acknowledge receipt of your comments on these special conditions, include with your comments a self-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it back to you.

Background

On February 21, 2007, Aviation Partners Boeing, Seattle, WA, applied for an STC to modify Boeing Model 767–300 and –300F series airplanes. These models are currently approved under Type Certificate No. A1NM. The Boeing Model 767–300 and 767–300F series airplanes are large transport-category airplanes. The Model 767–300 airplane is powered by either two Pratt

& Whitney or two General Electric engines. The Model 767–300F airplane is powered by two General Electric engines. The Boeing Model 767–300 airplane carries a maximum of 351 passengers. The Boeing Model 767–300F airplane is a freighter configuration.

The Boeing Model 767–300 and –300F airplanes, as modified by Aviation Partners Boeing, feature a wing-load-alleviation system which precludes full deployment of the speedbrakes given certain aircraft weights and airspeeds, thereby reducing wing loading. Special conditions have been applied on past airplane programs to require consideration of the effects of systems on structures. Current regulations do not take into account the effects of system failures on aircraft loads. A special condition is needed to account for these effects. These special conditions define the necessary requirements for assessing the effects of the speedbrake wing-load alleviation system on structures.

Type Certification Basis

Under the provisions of 14 CFR 21.101, Aviation Partners Boeing must show that the Boeing Model 767–300 and –300F series airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. A1NM, or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the "original type certification basis." The certification basis for Boeing Model 767–300 and –300F series airplanes includes applicable sections of 14 CFR part 25, as amended by Amendments 25–1 through 25–37, with some later amendments as noted in Type Certificate No. A1NM. In addition, the certification basis includes certain special conditions, exemptions, equivalent levels of safety, or later amended sections of the applicable part 25 that are not relevant to these special conditions.

If the Administrator finds that the applicable airworthiness regulations (i.e., part 25, as amended) do not contain adequate or appropriate safety standards for Boeing Model 767–300 and –300F series airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of Sec. 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Boeing Model 767–300 and –300F series airplanes must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34, and the noise-certification requirements of 14 CFR part 36.

Special conditions, as defined in 14 CFR 11.19, are issued in accordance with Sec. 11.38 and become part of the type certification basis in accordance with Sec. 21.101.

Special conditions are initially applicable to the model for which they are issued. Should Aviation Partners Boeing apply at a later date for an STC to modify any other model included on Type Certificate No. A1NM to incorporate the same or similar novel or unusual design feature, these special conditions would also apply to the other model under the provisions of Sec. 21.101.

Novel or Unusual Design Features

The Boeing Model 767–300 and –300F, as modified by Aviation Partners Boeing, incorporates the following novel or unusual design features:

Blended winglets are installed on the wing tips. To reduce the structural loading of the 767–300 and 767–300F with Aviation Partners Boeing blended winglets, a wing-load-alleviation system will be used that limits the speedbrake deflection under certain conditions. The regulations do not provide adequate criteria governing the safety margins required for systems that affect design loads when they fail.

For airplanes equipped with systems that affect structural performance, either directly or as a result of a failure or malfunction, the influence of these systems and their failure conditions must be taken into account when showing compliance with the requirements of 14 CFR part 25 Subparts C and D.

The following criteria must be used for showing compliance with this special condition for airplanes equipped with flight-control systems, autopilots, stability-augmentation systems, load-alleviation systems, flutter-control systems, fuel-management systems, and other systems that either directly, or as a result of failure or malfunction, affect structural performance. If this special condition is used for other systems, it may be necessary to adapt the criteria to the specific system.

The criteria defined herein only address the direct structural consequences of the system responses and performances and cannot be considered in isolation, but should be included in the overall safety evaluation of the airplane. These criteria may, in some instances, duplicate standards already established for this evaluation. These criteria are only applicable to structures whose failure could prevent continued safe flight and landing. Specific criteria that define acceptable limits on handling characteristics or stability requirements, when operating in the system-degraded or inoperative mode, are not provided in this special condition.

Depending upon the specific characteristics of the airplane, additional studies may be required that go beyond the criteria provided in this special condition to demonstrate the capability of the airplane to meet other realistic conditions such as alternative gust or maneuver descriptions for an airplane equipped with a wing-load-alleviation system.

The following definitions are applicable to this special condition.

1. Structural performance: Capability of the airplane to meet the structural requirements of 14 CFR part 25.

2. Flight limitations: Limitations that can be applied to the airplane flight conditions following an in-flight occurrence and that are included in the flight manual (e.g., speed limitations, avoidance of severe-weather conditions, etc.).

3. Operational limitations: Limitations, including flight limitations, that can be applied to the airplane operating conditions before dispatch (e.g., fuel, payload, and Master Minimum Equipment List limitations).

4. Probabilistic terms: The probabilistic terms (probable, improbable, extremely improbable) used in this special condition are the same as those used in § 25.1309.

5. Failure condition: The term failure condition is the same as that used in § 25.1309. However, this special condition applies only to system-failure conditions that affect the structural performance of the airplane (e.g., system failure conditions that induce loads, change the response of the airplane to inputs such as gusts or pilot actions, or lower flutter margins).

Applicability

As discussed above, these special conditions are applicable to Boeing Model 767–300 and –300F airplanes modified by Aviation Partners Boeing. Should Aviation Partners Boeing apply at a later date for an STC to modify any other model included on Type Certificate No. A1NM, to incorporate the same or similar novel or unusual design feature, these special conditions would apply to that model as well under the provisions of Sec. 21.101.

Conclusion

This action affects only certain novel or unusual design features on Boeing Model 767–300 and –300F series

airplanes modified by Aviation Partners Boeing. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

The substance of these special conditions has been subjected to the notice and comment procedure in several prior instances and has been derived without substantive change from those previously issued. Because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

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

The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the STC basis for the Boeing Model 767–300 and –300F series airplanes modified by Aviation Partners Boeing.

1. General. The following criteria will be used in determining the influence of a system and its failure conditions on the airplane structure.

2. System fully operative. With the system fully operative, the following apply:

(a) Limit loads must be derived in all normal operating configurations of the system from all the limit conditions specified in Subpart C (or defined by special condition or equivalent level of safety in lieu of those specified in Subpart C), taking into account any special behavior of such a system or associated functions, or any effect on the structural performance of the airplane that may occur up to the limit loads. In particular, any significant nonlinearity (rate of displacement of control surface, thresholds, or any other system nonlinearities) must be accounted for in a realistic or conservative way when deriving limit loads from limit conditions.

(b) The airplane must meet the strength requirements of part 25 (static strength, residual strength), using the specified factors to derive ultimate loads from the limit loads defined above. The effect of nonlinearities must be investigated beyond limit conditions to ensure that the behavior of the system presents no anomaly compared to the behavior below limit conditions. However, conditions beyond limit conditions need not be considered when it can be shown that the airplane has design features that do not allow it to exceed those limit conditions.

(c) The airplane must meet the aeroelastic stability requirements of § 25.629.

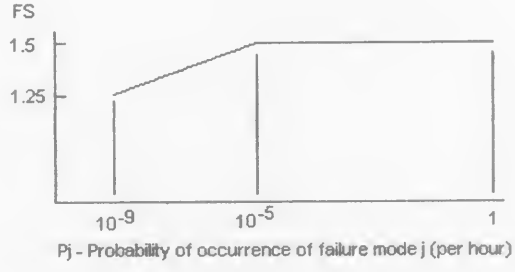
3. System in the failure condition. For any system-failure condition not shown to be extremely improbable, the following apply:

(a) At the time of occurrence. Starting from 1-g level-flight conditions, a realistic scenario, including pilot corrective actions, must be established to determine the loads occurring at the time of failure and immediately after failure.

(1) For static-strength substantiation, these loads, multiplied by an appropriate factor of safety that is related to the probability of occurrence of the failure, are ultimate loads to be considered for design. The factor of safety (FS) is defined in Figure 1.

Figure 1

Factor of safety at the time of occurrence



(2) For residual-strength substantiation, the airplane must be able to withstand two-thirds of the ultimate loads defined in subparagraph 3(a)(1). For pressurized cabins, these loads must be combined with the normal operating differential pressure.

(3) Freedom from aeroelastic instability must be shown up to the speeds defined in § 25.629(b)(2). For failure conditions that result in speeds beyond V_C/M_C, freedom from aeroelastic instability must be shown to increase speeds, so that the margins intended by § 25.629(b)(2) are maintained.

(4) Failures of the system that result in forced-structural vibrations (oscillatory failures) must not produce loads that could result in detrimental deformation of primary structure.

(b) For the continuation of the flight. For the airplane, in the system-failed state and considering any appropriate reconfiguration and flight limitations, the following apply:

(1) The loads derived from the following conditions (or defined by special condition or equivalent level of safety in lieu of the following conditions) at speeds up to V_C/M_C, or the speed limitation prescribed for the

remainder of the flight, must be determined:

(i) The limit-symmetrical-maneuvering conditions specified in § 25.331 and in § 25.345.

(ii) The limit-gust-and-turbulence conditions specified in § 25.341 and in § 25.345.

(iii) The limit-rolling conditions specified in § 25.349

(iv) The limit-unsymmetrical conditions specified in § 25.367 and § 25.427(b) and (c).

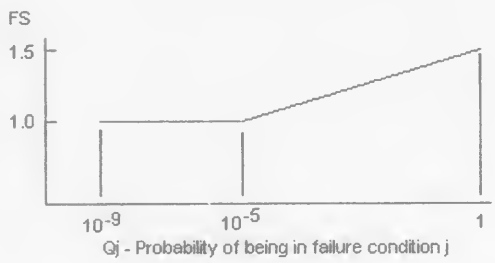
(v) The limit-yaw-maneuvering conditions specified in § 25.351.

(vi) The limit-ground-loading conditions specified in §§ 25.473 and 25.491.

(2) For static-strength substantiation, each part of the structure must be able to withstand the loads in paragraph 3(b)(1) of the special condition multiplied by a factor of safety depending on the probability of being in this failure state. The factor of safety is defined in Figure 2.

Figure 2

Factor of safety for continuation of flight



$Qj = (Tj)(Pj)$

Where:

Tj = Average time spent in failure condition j (in hours)

Pj = Probability of occurrence of failure mode j (per hour)

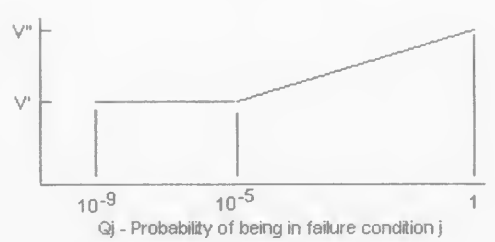
Note: If Pj is greater than 10^{-3} per flight hour then a 1.5 factor of safety must be applied to all limit-load conditions specified in Subpart C.3. For residual-strength substantiation, the airplane must be able to withstand two-thirds of the ultimate loads defined in paragraph 3(b)(2) of the special condition. For pressurized cabins, these loads must be combined with the normal operating differential pressure.

4. If the loads induced by the failure condition have a significant effect on fatigue or damage tolerance, then their effects must be taken into account.

5. Freedom from aeroelastic instability must be shown up to a speed determined from Figure 3. Flutter clearance speeds V′ and V″ may be based on the speed limitation specified for the remainder of the flight using the margins defined by § 25.629(b).

Figure 3

Clearance speed



V′ = Clearance speed as defined by § 25.629(b)(2).

V″ = Clearance speed as defined by § 25.629(b)(1).

$Qj = (Tj)(Pj)$

Where:

Tj = Average time spent in failure condition j (in hours)

Pj = Probability of occurrence of failure mode j (per hour)

Note: If Pj is greater than 10^{-3} per flight hour, then the flutter clearance speed must not be less than V″.

6. Freedom from aeroelastic instability must also be shown up to V′ in Figure 3 above, for any probable system-failure condition combined with any damage required or selected for investigation by § 25.571(b).

(c) Consideration of certain failure conditions may be required by other sections of 14 CFR part 25 regardless of calculated system reliability. Where analysis shows the probability of these failure conditions to be less than 10^{-9}, criteria other than those specified in this paragraph may be used for structural substantiation to show continued safe flight and landing.

4. Failure indications. For system failure detection and indication, the following apply:

(a) The system must be checked for failure conditions, not extremely improbable, that degrade the structural capability below the level required by part 25 or significantly reduce the reliability of the remaining system. As far as reasonably practicable, the flight crew must be made aware of these failures before flight. Certain elements of the control system, such as mechanical and hydraulic components, may use special periodic inspections, and electronic components may use daily checks, in lieu of detection-and-indication systems to achieve the objective of this requirement. These certification-maintenance requirements must be limited to components that are not readily detectable by normal detection-and-indication systems and where service history shows that inspections provide an adequate level of safety.

(b) The existence of any failure condition, not extremely improbable, during flight that could significantly affect the structural capability of the airplane, and for which the associated reduction in airworthiness can be minimized by suitable flight limitations, must be signaled to the flight crew. For example, failure conditions that result in a factor of safety between the airplane strength and the loads of Subpart C below 1.25, or flutter margins below V", must be signaled to the crew during flight.

5. Dispatch with known failure conditions. If the airplane is to be dispatched in a known system-failure condition that affects structural performance, or affects the reliability of the remaining system to maintain structural performance, then the provisions of this special condition must be met, including the provisions of paragraph 2 for the dispatched condition, and paragraph 3 for subsequent failures. Expected operational limitations may be taken into account in establishing Pj as the probability of failure occurrence for determining the safety margin in Figure 1. Flight limitations and expected operational limitations may be taken into account in establishing Qj as the combined probability of being in the dispatched failure condition, and the subsequent failure condition for the safety margins in Figures 2 and 3. These limitations must be such that the probability of being in this combined failure state and then subsequently encountering limit-load conditions is extremely improbable. No reduction in these safety margins is allowed if the subsequent system-failure rate is greater than 1E–3 per hour.

Issued in Renton, Washington, on November 14, 2008.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–28024 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0757; Airspace Docket No. 08–ASW–13]

Amendment of Class E Airspace; Big Spring, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace at Big Spring McMahon-Wrinkle Airport, Big Spring, TX. Changes to the VOR/DME RWY 17 Standard Instrument Approach Procedure (SIAP) have made this action necessary for the safety of Instrument Flight Rule (IFR) operations at the airport.

DATES: *Effective Date:* 0901 UTC, March 12, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR Part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Ft Worth, TX 76193–0530; telephone (817) 222–5582.

SUPPLEMENTARY INFORMATION:

History

On September 29, 2008, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace at Big Spring, TX (73 FR 56528, Docket No. FAA–2008–0757). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9S signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designations listed in this document will be published subsequently in that Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending Class E airspace at Big Spring McMahon-Wrinkle Airport, Big Spring, TX. Additional controlled airspace is necessary to accommodate changes to the VOR/DME Rwy 17 SIAP.

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. Therefore, this regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends controlled airspace at Big Spring McMahon-Wrinkle Airport, Big Spring, TX.

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, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE 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 Part 71.1 of the Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, signed October 3, 2008, and effective October 31, 2008, is amended as follows:

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

* * * * *

ASW TX E5 Big Spring, TX [Amended]

Big Spring McMahon-Wrinkle Airport, TX
(Lat. 32°12′45″ N., long. 101°31′18″ W.)
Big Spring VORTAC
(Lat. 32°23′08″ N., long. 101°29′01″ W.)

That airspace extending upward from 700 feet above the surface within a 6.9-mile radius of Big Spring McMahon-Wrinkle Airport and within 8 miles east and 4 miles west of the 190° radial of the Big Spring VORTAC extending from the 6.9-mile radius to 21.9 miles south of the airport and within 3.9 miles each side of the 191° radial of the Big Spring VORTAC extending from the 6.9-mile radius to 10.3 miles north of the airport.

* * * * *

Issued in Fort Worth, TX, on November 18, 2008.

Walter L. Tweedy,

Acting Manager, Operations Support Group, Central Service Center.

[FR Doc. E8–28078 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0652; Airspace Docket No. 08–AGL–5]

Establishment of Class D and Class E Airspace; Grayling, MI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class D airspace and Class E airspace at Grayling Army Airfield, Grayling, MI. Establishment of an air traffic control tower at Grayling Army Airfield has made this action necessary for the safety of Instrument Flight Rule (IFR) operations at the airport. Class D airspace will revert to a Class E Surface Area during periods when the control tower is not operating. This action also corrects the required arrival extension to the Class D airspace and redesignates it as Class E4 airspace.

DATES: *Effective Date:* 0901 UTC, March 12, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Ft Worth, TX 76193–0530; telephone (817) 222–5582.

SUPPLEMENTARY INFORMATION:

History

On September 24, 2008, the FAA published in the **Federal Register** a notice of proposed rulemaking to establish Class D airspace and Class E airspace at Grayling, MI (73 FR 54989, Docket No. FAA–2008–0652). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Subsequent to publication, the FAA found that a portion of the Class D airspace area needed to be reclassified as Class E4 airspace as the arrival extension was more than 2 nautical miles. This action makes that correction. With the exception of editorial changes, and the changes described above, this rule is the same as that proposed in the NPRM. Class D airspace designations are published in paragraph 5000 of FAA Order 7400.9S signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR Part 71.1. Class E Surface Area airspace designations are published in paragraph 6002 of FAA Order 7400.9S signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR Part 71.1. Class E airspace areas designated as an extension to a Class D surface area are published in paragraph 6004 of FAA Order 7400.9S signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR Part 71.1. The Class D airspace and Class E airspace designations listed in this document will be published subsequently in that Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class D airspace and Class E Surface Area airspace extending upward from the surface to and including 3,700 feet MSL within a 4.2-mile radius of Grayling Army Airfield; and Class E airspace designated as an extension to a Class D Surface Area within 2 miles each side of the 304° bearing from Grayling Army Airfield extending from the 4.2-mile radius to 7.7 miles northwest of the airport.

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. Therefore, this regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes controlled airspace at Grayling Army Airfield, Grayling, MI.

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, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE 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 Part 71.1 of the Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, signed October 3, 2008, and effective October 31, 2008, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

AGL MI D Grayling, MI [New]

Grayling Army Airfield, MI
(Lat. 44°40′49″ N., long. 84°43′44″ W.)

That airspace extending upward from the surface to and including 3,700 feet MSL within a 4.2-mile radius of Grayling Army Airfield. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Paragraph 6002 Class E Airspace Designated as Surface Areas.

* * * * *

AGL MI E2 Grayling, MI [New]

Grayling Army Airfield, MI
(Lat. 44°40′49″ N., long. 84°43′44″ W.)

That airspace extending upward from the surface to and including 3,700 feet MSL within a 4.2-mile radius of Grayling Army Airfield. This Class E Surface Area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

Paragraph 6004 Class E Airspace Areas Designated as an Extension to a Class D Surface Area.

* * * * *

AGL MI E4 Grayling, MI [New]

Grayling Army Airfield, MI
(Lat. 44°40′49″ N., long. 84°43′44″ W.)

That airspace extending upward from the surface within 2 miles each side of the 304° bearing from Grayling Army Airfield extending from the 4.2-mile radius of Grayling Army Airfield to 7.7 miles northwest of the 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 Airport/Facility Directory.

* * * * *

Issued in Fort Worth, TX, on November 17, 2008.

Walter L. Tweedy,

Acting Manager, Operations Support Group, Central Service Center.

[FR Doc. E8–28080 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 270

[Release No. IC–28487; File No. S7–32–08]

RIN 3235–AK24

Temporary Exemption for Liquidation of Certain Money Market Funds

AGENCY: Securities and Exchange Commission.

ACTION: Interim final temporary rule; request for comment.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting an interim final temporary rule under the Investment Company Act of 1940 ("Investment Company Act" or "Act") to provide relief from certain provisions of the Act for those money market funds that have elected to participate in a temporary guaranty program ("Guaranty Program" or "Program") established by the U.S. Department of Treasury ("Treasury Department"). The Guaranty Program includes a procedure for the orderly liquidation of money market fund assets in certain circumstances, and the interim final temporary rule will permit money market funds that commence liquidation under the Guaranty Program to temporarily suspend redemptions of their outstanding shares and postpone the payment of redemption proceeds.

DATES: *Effective Date:* From November 26, 2008 until October 18, 2009, unless the Commission publishes a notice in the **Federal Register** announcing an earlier termination date in connection with termination of the Guaranty Program.

Comment Date: Comments should be received on or before December 26, 2008.

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/final.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–32–08 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 Florence E. Harmon, Acting Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–32–08. 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/final.shtml*). Comments are also 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: Thu B. Ta, Senior Counsel, or Diane C. Blizzard, Attorney-Fellow, at (202) 551–6792, Office of Regulatory Policy, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–5041.

SUPPLEMENTARY INFORMATION: The Commission is adopting rule 22e–3T [17 CFR 270.22e–3T] under the Investment Company Act [1] as an interim final temporary rule. We are soliciting comments on all aspects of the interim final temporary rule. We will carefully consider the comments that we receive and intend to respond to them in a subsequent release.

I. Background

Money market funds are open-end management investment companies ("funds") registered under the Investment Company Act that have an investment objective of maintaining a stable net asset value (typically $1.00 per share) by investing in short-term, high quality securities.[2] Rule 2a–7

[1] 15 U.S.C. 80a. Unless otherwise noted, all references to rules under the Investment Company Act will be to Title 17, Part 270 of the Code of Federal Regulations [17 CFR 270], and all references to statutory sections are to the Investment Company Act.

[2] *See* Valuation of Debt Instruments and Computation of Current Price Per Share by Certain Open-End Investment Companies (Money Market

Continued

under the Investment Company Act governs the operation of money market funds; the rule facilitates the maintenance of a stable net asset value by permitting money market funds to use the amortized cost method of valuing their securities.

Under the Act, funds must calculate their current net asset value per share by reference to: (i) The market values of their portfolio securities or, (ii) in the absence of readily available market quotations for the securities, their fair value as determined in good faith by the funds' boards of directors.[3] Rule 2a–7 provides an exemption from these requirements in the case of money market funds. Under the amortized cost method of valuation in rule 2a–7, portfolio securities are valued by reference to their acquisition cost as adjusted for amortization of premium or accumulation of discount.[4] In order to use this method of valuing securities, a money market fund must establish controls to monitor the deviation between the fund's stabilized share price, *e.g.*, $1.00, and its market-based share price.[5] If the deviation becomes significant, the fund's board of directors may be required to take steps necessary to address this deviation, including re-pricing its shares at less than $1.00.[6] This is often referred to as "breaking the buck."

The risk-limiting conditions built into rule 2a–7, together with the management skill and, in some cases, the financial commitment of the advisers that sponsor money market funds, have contributed to the stability of money market funds for more than 30 years. Until recently, only one money market fund, a small institutional fund, had ever broken the buck.[7] On September 16, 2008, The Reserve Primary Fund became the first large money market fund to break the buck when it announced that it would re-price its securities at $0.97 per share. The fund sought and obtained from us an order permitting it to suspend redemptions and postpone the payment of redemption proceeds.[8] These events, and the turmoil in the credit markets in general, have placed pressure on money market funds, particularly those that offer their shares primarily to institutional shareholders and have experienced substantial redemptions.[9]

To bolster investor confidence in money market funds and protect the stability of the global financial system, on September 19, 2008, the Treasury Department announced the establishment of the Guaranty Program.[10] Under the Guaranty Program, the Treasury Department will guarantee the share price of participating money market funds that seek to maintain a stable net asset value of $1.00 per share, or some other fixed amount, subject to certain conditions and limitations. The Guaranty Program provides coverage only to shareholders of record as of September 19, 2008, and the coverage is limited to the number of shares they held as of the close of business on that day. The Commission is assisting the Treasury Department in administering the Guaranty Program.

The Treasury Department opened the Guaranty Program on Monday, September 29, 2008. Most of the nation's money market funds elected to participate in the Program by the October 8, 2008 deadline by executing an agreement with the Treasury Department ("Guarantee Agreement" or "Agreement") and paying the required participation fee.[11]

Under the terms of the Guaranty Program, the Treasury Department guarantees that, upon the liquidation of a participating money market fund, the fund's shareholders will receive the fund's stable share price of $1.00 for each fund share owned as of September 19, 2008.[12] Pursuant to the Agreement, a participating money market fund that breaks the buck, *i.e.*, experiences a "Guarantee Event," [13] is required to commence liquidation within five business days (with an exception under a curing provision).[14] The Agreement further requires the fund board to promptly suspend the redemption of its outstanding shares "in accordance with applicable Commission rules, orders and no-action letters." [15] The fund must be liquidated within thirty days after a Guarantee Event unless the Treasury Department, in its discretion, consents in writing to a later date (the "Liquidation Date").[16] These provisions are intended to ensure that the money market fund liquidates in an orderly manner and maximizes the proceeds realized from the disposition of the fund's portfolio securities.[17]

II. Discussion

A. Reason for the Exemption

Section 22(e) of the Investment Company Act prohibits funds, including money market funds, from suspending the right of redemption, or postponing the date of payment or satisfaction upon redemption of any redeemable security for more than seven days, except for certain periods specified in that section. Although section 22(e) permits funds to postpone the date of payment or satisfaction upon redemption for up to seven days, it does not permit funds to suspend the right of redemption, absent certain specified circumstances or a Commission order. However, in order for the Guaranty Program to operate as intended, a participating money market fund that experiences a Guarantee Event and must liquidate may need to suspend redemptions and postpone the payment of proceeds beyond the seven-day limit

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Funds), Investment Company Act Release No. 13380 (July 11, 1983) [48 FR 32555 (July 18, 1983)]. Most money market funds seek to maintain a stable net asset value per share of $1.00, but a few seek to maintain a stable net asset value per share of a different amount, *e.g.*, $10.00. For convenience, throughout this release, the discussion will simply refer to the stable net asset value of $1.00.

[3] Section 2(a)(41) of the Act and rules 2a–4(a)(1) and 22c–1 under the Act.

[4] Rule 2a–7(a)(2). Money market funds may also use the penny-rounding method of pricing to maintain a stable price per share. See rule 2a–7(a)(18).

[5] Rule 2a–7(c)(7)(ii)(A).

[6] See rule 2a–7(c)(7)(ii)(B) (requiring fund boards to "promptly consider what action, if any, should be initiated by the board of directors" if the deviation between a money market fund's market-based net asset value and amortized cost price per share exceeds ½ of 1 percent).

[7] Community Bankers U.S. Government Money Market Fund broke the buck in 1994.

[8] In the Matter of The Reserve Fund, Investment Company Act Release No. 28386 (Sept. 22, 2008) (order).

[9] Between September 11th and September 17th, the assets of institutional money market funds fell by $173 billion. See Investment Company Institute, *Money Market Mutual Fund Assets* (Sept. 18, 2008), *http://www.ici.org/stats/mf/mm_09_18_08.html#TopOfPage*.

[10] *See* Press Release, U.S. Dep't of the Treasury, Treasury Announces Guaranty Program for Money Market Funds (Sept. 19, 2008), *http://www.treas.gov/press/releases/hp1147.htm*. The Program is backed by the Exchange Stabilization Fund, which currently has assets of approximately $50 billion.

[11] The Guaranty Program is currently scheduled to terminate on December 18, 2008, unless the Secretary of the Treasury extends it, but in no event may the Program be extended beyond September 18, 2009. *See* sections 1(v), 3(a), and 3(b) of the Agreement. A form of the Guarantee Agreement is available at: *http://www.treas.gov/offices/domestic-finance/key-initiatives/money-market-docs/Guarantee_Agreement_Stable-Value_Single-Fund.pdf*.

[12] Sections 7(g) and 1(j) of the Agreement.

[13] For funds that seek to maintain a stable net asset value per share of $1.00, Section 1(i) of the Agreement defines a "Guarantee Event" as:

> The first date after the Agreement Date on which the Market-Based NAV of the Fund is less than $0.995 * * * *provided, however*, that if a Guarantee Event occurs prior to the Execution Date, then the Guarantee Event shall be deemed to have occurred on the Execution Date, *provided, further*, that if the Market-Based NAV of the Fund is greater than or equal to $0.995 on any date after such Guarantee Event but prior to the commencement of liquidation of the Fund as provided under Section 2(c)(iii) * * * subject to the delivery of the notice provided for in Section 2(g), the Guarantee Event will be deemed to have not occurred (a "Guarantee Cure Event").

[14] Sections 2(c) and 1(i) of the Agreement.

[15] Section 7(a)(ii) of the Agreement.

[16] Section 7(c) of the Agreement.

[17] Section 7(a)(i) of the Agreement.

(specifically, until the Liquidation Date provided by the Agreement).

The temporary rule we are adopting today provides the necessary exemption to permit participating money market funds to take full advantage of the Program and initiate the steps necessary to protect the interests of all shareholders during liquidations, including those shareholders not covered by the Guaranty Program.[18] Specifically, the rule is designed to facilitate orderly liquidations and help prevent the sale of fund assets at "fire sale" prices. Such a result could lead to substantial losses for the liquidating fund and further depress prices for short-term securities that may be held in the portfolios of other money market funds.

We are adopting the rule on an interim final basis because the Program is already in place and participating money market funds are currently subject to its liquidation provisions. In light of current market conditions, it is possible that a Guarantee Event could occur for a participating money market fund at any time. We could, alternatively, consider individual applications for orders under section 22(e) from funds that experience Guarantee Events. When the net asset value of a money market fund falls below $1.00 per share and the fund decides to liquidate, however, redemption requests can outpace the fund's ability to sell off its portfolio instruments and the Commission's ability to grant a timely exemptive order. As a result, consideration of individual applications for exemptive orders for funds that experience Guarantee Events would be impracticable.

The Commission finds that the interim final temporary rule is necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 22(e) was designed to prevent funds and their investment advisers from interfering with the redemption rights of shareholders for "ulterior motives," such as to prevent a reduction in management fees that would result from significant redemption requests.[19] Liquidation of a money market fund under the Guaranty Program would ultimately eliminate a source of advisory fees for the adviser.[20] Section 22(e) also provides for suspending redemptions and postponing payment in certain specified circumstances or "for such other periods as the Commission may by order permit for the protection of security holders."[21] The temporary rule we are adopting today is intended to achieve the same purposes when a money market fund commences liquidation under the Guaranty Program.

B. Operation of Rule 22e–3T

The exemption from section 22(e) provided by rule 22e–3T is available to any money market fund that has a currently effective Agreement, subject to two other conditions.[22] First, the fund must have delivered to the Treasury Department the required notice indicating that it has experienced a Guarantee Event and will promptly commence liquidation of the fund under the terms of the Agreement.[23] Second, the fund must not have cured the Guarantee Event, as provided under the terms of the Agreement.[24] In the event that a participating money market fund experiences a Guarantee Event and commences liquidation in compliance with the terms of the Agreement, the fund will be exempt from section 22(e).

The rule also provides that the Commission may rescind or modify the exemptive relief by order if necessary to protect the liquidating money market fund's security holders.[25] This provision permits the Commission to modify the relief if, among other things, a liquidating fund has not devised, or is not properly executing, a plan of liquidation that protects fund security holders. Under this provision, the Commission may modify the relief "after appropriate notice and opportunity for hearing," in accordance with section 40 of the Act.

The Program cannot extend beyond September 18, 2009. Under the terms of the Agreement, however, a money market fund has thirty days to liquidate. Accordingly, rule 22e–3T will expire on October 18, 2009.[26]

III. Request for Comment

The Commission requests comment on interim final temporary rule 22e–3T. We will carefully consider the comments that we receive and intend to respond to them in a subsequent release. We seek comment generally on all aspects of the temporary rule. Are the conditions for relief adequate to protect the interests of security holders? Should the rule include additional conditions and, if so, what should those conditions be? Should the rule have a later or earlier expiration date and, if so, what should the expiration date be and why?

IV. Other Matters

The Administrative Procedure Act ("APA") generally requires an agency to publish notice of a proposed rulemaking in the **Federal Register**.[27] This requirement does not apply, however, if the agency "for good cause finds * * * that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[28] The APA also generally requires that an agency publish an adopted rule in the **Federal Register** 30 days before it becomes effective.[29] This requirement also does not apply, however, if the agency finds good cause for making the rule effective sooner.[30]

For the reasons discussed in this release, we believe that we have good cause to act immediately to adopt this rule on an interim final temporary basis. The Treasury Department established the Program in response to extraordinary market turmoil and in recognition that maintaining confidence in money market funds is critical to protecting the integrity and stability of the global financial markets. The Program is currently operating to guarantee a large portion of existing money market fund assets. Immediate adoption of this rule will facilitate the Program and allow it to operate as designed. Without the relief provided by this rule, liquidating funds would not be able to promptly suspend redemptions and postpone the payment of proceeds without formally requesting and obtaining an individual exemption from the Commission, which could cause the funds to be inundated with redemption requests that they would have to meet

[18] As discussed above, the Guaranty Program covers only shareholders of record as of September 19, 2008, and the coverage is limited to the number of shares they held as of the close of business on that day.

[19] *See Investment Trusts and Investment Companies: Hearings on S. 3580 Before o Subcomm. of the Senote Comm. on Banking and Currency*, 76th Cong., 3d Sess. 291 ("Senate Hearings") (statement of David Schenker, Chief Counsel, Investment Trust Study, SEC).

[20] Moreover, the Guarantee Agreement would preclude a liquidation from relieving the adviser or any other affiliated person of the fund from their obligations to support the fund's net asset value under any agreement in place at the time the Agreement is entered into by the fund. *See* sections 1(n) and 5(c) of the Guarantee Agreement.

[21] Section 22(e)(3) of the Act.

[22] Rule 22e–3T(a).

[23] Rule 22e–3T(a)(2). *See also* section 2(c) of the Agreement.

[24] Rule 22e–3T(a)(3). *See also* section 1(i) of the Agreement.

[25] Rule 22e–3T(b).

[26] The Commission may publish a notice in the **Federal Register** announcing an earlier expiration date for the rule if the Guaranty Program terminates before September 18, 2009.

[27] 5 U.S.C. 553(b).

[28] *Id.*

[29] 5 U.S.C. 553(d).

[30] *Id.*

in the interim. This could result in a disorderly liquidation that would be at odds with the objective of the Program and could substantially harm certain of the affected fund's security holders.[31]

The temporary rule takes effect on November 26, 2008. For the reasons discussed above, we have acted on an interim final basis. We emphasize that we are requesting comment on the temporary rule. We will carefully consider the comments we receive, and we intend to respond to them in a subsequent release. Moreover, this is a temporary rule that will expire on October 18, 2009. The rule will have no application to any money market fund after that time.

We find that there is good cause to have the temporary rule take effect on November 26, 2008; and that notice and public procedure in advance of effectiveness of the rule are impracticable, unnecessary, and contrary to the public interest.

V. Paperwork Reduction Act

Rule 22e–3T does not impose any recordkeeping or information collection requirements, or other "collections of information" within the meaning of the Paperwork Reduction Act.[32] Accordingly, the Paperwork Reduction Act is not applicable.

VI. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits of its rules. We have identified certain costs and benefits of rule 22e–3T and request comment on all aspects of this cost-benefit analysis, including identification and assessment of any costs and benefits not discussed in this analysis. Where possible, we request that commenters provide empirical data to support any positions advanced.

As discussed above, the Guarantee Agreement requires money market funds to engage in an orderly liquidation upon experiencing a Guarantee Event. The Agreement further contemplates that funds will suspend the redemption of fund shares pending the liquidation. We believe it is necessary to provide an exemption from section 22(e) for funds participating in the Program to facilitate orderly liquidations.

A. Benefits

As discussed above, the rule will facilitate achievement of the benefits of the Guaranty Program by permitting participating money market funds to fulfill their obligations under the Agreement and initiate the steps necessary to effect an orderly liquidation. An orderly liquidation would protect value for fund shareholders and minimize disruption to financial markets. The rule would also provide certainty for participating funds, and enable funds to avoid the expense and delay of obtaining an exemptive order from the Commission.

B. Costs

Most of the costs associated with rule 22e–3T, such as the requirement to deliver to the Treasury Department a notice indicating that the money market fund has experienced a Guarantee Event, are necessitated by the Agreement. The rule may, however, impose some costs on shareholders who seek to redeem their shares, but are unable to do so. We believe the potential costs associated with rule 22e–3T are modest because the rule provides a narrow exemption that is only triggered in connection with the Guaranty Program and the exemption is only temporary.

C. Request for Comment

We request comment on all aspects of this cost-benefit analysis. Commenters should address in particular whether rule 22e–3T will generate the anticipated benefits or impose any other costs on funds or other market participants. We also request comment as to any costs or benefits associated with rule 22e–3T that we may not have considered here. Commenters are specifically invited to share quantified costs and benefits.

VII. Consideration of Promotion of Efficiency, Competition, and Capital Formation

Section 2(c) of the Investment Company Act requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation.[33] We anticipate that the rule will promote efficiency in the financial markets by facilitating orderly liquidations. The rule also may promote capital formation by providing investors reassurance about the safety of money market funds and minimizing disruption in the financial markets. We do not anticipate any effect on competition. We request comment on whether rule 22e–3T is likely to promote efficiency, competition, and capital formation. Commenters are requested to provide empirical data to support their views.

VIII. Regulatory Flexibility Act Certification

Section 3(a) of the Regulatory Flexibility Act ("RFA")[34] requires the Commission to undertake an initial regulatory flexibility analysis of the effect of its rules on small entities unless the Commission certifies that the rules do not have a significant economic impact on a substantial number of small entities.[35] Pursuant to section 605(b) of the RFA, the Commission hereby certifies that Investment Company Act rule 22e–3T does not have a significant impact on a substantial number of small entities.[36]

Rule 0–10 of the Investment Company Act defines a "small entity" for purposes of the Act as an investment company that, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year. Rule 22e–3T applies only to funds participating in the Treasury Department's Temporary Guaranty Program for Money Market Funds, and none of these funds meets the definition of a small entity under the Act.

We solicit comment on the certification. Commenters are asked to describe the nature of any impact on small entities and provide any empirical data.

IX. Statutory Authority

The Commission is adopting rule 22e–3T pursuant to the authority set forth in sections 6(c), 22(e) and 38(a) of the Investment Company Act [15 U.S.C. 80a–6(c), 80a–22(e) and 80a–37(a)].

List of Subjects in 17 CFR Part 270

Investment companies; Securities.

Text of Rule

■ For the reasons set out in the Preamble, the Commission amends Title 17, Chapter II of the Code of Federal Regulations as follows:

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[31] Without the exemption provided by rule 22e–3T, section 22(e) could operate to compel funds to redeem shares of earlier-redeeming security holders at or near the $1.00 amortized cost and, as a result of current market conditions, later-redeeming shareholders at less than $1.00.

[32] 44 U.S.C. 3501 *et seq.*

[33] 15 U.S.C. 80a–2(c).

[34] 5 U.S.C. 603(a).

[35] 5 U.S.C. 605(b).

[36] Although the requirements of the RFA do not apply to rules adopted under the APA's "good cause" exception, *see* 5 U.S.C. 601(2) (defining "rule" and notice requirement under the APA), we have nevertheless provided this certification.

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 1. The authority citation for Part 270 is amended by adding the following citation to read as follows:

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–34(d), 80a–37, and 80a–39, unless otherwise noted.

* * * * *

Section 270.22e–3T is also issued under 15 U.S.C. 80a–6(c) and 80a–37(a).

* * * * *

■ 2. Section 270.22e–3T is added to read as follows:

§ 270.22e–3T Temporary exemption for liquidation of certain money market funds.

(a) A registered investment company, or a series thereof ("fund"), is exempt from the requirements of section 22(e) of the Act (15 U.S.C. 80a–22(e)) if:

(1) The fund has a currently effective agreement ("Agreement") with the U.S. Department of the Treasury ("Treasury") to participate in the Temporary Guaranty Program for Money Market Funds ("Program");

(2) The fund has delivered to Treasury a notice indicating that it has experienced a guarantee event, and will promptly commence liquidation of the fund under the terms of the Agreement; and

(3) The fund has not cured the guarantee event as provided under the terms of the Agreement.

(b) For the protection of security holders of a fund, the Commission may issue an order to rescind or modify the exemption provided by this section as to that fund, after appropriate notice and opportunity for hearing in accordance with section 40 of the Act (15 U.S.C. 80a–39).

(c) This section will expire on October 18, 2009, unless the Commission publishes a notice in the **Federal Register** announcing an earlier termination date in connection with termination of the Guaranty Program.

Dated: November 20, 2008.

By the Commission.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28050 Filed 11–25–08; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 530

[Docket No. FDA–2008–N–0326]

New Animal Drugs; Cephalosporin Drugs; Extralabel Animal Drug Use; Revocation of Order of Prohibition; Withdrawal

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; withdrawal.

SUMMARY: The Food and Drug Administration (FDA) is revoking the order prohibiting the extralabel use of cephalosporin antimicrobial drugs in food-producing animals. FDA received many substantive comments on the order of prohibition. The agency is taking this action so that it may fully consider these comments.

DATES: Effective November 26, 2008, the final rule published July 3, 2008 (73 FR 38110), for which the effective date was delayed until November 30, 2008, in a document published August 18, 2008 (73 FR 48127), is withdrawn.

FOR FURTHER INFORMATION CONTACT: Neal Bataller, Center for Veterinary Medicine (HFV–230), Food and Drug Administration, 7519 Standish Pl., Rockville, MD, 20855, 240–276–9200, e-mail: *neal.bataller@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of July 3, 2008 (73 FR 38110), FDA published an order prohibiting the extralabel use of cephalosporin antimicrobial drugs in food-producing animals, with a 60-day comment period and a 90-day effective date for the final order. The order, that was to take effect on November 30, 2008, would have resulted in a change to § 530.41 (21 CFR 530.41) to list cephalosporins as prohibited from extralabel use in food-producing animals as provided for in 21 CFR 530.25(f).

In response to publication of this order, the agency received requests for a 60-day extension of the comment period. The requests conveyed concern that the original 60-day comment period would not allow the requesters sufficient time to examine the available evidence, consider the impact of the order, and provide constructive comment.

FDA considered the requests and, in the **Federal Register** of August 18, 2008 (73 FR 48127), extended the comment period for the order for 60 days, until November 1, 2008. Accordingly, FDA also delayed the effective date of the final rule 60 days, until November 30, 2008.

The agency received many substantive comments on the order of prohibition. Therefore, to allow more time to fully consider the comments, FDA has decided to revoke the order so that it does not take effect November 30, 2008. This means that neither the order nor the change to § 530.41 that would have listed cephalosporins as prohibited from extralabel use will take effect on November 30, 2008. If, after considering the comments and other relevant information, FDA decides to issue another order of prohibition addressing this matter, FDA will follow the procedures in 21 CFR 530.25 that provide for a public comment period prior to implementing the order.

We note that, insofar as withdrawal of the amendment to § 530.41 might be considered a rule subject to 5 U.S.C. 553(b), the agency for good cause finds that prior notice and comment procedures are unnecessary because there is no need to amend § 530.41 since the order is being revoked.

Dated: November 21, 2008.

William T. Flynn,

Acting Director, Center for Veterinary Medicine.

[FR Doc. E8–28093 Filed 11–25–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0984]

RIN 1625–AA00

Safety Zone, Bayfront Park New Year's Eve Celebration, Biscayne Bay, FL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a Safety Zone east of the Intracoastal Waterway at the Port of Miami, Florida for the Bayfront Park New Year's Eve Ceremony. This temporary zone is intended to restrict vessels from entering waters within the zone unless specifically authorized by the Captain of the Port Miami, Florida, or a designated representative. This rule is necessary to provide for the safety of life on the navigable waters of the United States, and protect participants, spectators, and mariner traffic from potential hazards associated with

launching fireworks over the navigable waters of the United States.

DATES: This rule is effective from 11:59 p.m. on December 31, 2008 to 1 a.m. on January 1, 2009.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0984 and are available online at *www.regulations.gov*. They are also available for inspection or copying at two locations: The Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and at Sector Miami, 100 MacArthur Causeway, Miami Beach, FL 33139 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call Lieutenant Paul Steiner, Coast Guard Sector Miami, Florida at (305) 535–8724. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because immediate action is necessary to ensure the safety of commercial and recreational vessels in the vicinity of the fireworks display on the dates and times this rule will be in effect and delay would be contrary to the public interest. A Coast Guard Patrol Commander will be available and the Coast Guard will also issue a Broadcast Notice to Mariners. This temporary rule is necessary to ensure the safety of participants, spectators, and the general public on the navigable waters of the United States.

For the same reasons above, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

Background and Purpose

Firepower Displays Unlimited will be sponsoring the Bayfront Park New Year's Eve Celebration. The event will be held from 11:59 p.m. on December 31, 2008 to 1 a.m. on January 1, 2009. The public is invited to attend. The high concentration of event participants, spectators, and the general boating public presents an extra hazard to the safety of life on the navigable waters of the United States. A regulated area east of the Intracoastal Waterways of the Port of Miami, Florida is necessary to protect participants as well as spectators from hazards associated with the event.

Discussion of Rule

This rule establishes a temporary safety zone surrounding the fireworks barge east of the Intracoastal Waterways of Miami, Florida. A 375 yard radius safety zone encompassing the waters surrounding the fireworks barge east of the Intracoastal Waterway is necessary to protect participants as well as spectators from hazards associated with the fireworks display. The fireworks barge will be located in position 25°46′23″ N, 080°10′57″ W. All vessels and persons are prohibited from anchoring, mooring, or transiting within this zone unless authorized by the Captain of the Port Miami, Florida or a designated representative. The temporary safety zone will protect the participants and the public from the dangers associated with the event. This regulation will be effective from 11:59 p.m. on Wednesday, December 31, 2008 to 1 a.m. on Thursday, January 01, 2009.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

This expectation is based on the fact that this regulation will only be in effect for a short period of time and the impact on routine navigation is expected to be minimal. For the above reasons, the Coast Guard does not anticipate any significant economic impact.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit this zone between 11:59 p.m. on December 31, 2008 and 1 a.m. on January 1, 2009. This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: This rule will only be in effect for a short period of time and the impact on routine navigation is expected to be minimal.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and

would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 5100.1 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded under the Instruction that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g.), of the Instruction, from further environmental documentation. An environmental analysis checklist and a categorical exclusion determination will be available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. A new temporary § 165.T08–0984 is added to read as follows:

§ 165.T08–0984 Safety Zone, Bayfront Park New Year's Eve Celebration, Biscayne Bay, Florida.

(a) *Regulated areas.* The Coast Guard is establishing a temporary safety zone on the waters of the Intracoastal Waterway, in the Port of Miami, Florida, that encompasses the area within a 375 yard radius of the fireworks barge located in approximate position: 25°46′23″ N, 080°10′57″ W. The safety zone is within the boundaries of the Intracoastal Waterway in the Port of Miami, Florida. All coordinates referenced use datum: NAD 83.

(b) *Definitions.* The following definitions apply to this section:

Designated representative means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers and other officers operating Coast Guard vessels, and federal, state, and local officers designated by or assisting the Captain of the Port Miami, Florida (COTP) in the enforcement of regulated navigation areas, safety zones, and security zones.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, no person or vessel may anchor, moor or transit a safety zone without permission of the Captain of the Port Miami, Florida or a designated representative. To request permission to enter into a safety zone, the Captain of the Port's designated representative may be contacted on VHF channel 16.

(2) At the completion of scheduled event, and departure of participants from the regulated area, the Coast Guard Patrol Commander may permit traffic to resume normal operations.

(3) The public will be informed of this regulation by a Coast Guard Patrol Commander on scene and through a Broadcast Notice to Mariners.

(d) *Enforcement Period.* This temporary safety zone will be effective between the hours of 11:59 p.m., Wednesday, December 31, 2008 and 1 a.m., Thursday, January 1, 2009.

Dated: October 30, 2008.

J.O. Fitton,

Captain, U.S. Coast Guard, Captain of the Port Miami, FL.

[FR Doc. E8–28150 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 9

RIN 2900–AN00

Servicemembers' Group Life Insurance Traumatic Injury Protection Program

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule.

SUMMARY: The Department of Veterans Affairs (VA) is issuing this interim final rule to amend the Servicemembers' Group Life Insurance traumatic injury protection program (TSGLI) regulations in order to add losses that would be covered under the program and to define terms relevant to these new losses. This rulemaking also clarifies language in and reorganizes existing provisions.

DATES: This interim final rule is effective November 26, 2008. Comments must be received on or before December 26, 2008.

Applicability Date: VA will apply this rule to injuries incurred in Operation Enduring Freedom or Operation Iraqi Freedom on or after October 7, 2001, through and including November 30, 2005, and to all qualifying injuries incurred on or after December 1, 2005.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov*; by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to "RIN 2900–AN00." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments are available online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Jeanne King, Attorney-Advisor, Department of Veterans Affairs Regional Office and Insurance Center (310/290B), P.O. Box 8079, Philadelphia, Pennsylvania 19101, (215) 842–2000, ext. 4839. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: TSGLI was established by Congress in May 2005 to provide monetary assistance to severely injured service members who suffer a loss, such as the loss of a hand, as a direct result of a serious traumatic injury in order to help the member and the member's family through an often long and arduous treatment and rehabilitation period. VA codified regulations to implement TSGLI at 38 CFR 9.1(k)–(q) and 9.20. *See* 70 FR 75940 (Dec. 22, 2005); 72 FR 10362 (Mar. 8, 2007).

VA conducted an extensive review of the TSGLI program at the end of the first year of the program's operation ("Year-One Review") to ensure that the program was operating effectively and that it was meeting the intent of Congress. The report was published on the VA Web site on July 17, 2008. *http://www.insurance.va.gov/miscellaneous/index.htm*. Many of the amendments made by this interim final rule, particularly the losses that we propose to add to the Schedule of Losses in § 9.20, are derived from the recommendations and findings of the TSGLI Year-One Review.

Congress has expressed its intent to provide TSGLI benefits retroactively. Section 1032(c)(1) of the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005," Public Law 109–13, which established the TSGLI program effective December 1, 2005, also provided for the payment of TSGLI benefits to service members who experienced a traumatic injury between October 7, 2001, when Operation Enduring Freedom began, and December 1, 2005, the effective date of section 1032 of Public Law 109–13, if the loss was a direct result of injuries incurred in Operation Enduring Freedom or Operation Iraqi Freedom. VA as well has made its regulations implementing the TSGLI program retroactive. In 2007, VA applied changes to the TSGLI program made by the Veterans' Housing Opportunity and Benefits Improvement Act of 2006, Public Law 109–233, section 501(a)(3), 120 Stat. 397, 413, to claims filed or injuries suffered prior to the date of the change in the law because it was consistent with the objectives of the TSGLI provisions authorizing payments based on injuries preceding the program's creation. 72 FR 10362, 10363 (2007). We believe that the same holds true with regard to the changes made by this rulemaking. Further, because TSGLI is intended to provide a source of income for expenses during periods of treatment and convalescence following a loss due to traumatic injury, we believe the application of these regulations is more directly connected to those persistent circumstances than to the past date on which an injury or loss was incurred or a claim was filed. *Id.* We also note that these regulatory amendments would not have affected conduct prior to the date of publication, nor would the regulations upset any settled expectations in any meaningful way. *See Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994); *Princess Cruises, Inc.* v. *United States*, 397 F.3d 1358, 1362–63 (Fed. Cir. 2005). The service member's traumatic injury, the scheduled loss due to the injury, and the resulting economic burdens on the service member were not within any party's control and obviously actions were not taken in reliance on prior regulations. Although application of the regulations will increase the Government's economic burden, we believe the additional burden is countered in this instance by the other considerations discussed above.

We are amending 38 CFR 9.1(b) to provide the current address of the Office of Servicemembers' Group Life Insurance (OSGLI), which is 80 Livingston Avenue, Roseland, New Jersey 07068.

We are moving the definitions from 38 CFR 9.1(k)–(q), which pertain only to TSGLI, to 38 CFR 9.20(e)(6)(vi)–(xii) for purposes of administrative convenience and to make it easier for the public to locate the rules. We are expanding the definition of "medical professional" at § 9.20(e)(6)(xii) to include a "licensed practitioner of the healing arts acting within the scope of his or her practice." We have broadened the definition in order to encompass a wider range of licensed medical professionals who are qualified to certify eligibility for TSGLI.

We are revising 38 CFR 9.20(b)(3) to state that the term "traumatic event" does not include a medical procedure or a surgical procedure in and of itself. Current § 9.20(b)(3) only refers to a surgical procedure. The revision makes the regulation consistent with VA's current practice of not providing TSGLI payments for an injury that directly results from either a medical or surgical procedure. The publication of this revision to the current rule will not result in any deviation from already established guidelines or processes. Further, the revised definition is consistent with current 38 CFR 9.20(e)(3)(i)(C), which excludes payment for a scheduled loss due to a

traumatic injury caused by either medical treatment or surgical treatment of an illness or disease.

We are adding a new paragraph at the end of 38 CFR 9.20(d) with regard to the eligibility requirements for a TSGLI payment. The governing statute for the TSGLI program, 38 U.S.C. 1980A(h), states that "[c]overage for loss resulting from traumatic injury provided under this section shall cease at midnight on the date of the termination of the member's duty status in the uniformed services that established eligibility for Servicemembers' Group Life Insurance." New § 9.20(d)(5) specifies that a member would be covered by TSGLI if the member has a traumatic injury prior to midnight on the date of termination, even if the member's scheduled loss does not occur until after the member's termination date. We are making this revision to the regulation because in some cases there is a long period between the date of a member's traumatic injury and the date on which the scheduled loss actually occurs. For example, a member who suffers a severe leg injury from an explosion in service may not undergo amputation of the leg until after separating from service. This amendment to § 9.20(d) would clarify that, under such circumstances, the member would be eligible for TSGLI.

Currently, 38 CFR 9.20(e)(3)(i)(C) provides that TSGLI is not payable if a traumatic injury is caused by medical or surgical treatment of an illness or disease. We are revising that paragraph to explain that TSGLI also is not payable if a traumatic injury is caused by diagnostic procedures or any complications arising from such procedures or from medical or surgical treatment for an illness or disease. The commercial industry's Accidental Death and Dismemberment (AD&D) policies provide a model for the TSGLI program. 70 FR 75940. Under commercial AD&D policies, neither diagnostic complications nor post-surgical complications due to medical or surgical treatment usually constitute a covered loss. We are therefore revising § 9.20(d)(5) to make it consistent with commercial policies. We are also revising § 9.20(e)(3)(i)(C) to explain that TSGLI is not payable if a traumatic injury is caused by preventive medical procedures such as inoculations.

We are amending 38 CFR 9.20(e)(3)(i)(D), which currently excludes payment of TSGLI for a scheduled loss due to a traumatic injury caused by willful use of a controlled substance unless administered or consumed on the advice of a "medical doctor." We are deleting the term "medical doctor" and inserting in its place "medical professional," because prescriptions for controlled substances may be dispensed by a caregiver other than a medical doctor (*e.g.*, a nurse practitioner). This revision will clarify that a member who receives a lawful controlled substance from a medical professional who is legally authorized to provide such a controlled substance will be eligible for a TSGLI payment. Also, use of the term "medical professional" is consistent with the terminology in the TSGLI procedural guide, *http://www.insurance.va.gov/sgliSite/TSGLI/TSGLI.htm*, and the TSGLI application form.

We are amending 38 CFR 9.20(e)(6) to correct a misstatement concerning the scope of its application. Current 38 CFR 9.20(e)(6) states that the definitions apply "[f]or purposes of this paragraph (e)(6)—." We have corrected this to read, "For purposes of this section—."

We also are adding to § 9.20(e)(6) definitions of terms relevant to qualifying losses under the existing TSGLI Schedule of Losses and to other losses that we are adding to that schedule in this rulemaking. Because of the interrelated nature of the definitions and schedule losses, we will discuss the definitions in conjunction with the relevant amendments for each loss.

In the Schedule of Losses, we are making several non-substantive changes that will make it easier to use. These non-substantive changes include moving the schedule from § 9.20(e)(7) to § 9.20(f) and replacing the Roman numerals preceding each loss with Arabic numerals. Another non-substantive change involves the types of losses listed in the schedule. The current schedule lists both single losses (*e.g.*, total and permanent loss of speech) and combinations of losses (*e.g.*, total and permanent loss of speech and loss of thumb and index finger on the same hand). We are removing all losses involving a combination of losses and instead explain how the different individual losses may be combined for purposes of calculating the TSGLI benefit that is payable. For losses listed in paragraphs (f)(1) through (18) of § 9.20, payment may be made for multiple losses resulting from a single traumatic event (except where noted otherwise); however, the total payment amount may not exceed $100,000 for losses resulting from a single traumatic event. Payments for losses listed in paragraphs (f)(19) through (20) of § 9.20 may not be made in addition to payments for losses under paragraphs (f)(1) through (18)—only the higher amount will be paid. The total payment amount may not exceed $100,000 for multiple losses resulting from a single traumatic event.

Payment for total and permanent loss of sight is required by 38 U.S.C. 1980A(b)(1)(A). In § 9.20(e)(6)(xiv), consistent with current VA practice, we are defining "total and permanent loss of sight," which is included in the Schedule of Losses at § 9.20(f)(1), as: (1) Visual acuity in the eye of 20/200 or less (worse) with corrective lenses lasting at least 120 days; (2) visual acuity in the eye of greater than 20/200 with corrective lenses and a visual field of 20 degrees or less lasting at least 120 days; or (3) anatomical loss of the eye. These visual-acuity standards are similar to the eligibility criteria for automobiles and adaptive equipment for certain disabled veterans, 38 U.S.C. 3901(1)(A)(iii), and to the definition of "blindness" for purposes of Social Security disability benefits. 42 U.S.C. 1382c(2).

We are incorporating the temporal requirement of "at least 120 days" in the definition of "permanent and total loss of sight" for the benefit of medical professionals who are responsible for certifying TSGLI eligibility of an injured service member. Staff members at the branches of service who process TSGLI claims reported for purposes of the Year-One Review that medical professionals were sometimes unwilling to certify that loss of sight was "permanent," even when the loss of sight had already existed for a rather lengthy period of time and even when it required substantial rehabilitation on the part of the member, because the member might regain some sight due to surgery (*e.g.*, corneal transplants) at a later date. Year-One Review at 24.

We are combining the losses for total and permanent loss of hearing in one ear and both ears at 38 CFR 9.20(f)(2). We are defining the term "total and permanent loss of hearing" at 38 CFR 9.20(e)(6)(xvi) to mean average hearing threshold sensitivity for air conduction of at least 80 decibels that is clinically stable and unlikely to improve and based upon hearing measured at 500, 1000, and 2000 Hertz. According to the American Speech-Language-Hearing Association, a hearing loss is considered "profound" if it measures at 80 decibels. *http://www.asha.org/public/hearing/testing/assess.htm*. We are adding this definition to provide an objective standard for determining whether a hearing loss is total and permanent for purposes of TSGLI.

In § 9.20(e)(6)(xv), we are defining the term "total and permanent loss of speech," used in § 9.20(f)(3), as "organic loss of speech or the ability to express oneself, both by voice and whisper.

through normal organs for speech, notwithstanding the use of an artificial appliance to simulate speech." The loss of speech must be clinically stable and unlikely to improve in order to be compensable. We are adding this objective definition to assist the medical professionals who evaluate injured service members for purposes of entitlement to TSGLI.

We are adding uniplegia as a qualifying loss for TSGLI at § 9.20(f)(7) and defining "uniplegia" at 38 CFR 9.20(e)(6)(iv) as "the complete and irreversible paralysis of one limb of the body." The Year-One Review states that research shows that the impact of rehabilitation and recovery for uniplegia is similar to the rehabilitation and recovery from severance of a hand or foot, which Congress included as a scheduled loss under 38 U.S.C. 1980A(b)(1)(B). Year-One Review at 24. The AD&D policies of the commercial sector, upon which TSGLI was modeled, also often cover uniplegia. We are therefore including uniplegia as a scheduled loss for purposes of TSGLI. Because uniplegia involves paralysis of one limb only, and is therefore less severe a loss than paralysis that involves more than one limb, and because of the reported similar effect of the amputation of one hand or foot, the payment for this loss is $50,000, which is the amount of TSGLI payable for amputation of one hand or one foot. However, we note in the Schedule that a payment for uniplegia cannot be combined with the payments for amputation or limb salvage, as the initial payment for the uniplegia loss provides payment to the service member during the rehabilitation period.

We are adding a definition of "complete and irreversible paralysis" to aid in understanding the definitions of quadriplegia, paraplegia, hemiplegia, and uniplegia. "Complete and irreversible paralysis" is defined in § 9.20(e)(6)(v) as total loss of voluntary movement resulting from damage to the spinal cord or associated nerves, or to the brain, that is deemed clinically stable and unlikely to improve.

In § 9.20(e)(6)(xvii) and (f)(8), we are expanding TSGLI coverage from third degree or worse burns covering at least 30 percent of the body or 30 percent of the face to second degree or worse burns covering at least 20 percent of a service member's body or at least 20 percent of the face. Although 38 U.S.C. 1980A(b)(1)(G) states that the Schedule of Losses prescribed by the Secretary of Veterans Affairs must include "[b]urns greater than second degree, covering 30 percent of the body or 30 percent of the face," the statute also authorizes the Secretary of Veterans Affairs to prescribe additional losses by regulation. We therefore believe that VA has authority to add other kinds of burns to the TSGLI Schedule of Losses.

Second degree burns, also called partial thickness burns, are less severe than third degree burns, also called full thickness burns. Nevertheless, burn specialists at Brooke Army Medical Center and VA physicians indicated that a second degree burn to at least 20 percent of the face or body would be considered to be a severe burn. Year-One Review at 26. They also reported that patients with second degree burns require as much rehabilitation as those with third degree burns. *Id.* We are therefore providing a TSGLI payment of $100,000 for second degree burns or worse covering at least 20 percent of the body or at least 20 percent of the face. The definition of burns in § 9.20(e)(6)(xvii) states explicitly that the body includes the face and head. The percentage of the body burned will be determined by using the Rule of Nines, which is a chart dividing the body surface into areas, each of which represents 9 percent, or another method for estimating the extent of a member's burns that is generally accepted within the medical profession.

We are replacing the phrase "loss of" hand or foot in the schedule with "amputation of," and we define "amputation" in § 9.20(e)(6)(xx) to mean "severance or removal of a limb or part of a limb resulting from trauma or surgery." We also explain that, "[a]n amputation *above* a joint means a severance or removal that is *closer to the body than the specified joint is.*" (Emphasis added.)

TSGLI coverage under the schedule will be expanded with respect to amputation of part of a limb. For amputation of part of the hand, we are adding at § 9.20(f)(10) amputation of the thumb or the other four fingers at or above the metacarpophalangeal joint, for which $50,000 in TSGLI is payable. For amputation of part of the foot, we are adding at § 9.20(f)(12) amputation at or above the metatarsophalangeal joints of all toes on one foot, for which the TSGLI payment is $50,000, and at § 9.20(f)(13) amputation of the big toe or the four other toes, for which the TSGLI payment is $25,000.

We are expanding both the hand and foot scheduled losses because the TSGLI Year-One Review Team found that there have been cases of significant injuries involving loss of part of a hand or foot that did not qualify for payment under the current TSGLI Schedule of Losses. Year-One Review at 25. Currently, the schedule provides a payment for loss of an entire hand or foot or for loss of an index finger and thumb of the same hand. Interviews and medical research indicated that amputations involving four fingers on one hand, a thumb, four toes on one foot, or a big toe required at least short-term rehabilitation. *Id.* Interviews with the branches of service TSGLI administrative office staff, as well as staff at National Naval Medical Center, Walter Reed Army Medical Center, and Brooke Army Medical Center all documented the significance of these losses. *Id.* The medical literature affirms the key role that the thumb and other fingers play in activities of daily living that require grasping and other fine motor skills. *Id.* The toes function similarly in terms of balance and propulsion for walking. *Id.* Additionally, many AD&D policies in the commercial sector now typically include coverage for loss of fingers and toes. *Id.*

We are adding limb salvage of an arm or leg to the Schedule of Losses at § 9.20(f)(14) and (15) and defining the term " limb salvage" at § 9.20(e)(6)(xix) as "a series of operations designed to save an arm or leg with all of its associated parts rather than amputate it." Eligibility for TSGLI based on salvage of an arm or leg will require a surgeon's certification that the option of amputation of the limb was a medically justified alternative to salvage and that the service member chose to pursue salvage. The TSGLI payment for salvage of an arm or leg is $50,000, the same amount payable under the schedule for loss of a hand or foot. According to the Year-One Review, surgeons at the National Naval Medical Center and Brooke Army Medical Center stated that limb salvage requires more significant rehabilitation than an amputation. Year-One Review at 25–26. These medical professionals also raised the issue that providing a TSGLI payment for amputations but not limb salvage could create a monetary incentive that would unintentionally encourage a service member to proceed with amputation rather than attempt to save the limb. *Id.* By adding limb salvage as a covered loss, the TSGLI program will obviate this possibility and also recognize the severity of the rehabilitation that members undergo when they elect to pursue limb salvage.

We are adding facial reconstruction to the Schedule of Losses at § 9.20(f)(16). Consultation with medical experts in the field of oral and maxillofacial surgery during the Year-One Review indicated that 20–25 percent of all injuries to members serving in Operation Enduring Freedom/Operation Iraqi Freedom occur to the head, face,

and neck. Year-One Review at 29. The experts also opined that these injuries are significantly more severe than in the civilian world because they often result in severe functional losses, including impairment in areas such as eating, breathing, digestion, vision, and salivation that require significant recovery and rehabilitation but do not result in a loss of the member's ability to carry out activities of daily living that would be covered in the current Schedule of Losses. *Id.* New § 9.20(f)(16) provides a graduated scale of payments for facial reconstruction, starting at $25,000, with a maximum payment of $75,000. The amount of the payment for facial reconstruction is based on the location and severity of the injury. The regulation, however, excludes TSGLI for relatively minor injuries to the face, such as the loss of the tip of the nose, because TSGLI is intended for traumatic injuries that require complex surgeries and rehabilitation, as evidenced by the losses prescribed at 38 U.S.C. 1980A(b)(1).

In § 9.20(e)(6)(xviii), we are defining "coma," as used in § 9.20(f)(17) to mean "a state of profound unconsciousness that is measured at a Glasgow Coma Score of 8 or less." The Glasgow Coma Score is a neurological scale comprised of the combined score on tests of a patient's eye, verbal, and motor responses and ranges between 3 (indicating deep unconsciousness) and 15 (widely awake). *http://www.unc.edu/~rowlett/units/scales/glasgow.htm.* The scale is applicable to acute medical and trauma patients and is also used for chronic conditions. *http://www.bt.cdc.gov/masscasualties/gscale.asp.* Use of the Glasgow Coma Score will provide a reliable, objective way of assessing the conscious state of a service member.

We are adding to the schedule at § 9.20(f)(18) and (20) a $25,000 TSGLI payment for hospitalization due to traumatic brain injury (TBI) or other traumatic injury (OTI) if the service member's TBI or OTI results in 15 consecutive days of inpatient hospitalization, and we define "hospitalization" in § 9.20(e)(6)(xiii) to mean an inpatient stay in a facility that is: (1) Accredited by the Joint Commission or its predecessor, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), or accredited or approved by a program of the qualified governmental unit in which such institution is located if the Secretary of Health and Human Services has found that the accreditation or comparable approval standards of such qualified governmental unit are essentially equivalent to those of the Joint Commission or JCAHO; (2) used primarily to provide, by or under the supervision of physicians, to inpatients' diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons; (3) requires every patient to be under the care and supervision of a physician; and (4) provides 24-hour nursing services rendered or supervised by a registered professional nurse and has a licensed practical nurse or registered nurse on duty at all times. The definition of hospitalization also includes any Armed Forces medical facility that is authorized to provide inpatient and/or ambulatory care to eligible service members. The definition is intended to exclude facilities that do not provide traditional hospital-level care unless the limitation on the level of care is a result of military necessity. The requisite consecutive 15-day hospitalization period includes the dates on which the member is transported from the injury site to a facility described above, admitted to the facility, transferred between such facilities, and discharged from the facility.

A service member is not entitled to receive both a TSGLI payment for a 15-day hospitalization due to TBI under § 9.20(f)(18) and a $25,000 TSGLI payment for TBI that causes the inability to perform at least two activities of daily living under § 9.20(f)(17). Also, a service member is not entitled to receive both a TSGLI payment for a 15-day hospitalization due to OTI under § 9.20(f)(20) and a $25,000 payment for a traumatic injury causing the inability to perform at least two activities of daily living under § 9.20(f)(19).

By adding this loss, we will allow injured service members whose inability to perform activities of daily living cannot be documented in the early stages following their traumatic injury to nonetheless establish the consequences of the injury via easily obtainable information regarding the length of their hospital stay. We also believe that establishing this scheduled loss will result in more consistent decisions and more rapid payments in cases involving TBI. In considering the Schedule of Losses award for TBI, we considered not only the length of the loss of the activities of daily living, but the fact that there was an underlying injury to the brain.

Hospitalization for 15 consecutive days or more in today's health care environment generally indicates a rather severe injury. Such a severe injury usually requires the member's family or other caregivers to assist the member in their recovery.

In 38 CFR 9.20(h)(1)(i), (ii), and (iii) and (2) we refer to an "Application for TSGLI Benefits Form," rather than the "Certification of Traumatic Injury Protection Form," in order to conform to the current name of the document. In 38 CFR 9.20(h)(1)(ii) we are adding "agent" in order to broaden the types of persons who may receive a TSGLI payment on behalf of a member, and we are changing "attorney in fact" to "attorney."

We are amending 38 CFR 9.20(h)(1)(ii) and 38 CFR 9.20(j) to implement 38 U.S.C. 1980A(k), which provides:

> The Secretary [of the appropriate branch of service], in consultation with the Secretary [of Veterans Affairs], shall develop a process for the designation of a fiduciary or trustee of a member of the uniformed services who is insured against traumatic injury under [the TSGLI program]. The fiduciary or trustee so designated would receive a payment for a qualifying loss under [the TSGLI program] if the member is medically incapacitated (as determined pursuant to regulations prescribed by the Secretary [of the appropriate branch of service] in consultation with the Secretary [of Veterans Affairs]) or experiencing an extended loss of consciousness.

Section 602 of title 37, United States Code, authorizes the Secretary of a military department to designate a person to receive amounts due a member "who is mentally incapable of managing his affairs * * * without the appointment in judicial proceedings of a committee, guardian, or other legal representative." In § 9.20(j)(2) we are adding a new paragraph that provides that, if a member does not have a guardian or agent (also known as "attorney-in-fact") who is authorized to act as the member's legal representative, then a trustee appointed under 37 U.S.C. 602 may be authorized to receive a TSGLI payment on behalf of the member and is also obligated to render a full accounting of any disbursements made from the TSGLI benefit in accordance with Department of Defense regulations implementing section 602. *See* 37 U.S.C. 603. In order to achieve Congress' obvious intent in enacting 38 U.S.C. 1980A(k) of providing TSGLI to legally incapacitated service members and their families who are entitled to the payment as soon as possible, we are amending 38 CFR 9.20(h)(1)(ii) to provide that a military trustee may apply for and receive TSGLI on behalf of a legally incapacitated member.

Administrative Procedure Act

In accordance with 5 U.S.C. 553(b)(3)(B), the Secretary of Veterans Affairs finds that there is good cause to

dispense with the opportunity for prior notice and opportunity for public comment with respect to this rule, which explains how the TSGLI program will be amended. The Secretary finds that it is impracticable to delay this regulation for the purpose of soliciting prior public comment because service members and their families need the payment provided by TSGLI as soon as possible following a traumatic injury in order to reduce the financial burden that results from the severe losses covered by the schedule. The amendments would be applied retroactively for losses previously not covered that result from injuries that occurred on or after October 1, 2001. As a result, we estimate that approximately 1640 service members who were not previously eligible for TSGLI would now be entitled to a payment under these amended rules and are in need of these payments as soon as possible. For these reasons, the Secretary of Veterans Affairs is issuing this rule as an interim final rule. The Secretary of Veterans Affairs will consider and address comments that are received within 30 days of the date this interim final rule is published in the **Federal Register**.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any given year. This rule would have no such effect on State, local, and tribal governments or the private sector.

Paperwork Reduction Act

OMB assigns a control number for each collection of information it approves. Except for emergency approvals under 44 U.S.C. 3507(j), VA 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. This interim final rule expands the collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521) (the Act). Accordingly, under section 3507(d) of the Act, VA will submit a copy of the amended TSGLI form (titled Application for TSGLI Benefits Form) to OMB for its review of the collections of information concurrent with the publication of this interim final rule.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a "significant regulatory action," requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined, and it has been determined to be a significant regulatory action under the Executive Order 12866.

Regulatory Flexibility Act

The Secretary of Veterans Affairs hereby certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* This interim final rule will directly affect only individuals and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance Number and Title

The Catalog of Federal Domestic Assistance Program number and title for this regulation is 64.103, Life Insurance for Veterans.

List of Subjects in Part 9

Life insurance, Military personnel, Veterans.

Approved: October 10, 2008.

James B. Peake,

Secretary of Veterans Affairs.

■ For the reasons stated in the preamble, the Department of Veterans Affairs is amending 38 CFR part 9 as follows:

PART 9—SERVICEMEMBERS' GROUP LIFE INSURANCE AND VETERANS' GROUP LIFE INSURANCE

■ 1. The authority citation for part 9 is revised to read as follows:

Authority: 38 U.S.C. 501, 1965–1980A, unless otherwise noted.

■ 2. Section 9.1 is amended by:
■ a. Revising paragraph (b).
■ b. Removing paragraphs (k) through (q).

The revision reads as follows:

§ 9.1 Definitions.

* * * * *

(b) The term *administrative office* means the Office of Servicemembers' Group Life Insurance, located at 80 Livingston Avenue, Roseland, New Jersey 07068.

* * * * *

■ 3. Section 9.20 is amended by:
■ a. Revising paragraph (b)(3).
■ b. Adding paragraph (d)(5).
■ c. Revising paragraphs (e)(3)(i)(C) and (D).
■ d. Removing paragraph (e)(5)(ii) and redesignating paragraph (e)(5)(iii) as new paragraph (e)(5)(ii).
■ e. Revising paragraphs (e)(6)(i) through (iii).
■ f Adding paragraphs (e)(6)(iv), through (xx).
■ g. Removing paragraph (e)(7).
■ h. Redesignating paragraphs (f) through (j) as (g) through (k), respectively.
■ i. Adding new paragraph (f).
■ j. Revising newly designated paragraph (h).
■ k. Revising newly designated paragraph (j)(1).
■ l. Redesignating newly redesignated paragraph (j)(2) as (j)(3) and adding a new paragraph (j)(2).
■ m. Revising the authority citation.

The revisions and additions read as follows:

§ 9.20 Traumatic injury protection.

* * * * *

(b) * * *

(3) A traumatic event does not include a medical or surgical procedure in and of itself.

* * * * *

(d) * * *

(5) You must suffer a traumatic injury before midnight on the date of termination of your duty status in the

uniformed services that established eligibility for Servicemembers' Group Life Insurance. For purposes of this section, the scheduled loss may occur after the date of termination of your duty status in the uniformed services that established eligibility for Servicemembers' Group Life Insurance.

(e)* * *

(3) * * *

(i) * * *

(C) Diagnostic procedures, preventive medical procedures such as inoculations, medical or surgical treatment for an illness or disease, or any complications arising from such procedures or treatment;

(D) Willful use of an illegal substance or a controlled substance unless administered or consumed on the advice of a medical professional; or

* * * * *

(6) *Definitions.* For purposes of this section—

(i) The term *quadriplegia* means the complete and irreversible paralysis of all four limbs.

(ii) The term *paraplegia* means the complete and irreversible paralysis of both lower limbs.

(iii) The term *hemiplegia* means the complete and irreversible paralysis of the upper and lower limbs on one side of the body.

(iv) The term *uniplegia* means the complete and irreversible paralysis of one limb of the body.

(v) The term *complete and irreversible paralysis* means total loss of voluntary movement resulting from damage to the spinal cord or associated nerves, or to the brain, that is deemed clinically stable and unlikely to improve.

(vi) The term *inability to carry out activities of daily living* means the inability to independently perform at least two of the six following functions:

(A) Bathing.

(B) Continence.

(C) Dressing.

(D) Eating.

(E) Toileting.

(F) Transferring in or out of a bed or chair with or without equipment.

(vii) The term *pyogenic infection* means a pus-producing infection.

(viii) The term *contaminated substance* means food or water made unfit for consumption by humans because of the presence of chemicals, radioactive elements, bacteria, or organisms.

(ix) The term *chemical weapon* means chemical substances intended to kill, seriously injure, or incapacitate humans through their physiological effects.

(x) The term *biological weapon* means biological agents or microorganisms intended to kill, seriously injure, or incapacitate humans through their physiological effects.

(xi) The term *radiological weapon* means radioactive materials or radiation-producing devices intended to kill, seriously injure, or incapacitate humans through their physiological effects.

(xii) The term *medical professional* means a licensed practitioner of the healing arts acting within the scope of his or her practice. Some examples include a licensed physician, optometrist, nurse practitioner, registered nurse, physician assistant, or audiologist.

(xiii) The term *hospitalization* means an inpatient stay in a facility that is:

(A)(*1*) Accredited by the Joint Commission or its predecessor, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), or accredited or approved by a program of the qualified governmental unit in which such institution is located if the Secretary of Health and Human Services has found that the accreditation or comparable approval standards of such qualified governmental unit are essentially equivalent to those of the Joint Commission or JCAHO;

(*2*) Used primarily to provide, by or under the supervision of physicians, to inpatients diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons;

(*3*) Requires every patient to be under the care and supervision of a physician; and

(*4*) Provides 24-hour nursing services rendered or supervised by a registered professional nurse and has a licensed practical nurse or registered nurse on duty at all times; or

(B) Any Armed Forces medical facility that is authorized to provide inpatient and/or ambulatory care to eligible service members.

(xiv) The term *total and permanent loss of sight* means:

(A) Visual acuity in the eye of 20/200 or less (worse) with corrective lenses lasting at least 120 days;

(B) Visual acuity in the eye of greater (better) than 20/200 with corrective lenses and a visual field of 20 degrees or less lasting at least 120 days; or

(C) Anatomical loss of the eye.

(xv) The term *total and permanent loss of speech* means organic loss of speech or the ability to express oneself, both by voice and whisper, through normal organs for speech, notwithstanding the use of an artificial appliance to simulate speech. Loss of speech must be clinically stable and unlikely to improve.

(xvi) The term *total and permanent loss of hearing* means average hearing threshold sensitivity for air conduction of at least 80 decibels, based on hearing acuity measured at 500, 1,000, and 2,000 Hertz, that is clinically stable and unlikely to improve.

(xvii) The term *burns* means 2nd degree (partial thickness) or worse burns covering at least 20 percent of the body, including the face and head, or 20 percent of the face alone. Percentage of the body burned may be measured using the Rule of Nines or any means generally accepted within the medical profession.

(xviii) The term *coma* means a state of profound unconsciousness that is measured at a Glasgow Coma Score of 8 or less.

(xix) The term *limb salvage* means a series of operations designed to save an arm or leg with all of its associated parts rather than amputate it. For purposes of this section, a surgeon must certify that the option of amputation of the limb(s) was a medically justified alternative to salvage, and the patient chose to pursue salvage.

(xx) The term *amputation* means the severance or removal of a limb or part of a limb resulting from trauma or surgery. An amputation *above* a joint means a severance or removal that is closer to the body than the specified joint is.

* * * * *

(f) Schedule of Losses.

For losses listed in paragraphs (f)(1) through (18) of this section, multiple losses resulting from a single traumatic event may be combined for purposes of a single payment (except where noted otherwise); however, the total payment amount may not exceed $100,000 for losses resulting from a single traumatic event.

Payments for losses listed in paragraphs (f)(19) through (20) of this section may not be made in addition to payments for losses under paragraphs (f)(1) through (18)—only the higher amount will be paid. The total payment amount may not exceed $100,000 for losses resulting from a single traumatic event.

If the loss is—	Then the amount payable for that loss is—
(1) Total and permanent loss of sight: • For each eye	$50,000
(2) Total and permanent loss of hearing: • For one ear • For both ears	 $25,000 $100,000
(3) Total and permanent loss of speech	$50,000
(4) Quadriplegia	$100,000
(5) Hemiplegia	$100,000
(6) Paraplegia	$100,000
(7) Uniplegia: • For each limb* **Note: Payment for uniplegia of arm cannot be combined with loss 9, 10, or 14 for the same arm. Payment of uniplegia of leg cannot be combined with loss 11, 12, 13, or 15 for the same leg*	$50,000
(8) Burns	$100,000
(9) Amputation of a hand at or above the wrist: • For each hand* **Note: Payment for loss 9 cannot be made in addition to payment for loss 10 for the same hand.*	$50,000
(10) Amputation at or above the metacarpophalangeal joint(s) of either the thumb or the other 4 fingers on 1 hand: • For each hand* **Note: Payment for loss of the thumb cannot be made in addition to payment for loss of the other 4 fingers for the same hand.*	$50,000

(11) Amputation of a foot at or above the ankle: • For each foot* **Note: Payment for loss 11 cannot be made in addition to payments for losses 12 or 13 for the same foot.*	$50,000
(12) Amputation at or above the metatarsophalangeal joints of all toes on 1 foot: • For each foot* **Note: Payment for loss 12 cannot be made in addition to payments for loss 13 for the same foot.*	$50,000
(13) Amputation at or above the metatarsophalangeal joint(s) of either the big toe, or the other 4 toes on 1 foot: • For each foot	$25,000
(14) Limb salvage of arm: • For each arm* **Note: Payment for loss 14 cannot be made in addition to payments for losses 9 or 10 for the same arm.*	$50,000
(15) Limb salvage of leg: • For each leg* **Note: Payment for loss 15 cannot be made in addition to payments for losses 11, 12 or 13 for the same leg.*	$50,000
(16) Facial Reconstruction:	
• **Jaw** – surgery to correct discontinuity loss of the upper or lower jaw	$75,000
• **Nose** – surgery to correct discontinuity loss of 50% or more of the cartilaginous nose	$50,000
• **Lips** – surgery to correct discontinuity loss of 50% or more of the upper or lower lip - For one lip - For both lips	 $50,000 $75,000
• **Eyes** – surgery to correct discontinuity loss of 30% or more of the periorbita - For each eye	 $25,000
• **Facial Tissue** – surgery to correct discontinuity loss of the tissue in 50% or more of any of the following facial subunits: forehead, temple, zygomatic, mandibular, infraorbital or chin. - For each facial subunit *Note 1: Losses due to facial reconstruction may be combined with each other, but the maximum benefit for facial reconstruction may not exceed $75,000.* *Note 2: Any injury or combination of losses under facial reconstruction may also be combined with other losses in paragraphs 9.20(f)(1)-(18) and treated as one loss, provided that all losses are the result of a single traumatic event. However, the total payment amount may not exceed $100,000.*	 $25,000
(17) Coma from traumatic injury AND/OR Traumatic Brain Injury resulting in inability to perform at least 2 Activities of Daily Living (ADL)	

• at 15th consecutive day of coma or ADL loss*	$25,000
• at 30th consecutive day of coma or ADL loss*	an additional $25,000
• at 60th consecutive day of coma or ADL loss*	an additional $25,000
• at 90th consecutive day of coma or ADL loss*	an additional $25,000
**Note: Duration of coma and inability to perform ADLs includes date of onset of coma or inability to perform ADLs and the first date on which member is no longer in a coma or is able to perform ADLs.*	
(18) Hospitalization due to traumatic brain injury*	
• at 15th consecutive day of hospitalization**	$25,000
**Note: Payment for hospitalization replaces the first payment period in loss 17.*	
***Note: Duration of hospitalization includes dates on which member is transported from the injury site to a facility described in § 9.20(e)(6)(xiii), admitted to the facility, transferred between facilities, and discharged from the facility.*	
(19) Traumatic injury, other than traumatic brain injury, resulting in inability to perform at least 2 Activities of Daily Living (ADL)	
• at 30th consecutive day of ADL loss*	$25,000
• at 60th consecutive day of ADL loss*	an additional $25,000
• at 90th consecutive day of ADL loss*	an additional $25,000
• at 120th consecutive day of ADL loss*	an additional $25,000
**Note: Duration of inability to perform ADLs includes date of onset of inability to perform ADLs and the first date on which member is able to perform ADLs.*	
(20) Hospitalization due to traumatic injury other than traumatic brain injury*	
• at 15th consecutive day of hospitalization**	$25,000
**Note: Payment for hospitalization replaces the first payment period in loss 19.*	
***Note: Duration of hospitalization includes dates on which member is transported from the injury site to a facility described in § 9.20(e)(6)(xiii), admitted to the facility, transferred between facilities, and discharged from the facility.*	

* * * * *

(h) *How does a member make a claim for traumatic injury protection benefits?* (1)(i) A member who believes he or she qualifies for traumatic injury protection benefits must complete Part A of the Application for TSGLI Benefits Form and sign the form.

(ii) If a member is unable to sign the Application for TSGLI Benefits Form due to the member's physical or mental incapacity, the form must be signed by the member's guardian; if none, the member's agent or attorney acting under a valid Power of Attorney; if none, the member's military trustee.

(iii) If a member suffered a scheduled loss as a direct result of the traumatic injury, survived seven full days from the date of the traumatic event, and then died before the maximum benefit for which the service member qualifies is paid, the beneficiary or beneficiaries of the member's Servicemembers' Group Life Insurance policy should complete an Application for TSGLI Benefits Form.

(2) If a member seeks traumatic injury protection benefits for a scheduled loss occurring after submission of a completed Application for TSGLI Benefits Form for a different scheduled loss, the member must submit a completed Application for TSGLI Benefits Form for the new scheduled loss and for each scheduled loss that occurs thereafter and for each increment of a scheduled loss that occurs thereafter. For example, if a member seeks traumatic injury protection benefits for a scheduled loss due to coma from traumatic injury and/or the inability to carry out activities of daily living due to traumatic brain injury (§ 9.20(f)(17)), or the inability to carry out activities of daily living due to loss directly resulting from a traumatic injury other than an injury to the brain (§ 9.20(f)(19)), a completed Application for TSGLI Benefits Form must be submitted for each increment of time for which TSGLI is payable. Also, for example, if a service member suffers a scheduled loss due to a coma, a completed Application for TSGLI

Benefits Form should be filed after the 15th consecutive day that the member is in the coma, for which $25,000 is payable. If the member remains in a coma for another 15 days, another completed Application for TSGLI Benefits Form should be submitted and another $25,000 will be paid.

* * * * *

(j) *Who will be paid the traumatic injury protection benefit?* The injured member who suffered a scheduled loss will be paid the traumatic injury protection benefit in accordance with title 38 U.S.C. 1980A except under the following circumstances:

(1) If a member is legally incapacitated, the member's guardian or agent or attorney acting under a valid Power of Attorney will be paid the benefit on behalf of the member.

(2) If no guardian, agent, or attorney is authorized to act as the member's legal representative, a military trustee who has been appointed under the authority of 37 U.S.C. 602 will be paid the benefit on behalf of the member. The military trustee will report the receipt of the traumatic injury benefit payment and any disbursements from that payment to the Department of Defense.

* * * * *

(Authority: 37 U.S.C. 602, 603; 38 U.S.C. 501(a), 1980A)

[FR Doc. E8–28114 Filed 11–25–08; 8:45 am]
BILLING CODE 8320–01–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3020

[Docket Nos. MC2009–6 and CP2009–7; Order No. 138]

Administrative Practice and Procedure, Postal Service

AGENCY: Postal Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Commission is adding Express Mail & Priority Mail to the Competitive Product List. This action is consistent with changes in a recent law governing postal operations and a recent Postal Service request. Republication of the lists of market dominant and competitive products is also consistent with new requirements in the law.

DATES: Effective November 26, 2008.

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: *Regulatory History*, 73 FR 66077 (November 6, 2008).

The Postal Service seeks to add a new product identified as Express Mail & Priority Mail Contract 1 to the Competitive Product List. For the reasons discussed below, the Commission approves the Request.

I. Background

On October 27, 2008, the Postal Service filed a formal request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to add Express Mail & Priority Mail Contract 1 to the Competitive Product List.[1] The Postal Service asserts that the Express Mail & Priority Mail Contract 1 product is a competitive product "not of general applicability" within the meaning of 39 U.S.C. 3632(b)(3). This Request has been assigned Docket No. MC2009–6.

The Postal Service contemporaneously filed a contract related to the proposed new product pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. The contract has been assigned Docket No. CP2009–7.

In support of its Request, the Postal Service filed the following materials: (1) A redacted version of the Governors' Decision authorizing the new product which also includes an analysis of Express Mail & Priority Mail Contract 1 and certification of the Governors' vote;[2] (2) a redacted version of the contract which, among other things, provides that the contract will expire 3 years from the effective date, which is proposed to be 1 day after the Commission issues all regulatory approvals;[3] (3) requested changes in the Mail Classification Schedule product list;[4] (4) a Statement of Supporting Justification as required by 39 CFR 3020.32;[5] and (5) certification of compliance with 39 U.S.C. 3633(a).[6]

In the Statement of Supporting Justification, Kim Parks, Manager, Sales and Communications, Expedited Shipping, asserts that the service to be provided under the contract will cover its attributable costs, make a positive contribution to coverage of institutional costs, and will increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. Request, Attachment D, at 1. W. Ashley Lyons, Manager, Corporate Financial Planning, Finance Department, certifies that the contract complies with 39 U.S.C. 3633(a). *See id.* Attachment E.

The Postal Service filed much of the supporting materials, including the unredacted Governors' Decision and the unredacted Express Mail & Priority Mail contract, under seal. In its Request, the Postal Service maintains that the contract and related financial information, including the customer's name and the accompanying analyses that provide prices, terms, conditions, and financial projections, should remain confidential. *Id.* at 2–3.

In Order No. 125, the Commission gave notice of the two dockets, appointed a public representative, and provided the public with an opportunity to comment.[7] The Postal Service filed supplemental materials on November 19, 2008.[8]

II. Comments

Comments were filed by the Public Representative.[9] No filings were submitted by other interested parties. The Public Representative Comments focus principally on the adequacy of cost coverage, appropriate classification of the product, and overall transparency.[10] Public Representative Comments at 2–3.

The Public Representative does not see a substantial risk for this particular contract, but does raise concerns regarding mailing profiles that he says warrant close attention when evaluating this and similar agreements.[11] The Public Representative believes that the proposed Express Mail & Priority Mail Contract 1 product is appropriately classified as competitive. After reviewing the cost savings measures underlying this contract, the Public Representative determines that the

[1] Request of the United States Postal Service to Add Express Mail & Priority Mail Contract 1 to Competitive Product List and Notice of Establishment of Rates and Class Not of General Applicability, October 27, 2008 (Request).

[2] Attachment A to the Request. The analysis that accompanies the Governors' Decision notes, among other things, that the contract is not risk free, but concludes that the risks are manageable.

[3] Attachment B to the Request.

[4] Attachment C to the Request.

[5] Attachment D to the Request.

[6] Attachment E to the Request.

[7] PRC Order No. 125, Notice and Order Concerning Express Mail & Priority Mail Contract 1 Negotiated Service Agreement, October 31, 2008 (Order No. 125).

[8] United States Postal Service Notice of Filing Under Seal of Additional Information Regarding Financial Analysis, November 19, 2008.

[9] Public Representative Comments in Response to Order No. 125, November 10, 2008 (Public Representative Comments).

[10] With respect to transparency, the Public Representative concludes that "[t]he Postal Service should be commended for proceeding diligently toward accommodating transparency concerns." *Id.* at 10.

[11] *Id.* at 3–4. The specific areas of concern identified by the Public Representative are whether mailer-specific projected volumes are sufficiently reliable, whether cost impacts of mailer-specific shape and weight profiles are sufficiently acknowledged, whether seasonal effects are taken into account, and whether package density has been considered. *Id.* at 7–9.

contract is advantageous to the Postal Service and beneficial to the general public. *Id.* at 6. He concludes, *inter alia*, that the contract should generate sufficient revenue to cover the product's attributable costs and contribute to the recovery of total institutional costs assigned to competitive products. *Id.* at 3–4.

III. Commission Analysis

The Commission has reviewed the Request, the contract, the financial analysis provided under seal that accompanies it, and the comments filed by the Public Representative.

Statutory requirements. The Commission's statutory responsibilities in this instance entail assigning Express Mail & Priority Mail Contract 1 to either the Market Dominant Product List or to the Competitive Product List. 39 U.S.C. 3642. As part of this responsibility, the Commission also reviews the proposal for compliance with the Postal Accountability and Enhancement Act (PAEA) requirements. This includes, for proposed competitive products, a review of the provisions applicable to rates for competitive products. 39 U.S.C. 3633.

Product list assignment. In determining whether to assign Express Mail & Priority Mail Contract 1 as a product to the Market Dominant Product List or the Competitive Product List, the Commission must consider whether

> The Postal Service exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms or offering similar products.

39 U.S.C. 3642(b)(1). If so, the product will be categorized as market dominant. The competitive category of products shall consist of all other products.

The Commission is further required to consider the availability and nature of enterprises in the private sector engaged in the delivery of the product, the views of those who use the product, and the likely impact on small business concerns. 39 U.S.C. 3642(b)(3).

The Postal Service asserts that its bargaining position is constrained by the existence of other shippers who can provide similar services, thus precluding it from taking unilateral action to increase prices without the risk of losing volume to private companies. Request, Attachment D, at 2–3. The Postal Service also contends that it may not decrease quality or output without risking the loss of business to competitors that offer similar expedited delivery services. *Id.* at 2. It further states that the contract partner supports the addition of the contract to the product list to effectuate the negotiated contractual terms. *Id.* at 3. Finally, the Postal Service states that the market for expedited delivery services is highly competitive and requires a substantial infrastructure to support a national network. It indicates that large carriers serve this market. Accordingly, the Postal Service states that it is unaware of any small business concerns that could offer comparable service for this customer. *Id.*

No commenter opposes the proposed classification of Express Mail & Priority Mail Contract 1 as competitive. Having considered the statutory requirements and the support offered by the Postal Service, the Commission finds that Express Mail & Priority Mail Contract 1 is appropriately classified as a competitive product and should be added to the Competitive Product List.

Cost considerations. The Postal Service's filing seeks to establish a new domestic Express Mail and Priority Mail product. The contract is predicated on unit costs for major mail functions, *e.g.*, window service, mail processing, and transportation, based on the shipper's mail characteristics.

The Postal Service contends that adding the Express Mail & Priority Mail Contract 1 product will result in processing Express Mail and Priority Mail pieces that are less costly for the Postal Service than the average respective Express Mail and Priority Mail mailpiece. *See id.* Attachment A. It believes that its financial analysis shows that these cost savings can be accomplished while ensuring that the contract covers its attributable costs, does not result in subsidization of competitive products by market dominant products, and increases contribution from competitive products. *Id.*, Attachment E, at 1.

The Postal Service's supplemental filing of November 19, 2008 modifies data it submitted in support of the Request.[12] The Commission's analysis of the proposed contract is based on the updated information and alternate cost estimates of certain mail functions.[13] The Commission employed the latter to determine whether changed cost inputs would materially affect the contract's financial analysis. Based on that analysis, the Commission concludes that the changed inputs do not have a material affect on the underlying financial analysis of the contract. In evaluating costs under a prospective contract compared to the average, the Postal Service should take into account all departures from average cost that may be due to services provided under the contract.

Based on the data submitted and the Commission's analysis shown in Library Reference PRC–CP2009–7–NP–LR–1, the Commission finds that Express Mail & Priority Mail Contract 1 should cover its attributable costs (39 U.S.C. 3633(a)(2)), should not lead to the subsidization of competitive products by market dominant products (39 U.S.C. 3633(a)(1)), and should have a positive effect on competitive products' contribution to institutional costs (39 U.S.C. 3633(a)(3)). Thus, an initial review of the proposed Express Mail & Priority Mail Contract 1 indicates that it comports with the provisions applicable to rates for competitive products.

The Postal Service shall promptly notify the Commission when the contract terminates, but no later than the actual termination date. The Commission will then remove the contract from the Mail Classification Schedule at the earliest possible opportunity.

In conclusion, the Commission approves Express Mail & Priority Mail Contract 1 as a new product. The revision to the Competitive Product List is shown below the signature of this order and is effective upon issuance of this order.

IV. Ordering Paragraphs

It is Ordered:

1. Express Mail & Priority Mail Contract 1 (MC2009–6 and CP2009–7) is added to the Competitive Product List as a new product under Negotiated Service Agreements, Domestic.

2. The Postal Service shall notify the Commission of the termination date of the contract as discussed in this order.

3. The Secretary shall arrange for the publication of this Order in the **Federal Register**.

List of Subjects in 39 CFR Part 3020

Administrative practice and procedure; Postal Service.

By the Commission.

Steven W. Williams,

Secretary.

■ For the reasons stated in the preamble, under the authority at 39 U.S.C. 503, the Postal Regulatory Commission amends 39 CFR part 3020 as follows:

[12] The Postal Service is encouraged to exercise greater care in reviewing supporting materials for accuracy. The Commission's efforts to review negotiated service agreements expeditiously is hampered if the underlying data are incomplete, erroneous, or otherwise not adequately supported.

[13] The Commission's analysis is set forth in Library Reference PRC–CP2009–7–NP–LR–1 which, because it contains confidential information, is being filed under seal.

PART 3020—PRODUCT LISTS

■ 1. The authority citation for part 3020 continues to read as follows:

Authority: 39 U.S.C. 503; 3622; 3631; 3642; 3682.

■ 2. Revise Appendix A to subpart A of part 3020—Mail Classification to read as follows:

APPENDIX A TO SUBPART A OF PART 3020—MAIL CLASSIFICATION

Schedule

Part A—Market Dominant Products:
- 1000 Market Dominant Product List:
  - First-Class Mail:
    - Single-Piece Letters/Postcards
    - Bulk Letters/Postcards
    - Flats
    - Parcels
    - Outbound Single-Piece First-Class Mail International
    - Inbound Single-Piece First-Class Mail International
  - Standard Mail (Regular and Nonprofit)
    - High Density and Saturation Letters
    - High Density and Saturation Flats/Parcels
    - Carrier Route
    - Letters
    - Flats
    - Not Flat-Machinables (NFMs)/Parcels
  - Periodicals
    - Within County Periodicals
    - Outside County Periodicals
  - Package Services
    - Single-Piece Parcel Post
    - Inbound Surface Parcel Post (at UPU rates)
    - Bound Printed Matter Flats
    - Bound Printed Matter Parcels
    - Media Mail/Library Mail
  - Special Services
    - Ancillary Services
    - International Ancillary Services
    - Address List Services
    - Caller Service
    - Change-of-Address Credit Card Authentication
    - Confirm
    - International Reply Coupon Service
    - International Business Reply Mail Service
    - Money Orders
    - Post Office Box Service
  - Negotiated Service Agreements
    - HSBC North America Holdings Inc. Negotiated Service Agreement
    - Bookspan Negotiated Service Agreement
    - Bank of America corporation Negotiated Service Agreement
    - The Bradford Group Negotiated Service Agreement
  - Market Dominant Product Descriptions
  - First-Class Mail
  - [Reserved for Class Description]:
    - Single-Piece Letters/Postcards
    - [Reserved for Product Description]
    - Bulk Letters/Postcards
    - [Reserved for Product Description]
    - Flats
    - [Reserved for Product Description]
    - Parcels
    - [Reserved for Product Description]
    - Outbound Single-Piece First-Class Mail International
    - [Reserved for Product Description]
    - Inbound Single-Piece First-Class Mail International
    - [Reserved for Product Description]
  - Standard Mail (Regular and Nonprofit)
  - [Reserved for Class Description]:
    - High Density and Saturation Letters
    - [Reserved for Product Description]
    - High Density and Saturation Flats/Parcels
    - [Reserved for Product Description]
    - Carrier Route
    - [Reserved for Product Description]
    - Letters
    - [Reserved for Product Description]
    - Flats

APPENDIX A TO SUBPART A OF PART 3020—MAIL CLASSIFICATION—Continued

Schedule

- [Reserved for Product Description]
- Not Flat-Machinables (NFMs)/Parcels
- [Reserved for Product Description]

Periodicals
[Reserved for Class Description]:
- Within County Periodicals
- [Reserved for Product Description]
- Outside County Periodicals
- [Reserved for Product Description]

Package Services
[Reserved for Class Description]:
- Single-Piece Parcel Post
- [Reserved for Product Description]
- Inbound Surface Parcel Post (at UPU rates)
- [Reserved for Product Description]
- Bound Printed Matter Flats
- [Reserved for Product Description]
- Bound Printed Matter Parcels
- [Reserved for Product Description]
- Media Mail/Library Mail
- [Reserved for Product Description]

Special Services
[Reserved for Class Description]:
- Ancillary Services
- [Reserved for Product Description]
- Address Correction Service
- [Reserved for Product Description]
- Applications and Mailing Permits
- [Reserved for Product Description]
- Business Reply Mail
- [Reserved for Product Description]
- Bulk Parcel Return Service
- [Reserved for Product Description]
- Certified Mail
- [Reserved for Product Description]
- Certificate of Mailing
- [Reserved for Product Description]
- Collect on Delivery
- [Reserved for Product Description]
- Delivery Confirmation
- [Reserved for Product Description]
- Insurance
- [Reserved for Product Description]
- Merchandise Return Service
- [Reserved for Product Description]
- Parcel Airlift (PAL)
- [Reserved for Product Description]
- Registered Mail
- [Reserved for Product Description]
- Return Receipt
- [Reserved for Product Description]
- Return Receipt for Merchandise
- [Reserved for Product Description]
- Restricted Delivery
- [Reserved for Product Description]
- Shipper-Paid Forwarding
- [Reserved for Product Description]
- Signature Confirmation
- [Reserved for Product Description]
- Special Handling
- [Reserved for Product Description]
- Stamped Envelopes
- [Reserved for Product Description]
- Stamped Cards
- [Reserved for Product Description]
- Premium Stamped Stationery
- [Reserved for Product Description]
- Premium Stamped Cards
- [Reserved for Product Description]
- International Ancillary Services
- [Reserved for Product Description]
- International Certificate of Mailing

APPENDIX A TO SUBPART A OF PART 3020—MAIL CLASSIFICATION—Continued

Schedule

[Reserved for Product Description]
International Registered Mail
[Reserved for Product Description]
International Return Receipt
[Reserved for Product Description]
International Restricted Delivery
[Reserved for Product Description]
Address List Services
[Reserved for Product Description]
Caller Service
[Reserved for Product Description]
Change-of-Address Credit Card Authentication
[Reserved for Product Description]
Confirm
[Reserved for Product Description]
International Reply Coupon Service
[Reserved for Product Description]
International Business Reply Mail Service
[Reserved for Product Description]
Money Orders
[Reserved for Product Description]
Post Office Box Service
[Reserved for Product Description]
Negotiated Service Agreements
[Reserved for Class Description]:
HSBC North America Holdings Inc. Negotiated Service Agreement
[Reserved for Product Description]
Bookspan Negotiated Service Agreement
[Reserved for Product Description]
Bank of America Corporation Negotiated Service Agreement
The Bradford Group Negotiated Service Agreement
Part B—Competitive Products.
Competitive Product List:
Express Mail:
Express Mail
Outbound International Expedited Services
Inbound International Expedited Services
Inbound International Expedited Services 1 (CP2008–7)
Priority Mail:
Priority Mail
Outbound Priority Mail International
Inbound Air Parcel Post
Parcel Select
Parcel Return Service
International:
International Priority Airlift (IPA)
International Surface Airlift (ISAL)
International Direct Sacks-M-Bags
Global Customized Shipping Services
Inbound Surface Parcel Post (at non-UPU rates)
International Money Transfer Service
International Ancillary Services
Special Services:
Premium Forwarding Service
Negotiated Service Agreements:
Domestic
Express Mail Contract 1 (MC2008–5)
Express Mail Contract 2 (MC2009–3 and CP2009–4)
Express Mail & Priority Mail Contract 1 (MC2009–6 and CP2009–7)
Parcel Return Service Contract 1 (MC2009–1 and CP2009–2)
Priority Mail Contract 1 (MC2008–8 and CP2008–26)
Priority Mail Contract 2 (MC2009–2 and CP2009–3)
Priority Mail Contract 3 (MC2009–4 and CP2009–5)
Priority Mail Contract 4 (MC2009–5 and CP2009–6)
Outbound International
Global Expedited Package Services (GEPS) Contracts GEPS 1 (CP2008–5, CP2008–11, CP2008–12, and CP2008–13, CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23, and CP2008–24)
Global Plus Contracts Global Plus 1 (CP2008–9 and CP2008–10) Global Plus 2 (MC2008–7, CP2008–16 and CP2008–17)
Inbound Direct Entry Contracts with Foreign Postal Administrations (MC2008–6, CP2008–14 and CP2008–15)
Competitive Product Descriptions
Express Mail
[Reserved for Group Description]

APPENDIX A TO SUBPART A OF PART 3020—MAIL CLASSIFICATION—Continued

Schedule
Express Mail
[Reserved for Product Description]
Outbound International Expedited Services
[Reserved for Product Description]
Inbound International Expedited Services
[Reserved for Product Description]
Priority
[Reserved for Product Description]
Priority Mail
[Reserved for Product Description]
Outbound Priority Mail International
[Reserved for Product Description]
Inbound Air Parcel Post
[Reserved for Product Description]
Parcel Select
[Reserved for Group Description]
Parcel Return Service
[Reserved for Group Description]
International
[Reserved for Group Description]
International Priority Airlift (IPA)
[Reserved for Product Description]
International Surface Airlift (ISAL)
[Reserved for Product Description]
International Direct Sacks-M-Bags
[Reserved for Product Description]
Global Customized Shipping Services
[Reserved for Product Description]
International Money Transfer Service
[Reserved for Product Description]
Inbound Surface Parcel Post (at non-UPU rates)
[Reserved for Product Description]
International Ancillary Services
[Reserved for Product Description]
International Certificate of Mailing
[Reserved for Product Description]
International Registered Mail
[Reserved for Product Description]
International Return Receipt
[Reserved for Product Description]
International Restricted Delivery
[Reserved for Product Description]
International Insurance
[Reserved for Product Description]
Negotiated Service Agreements
[Reserved for Group Description]
Domestic
[Reserved for Product Description]
Outbound International
[Reserved for Group Description]
Part C—Glossary of Terms and Conditions [Reserved]
Part D—Country Price Lists for International Mail [Reserved]

[FR Doc. E8–28100 Filed 11–25–08; 8:45 am]
BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2005–0161; FRL–8745–2]

RIN 2060–AO80

Regulation of Fuels and Fuel Additives: Modifications to Renewable Fuel Standard Program Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Partial withdrawal of direct final rule.

SUMMARY: Because EPA received adverse comment, we are withdrawing several provisions of the direct final rule to amend the Renewable Fuel Standard program requirements, published on October 2, 2008.

DATES: Effective November 26, 2008, EPA withdraws the amendments to 40 CFR 80.1129(b)(1), 80.1129(b)(4), 80.1129(b)(8), 80.1131(a)(8), and 80.1131(b)(4) published at 73 FR 57248 on October 2, 2008.

FOR FURTHER INFORMATION CONTACT: Megan Brachtl, Compliance and Innovative Strategies Division, Office of Transportation and Air Quality (Mail Code: 6406J), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., 20460; telephone number: (202) 343–9473; fax number: (202) 343–2802; e-mail address: *brachtl.megan@epa.gov*.

SUPPLEMENTARY INFORMATION: Because EPA received adverse comment, we are withdrawing several provisions of the direct final rule to amend the Renewable Fuel Standard program requirements, published on October 2, 2008. We stated in that direct final rule that if we received adverse comment by November 3, 2008, the portions of the direct final rule on which adverse comments were received would not take effect, and we would publish a timely withdrawal of such portions of the direct final rule in the **Federal Register**. We subsequently received adverse comments on the following provisions: The amendments to 40 CFR 80.1129(b)(1) and 80.1129(b)(8) (providing that a party with a small refinery or small refiner exemption may only separate RINs that have been assigned to a volume of renewable fuel that the party blends into motor vehicle fuel), 40 CFR 80.1129(b)(4) (providing that any party may separate the RINs from renewable fuel that it produces or markets for use in motor vehicles in neat form, or uses in motor vehicles in neat form), and 40 CFR 80.1131(a)(8) and 80.1131(b)(4) (changing the location in the RFS regulations of a provision stating that a RIN that is transferred to two or more parties is considered an invalid RIN). Because EPA received adverse comments, we are withdrawing these provisions.

EPA published a parallel proposed rule on the same day as the direct final rule. The proposed rule invited comment on the substance of the direct final rule. We will address the comments received on the portions of the direct final rule being withdrawn today in a subsequent final action based on the parallel proposed rule also published on October 2, 2008 (73 FR 57274). As stated in the parallel proposal, we will not institute a second comment period on this proposed action. The provisions for which we did not receive adverse comment will become effective on December 1, 2008, as provided in the October 2, 2008, direct final rule.

Dated: November 20, 2008.

Stephen L. Johnson,

Administrator.

■ Accordingly, the amendments to 40 CFR 80.1129(b)(1), 80.1129(b)(4), 80.1129(b)(8), 80.1131(a)(8), and 80.1131(b)(4) published on October 2, 2008 (73 FR 57248) are withdrawn as of November 26, 2008.

[FR Doc. E8–28125 Filed 11–25–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 112

[EPA–HQ–OPA–2008–0569 FRL–8746–1]

RIN 2050–AG48

Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure Rule; Revisions to the Regulatory Definition of "Navigable Waters"

AGENCY: Environmental Protection Agency.

ACTION: Final rule; Response to court order vacating regulatory definition of navigable waters.

SUMMARY: The Environmental Protection Agency (EPA) is promulgating a final rule to amend a Clean Water Act (CWA) section 311 regulation that defines the term "navigable waters." On July 17, 2002, EPA promulgated a final rule which included revisions to the definition of "navigable waters" in the Spill Prevention, Countermeasure and Control (SPCC) regulation. In this action, EPA is announcing the vacatur of the July 17, 2002 revisions to the definition of "navigable waters" in accordance with an order, issued by the United States District Court for the District of Columbia (D.D.C.) in *American Petroleum Institute* v. *Johnson*, 571 F.Supp.2d 165 (D.D.C. 2008), invalidating those revisions. The court decision also restored the regulatory definition of "navigable waters" promulgated by EPA in 1973; consequently, we are amending the definition of "navigable waters" in part 112 to comply with that decision.

DATES: This rule is effective November 26, 2008.

ADDRESSES: The public docket for this final rule, Docket ID No. EPA–HQ–OPA–2008–0569, contains the information related to this rulemaking. All documents in the docket are listed in an index at *http://www.regulations.gov*. Although listed in the index, some information may not be publicly available, such as Confidential Business Information (CBI) or other information the 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 EPA Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the Public Reading Room is 202–566–1744, and the telephone number to make an appointment to view the docket is 202–566–0276.

FOR FURTHER INFORMATION CONTACT: For general information, contact the Superfund, TRI, EPCRA, RMP, and Oil Information Center at 800–424–9346 or TDD at 800–553–7672 (hearing impaired). In the Washington, DC metropolitan area, contact the Superfund, TRI, EPCRA, RMP, and Oil Information Center at 703–412–9810 or TDD 703–412–3323. For more detailed information on specific aspects of this final rule, contact Hugo Fleischman of EPA at 202–564–1968 (*fleischman.hugo@epa.gov*), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460–0002, Mail Code 5104A.

SUPPLEMENTARY INFORMATION:

I. Background

A. Potentially Affected Entities

Persons or entities who own or operate facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil or oil products, which due to their location, could reasonably be expected to discharge oil in quantities that may be harmful, as described in 40 CFR part 110 of this chapter, into or upon the navigable waters of the United States or adjoining shorelines, could be affected by this rule. The rule addresses the regulatory definition of "navigable waters" under the Clean Water Act (CWA) section 311, a term that is important in determining which owners or operators are required to prepare Spill Prevention, Control and Countermeasure (SPCC) Plans and/or Facility Response Plans (FRP) under 40 CFR part 112 for their facilities. As described further below, this action does not increase regulatory burdens, but rather conforms the language in EPA's CWA section 311 regulations to the outcome of a lawsuit challenging the regulatory definition. Examples of entities that might potentially be affected include:

Industry sector	NAICS code
Oil Production	211111
Farms	111, 112
Electric Utility Plants	2211
Petroleum Refining and Related Industries	324
Chemical Manufacturing	325
Food Manufacturing	311, 312
Manufacturing Facilities Using and Storing Animal Fats and Vegetable Oils	311, 325
Metal Manufacturing	331, 332
Other Manufacturing	31–33
Real Estate Rental and Leasing	531–533
Retail Trade	441–446, 448, 451–454
Contract Construction	23
Wholesale Trade	42
Other Commercial	492, 541, 551, 561–562
Transportation	481–488
Arts Entertainment & Recreation	711–713
Other Services (Except Public Administration)	811–813
Petroleum Bulk Stations and Terminals	4247
Education	61
Hospitals & Other Health Care	621, 622
Accommodation and Food Services	721, 722
Fuel Oil Dealers	45431
Gasoline stations	4471
Information Finance and Insurance	51, 52
Mining	212
Warehousing and Storage	493
Religious Organizations	813110
Military Installations	928110
Pipelines	4861, 48691
Government	92

The list of potentially affected entities in the above table may not be exhaustive. The Agency's goal is to provide a guide for readers to consider regarding entities that potentially could be affected by this action. However, this action may affect other entities not listed in this table. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section titled **FOR FURTHER INFORMATION CONTACT.**

B. The SPCC Rule and Litigation

Section 311 of the CWA prohibits the discharge of oil in quantities that may be harmful, as described in 40 CFR part 110, into or upon the navigable waters of the United States or adjoining shorelines (33 U.S.C. 1321(b)(3)). Section 311(j)(1)(C) requires the President of the United States (the President) to issue regulations establishing procedures, methods, equipment, and other requirements to prevent discharges of oil to navigable waters or adjoining shorelines from vessels and facilities and to contain such discharges. 33 U.S.C. 1321(j)(1)(C). The President delegated the authority to regulate non-transportation-related onshore facilities to EPA in Executive Order 11548 (35 FR 11677, July 22, 1970), which was superseded by Executive Order 12777 (56 FR 54757, October 22, 1991).

The SPCC rule was originally promulgated on December 11, 1973 (38 FR 34164). The 1973 SPCC rule defined "navigable waters" in 40 CFR 112.2(k) as follows:

The term "navigable waters" of the United States means "navigable waters" as defined in section 502(7) of the FWPCA, and includes:

(1) All navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA (Pub. L. 92–500), and tributaries of such waters;

(2) Interstate waters;

(3) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and

(4) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

On July 17, 2002, EPA published a final rule amending the SPCC rule at 40 CFR part 112, formally known as the Oil Pollution Prevention regulation (67 FR 47042). The July 2002 rule became effective on August 16, 2002, and included revised requirements for SPCC and Facility Response Plans (FRPs), including a revision to the regulatory definition of "navigable waters" (§ 112.2).

The American Petroleum Institute, the Petroleum Marketers Association of America and Marathon Oil Company challenged certain aspects of this regulation. On March 31, 2008, the U.S. District Court for the District of Columbia ruled that the Agency's promulgation of the revised definition of "navigable waters" in the July 2002 SPCC rule violated the Administrative Procedure Act. (*American Petroleum Institute* v. *Johnson*, 571 F.Supp. 2d 165, 173 (D.D.C. 2008)). The court concluded that the Agency failed to provide a reasoned explanation for its decision to promulgate the broader definition of "navigable waters." (*Id.* at 173, 182–185.) The court vacated the July 2002 SPCC regulatory definition of "navigable waters" and specifically restored the 1973 SPCC regulatory definition pending further rulemaking or other appropriate Agency action. (*Id.* at 186–87.) None of the parties appealed the court's decision.

II. This Final Rule

This final rule conforms the language in the Code of Federal Regulations with the legal state of the regulation defining "navigable waters" in the SPCC rule following the District Court's decision invalidating the July 2002 SPCC rule revisions to the definition of "navigable waters." This rule restores the 1973 SPCC rule definition of "navigable waters" in conformance with the District Court's decision.

III. Why Do We Have Good Cause for Promulgating an Immediately Effective Final Rule Without Prior Notice and Opportunity for Public Comment?

Under the Administrative Procedure Act (APA), 5 U.S.C. 553, agencies generally are required to publish a notice of proposed rulemaking and provide an opportunity for the public to comment on any substantive rulemaking action. However, the Agency may issue a rule without providing notice and an opportunity for public comment, when the Agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public comment procedures thereon are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(3)(B). EPA has determined that there is good cause for making this rule final without prior proposal and opportunity for comment because of the court-ordered decision from the 2002 SPCC rule litigation. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

This rule merely conforms the language in Clean Water Act section 311 regulations to the District Court's decision invalidating the revisions to the regulatory definition of "navigable waters" promulgated on July 17, 2002. By restoring the 1973 SPCC rule definition of "navigable waters," the revision in this final rule conforms the regulations to reflect the legal status quo in light of the District Court's March 31, 2008 order, invalidating the July 2002 SPCC rule definition of "navigable waters." Therefore, pursuant to 5 U.S.C. 553(b)(3)(B), the Agency finds that solicitation of public comment is unnecessary because the court vacated the July 2002 SPCC regulatory definition of "navigable waters" and specifically restored the 1973 SPCC regulatory definition pending further rulemaking or other appropriate Agency action.

Under 5 U.S.C. 553(d)(1) and (3), rules must be published at least 30 days prior to their effective date, except where the rule "grants or recognizes an exemption or relieves a restriction," or where justified by the Agency for "good cause." The good cause rationale presented in the preceding paragraph also applies herein. Because this rule conforms to the published regulatory text with the applicable regulations following the District Court's March 31, 2008 order, the Agency has good cause to make this rule effective immediately.

IV. Statutory and Executive Order Reviews

A. General Requirements

This rule does not establish any new requirements, mandates or procedures. As explained above, this rule merely conforms the SPCC regulatory definition of "navigable waters" to reflect the District Court's March 31, 2008, decision. This rule does not result in any additional or new regulatory requirements because it is merely undertaken to conform the regulatory language to that judicial determination. Accordingly, EPA has determined that this rule is a "significant regulatory action" under Executive Order 12866, and thus is subject to review by the Office of Management and Budget (OMB).

This final rule does not impose an information collection burden under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). The rule conforms the definition of "navigable waters" to reflect the ruling in the July 2002 SPCC rule litigation and does not establish or modify any information reporting or recordkeeping requirements. Therefore, this rule is not subject to the requirements of the Paperwork Reduction Act. Because this rule is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). In addition, this rule does not contain any unfunded mandate or impose any enforceable duty or any significant or unique impact on small governments as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). This rule also does not impose any federalism requirements or require prior consultation with tribal government officials as specified by Executive Order 13132 (64 FR 43255, August 10, 1999) or Executive Order 13175 (65 FR 67249, November 9, 2000), or involve special consideration of environmental justice-related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994).

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

B. Submission to Congress and the Comptroller General

The Congressional Review Act (CRA), 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. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public comment procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated above, the Agency has made such a good cause finding, including the reasons stated, and established an effective date of November 26, 2008. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this rule in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 112

Environmental protection, Navigable waters, Oil pollution, Reporting and recordkeeping requirements, Water pollution control, Water resources.

Dated: November 20, 2008

Stephen L. Johnson,

Administrator.

■ In consideration of the foregoing, 40 CFR part 112 is amended as follows:

PART 112—OIL POLLUTION PREVENTION

■ 1. The authority citation for part 112 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*; 33 U.S.C. 2720; E.O. 12777 (October 18, 1991), 3 CFR, 1991 Comp., p. 351.

Subpart A—[Amended]

■ 2. Amend § 112.2 by revising the definition of "navigable waters" to read as follows:

§ 112.2 Definitions.

* * * * *

Navigable waters of the United States means "navigable waters" as defined in section 502(7) of the FWPCA, and includes:

(1) All navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA (Pub. L. 92–500), and tributaries of such waters;

(2) Interstate waters;

(3) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and

(4) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

* * * * *

[FR Doc. E8–28123 Filed 11–25–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–1170; FRL–8390–7]

Modification of Pesticide Tolerance Revocation for Diazinon

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule amends the pesticide tolerance regulation for diazinon by modifying the revocation of the tolerance for mushrooms. Pesticide tolerances are established under the Federal Food, Drug, and Cosmetic Act (FFDCA). This final rule resolves an objection filed by the American Mushroom Institute in response to a final rule on diazinon tolerances published on September 10, 2008, by granting the objection and modifying the revocation of the diazinon tolerance on mushrooms to expire on September 10, 2010.

DATES: This final rule is effective November 26, 2008.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–1170. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Jane Smith, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0048; fax number: (703) 308–8005; e-mail address: *smith.jane-scott@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

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

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

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

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

II. Prior Diazinon Tolerance Rulemaking

On May 21, 2008 (73 FR 29456) (FRL–8362–1), EPA proposed the revocation of the tolerance for residues of diazinon, (O, O-diethyl O-(6-methyl-2-(1-methylethyl)-4-pyrimidinyl]-phosphorothioate; CAS Reg. No. 333–41–5) in/on the food commodity mushroom at 0.75 parts per million (ppm) in 40 CFR 180.153(a) because a previous registration for the use of diazinon in mushroom houses had been canceled due in part to worker risk concerns.

The preamble of the proposed rule stated the following:

> This proposed rule provides a comment period of 60 days for any person to state an interest in retaining a tolerance proposed for revocation. If EPA receives a comment within the 60–day period to that effect, EPA will not proceed to revoke the tolerance immediately.

Within the 60–day comment period, the American Mushroom Institute (AMI) submitted a comment in response to the proposed rule requesting the Agency retain the diazinon tolerance on mushrooms stating that AMI is working to submit a new registration reinstating the use of diazinon in mushroom houses. AMI also stated that diazinon remains a valuable and unique pest management tool in mushroom production facilities, and indicated that an application would be filed to reinstate the canceled mushroom house use.

On September 10, 2008 (73 FR 52607) (FRL–8379–9), EPA issued a final rule revoking the tolerance for residues of diazinon on mushrooms at 0.75 ppm (among others), effective immediately. The Agency acknowledged AMI's comment, nonetheless declining to maintain the tolerance because AMI had not stated an immediate need for the tolerance, stating that "there are no current or pending uses of diazinon in mushroom houses and no resolution of the exposure risk to workers during application at this time."

III. AMI Objection

On November 4, 2008, AMI filed an objection to the tolerance rulemaking pursuant to 21 U.S.C. 346a(g)(2)(A), objecting to the revocation of the mushroom tolerance. AMI's basis for the objection is the statement in Unit I.C. of the proposed rule that EPA would not proceed to immediately revoke a tolerance where someone indicates an interest in retaining the tolerance.

IV. Order on Objection

The basis for AMI's objection is sound. Given EPA's commitment in the proposed rule not to immediately

revoke the tolerance if a comment was filed requesting that the tolerance be retained, EPA erred by immediately revoking the mushroom tolerance for diazinon notwithstanding AMI's comment expressing an interest in retaining the tolerance. However, EPA did not commit in the proposed rule to an indefinite retention of the tolerance. Accordingly, EPA, by this final rule, and pursuant to FFDCA section 408(g)(2)(C), is amending the diazinon tolerance in 40 CFR 180.153(a) to reflect that the tolerance for mushrooms at 0.75 ppm is reinstated and will remain in effect until September 10, 2010. This will allow a reasonable period of time for either a person to successfully apply for a registration to bring back the use in mushroom houses, or for some existing registrant to obtain an amendment to an existing registration to bring back this use. If EPA approves an application reinstating the mushroom house use before the expiration date of September 10, 2010, EPA will either amend the tolerance to remove the expiration date or promulgate a new tolerance as appropriate. If no such registration action has occurred prior to that date, the revocation of the tolerance on mushrooms will become effective on September 10, 2010.

V. Conclusion

Therefore, pursuant to FFDCA section 408(g)(2)(C), the tolerance for the residues of diazinon, (O, O-diethyl O-(6-methyl-2-(1-methylethyl)-4-pyrimidinyl]- phosphorothioate; CAS Reg. No. 333–41–5), in or on the food commodity mushroom at 0.75 ppm is reinstated until September 10, 2010.

VI. Statutory and Executive Order Reviews

EPA included the required statutory discussion in the September 10, 2008 final rule (72 FR 52607).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report to each House of the Congress and 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**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: November 18, 2008.

Martha Monell,

Acting Director, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. Section 180.153, is amended by alphabetically adding the following entry and a footnote to the table in paragraph (a) to read as follows:

§ 180.153 Diazinon; tolerances for residues.

(a) General. * * *

Commodity	Parts per million
* * * *	*
Mushroom	0.75[2]
* * * *	*

[1] * * *

[2] The expiration/revocation date for this tolerance is 9/10/2010.

* * * * *

[FR Doc. E8–28188 Filed 11–25–08; 8:45 am]

BILLING CODE 6560–50–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 071030625–7696–02]

RIN 0648–XL95

Fisheries of the Northeastern United States; Scup Fishery; Commercial Quota Harvested for 2008 Winter II Period

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces the closure of the scup commercial coastwide fishery from Maine through North Carolina for the Winter II Period. Regulations governing the scup fishery require publication of this notification to advise the coastal states from Maine through North Carolina that this quota has been harvested and to advise Federal vessel permit holders and Federal dealer permit holders that no commercial quota is available for landing scup in these states. Federally permitted commercial vessels may not land scup in these states for the remainder of the 2008 Winter II quota period (through December 31, 2008).

DATES: Effective 0001 hours on November 24, 2008, through December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Emily Bryant, Fishery Management Specialist, (978) 281–9244.

SUPPLEMENTARY INFORMATION: Regulations governing the scup fishery are found at 50 CFR part 648. The regulations at § 648.121 require the Regional Administrator to monitor the commercial scup quota for each quota period and, based upon dealer reports, state data, and other available information, to determine when the commercial quota for a period has been harvested. NMFS is required to publish a notification in the **Federal Register** advising and notifying commercial vessels and dealer permit holders that, effective upon a specific date, the scup commercial quota has been harvested and no commercial quota is available for landing scup for the remainder of the Winter II Period. Based upon recent projections, the Regional Administrator has determined that the Federal commercial quota of 940,948 lb (427 mt) for the 2008 Winter II Period will be fully harvested on or before December 31, 2008. To maintain the integrity of the 2009 Winter II Period quota by avoiding or minimizing quota overages, the commercial scup fishery will close for the remainder of the Winter II Period (through December 31, 2008) in Federal waters, effective as of the date specified above (see **DATES**).

Section 648.4(b) provides that Federal scup moratorium permit holders agree, as a condition of the permit, not to land scup in any state after NMFS has published a notification in the **Federal Register** stating that the commercial quota for the period has been harvested and that no commercial quota for scup is available. Therefore, effective 0001 hours on November 24, 2008, further landings of scup by vessels holding Federal scup moratorium permits are prohibited through December 31, 2008. Effective 0001 hours on November 24, 2008, federally permitted dealers are also advised that they may not purchase scup from federally permitted vessels that land in coastal states from Maine through North Carolina for the remainder of the Winter II Period

(through December 31, 2008). The Winter I Period for commercial scup harvest will open on January 1, 2009.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

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

Dated: November 20, 2008.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–28165 Filed 11–21–08; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 071030625–7696–02]

RIN 0648–XL93

Fisheries of the Northeastern United States; Summer Flounder Fishery; Commercial Quota Harvested for the State of New Jersey

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces that the 2008 summer flounder commercial quota allocated to the State of New Jersey has been harvested. Vessels issued a commercial Federal fisheries permit for the summer flounder fishery may not land summer flounder in New Jersey for the remainder of calendar year 2008, unless additional quota becomes available through a transfer from another state. Regulations governing the summer flounder fishery require publication of this notification to advise New Jersey that the quota has been harvested and to advise vessel permit holders and dealer permit holders that no commercial quota is available for landing summer flounder in New Jersey.

DATES: Effective 0001 hours, November 23, 2008, through 2400 hours, December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Emily Bryant, Fishery Management Specialist,(978) 281–9244.

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned on a percentage basis among the coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.100.

The initial total commercial quota for summer flounder for the 2008 calendar year was set equal to 9,462,001 lb (4,292 mt) (72 FR 74197, December 31, 2007). The percent allocated to vessels landing summer flounder in New Jersey is 16.72499 percent, resulting in a commercial quota of 1,582,519 lb (718 mt). The 2008 allocation was reduced to 1,559,118 lb (707 mt) when research set-aside was deducted.

Section 648.101(b) requires the Administrator, Northeast Region, NMFS (Regional Administrator), to monitor state commercial quotas and to determine when a state's commercial quota has been harvested. NMFS then publishes a notification in the **Federal Register** to advise the state and to notify Federal vessel and dealer permit holders that, effective upon a specific date, the state's commercial quota has been harvested and no commercial quota is available for landing summer flounder in that state. The Regional Administrator has determined, based upon dealer reports and other available information, that New Jersey has harvested its quota for 2008.

The regulations at § 648.4(b) provide that Federal permit holders agree, as a condition of the permit, not to land summer flounder in any state that the Regional Administrator has determined no longer has commercial quota available. Therefore, effective 0001 hours, November 23, 2008, further landings of summer flounder in New Jersey by vessels holding summer flounder commercial Federal fisheries permits are prohibited for the remainder of the 2008 calendar year, unless additional quota becomes available through a transfer and is announced in the **Federal Register**. Effective 0001 hours, November 23, 2008, federally permitted dealers are also notified that they may not purchase summer flounder from federally permitted vessels that land in New Jersey for the remainder of the calendar year, or until additional quota becomes available through a transfer from another state.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

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

Dated: November 20, 2008.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–28116 Filed 11–21–08; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106673–8011–02]

ID 112108B

Fisheries of the Exclusive Economic Zone Off Alaska; Yellowfin Sole by Vessels Participating in the Amendment 80 Limited Access Fishery in Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is closing directed fishing for yellowfin sole by vessels participating in the Amendment 80 limited access fishery in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2008 halibut bycatch allowance specified for the trawl yellowfin sole fishery category by vessels participating in the Amendment 80 limited access fishery in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), November 22, 2008, through 2400 hrs, A.l.t., December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson–Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2008 halibut bycatch allowance specified for the trawl yellowfin sole fishery category by vessels participating in the Amendment 80 limited access fishery for the yellowfin sole fishery category in the BSAI is 363 metric tons as established by the 2008 and 2009

final harvest specifications for groundfish in the BSAI (73 FR 10160, February 26, 2008).

In accordance with § 679.21(e)(3)(vi)(B) and § 679.21(e)(7)(v), the Administrator, Alaska Region, NMFS, has determined that the 2008 halibut bycatch allowance specified for the trawl yellowfin sole fishery category by vessels participating in the Amendment 80 limited access fishery in the BSAI will be caught. Consequently, NMFS is closing directed fishing for yellowfin sole by vessels participating in the Amendment 80 limited access fishery in the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of directed fishing for yellowfin sole by vessels participating in the Amendment 80 limited access fishery in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of November 22, 2008.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.21 and is exempt from review under Executive Order 12866.

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

Dated: November 21, 2008.

Alan D. Risenhoover

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–28160 Filed 11–21–08; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106673–8011–02]

ID 112108A

Fisheries of the Exclusive Economic Zone Off Alaska; Rock Sole, Flathead Sole, and "Other Flatfish" by Vessels Participating in the Amendment 80 Limited Access Fishery in Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for rock sole, flathead sole, and "other flatfish" by vessels participating in the Amendment 80 limited access fishery in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2008 halibut bycatch allowance specified for the trawl rock sole, flathead sole, and "other flatfish" fishery category by vessels participating in the Amendment 80 limited access fishery in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), November 22, 2008, through 2400 hrs, A.l.t., December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson–Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2008 halibut bycatch allowance specified for the trawl rock sole, flathead sole, and "other flatfish" fishery category by vessels participating in the Amendment 80 limited access fishery in the BSAI is 224 metric tons as established by the 2008 and 2009 final harvest specifications for groundfish in the BSAI (73 FR 10160, February 26, 2008). See § 679.21(e)(3)(vi)(A) and § 679.91(d)(1) and (3).

In accordance with § 679.21(e)(3)(vi)(B) and § 679.21(e)(7)(v), the Administrator, Alaska Region, NMFS, has determined that the 2008 halibut bycatch allowance specified for the trawl rock sole, flathead sole, and "other flatfish" fishery category by vessels participating in the Amendment 80 limited access fishery in the BSAI will be caught. Consequently, NMFS is closing directed fishing for rock sole, flathead sole, and "other flatfish" by vessels participating in the Amendment 80 limited access fishery in the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of directed fishing for rock sole, flathead sole, and "other flatfish" by vessels participating in the Amendment 80 limited access fishery in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of November 22, 2008.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.21 and is exempt from review under Executive Order 12866.

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

Dated: November 21, 2008.

Alan D. Risenhoover

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–28157 Filed 11–21–08; 4:15 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 73, No. 229
Wednesday, November 26, 2008

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.

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701 and 705

RIN 3133–AC98

Agency Information Collection Activities: Request for Office of Management and Budget Approval of the Low-Income Definition

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice of regulatory review; request for comments.

SUMMARY: NCUA is submitting the following information collection to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995, Pub. L. 104–13, 44 U.S.C. Chapter 35. The information collection is published to obtain comments from the public.

DATES: Comment must be received on or before January 26, 2009

ADDRESSES: You may submit comments to NCUA by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *NCUA Web Site: http://www.ncua.gov/news/proposed_regs/proposed_regs.html.* Follow the instructions for submitting comments.
- *E-mail:* Address to *regcomments@ncua.gov.* Include "[Your name] Comments on Paperwork Reduction Act Notice—Parts 701 and 705" in the e-mail subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for e-mail.
- *Mail:* Jeryl Fish, Paperwork Clearance Officer, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

Additionally, submit a copy of your comments to the Office of Information and Regulatory Affairs to the attention of Mr. Nick Frazier, Office of Management and Budget, New Executive Office Building, Room 10236, Washington DC 20503, telephone: (202) 395–5887.

Public inspection: NCUA will post comments on its Web site at *http://www.ncua.gov/RegulationsOpinionsLaws/Comments/Index.htm* as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library, at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6540 or send an e-mail to *OGCmail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: Moisette Green, Staff Attorney, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428, or telephone: (703) 518–6540.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, (PRA), NCUA may not conduct or sponsor, and an organization is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. NCUA has submitted the information collection requirements contained § 701.34 of its recent final rule regarding the low-income credit union (LICU) definition, published in today's **Federal Register**, to OMB for review and approval under section 3507 of the PRA and § 1320.11 of OMB's implementing regulations. 5 CFR 1320.11. Under the final rule, FCUs that receive notification that they qualify for a LICU designation and wish to receive it must notify the regional director in writing.

The second portion of the collection is strictly voluntary and depends on an FCU's desire to demonstrate it meets the criteria to receive a LICU designation. Specifically, FCUs that do not receive a LICU designation may provide information to the regional director to demonstrate they meet the criteria. An FCU may be able to demonstrate the actual income of its members based on data it has, for example, from loan applications or surveys of its members. As a practical matter, the Board thinks few FCUs will need this option because NCUA's approach of matching member residential information with Census Bureau income information will provide an estimate very close to members' actual income.

Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of NCUA's functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the information collection, 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 information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

Proposal for the following collection of information:

Title: The Low-Income Definition.

OMB Number: None.

Form Number: None.

Type of Review: Approval of a new collection.

Description: (1) FCUs that receive notification that they qualify for a LICU designation and wish to receive it must notify the regional director in writing. (2) FCUs that do not receive a LICU designation may provide information to the regional director to demonstrate they meet the criteria.

Written Notification to Regional Director:

Respondents: Federal credit unions that wish to receive a low-income credit union designation after the regional director notifies them they qualify.

Estimated Number of Respondents/Recordkeepers: 1,087.

Estimated Burden Hours per Response: .5 hours.

Frequency of Response: Every 18–24 months.

Estimated Total Annual Burden Hours: 543.5 hours.

Estimated Total Annual Cost: 0.

Voluntary Submission to Regional Director Demonstrating LICU Qualification Respondents: Federal credit unions that have not been

notified they qualify by the regional director, but wish to receive a low-income credit union designation.

Estimated Number of Respondents/Recordkeepers: 5.

Estimated Burden Hours per Response: 20 hours.

Frequency of Response: As determined by FCUs.

Estimated Total Annual Burden Hours: 100 hours.

Estimated Total Annual Cost: 0.

Additionally, NCUA estimates the new provisions will require a one-time training burden of one hour for approximately 1,092 credit unions, for a total one-time burden of 1,092 hours.

By the National Credit Union Administration Board on November 20, 2008.

Mary F. Rupp,

Secretary of the Board.

[FR Doc. E8–28077 Filed 11–25–08; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1025; Directorate Identifier 2008–NE–31–AD]

RIN 2120–AA64

Airworthiness Directives; General Electric Company CF6–80C2 and CF6–80E1 Series Turbofan Engines

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for General Electric Company (GE) CF6–80C2 and CF6–80E1 series turbofan engines with high-pressure compressor rotor (HPCR) spool shaft stage 14 disks, part number (P/N) 1703M49G02, 1703M49G03, or 1509M71G10 installed. This proposed AD would require a one-time eddy current inspection (ECI) of the HPCR spool shaft stage 14 disk web for crack indications, and removing from service any parts with web cracks. This proposed AD results from reports of 12 HPCR spool shaft stage 14 disks with web cracks discovered to date. We are proposing this AD to prevent cracks from propagating to an uncontained failure of the disk and damage to the airplane.

DATES: We must receive any comments on this proposed AD by January 26, 2009.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

You can get the service information identified in this proposed AD from 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 FURTHER INFORMATION CONTACT: Christopher Richards, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *christopher.j.richards@faa.gov*; telephone (781) 238–7133; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send us any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include "Docket No. FAA–2008–1025; Directorate Identifier 2008–NE–31–AD" in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

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

Examining the AD Docket

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

Discussion

Since July 2001, GE has reported 12 HPCR spool shaft stage 14 disks with web cracks that were installed in CF6–80C2 and CF6–80E1 series turbofan engines. GE determined that the cracks were caused by defects created during the manufacturing process as a result of high amplitude fatigue (HAF). Although the parts were fluorescent penetrant inspected (FPI) during manufacture, the FPI did not detect the cracks. GE has since revised their manufacturing process to eliminate the HAF. Failure to inspect each affected HPCR spool shaft stage 14 disk web for cracks could result in uncontained failure of the disk and damage to the airplane.

Relevant Service Information

We have reviewed and approved the technical contents of GE Alert Service Bulletin (ASB) No. CF6–80C2 S/B 72–A1122, Revision 1, dated June 19, 2006 (CF6–80C2 series engines), and GE ASB No. CF6–80E1 S/B 72–A0258, Revision 1, dated June 15, 2006 (CF6–80E1 series engines). Those ASBs describe procedures for performing a one-time ECI of the HPCR spool shaft stage 14 disk web for crack indications.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. We are proposing this AD, which would require, at the next engine shop visit where the separation of a major engine flange will occur, a one-time ECI of the HPCR spool shaft stage 14 disk web for crack indications, and removal from service of parts found cracked. The proposed AD would require you to use the service information described previously to perform these actions.

Costs of Compliance

We estimate that this proposed AD would affect 126 CF6–80C2 and CF6–80E1 series turbofan engines installed on airplanes of U.S. registry. We also estimate that it would take about 10 work-hours per engine to perform the inspection, and about 281 hours to complete the proposed actions if done at module level, and that the average labor rate is $80 per work-hour. The pro-rated cost of a HPCR stage 10–14 spool shaft, based on average life remaining on disks found cracked, is $526,890. Using data on the percentage of the affected fleet already in compliance with the corrective actions, we estimate there will be 10 disks found cracked as a result of these inspections. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $594,500.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

General Electric Company: Docket No. FAA–2008–1025; Directorate Identifier 2008–NE–31–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by January 26, 2009.

Affected ADs

(b) None.

Applicability

(c) This AD applies to General Electric Company (GE) CF6–80C2 and CF6–80E1 series turbofan engines with high-pressure compressor rotor (HPCR) spool shaft stage 14 disks part number (P/N) 1703M49G02, 1703M49G03, or 1509M71G10 installed. These engines are installed on, but not limited to, Airbus A300–600R/F, A310–200/300, and A330–200/300, and Boeing 747–300/400/400ER, 767–200/200ER/300/300ER/400ER and MD–11 airplanes.

Unsafe Condition

(d) This AD results from reports of 12 cracked HPCR spool shaft stage 14 disk webs discovered to date. We are issuing this AD to prevent cracks from propagating to an uncontained failure of the disk and damage to the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed at the next engine shop visit where the separation of a major engine flange will occur after the effective date of this AD, unless the actions have already been done.

(f) For the purpose of this AD, introduction of an engine into a shop solely for the following maintenance actions is not considered an engine shop visit:

(1) Removal of a compressor case for airfoil or variable stator vane bushing maintenance.

(2) Removal or replacement of the stage 1 fan disk.

(3) Replacement of the turbine rear frame.

(4) Removal or replacement of the accessory and/or transfer gearbox.

(5) Removal or replacement of the fan forward case.

(6) Any combination of the maintenance actions listed above.

One-Time Eddy Current Inspection (ECI)

(g) Using the following Alert Service Bulletin (ASB) instructions, perform a one-time ECI of the HPCR spool shaft stage 14 disk web for crack indications, and remove from service those parts found to be cracked.

(1) Use paragraphs 3.B.(1) through 3.B.(5) of the Accomplishment Instructions of GE ASB No. CF6–80C2 S/B 72–A1122, Revision 1, dated June 19, 2006, to ECI the CF6–80C2 series engine HPCR spool shaft stage 14 disk web at the module level.

(2) Use paragraph 3.C.(1) of the Accomplishment Instructions of GE ASB No. CF6–80C2 S/B 72–A1122, Revision 1, dated June 19, 2006, to ECI the CF6–80C2 series engine HPCR spool shaft stage 14 disk web at the piece-part level.

(3) Use paragraphs 3.B.(1) through 3.B.(5) of the Accomplishment Instructions of GE ASB No. CF6–80E1 S/B 72–A0258, Revision 1, dated June 15, 2006, to ECI the CF6–80E1 series engine HPCR spool shaft stage 14 disk web at the module level.

(4) Use paragraph 3.C.(1) of the Accomplishment Instructions of GE ASB No. CF6–80E1 S/B 72–A0258, Revision 1, dated June 15, 2006, to ECI the HPCR spool shaft stage 14 disk web at the piece-part level.

Previous Credit

(h) Performance of a one-time ECI of the HPCR spool shaft stage 14 disk web for crack indications, done before the effective date of this AD and following the procedures defined in GE ASB No. CF6 80C2 S/B 72–A1122, dated January 19, 2004, for CF6–80C2 series engines or GE ASB No. CF6 80E1 S/B 72–A0258, dated January 19, 2004, for CF6–80E1 series engines satisfies the compliance requirements specified in this AD.

Alternative Methods of Compliance

(i) 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.

Related Information

(j) Contact Christopher Richards, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *christopher.j.richards@faa.gov*; telephone (781) 238–7133; fax (781) 238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on November 18, 2008.

Peter A. White,

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

[FR Doc. E8–28054 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1245; Directorate Identifier 2008–NE–27–AD]

RIN 2120–AA64

Airworthiness Directives; CFM International S.A. Model CFM56 Turbofan Engines

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for CFM International S.A. CFM56–2, CFM56–3, CFM56–5A, CFM56–5B, CFM56–5C, and CFM56–7B series turbofan engines with certain part number (P/N) and serial number (SN) high-pressure compressor (HPC) 4–9 spools installed. This proposed AD would require removing certain HPC 4–9 spools listed by P/N and SN in this proposed AD. This proposed AD results from reports of certain HPC 4–9 spools that Propulsion Technology LLC (PTLLC) improperly repaired and returned to service. We are proposing this AD to prevent cracking of the HPC 4–9 spool, which could result in possible uncontained failure of the spool and damage to the airplane.

DATES: We must receive any comments on this proposed AD by January 26, 2009.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

FOR FURTHER INFORMATION CONTACT: Stephen K. Sheely, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *stephen.k.sheely@faa.gov*; telephone (781) 238–7750; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send us any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES.** Include "Docket No. FAA–2008–1245; Directorate Identifier 2008–NE–27–AD" in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

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

Examining the AD Docket

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

Discussion

We have received reports of life-limited parts (LLPs) HPC 4–9 spools that PTLLC, repair station certificate No. XZ4R084M, improperly repaired and returned to service. Our investigation found some areas of the seal tooth plasma coating that were thicker than allowed by the CFM56 engine overhaul limits. The investigation also found:

- Seal tooth plasma overspray between the seal teeth, which is not permitted by the engine overhaul manual, and
- Cracks that were missed during the fluorescent penetrant inspection.

These conditions, if not corrected, could cause cracking of the HPC 4–9 spool, which could result in possible uncontained failure of the spool and damage to the airplane.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. We are proposing this AD, which would require removing certain HPC 4–9 spools that have a P/N and SN listed in Table 1 of this proposed AD before accumulating 8,900 cycles since repair at PTLLC or within 1,100 cycles from the effective date of this AD, whichever occurs later.

Costs of Compliance

We estimate that this proposed AD would affect 26 engines installed on airplanes of U.S. registry. We also estimate that it would take about 410 work-hours per engine to perform the proposed actions, and that the average labor rate is $80 per work-hour. Required parts would cost about $227,500 per engine. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $6,767,800.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

CFM International S.A.: Docket No. FAA–2008–1245; Directorate Identifier 2008–NE–27–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by January 26, 2009.

Affected ADs

(b) None.

Applicability

(c) This AD applies to CFM International S.A. CFM56–2, CFM56–3, CFM56–5A, CFM56–5B, CFM56–5C, and CFM56–7B series turbofan engines with a high-pressure compressor (HPC) 4–9 spool that has a part number (P/N) and serial number (SN) specified in Table 1 of this AD, installed. These engines are installed on, but not limited to, Airbus A319, A320, and A340 airplanes and Boeing 737 airplanes.

TABLE 1—HPC 4–9 SPOOLS BY P/N AND SN

HPC 4–9 Spool P/N	HPC 4–9 Spool SN
9513M93G08	MPON1641
1590M29G01	GWN0087D
1590M29G01	GWN00MG2
1590M29G01	GWN011LG
1590M29G01	GWN01285
1590M29G01	GWN021JC
1590M29G01	GWNFY923
1590M29G01	GWNFY824
1590M29G01	GWNPA756
1590M29G01	GWNPG015
1590M29G01	GWNWC515
1590M29G01	GWNWR523
1590M29G01	GWNWT631
1590M29G01	GWNYC495
1588M89G03	GWN03K1R
1588M89G03	GWN03N61
1588M89G03	GWN03N6C
1588M89G03	GWN040L9
1588M89G03	GWN0468N
1588M89G03	GWN05AMO
1277M97G02	GWNE1298
1277M97G02	GWNE1564
1277M97G02	GWNJ7891
1277M97G02	GWNT4187
9513M93G11	GWNB3373
1358M94G01	GWNU0169

Unsafe Condition

(d) This AD results from reports of certain HPC 4–9 spools that Propulsion Technology LLC (PTLLC) improperly repaired and returned to service. We are issuing this AD to prevent cracking of the HPC 4–9 spool, which could result in possible uncontained failure of the spool and damage to 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.

Removing the HPC 4–9 Spool

(f) Remove HPC 4–9 spools from service that have a P/N and S/N listed in Table 1 of this AD before accumulating 8,900 cycles since repair at PTLLC or within 1,100 cycles from the effective date of this AD, whichever occurs later.

Installation Prohibition

(g) After the effective date of this AD, do not install any engine with an HPC 4–9 spool that has a P/N and SN specified in Table 1 of this AD.

Alternative Methods of Compliance

(h) 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.

Related Information

(i) Contact Stephen K. Sheely, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *stephen.k.sheely@faa.gov*; telephone (781) 238–7750; fax (781) 238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on November 18, 2008.

Peter A. White,

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

[FR Doc. E8–28055 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1243; Directorate Identifier 2007–SW–03–AD]

RIN 2120–AA64

Airworthiness Directives; Erickson Air-Crane Incorporated (Erickson) Model S–64F Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes adopting a new airworthiness directive (AD) for Erickson Model S–64F helicopters. The AD would require inspections for cracking or working rivets in each left and right splice fitting (transition fitting), the pylon bulkhead assembly—canted (bulkhead assembly), the pylon steel strap (strap), and the attaching rotary rudder boom and pylon structure. This proposal is prompted by several reports of cracking in the transition fittings, the bulkhead assembly, and pylon. The actions specified by the proposed AD are intended to detect cracking in the rotary rudder boom or pylon due to fatigue, and to prevent failure from static overload and subsequent loss of control of the helicopter.

DATES: Comments must be received on or before January 26, 2009.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–

30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You may get the service information identified in this proposed AD from Erickson Air-Crane Incorporated, ATTN: Chris Erickson/Compliance Officer, 3100 Willow Springs Rd., PO Box 3247, Central Point, OR 97502, telephone (541) 664–5544, fax (541) 664–2312, e-mail address *cerickson@ericksonaircrane.com.*

FOR FURTHER INFORMATION CONTACT: Michael Kohner, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Rotorcraft Certification Office, Fort Worth, Texas 76193–0170, telephone (817) 222–5170, fax (817) 222–5783.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any written data, views, or arguments regarding this proposed AD. Send your comments to the address listed under the caption **ADDRESSES**. Include the docket number "FAA–2008–1243, Directorate Identifier 2007–SW–03–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

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

Examining the Docket: You may examine the docket that contains the proposed AD, any comments, and other information 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 in Room W12–140 on the ground floor of the West Building at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

Discussion

This document proposes adopting a new AD for Erickson Model S–64F helicopters with a transition fitting, part number (P/N) 6420–66341–101, –102, –103, or –104, a bulkhead assembly, P/N 6420–66340–041, –043, or –044, or a strap, P/N 6420–66301–119 or –127, installed. The AD would require inspections for cracking or working rivets in each transition fitting, the bulkhead assembly, the strap, and the attaching rotary rudder boom and pylon structure, and replacing or repairing any cracked or damaged part with an airworthy part. This proposal is prompted by several reports of cracking in the transition fittings, the bulkhead assembly, and the pylon. The cracks were discovered during inspections. The actions specified by the proposed AD are intended to detect cracking in the rotary rudder boom or pylon due to fatigue, and to prevent failure from static overload and subsequent loss of control of the helicopter.

We have reviewed Erickson Service Bulletin (SB) No. 64B20–6, Revision A, dated December 12, 2007, which describes procedures for inspecting the transition fittings, the bulkhead assembly, the strap, and the attaching rotary rudder boom and pylon structure for cracking or working rivets. We have also reviewed Erickson SB No. 64F General–3, Revision C, dated December 12, 2007, which summarizes a listing of a portion of the Model S–64F helicopter components, their part numbers, and the corresponding service bulletins to use when performing the structural inspections.

The unsafe condition associated with the fatigue cracking and working rivets is likely to exist or develop on other helicopters of the same type design. Therefore, the proposed AD would require, within 20 hours time-in-service (TIS), and thereafter at intervals not to exceed 20 hours TIS:

- Visually inspecting each transition fitting for a crack or working rivets on the inboard face of the rotary rudder boom and pylon;
- Visually inspecting the outboard face of each rotary rudder boom and pylon skin panel (skin panel) that attaches to the transition fittings for a crack or working rivets in the transition fitting attachment areas;
- Visually inspecting the forward and aft sides of the bulkhead assembly for a crack;
- Visually inspecting the upper 12 inches of the strap for a crack or for working rivets; and
- Visually inspecting the pylon on each side of the upper 12 inches of the strap, and also 6 inches above the strap, for a crack or working rivets.

For any pylon with a strap installed, the proposed AD would require, within 155 hours TIS, and thereafter at intervals not to exceed 155 hours TIS, removing the inspection panels, P/N 6420–66304–109 and 6420–66303–125, on the forward and aft sides of the pylon, and visually inspecting the left-hand cap angle (longeron), P/N 6420–66304–136, and the interior area of the pylon that is adjacent to the upper 12 inches of the strap, as well as 6 inches above the end of the strap, for a crack or working rivets. At each 8,300 hours TIS transition fitting replacement, the proposed AD would require:

- With the transition fitting removed, visually inspecting both sides of each skin panel for a crack in the areas to which the transition fitting attaches; and
- Performing a fluorescent penetrant inspection of the skin panels for a crack in the area around the fastener holes attaching the transition fittings to the rotary rudder boom and pylon.

The proposed AD would also require, before further flight:

- Inspecting any part and the surrounding area using a 10-power or higher magnifying glass if you cannot visually determine that a crack does not exist in that part;
- Performing a fluorescent penetrant inspection of any part, other than a strap, if you cannot determine that a crack does not exist in the part after inspecting it with a 10-power or higher magnifying glass;
- Performing a magnetic particle inspection of any strap if you cannot determine that a crack does not exist in the strap after inspecting it with a 10-power or higher magnifying glass;
- If a crack is found, replacing any cracked part with an airworthy part or repairing that part if it is within the maximum repair damage limits; and
- If any loose or working rivets are found, removing the rivets, visually inspecting the fastener holes and surrounding area for a crack or any other damage, and replacing any cracked part with an airworthy part or replacing any damaged part with an airworthy part if the damage exceeds the maximum repair damage limits or repairing any damaged part, if the part is within the maximum repair damage limits.

Finally, replacing any loose or working rivet would be required. The actions would be required to be accomplished by following specified portions of the service bulletin described previously.

We estimate that this proposed AD would affect 7 helicopters of U.S.

registry, and the proposed actions would take approximately:

- 0.75 work hour for the visual inspection of the transition fittings, skin panels, the bulkhead assembly, strap, and pylon exterior in the strap area with 30 inspections per year;
- 0.50 work hour for the visual inspection of the pylon interior in the strap area with 4 inspections per year;
- 0.75 work hour for the visual and fluorescent penetrant inspections of the skin panels at the transition fitting with 1 inspection per year; and
- 40 work hours per helicopter to repair a pylon structural assembly.

The average labor rate is $80 per work hour. Required parts would cost approximately $50,000 per helicopter to repair a pylon structural assembly, if needed. The estimated cost of labor for the inspections of 7 helicopters would be $14,140. The estimated cost to repair the pylon structural assembly on a helicopter, including the cost of the replacement parts and labor, would be $53,200. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $67,340 per year for the fleet, assuming a pylon structural assembly on one helicopter would need to be repaired.

Regulatory Findings

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

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

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

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.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 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. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

Erickson Air-Crane Incorporated: Docket No. FAA–2008–1243; Directorate Identifier 2007–SW–03–AD.

Applicability: Model S–64F helicopters, with any of the parts listed in Table 1 of this AD installed, certificated in any category.

TABLE 1

Installed part	Part number (P/N)
Left or right splice fitting (transition fitting)	6420–66341–101, –102, –103, or –104
Pylon bulkhead assembly—canted (bulkhead assembly)	6420–66340–041, –043, or –044
Pylon steel strap (strap)	6420–66301–119 or –127

Compliance: Required as indicated.

To detect cracking in the rotary rudder boom or pylon due to fatigue, and to prevent failure from static overload and subsequent loss of control of the helicopter, accomplish the following:

(a) Within 20 hours time-in-service (TIS), unless accomplished previously, and thereafter at intervals not to exceed 20 hours TIS:

(1) Visually inspect each transition fitting, P/N 6420–66341–101, –102, –103, or –104, for a crack or working rivets on the inboard face of the rotary rudder boom and pylon, paying particular attention to the fastener attachment holes, as depicted in Figure 1, Detail A, of the Accomplishment Instructions in Erickson Air-Crane Incorporated Service Bulletin No. 64B20–6, Revision A, dated December 12, 2007 (SB).

(2) Visually inspect the outboard face of each rotary rudder boom and pylon skin panel (skin panel) that attaches to the transition fittings for a crack or working rivets in the transition fitting attachment areas, paying particular attention to the fastener attachment holes, as shown in Figure 1, Detail B, of the Accomplishment Instructions in the SB.

(3) Visually inspect the forward and aft sides of each bulkhead assembly, P/N 6420–66340–041, –043, or –044, for a crack. Pay particular attention to the circled areas shown in Figure 2 of the Accomplishment Instructions in the SB.

(4) Visually inspect the upper 12 inches of each strap, P/N 6420–66301–119 or –127, for a crack or for working rivets as shown in Figure 3 of the Accomplishment Instructions in the SB.

(5) Visually inspect the pylon for a crack or working rivets on each side of the upper 12 inches of the strap, and also 6 inches above the end of the strap as shown in Figure 3 of the Accomplishment Instructions in the SB.

(b) For any pylon with a strap installed, within 155 hours TIS, unless previously accomplished, and thereafter at intervals not to exceed 155 hours TIS, remove the inspection access covers, P/N 6420–66304–109 and P/N 6420–66303–125, on the forward and aft sides of the pylon and visually inspect the left-hand cap angle (longeron), P/N 6420–66304–136, and the interior area of the pylon adjacent to the upper 12 inches of the strap, as well as 6 inches above the end of the strap, for a crack or working rivets, as shown in Figure 3 of the Accomplishment Instructions in the SB.

(c) At each transition fitting replacement, which is required at intervals not to exceed 8,300 hours TIS:

(1) With each transition fitting removed, visually inspect both sides of each skin panel for a crack in the areas to which the transition fitting attaches, paying particular attention to the fastener attachment holes, as

depicted in Details A and B, Figure 1, of the Accomplishment Instructions in the SB.

(2) Perform a fluorescent penetrant inspection of each skin panel for a crack in the areas around the fastener holes where the transition fittings attach to the rotary rudder boom and pylon.

(d) Before further flight, accomplish the following:

(1) If you cannot visually determine that a crack does not exist in a part, inspect the part and the surrounding area using a 10-power or higher magnifying glass.

(2) If you cannot determine that a crack does not exist in a part other than a strap after inspecting it with a 10-power or higher magnifying glass, perform a fluorescent penetrant inspection of the part.

(3) If you cannot determine that a crack does not exist in a strap after inspecting it with a 10-power or higher magnifying glass, perform a magnetic particle inspection of the strap.

(e) If a crack is found, before further flight, replace any cracked part with an airworthy part, or repair the cracked part if the damage is within the maximum repair damage limits.

Note: The maximum repair damage limitations are stated in the applicable Component and Repair Overhaul Manual.

(f) If any loose or working rivets are found, before further flight, remove the rivets and visually inspect the fastener holes and surrounding area for a crack or any other damage. Replace any part that is cracked with an airworthy part; replace any damaged part with damage exceeding the maximum repair damage limits with an airworthy part or repair any damaged part that is within the maximum repair damage limits. Also, replace any loose or working rivets.

(g) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact the Manager, Rotorcraft Certification Office, FAA, ATTN: Michael Kohner, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Rotorcraft Certification Office, Fort Worth, Texas 76193–0170, telephone (817) 222–5170, fax (817) 222–5783, for information about previously approved alternative methods of compliance.

(h) Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to operate the helicopter to a location where the inspection requirements of this AD can be accomplished. No special flight permits will be issued to accomplish replacements or repairs, or if a crack is suspected.

Issued in Fort Worth, Texas, on November 14, 2008.

Scott A. Horn,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. E8–28109 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1242; Directorate Identifier 96–SW–13–AD]

RIN 2120–AA64

Airworthiness Directives; Bell Helicopter Textron Canada Model 206L, 206L–1, and 206L–3 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to revise an existing airworthiness directive (AD) for Bell Helicopter Textron Canada (BHTC) Model 206L, 206L–1, and 206L–3 helicopters with certain part-numbered tailbooms. That AD currently requires a visual inspection of the tailboom skin in the areas around the nutplates and in the areas of the tailboom drive shaft cover retention clips for cracks and corrosion using a 10-power or higher magnifying glass until the tailboom is replaced with an airworthy tailboom. This action would require the same actions as the existing AD but would allow a longer interval for the repetitive inspections if the tailboom is modified. Replacement with an airworthy tailboom other than a part-numbered tailboom affected by this proposal would constitute terminating action for the requirements of this AD. The existing AD was prompted by an accident and several reports of fatigue cracks in the tailboom skin in the areas around the nutplates for the tail rotor fairing and in the areas of the tail rotor drive shaft cover retention clips. These proposed actions are intended to prevent failure of the tailboom and subsequent loss of control of the helicopter.

DATES: Comments must be received by January 26, 2009.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD:

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

You may get the service information identified in this proposed AD from Bell Helicopter Textron Canada, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J1R4, telephone (450) 437–2862 or (800) 363–8023, fax (450) 433–0272, or at *http://www.bellcustomer.com/files/*.

Examining the Docket: You may examine the docket that contains the proposed AD, any comments, and other information 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 in Room W12–140 on the ground floor of the West Building at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Sharon Miles, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations and Guidance Group, Fort Worth, Texas 76193–0111, telephone (817) 222–5122, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any written data, views, or arguments regarding this proposed AD. Send your comments to the address listed under the caption **ADDRESSES**. Include the docket number "FAA–2008–1242, Directorate Identifier 96–SW–13–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

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

Discussion

On August 22, 1996, we issued AD 96–18–05, Amendment 39–9729 (61 FR

45876, August 30, 1996), to require, before further flight, and thereafter at intervals not to exceed 50 hours time-in-service (TIS), a visual inspection of the tailboom skin in the areas around the nutplates and in the areas of the tailboom drive shaft cover retention clips for cracks and corrosion using a 10-power or higher magnifying glass. That AD requires the 50-hour TIS inspection regardless of whether the tailboom has been modified in accordance with Bell Helicopter Textron Alert Service Bulletin No. 206L–87–47, Revision C, dated October 23, 1989 (ASB). That AD also requires repeating those inspections until the tailboom is replaced with a tailboom, part number (P/N) 206–033–004–143 or –177. That action was prompted by an accident and several reports of fatigue cracks in the tailboom skin in the areas around the nutplates for the tail rotor fairing and in the areas of the tail rotor drive shaft cover retention clips. That condition, if not corrected, could result in failure of the tailboom and subsequent loss of control of the helicopter.

Since issuing that AD, we have re-evaluated our AD determination that modified tailbooms should be inspected at intervals not to exceed 50 hours TIS. Therefore, we have issued several alternate method of compliances (AMOCs) to allow owners and operators to conduct 100 hours TIS repetitive inspections, as described in the ASB, instead of the 50 hours TIS repetitive inspections required by the existing AD for those tailbooms modified in accordance with Part I of the ASB. We have determined that increasing the inspection interval for modified tailbooms does not compromise the safety of this helicopter. To provide this relief to all operators, we have decided to propose to revise the AD.

This helicopter model is manufactured in Canada and is type certificated for operation in the United States under the provisions of 14 CFR 21.29 and the applicable bilateral agreement. When AD 96–18–05 was issued, the type certificate for these affected model helicopters was in the U.S. and the FAA had oversight responsibility for these model helicopters. Transport Canada issued an AD following the FAA AD, except that Transport Canada required modifying the tailboom in accordance with the ASB and increasing the inspection interval to 100 hours TIS. Subsequently, these type certificates were transferred to Canada.

Therefore, the proposed AD would revise AD 96–18–05 to allow an increased inspection interval to 100 hours TIS for a tailboom modified in accordance with the ASB. The inspection interval for an unmodified tailboom would remain at 50 hours TIS. The visual inspection of the tailboom skin in the areas around the nutplates and in the areas of the tailboom drive shaft cover retention clips for cracks and corrosion using a 10-power or higher magnifying glass would still be required. The proposed AD would also require repeating the 50-hour TIS inspections until the tailboom is modified per the requirements of the AD. Once modified, repeating the 100-hour TIS inspection until the tailboom is replaced with a tailboom, part number (P/N) 206–033–004–143 or –177, or a tailboom not affected by this AD, would be required.

We estimate that this proposed AD would affect 551 helicopters of U.S. registry, and the proposed actions would take approximately 0.8 work hour per helicopter to inspect and 8 work hours per helicopter to modify, at an average labor rate of $80 per work hour. If a helicopter is modified to increase the inspection intervals, required parts would cost approximately $385. Based on these figures, we estimate the total cost impact of the proposed AD on U.S. operators to be $423,168 per year, assuming all the helicopters are unmodified and 12 50-hour TIS inspections per helicopter. If we assume that all helicopters are modified at the beginning of the year, the cost impact of the proposed AD on U.S. operators would be $776,359 for the first year, assuming there are 6 100-hour TIS inspections the first year, and $211,584 for each year thereafter.

Regulatory Findings

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

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

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

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

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

We prepared a draft economic evaluation of the estimated costs to comply with this proposed AD. See the AD docket to examine the draft economic evaluation.

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.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 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. Section 39.13 is amended by removing Amendment 39–9729 (61 FR 45876, August 30, 1996), and by adding a new airworthiness directive (AD), to read as follows:

Bell Helicopter Textron Canada: Docket No. FAA–2008–1242; Directorate Identifier 96–SW–13–AD. Revises AD 96–18–05, Amendment 39–9729.

Applicability: Model 206L, 206L–1, and 206L–3 helicopters, with tailboom, part number (P/N) 206–033–004–003, –011, –045, or –103, installed, certificated in any category.

Compliance: Required as indicated.

To prevent failure of the tailboom and subsequent loss of control of the helicopter, accomplish the following:

(a) Before further flight, unless accomplished previously, using a 10-power

or higher magnifying glass, inspect the tailboom for cracks or corrosion in accordance with the Accomplishment Instructions, Part II, steps (1) through (7), of Bell Helicopter Textron Alert Service Bulletin No. 206L–87–47, Revision C, dated October 23, 1989 (ASB).

(b) For a tailboom that has *not* been modified in accordance with the Accomplishment Instructions, Part I of the ASB, using a 10-power or higher magnifying glass, inspect the tailboom for a crack at intervals not to exceed 50 hours time-in-service (TIS) in accordance with the Accomplishment Instructions, Part II, steps (1) through (7), of the ASB.

(c) For a tailboom that has been modified in accordance with the Accomplishment Instructions, Part I, of the ASB, using a 10-power or higher magnifying glass, inspect the tailboom for a crack or corrosion at intervals not to exceed 100 hours TIS in accordance with the Accomplishment Instructions, Part II and Part III of the ASB, except you are not required to contact the manufacturer.

(d) If a crack or corrosion is detected that is beyond the repairable limits stated in the applicable maintenance manual, remove the tailboom and replace it with an airworthy tailboom.

(e) Replacing the tailboom with a tailboom, P/N 206–033–004–143 or –177, or an airworthy part-numbered tailboom that is not listed in the Applicability section of this AD, constitutes a terminating action for the requirements of this AD.

(f) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact the Manager, Safety Management Group, FAA, ATTN: Sharon Miles, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations and Guidance Group, Fort Worth, Texas 76193–0111, telephone (817) 222–5122, fax (817) 222–5961, for information about previously approved alternative methods of compliance.

(g) Special flight permits will not be issued.

Issued in Fort Worth, Texas, on November 18, 2008.

Mark R. Schilling,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. E8–28113 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–0186; Directorate Identifier 2007–NM–226–AD]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–10–10, DC–10–10F, DC–10–15, DC–10–30, DC–10–30F (KC–10A and KDC–10), DC–10–40, DC–10–40F, MD–10–10F, and MD–10–30F Airplanes

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

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: The FAA is revising an earlier NPRM for an airworthiness directive (AD) that applies to certain McDonnell Douglas Model DC–10–10, DC–10–10F, DC–10–15, DC–10–30, DC–10–30F (KC–10A and KDC–10), DC–10–40, and DC–10–40F airplanes. The original NPRM would have revised an existing AD that currently requires installing or replacing with improved parts, as applicable, the bonding straps between the metallic frame of the fillet and the wing leading edge ribs, on both the left and right sides of the airplane. The original NPRM proposed to revise the applicability to clarify the identity of the affected airplanes. The original NPRM resulted from fuel system reviews conducted by the manufacturer. This new action proposes to revise the applicability to add and remove certain airplanes, and to add a requirement to reposition or replace two bonding straps for certain airplanes. This new action also proposes to supersede, rather than revise, the existing AD. We are proposing this supplemental NPRM to reduce the potential of ignition sources inside fuel tanks in the event of a severe lightning strike, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

DATES: We must receive comments on this supplemental NPRM by December 22, 2008.

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

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

For service information identified in this AD, contact Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024); telephone (206) 544–9990; fax (206) 766–5682; e-mail *DDCS@boeing.com*; Internet *https://www.myboeingfleet.com*.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Samuel Lee, Aerospace Engineer, Propulsion Branch, ANM–140L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5262; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2007–0186; Directorate Identifier 2007–NM–226–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We proposed to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) with a notice of proposed rulemaking (NPRM) for an AD (the "original NPRM") to revise AD 2006–16–03, amendment 39–14703 (71 FR 43962, August 3, 2006). The original NPRM applied to certain McDonnell Douglas Model DC–10–10, DC–10–10F, DC–10–15, DC–10–30, DC–10–30F (KC–10A and KDC–10), DC–10–40, and DC–10–40F airplanes, and MD–10–10F and MD–10–30F airplanes. The affected airplanes are identified by the manufacturer's fuselage numbers referenced in the applicable McDonnell Douglas DC–10 service bulletin (Service Bulletin 53–109, Revision 4, dated October 7, 1992; or Service Bulletin 53–111, Revision 3, dated August 24, 1992).

The original NPRM was published in the **Federal Register** on November 13, 2007 (72 FR 63836). The original NPRM proposed to revise AD 2006–16–03 to clarify the identity of the affected airplanes in the applicability.

Actions Since Original NPRM Was Issued

Since we issued the original NPRM, Boeing has revised the service bulletins. Service Bulletin DC10–53–111, Revision 5, dated March 19, 2008, and DC10–53–109, Revision 6, dated July 10, 2008, correct effectivity errors (to add and remove certain airplanes incorrectly excluded or included from previous versions). In addition, Service Bulletin DC10–53–109, Revision 5, now includes an action to reposition two bonding straps by using new bonding straps that are less susceptible to cracking. Revision 6 of Service Bulletin DC10–53–109 provides a faster and easier method, which involves replacing the straps with longer straps instead of relocating them.

The revised service bulletins have been approved by the FAA as alternative methods of compliance (AMOCs) with the requirements of AD 2006–16–03. Paragraph (i)(3) has been revised in this supplemental NPRM to include information about these AMOCs.

FAA's Determination and Proposed Requirements of the Supplemental NPRM

The changes discussed above expand the scope of the original NPRM; therefore, we have determined that it is necessary to reopen the comment period for revising AD 2006–16–03 to provide additional opportunity for public comment on this supplemental NPRM. Also, because of the expanded scope, we must supersede, rather than revise, the AD 2006–16–03.

Costs of Compliance

There are about 457 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs for U.S. operators to comply with this supplemental NPRM.

ESTIMATED COSTS

Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
2–17	$80	Up to $4,169	Up to $5,529	281	Up to $1,553,649.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this supplemental NPRM 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.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–14703 (71 FR 43962, August 3, 2006) and adding the following new airworthiness directive (AD):

McDonnell Douglas: Docket No. FAA–2007–0186; Directorate Identifier 2007–NM–226–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by December 22, 2008.

Affected ADs

(b) This AD supersedes AD 2006–16–03.

Applicability

(c) This AD applies to McDonnell Douglas Model DC–10–10, DC–10–10F, DC–10–15, DC–10–30, DC–10–30F (KC–10A and KDC–10), DC–10–40, and DC–10–40F airplanes, and MD–10–10F and MD–10–30F airplanes that have been converted from Model DC–10 series airplanes; certificated in any category; with manufacturer's fuselage numbers as identified in the applicable service bulletin listed in Table 1 of this AD.

McDonnell Douglas DC–10 Service Bulletin—	Revision—	Dated—	For airplanes with—
DC10–53–109	6	July 10, 2008	Extended wing-to-fuselage fillets.
DC10–53–111	5	March 19, 2008	Conventional wing-to-fuselage fillets.

Unsafe Condition

(d) This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to reduce the potential of ignition sources inside fuel tanks in the event of a severe lightning strike, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss 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 Requirements of AD 2006–16–03

Installation or Replacement

(f) For airplanes with manufacturer's fuselage numbers identified in the applicable service bulletin listed in Table 2 of this AD: Within 7,500 flight hours or 60 months after September 7, 2006 (the effective date of AD 2006–16–03), whichever occurs earlier: Install or replace with improved parts, as applicable, the bonding straps between the metallic frame of the fillet and the wing leading edge ribs, on both the left and right sides of the airplane, in accordance with the Accomplishment Instructions of the applicable service bulletin identified in Table 1 or Table 2 of this AD.

TABLE 2—FUSELAGE NUMBERS AFFECTED BY AD 2006–16–03

McDonnell Douglas DC–10 Service Bulletin—	Revision—	Dated—	For airplanes with—
53–109	4	October 7, 1992	Extended wing-to-fuselage fillets.
53–111	3	August 24, 1992	Conventional wing-to-fuselage fillets.

New Requirements of This AD

Installation or Replacement

(g) For airplanes with fuselage numbers not identified in Table 2 of this AD: Within 7,500 flight hours or 60 months, whichever occurs first after the effective date of this AD, install or replace with improved parts, as applicable, the bonding straps between the metallic frame of the fillet and the wing leading edge ribs, on both the left and right sides of the airplane, and reposition two bonding straps. Do the actions in accordance with the Accomplishment Instructions of the applicable service bulletin identified in Table 1 of this AD.

Strap Repositioning for Certain Airplanes

(h) For Configuration 3 airplanes, as identified in McDonnell Douglas DC–10 Service Bulletin DC10–53–109, Revision 6, dated July 10, 2008: Within 7,500 flight hours or 60 months, whichever occurs first after the effective date of this AD, reposition two bonding straps, in accordance with the Accomplishment Instructions of the service bulletin.

Alternative Methods of Compliance (AMOCs)

(i)(1) The Manager, Los Angeles Aircraft Certification Office (ACO), FAA, ATTN: Samuel Lee, Aerospace Engineer, Samuel Lee, Aerospace Engineer, Propulsion Branch, ANM–140L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5262; fax (562) 627–5210; has the authority to approve AMOCs for this AD, if requested using 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 2006–16–03 are approved as AMOCs for the corresponding provisions of this AD. McDonnell Douglas DC–10 Service Bulletins DC10–53–109 and DC10–53–111, both Revision 5, both dated March 19, 2008, and Service Bulletin DC10–53–109, Revision 6, dated July 10, 2008, have been approved by the FAA as an AMOC with the requirements of AD 2006–16–03.

Issued in Renton, Washington, on November 16, 2008.

Stephen P. Boyd,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–28129 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1240; Directorate Identifier 2008–NM–098–AD]

RIN 2120–AA64

Airworthiness Directives; Hawker Beechcraft Corporation Model BH.125 Series 600A Airplanes and Model HS.125 Series 700A Airplanes Modified in Accordance With Supplemental Type Certificate (STC) SA2271SW

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Hawker Beechcraft Corporation Model BH.125 series 600A airplanes and Model HS.125 series 700A airplanes. This proposed AD would require inspecting the wiring diagrams containing the cockpit blowers and comparing with the current airplane configuration, and reworking the wiring if necessary. This proposed AD results from a report indicating that a blower motor of the cockpit ventilation and avionics cooling system seized up and gave off smoke. We are proposing this AD to prevent smoke and fumes in the cockpit in the event that a blower motor seizes and overheats due to excessive current draw.

DATES: We must receive comments on this proposed AD by January 12, 2009.

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

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

For service information identified in this AD, contact Hawker Beechcraft Corporation, Department 62, P.O. Box

85, Wichita, Kansas 67201–0085; telephone 316–676–8238; fax 316–676–6706; e-mail *tmdc@hawkerbeechcraft.com*; Internet *https://www.hawkerbeechcraft.com/service_support/pubs.*

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Andy Shaw, Aerospace Engineer, Special Certification Office, ASW–190, FAA Southwest Regional Office, 2601 Meacham Boulevard. Fort Worth, Texas 76137; telephone (817) 222–5188; fax (817) 222–5785.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2008–1240; Directorate Identifier 2008–NM–098–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received a report indicating that a blower motor of the cockpit ventilation and avionics cooling system seized up and gave off smoke on a Raytheon Model Hawker 125–800 airplane. Investigation revealed inadequate short circuit protection on the blower motor electrical circuit. This condition, if not corrected, could result in smoke and fumes in the cockpit in the event that a blower motor seizes and overheats due to excessive current draw.

The cockpit blowers on certain Hawker Beechcraft Corporation Model BH.125 series 600A airplanes and Model HS.125 series 700A airplanes modified in accordance with Supplemental Type Certificate (STC) SA2271SW are identical to those on the affected Raytheon Model Hawker 125–800 airplanes. Therefore, all of these models may be subject to the same unsafe condition.

Other Relevant Rulemaking

We previously issued AD 2005–16–02, amendment 39–14207 (70 FR 44273, August 2, 2005), applicable to certain Raytheon Model HS.125 series 700A airplanes, Model BAe.125 series 800A airplanes, and Model Hawker 800 and Hawker 800XP airplanes. That AD requires inspecting to determine the current rating of the circuit breakers of certain cockpit ventilation and avionics cooling system blowers; and replacing the circuit breakers and modifying the blower wiring, as applicable.

Relevant Service Information

We have reviewed Hawker Beechcraft Mandatory Service Bulletin 24–3850, dated January 2008. The service bulletin describes procedures for inspecting the wiring diagrams containing the cockpit blowers and comparing with the current airplane configuration, and reworking the wiring if necessary.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the(se) same type design(s). This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under "Differences Between the Proposed AD and Service Bulletin."

Differences Between the Proposed AD and Service Bulletin

Although the NOTE specified in paragraph 3.A. of the Accomplishment Instructions of Hawker Beechcraft Mandatory Service Bulletin 24–3850 specifies that operators should consult the Inspection Authorization, Designated Engineering Representative, FAA, or Hawker Beechcraft Corporation for determination as to the suitability of the service bulletin, this proposed AD would require that the determination be approved by the FAA.

Operators should note that, although the Accomplishment Instructions of the referenced service bulletin describe procedures for submitting a sheet recording compliance with the service bulletin, this proposed AD would not require that action.

Costs of Compliance

We estimate that this proposed AD would affect 40 airplanes of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with this inspection proposed by this AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this proposed AD to the U.S. operators to be $3,200, or $80 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Arkansas Modification Center, Inc.: Docket No. FAA–2008–1240; Directorate Identifier 2008–NM–098–AD.

Comments Due Date

(a) We must receive comments by January 12, 2009.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Hawker Beechcraft Corporation Model BH.125 series 600A airplanes and Model HS.125 series 700A airplanes, certificated in any category; as identified in Hawker Beechcraft Mandatory Service Bulletin 24–3850, dated January 2008, which have been modified in accordance with Supplemental Type Certificate SA2271SW.

Unsafe Condition

(d) This AD results from a report indicating that a blower motor of the cockpit ventilation and avionics cooling system seized up and gave off smoke. We are issuing this AD to prevent smoke and fumes in the cockpit in the event that a blower motor seizes and overheats due to excessive current draw.

Compliance

(e) Comply with this AD within the compliance times specified, unless already done.

Inspection and Rework

(f) Within 600 flight hours or 6 months after the effective date of this AD, whichever occurs first, inspect the wiring diagrams containing the cockpit blowers and compare with the current airplane configuration, in accordance with the Accomplishment Instructions of Hawker Beechcraft Mandatory Service Bulletin 24–3850, dated January 2008; except as provided by paragraph (g) of this AD.

(1) If the current airplane configuration does not match the applicable cockpit blower wiring diagrams, before further flight, rework the wiring using a method approved by the Manager, Special Certification Office, ASW–190, Rotorcraft Directorate, FAA. For the determination to be approved by the Manager, Special Certification Office, as required by this paragraph, the Manager's approval letter must specifically refer to this AD.

(2) If the current airplane configuration matches the applicable cockpit blower wiring diagrams, before further flight, rework the wiring in accordance with the Accomplishment Instructions of Hawker Beechcraft Mandatory Service Bulletin 24–3850, dated January 2008.

No Submission of Certain Information

(g) Although Hawker Beechcraft Mandatory Service Bulletin 24–3850, dated January 2008, specifies to submit certain information to the manufacturer, this AD does not include that requirement.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Special Certification Office, ASW–190, Rotorcraft Directorate, FAA, ATTN: Andy Shaw, Aerospace Engineer, Special Certification Office, ASW–190, FAA, Southwest Regional Office, 2601 Meacham Boulevard, Fort Worth, Texas 76137; telephone (817) 222–5188; fax (817) 222–5785; has the authority to approve AMOCs for this AD, if requested using 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.

Issued in Renton, Washington, on November 16, 2008.

Stephen P. Boyd,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–28168 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1237; Directorate Identifier 2008–NM–125–AD]

RIN 2120–AA64

Airworthiness Directives; ATR Model ATR42–200, ATR42–300, ATR42–320, ATR42–500, ATR72–101, ATR72–201, ATR72–102, ATR72–202, ATR72–211, ATR72–212, and ATR72–212A Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

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

[C]hafed wirings were found in the rear baggage zone, closed [close] to the forward side of the aft pressure bulkhead, due to contact with an understructure securing screw. The concerned wiring harness includes rudder trim, pitch trim and stick pusher control wires. Damages on those wires might lead to the loss of fail safe criteria for those critical functions.

The unsafe condition is reduced controllability of the airplane. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by December 26, 2008.

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

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

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2008–1237; Directorate Identifier 2008–NM–125–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2008–0062, dated April 1, 2008 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> One ATR operator reported some spurious "Pitch disconnect" warning and "AIL and R ELEV" Anti-Ice Horn Fault caution annunciations which precluded the use of the autopilot.
>
> During the investigation, chafed wirings were found in the rear baggage zone, closed [close] to the forward side of the aft pressure bulkhead, due to contact with an understructure securing screw. The concerned wiring harness includes rudder trim, pitch trim and stick pusher control wires. Damages on those wires might lead to the loss of fail safe criteria for those critical functions.
>
> To address the identified unsafe condition, this AD mandates a one-time inspection and a routing modification of the electrical wires in the bulkhead area.

The unsafe condition is reduced controllability of the airplane. The corrective action also includes contacting ATR for repair instructions and doing the repair if any damage (chafing or contact between bundles of cables and the airframe structure) is found during the one-time inspection. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

ATR has issued Service Bulletins ATR42–92–0015, ATR42–92–0018, ATR72–92–1016, and ATR72–92–1018, all dated February 11, 2008. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

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

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 48 products of U.S. registry. We also estimate that it would take about 5 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $131 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $25,488, or $531 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

ATR–GIE Avions de Transport Régional (Formerly Aerospatiale): Docket No.

FAA–2008–1237; Directorate Identifier 2008–NM–125–AD.

Comments Due Date

(a) We must receive comments by December 26, 2008.

Affected ADs

(b) None.

Applicability

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

(1) ATR Model ATR42–200, ATR42–300, and ATR42–320 airplanes, all serial numbers, except serial numbers 1 through 107 inclusive, 110 through 112 inclusive, 114, and 115, and except airplanes on which ATR Service Bulletin ATR42–92–0018, dated February 11, 2008, has been incorporated.

(2) ATR Model ATR42–500 airplanes, all serial numbers, except serial numbers 667 and subsequent, and except airplanes on which ATR Service Bulletin ATR42–92–0018, dated February 11, 2008, has been incorporated.

(3) ATR Model ATR72–101, ATR72–201, ATR72–102, ATR72–202, ATR72–211, ATR72–212, and ATR72–212A airplanes, all serial numbers except serial numbers 756 and subsequent, and except airplanes on which ATR Service bulletin ATR72–92–1018, dated February 11, 2008, has been incorporated.

Subject

(d) Air Transport Association (ATA) of America Code 24: Electrical Power.

Reason

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

One ATR operator reported some spurious "Pitch disconnect" warning and "AIL and R ELEV" Anti-Ice Horn Fault caution annunciations which precluded the use of the autopilot.

During the investigation, chafed wirings were found in the rear baggage zone, closed [close] to the forward side of the aft pressure bulkhead, due to contact with an understructure securing screw. The concerned wiring harness includes rudder trim, pitch trim and stick pusher control wires. Damages on those wires might lead to the loss of fail safe criteria for those critical functions.

To address the identified unsafe condition, this AD mandates a one-time inspection and a routing modification of the electrical wires in the bulkhead area.

The unsafe condition is reduced controllability of the airplane. The corrective action also includes contacting ATR for repair instructions and doing the repair if any damage (chafing or contact between bundles of cables and the airframe structure) is found during the one-time inspection.

Actions and Compliance

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

(1) Within 550 flight hours after the effective date of this AD, perform a one-time detailed inspection for damage of the electrical routing in the rear baggage zone in accordance with the Accomplishment Instructions of ATR Service Bulletin ATR42–92–0015 or ATR72–92–1016, both dated February 11, 2008, as applicable.

(2) If any damage is found during the inspection required by paragraph (f)(1) of this AD, do the actions in paragraphs (f)(2)(i) and (f)(2)(ii) of this AD.

(i) Before further flight contact ATR for repair instructions, and do the repair.

(ii) Before further flight, modify the electrical routing and protective sleeve in the rear cargo compartment at frame 44 in accordance with the Accomplishment Instructions of ATR Service Bulletin ATR42–92–0018 or ATR72–92–1018, both dated February 11, 2008, as applicable.

(3) If no damage is found during the inspection required by paragraph (f)(1) of this AD: Within 5,000 flight hours after the effective date of this AD, modify the electrical routing and replace the protective sleeve in the rear cargo compartment at frame 44 in accordance with the Accomplishment Instructions of ATR Service Bulletin ATR42–92–0018 or ATR72–92–1018, both dated February 11, 2008, as applicable.

FAA AD Differences

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

(1) Although the MCAI or service information tells you to submit information to the manufacturer, such submittal is not required by this AD.

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: Tom Rodriguez, Aerospace Engineer, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; 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.

Related Information

(h) Refer to MCAI EASA Airworthiness Directive 2008–0062, dated April 1, 2008, and ATR Service Bulletins ATR42–92–0015, ATR42–92–0018, ATR72–92–1016, and ATR72–92–1018, all dated February 11, 2008, for related information.

Issued in Renton, Washington, on November 16, 2008.

Stephen P. Boyd,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–28163 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1239; Directorate Identifier 2008–NM–131–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Boeing Model 747 airplanes. This proposed AD would require repetitive external surface high frequency eddy current inspections to detect cracks in the radius detail of the upper lobe doubler on both sides of the airplane, and applicable corrective action. This proposed AD results from reports of cracks in the radius detail of the upper lobe doublers. We are proposing this AD to detect and correct cracks in the upper lobe doublers. Such cracks could result in significant degradation of the fuselage structure and reduce its ability to carry flight loads from the vertical stabilizer, which could adversely affect the controllability of the airplane.

DATES: We must receive comments on this proposed AD by January 12, 2009.

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

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

For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Ivan Li, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6437; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2008–1239; Directorate Identifier 2008–NM–131–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received reports of cracks in the radius detail of the upper lobe doublers on Boeing Model 747 airplanes. The upper lobe doublers are located between the fuselage skin and vertical stabilizer attach fittings. Cracks in the upper lobe doublers, if not detected and corrected, could result in significant degradation of the fuselage structure and reduce its ability to carry flight loads from the vertical stabilizer, which could adversely affect the controllability of the airplane.

Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 747–53A2651, dated June 12, 2008. The service bulletin describes procedures for repetitive external surface high frequency eddy current (HFEC) inspections to detect cracks in the radius detail of the upper lobe doubler on both sides of the airplane, and applicable corrective action. The corrective action involves either repairing or replacing any cracked upper lobe doubler with a new upper lobe doubler.

The compliance time for the initial external surface HFEC inspection is at the later of the following times, depending on the airplane configuration:

- Before the accumulation of 9,000 or 10,000 total flight cycles, or
- Within 48 months or 1,000 or 4,000 flight cycles, whichever occurs first.

The compliance time for the repetitive external surface HFEC inspections is within 1,500 or 4,000 flight cycles after the initial inspection, and thereafter at intervals not to exceed 1,500 or 4,000 flight cycles, depending on the airplane configuration.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the(se) same type design(s). This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under "Difference Between the Proposed AD and Service Bulletin."

Difference Between Proposed Rule and Service Bulletin

The service bulletin specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- Using a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization whom we have authorized to make those findings.

Costs of Compliance

We estimate that this proposed AD would affect 164 airplanes of U.S. registry. We also estimate that it would take about 9 work-hours per product to comply with this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this proposed AD to the U.S. operators to be $118,080 or $720 per product, per inspection cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket No. FAA–2008–1239; Directorate Identifier 2008–NM–131–AD.

Comments Due Date

(a) We must receive comments by January 12, 2009.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin 747–53A2651, dated June 12, 2008.

Unsafe Condition

(d) This AD results from reports of cracks in the radius detail of the upper lobe doublers. We are issuing this AD to detect and correct cracks in the upper lobe doublers. Such cracks could result in significant degradation of the fuselage structure and reduce its ability to carry flight loads from the vertical stabilizer, which could adversely affect the controllability of the airplane.

Compliance

(e) Comply with this AD within the compliance times specified, unless already done.

Inspection(s) and Corrective Action

(f) At the applicable times specified in paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin 747–53A2651, dated June 12, 2008, do repetitive external surface high frequency eddy current inspections to detect cracks in the radius detail of the upper lobe doubler on both sides of the airplane, and the applicable corrective action by accomplishing all the applicable actions specified in Accomplishment Instructions of the service bulletin, except as provided by paragraph (g) of this AD. The applicable corrective action must be done before further flight.

(g) Where Boeing Alert Service Bulletin 747–53A2651, dated June 12, 2008, specifies to contact Boeing for repair instructions instead of repairing or replacing any cracked upper lobe doubler in accordance with the service bulletin, this AD requires, before further flight, repairing any cracked upper lobe doubler using a method approved in accordance with the procedures specified in paragraph (h) of this AD.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, ATTN: Ivan Li, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6437; fax (425) 917–6590; has the authority to approve AMOCs for this AD, if requested using 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) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

Issued in Renton, Washington, on November 16, 2008.

Stephen P. Boyd,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–28167 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0987; Airspace Docket No. 08–ASW–19]

Proposed Amendment of Class E Airspace; Corpus Christi, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to amend Class E airspace for the Corpus Christi, TX, area. Controlled airspace is necessary to accommodate Area Navigation (RNAV) Standard Instrument Approach Procedures (SIAPs) at Mustang Beach Airport, Port Aransas, TX; and T.P. McCampbell Airport, Ingleside, TX. Also, Class E airspace around Aransas County Airport, Rockport, TX, and San Jose Island Airport, Rockport, TX, would be incorporated into the Corpus Christi, TX, area Class E airspace. The Rockport, TX, designation is being removed under a separate rulemaking. The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) aircraft operations in and around the Corpus Christi, TX, airspace area.

DATES: 0901 UTC. Comments must be received on or before January 12, 2009.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–0987/Airspace Docket No. 08–ASW–19, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov*. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Area, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76193–0530; telephone: (817) 222–5582.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2008–0987/Airspace Docket No. 08–ASW–19." The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

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

air_traffic/publications/airspace_amendments/.

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration (FAA), Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by amending the Class E airspace area for IFR operations in the Corpus Christi, TX area. This action would incorporate Aransas County Airport and San Jose Island Airport, Rockport, TX, into the Corpus Christi, TX airspace area. Also, with the addition of RNAV SIAPs at Mustang each Airport, Port Aransas, TX; and T.P. McCampbell Airport, Ingleside, TX controlled airspace 700 feet or more above the surface of the earth is necessary for IFR operations at these airports The area would be depicted on appropriate aeronautical charts.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9S, dated October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends controlled airspace at Corpus Christi, TX.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, dated October 3, 2008, and effective October 31, 2008, is amended as follows:

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

* * * * *

ASW TX E5 Corpus Christi, TX [Amended]

Corpus Christi International Airport, TX
(Lat. 27°46′13″ N., long. 97°30′04″ W.)
Corpus Christi NAS/Truax Field, TX
(Lat. 27°41′34″ N., long. 97°17′25″ W.)
Port Aransas, Mustang Beach Airport, TX
(Lat. 27°48′43″ N., long. 97°05′20″ W.)
Rockport, San Jose Island Airport, TX
(Lat. 27°56′40″ N., long. 96°59′06″ W.)
Rockport, Aransas County Airport, TX
(Lat. 28°05′12″ N., long. 97°02′41″ W.)
Ingleside, T.P. McCampbell Airport, TX
(Lat. 27°54′47″ N., long. 97°12′41″ W.)
Robstown, Nueces County Airport, TX
(Lat. 27°46′43″ N., long. 97°41′26″ W.)
Corpus Christi VORTAC, TX
(Lat. 27°54′14″ N., long. 97°26′42″ W.)

That airspace extending upward from 700 feet above the surface within a 7.5 mile radius of Corpus Christi International Airport and within 1.4 miles each side of the 200° radial of the Corpus Christi VORTAC extending from the 7.5 mile radius to 8.5 miles north of the airport, and within 1.5 miles each side of the 316° bearing from the airport extending from the 7.5 mile radius to 10.1 miles northwest of the airport, and within an 8.8-mile radius of Corpus Christi NAS/Truax Field, and within a 6.3-mile radius of Mustang Beach Airport, and within a 6.4-mile radius of T.P. McCampbell Airport, and within a 6.3-mile radius of Nueces County Airport, and within a 7.6-mile radius of Aransas County Airport, and within a 6.5-mile radius of San Jose Island Airport, and within 8 miles west and 4 miles east of the 327° bearing from the San Jose Island Airport extending from the airport to 20 miles northwest of the airport, and within 8 miles east and 4 miles west of the 147° bearing from the airport extending from the airport to 16 miles southeast of the airport, excluding that portion more than 12 miles from and parallel to the shoreline.

* * * * *

Issued in Fort Worth, TX on November 17, 2008.

Walter L. Tweedy,

Acting Manager, Operations Support Group, ATO Central Service Area.

[FR Doc. E8–28074 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–1140; Airspace Docket No. 08–ASW–24]

Proposed Amendment of Class D and Class E Airspace; Corpus Christi Naval Air Station/Truax Field, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to amend the geographic coordinates of the Class D and E Airspace areas for Corpus Christi Naval Air Station (NAS)/Truax Field, Corpus Christi, TX. The FAA's National Aeronautical Charting Office is requesting this action to enhance the safety and management of Instrument Flight Rules (IFR) aircraft operations at Corpus Christi NAS/Truax Field.

DATES: 0901 UTC. Comments must be received on or before January 12, 2009.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–1140/Airspace Docket No. 08–ASW–24,

at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov*. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd, Fort Worth, TX 76193–0530; telephone: (817) 222–5582.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2008–1140/Airspace Docket No. 08–ASW–24." The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

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

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration (FAA), Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by bringing current the geographic coordinates for Class D, E2 and E4 Airspace for the Corpus Christi NAS/Truax Field, Corpus Christi, TX. These coordinates would be depicted on appropriate aeronautical charts.

Class D surface areas are published in Paragraph 5000 of FAA Order 7400.9S, dated October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1.

Class E2 surface areas are published in Paragraph 6002 of FAA Order 7400.9S, dated October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1.

Class E4 airspace areas designated as extensions to a Class D surface area are published in Paragraph 6004 of FAA Order 7400.9S, dated October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class D and E airspace designations listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at Corpus Christi NAS/Truax Field, Corpus Christi, TX.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, dated October 3, 2008, and effective October 31, 2008, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * * *

ASW TX D Corpus Christi NAS/Truax Field, TX [Amended]

Corpus Christi NAS/Truax Field, TX
(Lat. 27°41′34″ N., long. 97°17′25″ W.)

That airspace extending upward from the surface to and including 2,500 feet MSL within a 4.3-mile radius of Corpus Christi NAS/Truax Field; excluding that airspace within the Corpus Christi International Airport, TX, Class C airspace area. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

Paragraph 6002 Class E Airspace Designated as Surface Areas.

* * * * * *

ASW TX E2 Corpus Christi NAS/Truax Field, TX [Amended]

Corpus Christi NAS/Truax Field, TX
(Lat. 27°41′34″ N., long. 97°17′25″ W.)

That airspace extending upward from the surface to and including 2,500 feet MSL within a 4.3-mile radius of Corpus Christi NAS/Truax Field; excluding that airspace

within the Corpus Christi International Airport, TX, Class C airspace area. 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 Airport/Facility Directory.

Paragraph 6004 Class E Airspace Areas Designated as an Extension to a Class D Surface Area.

* * * * *

ASW TX E4 Corpus Christi NAS/Truax Field, TX [Amended]

Corpus Christi NAS/Truax Field, TX
(Lat. 27°41′34″ N., long. 97°17′25″ W.)
Corpus Christi VORTAC
(Lat. 27°54′14″ N., long. 97°26′42″ W.)
Truax VORTAC
(Lat. 27°41′11″ N., long. 97°17′41″ W.)

That airspace extending upward from the surface within 1.3 miles each side of the 012° radial of the Truax VORTAC extending from the 4.3-mile radius of Corpus Christi NAS/Truax Field to 5 miles north of the airport and within 2.1 miles each side of the 119° radial of the Truax VORTAC extending from the 4.3-mile radius to 6.2 miles southeast of the airport and within 2.3 miles each side of the 147° radial of the Corpus Christi VORTAC extending from the 4.3-mile radius of the airport to 6.3 miles southeast of the airport and within 2.1 miles each side of the 329° radial of the Truax VORTAC extending from the 4.3-mile radius of the airport to 6.2 miles northwest of the airport; excluding that airspace within the Corpus Christi International Airport, TX. Class C airspace area.

* * * * *

Issued in Fort Worth, TX on November 14, 2008.

Roger M. Trevino,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. E8–28073 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

RIN 3038–AC67

Electronic Filing of Disclosure Documents

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rules.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing to amend its regulations applicable to the filing of Disclosure Documents by commodity pool operators (CPOs) and commodity trading advisors (CTAs) with the National Futures Association (NFA). In response to a petition from NFA, the CFTC is proposing that CPOs and CTAs be required to file their Disclosure Documents electronically with NFA (Proposal).

DATES: Comments must be received on or before December 26, 2008.

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 Electronic Filing of Disclosure Documents." 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: Barbara S. Gold, Associate Director, 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: *bgold@cftc.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

A. CPO and CTA Disclosure Documents

Part 4 of the Commission's regulations [1] governs the operations and activities of CPOs and CTAs. Regulations 4.21 and 4.31 respectively require each CPO and CTA registered or required to be registered with the Commission to deliver a Disclosure Document to prospective pool participants and clients. Regulations 4.24 and 4.25 specify the informational content of the CPO Disclosure Document, and Regulations 4.34 and 4.35 specify the informational content for the CTA Disclosure Document. Regulations 4.26 and 4.36 respectively pertain to the use, amendment and filing of CPO and CTA Disclosure Documents. Specifically, under Regulations 4.26(d) and 4.36(d), the CPO or CTA must file one copy of the Disclosure Document, and any supplements and amendments thereto, with NFA.[2] These regulations do not, however, prescribe any particular manner of filing.

B. The NFA Petition

By letter dated July 21, 2008, NFA petitioned the Commission to amend Regulations 4.26 and 4.36 in order to require that CPOs and CTAs file Disclosure Documents electronically through NFA's electronic Disclosure Document filing system (Petition).[3]

In its Supporting Arguments, NFA explained the reasoning behind the Petition as follows:

> Currently, while there is nothing to prohibit a firm from filing a disclosure document in hardcopy form, the vast majority of CPO and CTA registrants file disclosure documents with NFA primarily via electronic mail due to its expediency and convenience. While the use of electronic mail has been a significant improvement over hardcopy submissions in terms of filing efficiency, the current approach still requires a considerable amount of staffing resources and has other disadvantages, *e.g.*, the inability of registrants to obtain the status of the review of their filing without calling NFA and the lack of a central location for storing past filings. Accordingly, NFA has developed a new Internet-based electronic filing system for disclosure documents that will be significantly less resource intensive while also streamlining and enhancing the filing process for registrants. In order to realize the proposed benefits, however, registrants must be required to file their documents electronically through NFA's new system. Consequently, NFA is petitioning the Commission to amend its regulations accordingly.

The Commission understands that, as with NFA's other electronic filing systems,[4] the Disclosure Document system was designed to be easy and secure, such that Disclosure Documents, supplements and amendments will be uploaded through the system as either Word or PDF documents. Thus, although the CPO or CTA must have an Internet connection to access the system, it could use any public Internet site, such as those available in most public libraries. Moreover, CPOs and CTAs will access the system using the same designated login and password that they currently use for NFA's Online

[1] 17 CFR Part 4 (2008). The Commission's regulations can be accessed through the CFTC's Web site, *http://www.cftc.gov*.

[2] NFA is a registered futures association pursuant to section 17 of the Commodity Exchange Act (Act), 7 U.S.C. 21 (2000). The Act also may be accessed through the CFTC's Web site.

The Commission previously authorized NFA to conduct reviews of Disclosure Documents filed by CPOs and CTAs pursuant to Regulations 4.26(d) and 4.36(d). *See* 62 FR 52088 (Oct. 6, 1997).

[3] The Petition also adds the word "each" before the existing words "trading program" in paragraph (d)(1) of Regulation 4.36 to make that paragraph read parallel to the existing phrase "each trading program" in paragraph (d)(2) of Regulation 4.36.

The Commission previously authorized NFA to accept notices of exemptions or exclusions claimed under Part 4 and required that these notices be filed electronically. *See Id.* and 72 FR 1658 (Jan. 16, 2007), respectively.

[4] For example, NFA has adopted "Easyfile" for introducing broker and commodity pool financial statements required to be filed with it.

Registration System—which, NFA states, is "a well-tested authentication model with which participating registrants are already familiar."[5] NFA additionally states that it has been extremely careful in the development of the system to ensure that the database it maintains of Disclosure Document filings will not be compromised in any way by unauthorized persons.

Further in this regard, NFA explains that once CPOs and CTAs have accessed the system:

> They will be guided through the filing process, which culminates in the electronic transfer of the disclosure document through the secure web-based gateway. The system includes extensive help text to assist registrants with their filings, and the filing process includes a series of questions that will assist in identifying the type of filing as well as provide important background information to assist NFA staff with the analysis of the document itself. After the document is submitted, the system will automatically assign it to an available NFA analyst. By accessing the system, registrants will be able to track the status of their filing and receive comment letters as they are issued. Additionally, the system will serve as an electronic filing cabinet for registrants since it will maintain all previous filings and related comment letters filed through the system.

The Commission further understands, then, that NFA's process for the electronic filing of Disclosure Documents will have two components. One of those components will require CPOs and CTAs to electronically submit their Disclosure Documents, as well as any amendments and supplements thereto. The other of these components will require CPOs and CTAs to enter from their Disclosure Documents certain key information on their operations and activities into a standardized form accessed through NFA's Web site.[6]

II. The Proposal

In light of the foregoing, the Commission is proposing to amend Regulations 4.26(d) and 4.36(d) to require that any documents required to be filed thereunder be filed electronically with NFA, pursuant to NFA's electronic filing procedures. The Commission wishes to emphasize, however, that the Proposal would not impact the delivery of Disclosure Documents to prospective pool participants and clients, which CPOs and CTAs could continue to provide through hardcopy distribution via postal mail or electronically if the intended recipient consented thereto.[7]

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[8] requires that agencies, in proposing rules, consider the impact of those rules on small businesses. The Commission previously has established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its rules on such entities in accordance with the RFA.[9] With respect to CPOs, the Commission previously has determined that a registered CPO is not a small entity for the purpose of the RFA.[10] As for CTAs, the Commission previously has stated that it would evaluate within the context of a particular rule proposal whether all or some affected CTAs would be considered to be small entities and, if so, the economic impact on them of the particular rule.[11] As noted above, the Commission believes that the Proposal will not place any significant economic burdens, whether new or additional, on CPOs and CTAs who will be affected by it. This is because while the Proposal will require these CPOs and CTAs to have access to and a certain degree of technical knowledge to file Disclosure Documents electronically and to enter the required key information, they will access the system using the same designated login and password that they currently use for registration purposes and they will be entering the key information directly from their Disclosure Documents. Thus, the Proposal simply alters the mechanism for filing Disclosure Documents, and does not affect the substance or frequency of those filings. Accordingly, and based on section 3(a) of the RFA,[12] the Acting Chairman, on behalf of the Commission, certifies that the Proposal 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. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)[13] imposes certain requirements on federal agencies (including the Commission) in conducting or sponsoring any collection of information as defined by the PRA. If adopted, the Proposal would change the manner in which CPOs and CTAs file Disclosure Documents with NFA; it would not affect the substance or frequency of those filings. The Proposal would, however, authorize the separate collection from CPOs and CTAs of certain key information from the Disclosure Documents CPOs and CTAs would be filing electronically. Accordingly, pursuant to the PRA, the Commission has submitted a copy of this section to the Office of Management and Budget (OMB) for its review.

Collection of Information. [Rules Relating to the Operations and Activities of Commodity Pool Operators and Commodity Trading Advisors and to Monthly Reporting by Futures Commission Merchants, OMB Control Number 3038–0005.]

The expected effect of the proposed amended regulations will be to reduce the burden previously approved by OMB for this collection of information by 239.5 hours. This is because, while it will result in an increase in the estimated average number of hours per response under Regulations 4.26 and 4.36, there will be fewer CPOs and CTAs subject to the filing requirements of these regulations owing to increased claims of exemption under Regulation 4.7 from Disclosure Document requirements and under Regulations 4.13 and 4.14 from registration altogether.

Specifically:

The burden associated with Regulation 4.26 is expected to be decreased by 422.4 hours:

Estimated number of respondents: 160.

Annual responses by each respondent: 3.

Estimated average hours per response: 3.25.

Annual reporting burden: 1560.

This annual reporting burden of 1560 hours represents a decrease of 422.4 hours as a result of the proposed amendment to Regulation 4.26.

The burden associated with Regulation 4.36 is expected to be increased by 182.9:

Estimated number of respondents: 450.

Annual responses by each respondent: 1.

Estimated average hours per response: 1.85.

Annual reporting burden: 832.5.

This annual reporting burden of 832.5 hours represents an increase of 182.9

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[5] The Commission previously delegated to NFA registration responsibilities for CPOs, CTAs and their associated persons. See 49 FR 39593 (Oct. 9, 1984).

[6] Among other things, this key information concerns identification of contact persons, relationships with futures commission merchants or introducing brokers, and the past performance history and related data for the offered pool or trading program.

[7] *See* Regulations 4.21(b) for CPOs and 4.31(b) for CTAs.

[8] 5 U.S.C. 601 *et seq.*

[9] *See* 47 FR 18618 (Apr. 30, 1982).

[10] *Id.* at 18619.

[11] *Id.* at 18620.

[12] 5 U.S.C. 605(b).

[13] 44 U.S.C. 3501 *et seq.*

hours as a result of the proposed amendment to Regulation 4.36.

The net result of the proposed amendments to Regulations 4.26 and 4.36, then, is a decrease in the annual reporting burden of 239.5.

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. The Commission considers comments by the public on this proposed collection of information in—

Evaluating 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;

Evaluating 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;

Enhancing the quality, utility, and clarity of the information to be collected; and

Minimizing 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.

Organizations and individuals desiring to submit comments on the information collection should contact the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer of the Commodity Futures Trading Commission. OMB is required to make a decision concerning the collection of information contained in the Proposal between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Commission on the Proposal.

C. Cost-Benefit Analysis

Section 15(a) of the Act [14] 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 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, enumerated below. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule was 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 Proposal would amend Regulations 4.26(d) and 4.36(d) to require that CPOs and CTAs file Disclosure Documents, and any supplements and amendments thereto, electronically with NFA. The Commission is considering the costs and benefits of the Proposal in light of the specific provisions of section 15(a) as follows:

1. *Protection of market participants and the public.* The Proposal should not affect the protection of market participants and the public, as it provides an alternate method of filing Disclosure Documents, but does not alter the character or frequency of those filings.

2. *Efficiency and competition.* The Commission anticipates that the Proposal will benefit efficiency by permitting NFA to streamline its process for receiving and reviewing Disclosure Document filings. Thus, the Commission considers the Proposal as benefiting efficiency and not impacting competition.

3. *Financial integrity of futures markets and price discovery.* The Proposal should have no effect, from the standpoint of imposing costs or creating benefits, on the financial integrity of futures markets or the price discovery function of such markets.

4. *Sound risk management practices.* The Proposal should have no effect, from the standpoint of imposing costs or creating benefits, on sound risk management practices.

5. *Other public interest considerations.* The Commission believes that the Proposal is beneficial in that it should streamline the timeliness of filing, review and delivery of, and electronic accessibility to, Disclosure Documents.

After considering these factors, the Commission has determined to propose the amendments to Regulations 4.26(d) and 4.36(d) 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 Proposal with their comment letters.

List of Subjects in 17 CFR Part 4

Advertising, Brokers, Commodity futures, Commodity pool operators, Commodity trading advisors, Consumer protection, Reporting and recordkeeping requirements.

Accordingly, 17 CFR Chapter I is proposed to be amended as follows:

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

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

Authority: 7 U.S.C. 1a, 2, 4, 6b, 6c, 6*l*, 6m, 6n, 6*o*, 12a, and 23.

2. Revise paragraph (d) of § 4.26 to read as follows:

§ 4.26 Use, Amendment and Filing of Disclosure Document.

* * * * *

(d) Except as provided by § 4.8:

(1) The commodity pool operator must electronically file with the National Futures Association, pursuant to the electronic filing procedures of the National Futures Association, the Disclosure Document and, where used, profile document for each pool that it operates or that it intends to operate not less than 21 calendar days prior to the date the pool operator first intends to deliver such Document or documents to a prospective participant in the pool; and

(2) The commodity pool operator must electronically file with the National Futures Association, pursuant to the electronic filing procedures of the National Futures Association, the subsequent amendments to the Disclosure Document and, where used, profile document for each pool that it operates or that it intends to operate within 21 calendar days of the date upon which the pool operator first knows or has reason to know of the defect requiring the amendment.

3. Revise paragraph (d) of § 4.36 to read as follows:

§ 4.36 Use, amendment and filing of Disclosure Document.

* * * * *

(d)(1) The commodity trading advisor must electronically file with the National Futures Association, pursuant to the electronic filing procedures of the National Futures Association, the Disclosure Document for each trading program that it offers or that it intends to offer not less than 21 calendar days

[14] 7 U.S.C. 19(a).

prior to the date the trading advisor first intends to deliver the Document to a prospective client in the trading program; and

(2) The commodity trading advisor must electronically file with the National Futures Association, pursuant to the electronic filing procedures of the National Futures Association, the subsequent amendments to the Disclosure Document for each trading program that it offers or that it intends to offer within 21 calendar days of the date upon which the trading advisor first knows or has reason to know of the defect requiring the amendment.

Issued in Washington, DC, on November 21, 2008 by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. E8–28177 Filed 11–25–08; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 40

[Docket No. RM08–16–000]

Electric Reliability Organization Interpretations of Specific Requirements of Frequency Response and Bias and Voltage and Reactive Control Reliability Standards

Issued November 20, 2008.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: Pursuant to section 215 of the Federal Power Act, the Federal Energy Regulatory Commission proposes to: approve NERC's proposed interpretation of certain specific requirements of one Commission-approved Reliability Standard, BAL–003–0, Frequency Response and Bias; and remand NERC's proposed interpretation of VAR–001–1, Voltage and Reactive Control, for reconsideration consistent with this rulemaking.

DATES: Comments are due December 26, 2008.

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

- *Agency Web Site: http://ferc.gov.* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- *Mail/Hand Delivery:* Commenters unable to file comments electronically must mail or hand deliver an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT:

Patrick Harwood (Technical Information), Office of Electric Reliability, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, Telephone: (202) 502–6125, *Patrick.harwood@ferc.gov.*

Richard M. Wartchow (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, Telephone: (202) 502–8744.

SUPPLEMENTARY INFORMATION:

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

1. Pursuant to section 215 of the Federal Power Act, the Federal Energy Regulatory Commission proposes to approve the interpretation proposed by the North American Electric Reliability Corporation (NERC) of certain specific requirements of Commission-approved Reliability Standard BAL–003–0, Frequency Response and Bias, but remand NERC's proposed interpretation of Reliability Standard VAR–001–1, Voltage and Reactive Control, for additional clarification.[1]

I. Background

A. EPAct 2005 and Mandatory Reliability Standards

2. Section 215 of the FPA requires a Commission-certified Electric Reliability Organization (ERO) to develop mandatory and enforceable Reliability Standards, which are subject to Commission review and approval. Once approved, the Reliability Standards may be enforced by the ERO, subject to Commission oversight, or by the Commission independently.[2]

3. Pursuant to section 215 of the FPA, the Commission established a process to select and certify an ERO[3] and, subsequently, certified NERC as the ERO.[4] On April 4, 2006, as modified on August 28, 2006, NERC submitted to the Commission a petition seeking approval of 107 proposed Reliability Standards. On March 16, 2007, the Commission issued a final rule, Order No. 693, approving 83 of these 107 Reliability Standards and directing other action related to these Reliability Standards.[5] In addition, pursuant to section 215(d)(5) of the FPA, the Commission directed NERC to develop modifications to 56 of the 83 approved Reliability Standards.[6]

4. NERC's Rules of Procedure provide that a person that is "directly and materially affected" by Bulk-Power System reliability may request an interpretation of a Reliability Standard.[7] The ERO's "standards process manager" will assemble a team with relevant expertise to address the requested interpretation and also form a ballot pool. NERC's Rules provide that, within 45 days, the team will draft an interpretation of the Reliability Standard, with subsequent balloting. If approved by ballot, the interpretation is appended to the Reliability Standard and filed with the applicable regulatory authority for regulatory approval.[8]

B. NERC Filing

5. On July 28, 2008, NERC submitted a Petition for Approval of Formal Interpretations to Reliability Standards (Petition), seeking Commission approval of interpretations of two Commission-approved Reliability Standards: BAL–003–0, Frequency Response and Bias, Requirements R2 and R5; and VAR–001–1, Voltage and Reactive Control, Requirement R4.

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[1] The Commission is not proposing any new or modified text to its regulations. As set forth in 18 CFR part 40, proposed Reliability Standards will not become effective until approved by the Commission, and the ERO must post on its Web site each effective Reliability Standard. The proposed interpretations would assist entities in complying with the Reliability Standards.

[2] *See* 16 U.S.C. 824o(e)(3).

[3] *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh'g*, Order No. 672–A, FERC Stats. & Regs. ¶ 31,212 (2006).

[4] *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh'g & compliance*, 117 FERC ¶ 61,126 (2006), *appeal docketed sub nom. Alcoa, Inc.* v. *FERC*, No. 06–1426 (D.C. Cir. Dec. 29, 2006).

[5] *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g*, Order No. 693–A, 120 FERC ¶ 61,053 (2007).

[6] 16 U.S.C. 824o(d)(5). Section 215(d)(5) provides, "The Commission * * * may order the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out this section."

[7] NERC Rules of Procedure, Appendix 3A, Reliability Standards Development Procedure, Version 6.1, at 26–27 (2007).

[8] We note that, while the NERC Board of Trustees approved the interpretations of the Reliability Standards submitted by NERC for approval in this proceeding, Appendix 3A of NERC's Rules of Procedure is silent on the need for NERC Board of Trustees' approval of interpretations before they are filed. NERC's Rules of Procedure should expressly require such approval.

6. For BAL–003–0, Electric Reliability Council of Texas (ERCOT) requested clarification that the provision in BAL–003–0, Requirement R2, permitting use of a variable bias setting, did not conflict with BAL–003–0, Requirement R5, which states that the frequency bias setting for Balancing Authorities serving native load should be at least one percent of yearly peak demand. For VAR–001–1, Dynegy, Inc. (Dynegy) requested clarification whether there are implicit requirements that the voltage schedule and associated tolerance band to be provided by the transmission operator under Requirement R4 be technically based, reasonable and practical for a generator to maintain.

7. Consistent with the NERC Rules of Procedure, NERC assembled a team to respond to the requests for interpretation and presented the proposed interpretations to industry ballot, using a process similar to the process it uses for the development of Reliability Standards.[9] According to NERC, the interpretations were developed and approved by industry stakeholders using the NERC Reliability Standards Development Procedure and approved by the NERC Board of Trustees (Board).[10] The interpretations do not modify the language contained in the requirements under review. NERC requests that the Commission approve the interpretations and make them effective immediately after approval, consistent with the Commission's procedures.

II. Discussion

A. BAL–003–0

8. Order No. 693 explains that the purpose of BAL–003–0 is to ensure that a balancing authority's frequency bias setting is accurately calculated to match its actual frequency response.[11] A frequency bias setting is a value expressed in MW/0.1 Hz, set into a balancing authority area control error (ACE) algorithm, which allows the balancing authority to contribute its frequency response to the Interconnection.[12] The actual frequency response is the change in output or consumption from generators and non-generation resources, respectively, after the loss of a generator and determines the frequency at which electric supply and demand return to balance.

9. Requirement R2.2 states that a Balancing Authority may use a variable frequency bias value, which is calculated by analyzing frequency response taking into account factors such as load, generation, governor characteristics, and frequency. Requirement R5 states that balancing authorities that serve native load shall have a monthly average frequency bias setting that is at least one percent of estimated yearly peak demand per 0.1 Hz change. The BAL–003–0 Requirements at issue state:

> Requirement R2: Each Balancing Authority shall establish and maintain a Frequency Bias Setting that is as close as practical to, or greater than, the Balancing Authority's Frequency Response. Frequency Bias may be calculated several ways:
>
> R2.2. The Balancing Authority may use a variable (linear or non-linear) bias value, which is based on a variable function of Tie Line deviation to Frequency deviation. The Balancing Authority shall determine the variable frequency bias value by analyzing Frequency Response as it varies with factors such as load, generation, governor characteristics, and frequency.
>
> Requirement R5: Balancing Authorities that serve native load shall have a monthly average Frequency Bias Setting that is at least 1% of the Balancing Authority's estimated yearly peak demand per 0.1 Hz change.
>
> R5.1. Balancing Authorities that do not serve native load shall have a monthly average Frequency Bias Setting that is at least 1% of its estimated maximum generation level in the coming year per 0.1 Hz change.

1. ERCOT Request

10. ERCOT requested clarification from NERC that a balancing authority may use a variable bias value as authorized under Requirement R2.2, despite the fact that doing so could, according to ERCOT, cause a violation of Requirement R5.[13] According to ERCOT, if a balancing authority uses a variable bias in conformance with Requirement R2.2, it would violate Requirement R5 if its analysis resulted in a value less than one percent of its yearly peak demand (or maximum generation). ERCOT states that Requirement R2.2 is only viable if Requirement R5 is interpreted to apply only to balancing authorities using a fixed bias setting. ERCOT proposes that an alternate method be used to calculate a floor setting for balancing authorities that utilize a variable bias setting. Under ERCOT's proposal, the correct corresponding minimum setting for a balancing authority using a variable bias setting would be no less than one percent of estimated peak (or maximum generation) for the period in which the variable bias setting is active. ERCOT supported its interpretation as being consistent with a January 2003 NERC Resources Subcommittee analysis, which stated "for Control Areas utilizing variable bias, the Control Area's average Bias Setting for a month must be at least one percent of the Control Area's estimated peak load for that month (or one percent of peak generation for a generation only Control Area forecast for that month)."[14] ERCOT suggested that the failure to provide for a variable bias option in Requirement R5 appears to be an oversight. Furthermore, according to ERCOT, failure to adopt its interpretation would force ERCOT to abandon its longstanding practice of using a variable bias setting, without any corresponding improvement in reliability.

2. NERC Proposed Interpretation

11. NERC rejected ERCOT's proposal, finding that the variable bias setting under Requirement R2 does not conflict with the minimum setting required under Requirement R5. NERC found that its interpretation provides clarity and supports the reliability purpose of BAL–003–0, which it describes as providing a consistent methodology for calculating the frequency bias component of ACE. According to NERC, Requirement R2 requires a balancing authority to analyze its system as a first step in determining its frequency bias setting, which may be a fixed or variable bias setting. Requirement R5 establishes a minimum reliability threshold for an Interconnection and also a minimum contribution for all balancing authorities within an Interconnection. NERC states that the one percent minimum bias setting provides a minimum level of automatic generation control to stabilize frequency in response to a disturbance. As a second justification for the minimum setting, NERC states that the one percent minimum also helps ensure a consistent measure of control performance among balancing

[9] *Id.*

[10] NERC Petition at 3.

[11] Order No. 693 at P 357.

[12] NERC's glossary, which provides definitions of the relevant terms, defines ACE as "The instantaneous difference between a balancing authority's net actual and scheduled interchange, taking into account the effects of frequency bias and correction for meter error."

[13] On July 21, 2008, the Commission approved a previous interpretation of BAL–003–0, Requirement R3, which requires each balancing authority to operate its automatic generation control on tie line frequency basis, unless such operation would diminish system interconnection reliability. *See Modification of Interchange and Transmission Loading Relief Reliability Standards; and Electric Reliability Organization Interpretation of Specific Requirements of Four Reliability Standards*, Order No. 713, 73 FR 43613 (July 28, 2008), 124 FERC ¶ 61,071 (2008).

[14] NERC Petition at 6 (citing ERCOT request for interpretation at 1–2, available at *http://www.nerc.com/docs/standards/sar/Request_Interpretation_BAL-003_ERCOT_27Jul07.pdf*).

authorities within a multi-balancing authority Interconnection.

12. NERC points out that ERCOT is a single balancing authority Interconnection. NERC supports its proposed interpretation stating:

> The bias settings ERCOT uses do produce, on average, the best level of automatic generation control action to meet control performance metrics. The bias value in a single Balancing Authority interconnection does not impact the measure of control performance.

13. NERC notes that ERCOT is subject to a Regional Difference exempting it from certain requirements of a related Reliability Standard. ERCOT's Regional Difference addresses Requirement R2 of the related BAL–001–0 Reliability Standard, Real Power Balancing Control Performance, which adopts one of NERC's historical balancing control performance standards, known as CPS2.[15] The purpose of Reliability Standard BAL–001–0 is to maintain interconnection steady-state frequency within defined limits by balancing power demand and supply in real-time. BAL–001–0 uses two averages as compliance measures: Requirement R1 covers the one-minute ACE performance (CPS1) and Requirement R2 covers the 10-minute ACE performance (CPS2). Requirement R1 obligates each balancing authority, on a rolling 12-month basis, to maintain its clock-minute averages of ACE, modified by its frequency bias and the interconnection frequency, within a specific limit based on historical performance. Requirement R2 obligates each balancing authority, on a monthly basis, to maintain an average ACE within a specific limit based on historical performance for at least 90 percent of 10-minute periods within an hour. NERC presents two reasons supporting ERCOT's Regional Difference for BAL–001–0, namely (1) to accommodate ERCOT's asynchronous connections with other Interconnections; and (2) to recognize the fact that ERCOT employs a more stringent methodology to identify the frequency controls necessary to maintain reliable operations.[16]

14. During the ballot process, NERC responded to comments raising two issues. NERC indicated that it was sympathetic to comments that Requirement R5 is vague, finding that the requirement that each balancing authority have a monthly average bias greater than or equal to one percent of its projected annual peak load (or generation if it does not serve load), could be better drafted. However, NERC found that revising the requirement is beyond the scope of the interpretation process. Also, NERC states that it addressed a second comment by indicating that a balancing authority that is the sole balancing authority for an Interconnection must comply with Requirement R5 and also that a balancing authority that uses a variable bias setting must comply with Requirement R5 in BAL–003–0.

15. The formal interpretation was approved by the ballot pool in September 2007 and by the NERC Board in February 2008.

3. Commission Proposal

16. The Commission proposes to approve the ERO's formal interpretation of Requirements R2 and R5 of BAL–003–0 and requests comment on its proposal. The ERO's interpretation is reasonable in that it provides for consistent determination of frequency bias settings, used in calculating ACE. In addition, the one percent minimum set aside established by Requirement R5 ensures that an adequate level of generation will be set aside to provide frequency response in the event of system disturbances due to imbalances.

17. Furthermore, the ERO's interpretation is consistent with the Commission's discussion in Order No. 693, which reviewed a similar objection, and found that the requirements of BAL–003–0 do not conflict with one another.[17] Order No. 693 addressed the suggestion that Requirement R5 should be required in lieu of Requirement R2 for certain balancing authorities and found that Requirements R2 and R5 do not conflict. While, in this case, ERCOT is arguing the reverse, namely, that balancing authorities that meet the requirement of Requirement R2 should not have to meet Requirement R5, similar reasoning suggests no conflict in the two requirements. According to Order No. 693, Requirement R2 states that the frequency bias setting should be as close as practical to, or greater than, the balancing authority's frequency response, while Requirement R5 and R5.1 provide minimum frequency bias values for specific types of balancing authorities.[18]

18. As noted above, NERC's interpretation states that ERCOT's bias settings produce, on average, the best level of automatic generation control action to meet control performance metrics and the bias value in a single balancing authority interconnection does not impact the measure of control performance. We interpret this statement as providing that the second goal of the one percent minimum setting, to establish a consistent measure of control performance among balancing authorities, is not implicated by this interpretation. Nevertheless, the other justifications for the BAL–003–0, Requirement R5 minimum bias setting still apply namely, to establish a consistent methodology for one of the inputs into the ACE determination and to provide for a minimum threshold of reliability from frequency response.[19]

19. The Commission invites comment on its proposal.

B. VAR–001–1

20. VAR–001–1, Requirement R4 directs each transmission operator to provide each generator with a voltage and reactive power output schedule, within a tolerance band. A second Reliability Standard, VAR–002–1, Requirement R2, requires that each generator must meet the schedule (typically via automatic control) or provide an explanation why it cannot do so. Dynegy asked whether the voltage schedule, and associated tolerance band, provided by the transmission operator must be technically based, and reasonable and practical. In addition, Dynegy asked how a transmission operator would demonstrate compliance with such requirements.

21. VAR–001–1, Requirement R4 and VAR–002–1, Requirement R2, which are at issue in this proceeding, state:

> VAR–001–1—Voltage and Reactive Control
>
> Requirement R4. Each Transmission Operator shall specify a voltage or Reactive Power schedule[20] at the interconnection

[15] *See* NERC, Approval of ERCOT Waiver Request—Control Performance Standard 2 (Nov. 21, 2002), available at *http://www.nerc.com/commondocs.php?cd=2* (under "Links to Regional Differences" tab), which was approved in Order No. 693 at P 314.

[16] NERC Petition at 8.

[17] Order No. 693 at P 370.

[18] *See id.* at P 362, 370.

[19] The Commission notes that NERC's statement above could arguably be interpreted to suggest that the ERCOT methodology, by using a methodology that results in "the best level of automatic generation control action to meet control performance metrics," may be a preferable methodology. That question is not before us, and thus we need not and do not address it. Should ERCOT wish to demonstrate that its alternate methodology under its Regional Difference is a superior alternate measure to that established under BAL–003–0, Requirement R5, ERCOT should pursue a Regional Difference supporting a departure from the requirement. While ERCOT is a single-balancing-authority Interconnection and does not need to allocate automatic generation control responsibility among balancing authorities, the other justifications for Requirement R5, supporting a consistent ACE calculation methodology and providing a minimum standard for reliability, remain valid justifications for the minimum setting.

[20] The voltage schedule is a target voltage to be maintained within a tolerance band during a specified period. [Footnote in original.]

between the generator facility and the Transmission Owner's facilities to be maintained by each generator. The Transmission Operator shall provide the voltage or Reactive Power schedule to the associated Generator Operator and direct the Generator Operator to comply with the schedule in automatic voltage control mode (AVR [automatic voltage regulation] in service and controlling voltage). * * *

VAR–002–1—Generator Operation for Maintaining Network Voltage Schedules

Requirement R2. Unless exempted by the Transmission Operator, each Generator Operator shall maintain the generator voltage or Reactive Power output (within applicable Facility Ratings) [21] as directed by the Transmission Operator.

R2.1. When a generator's automatic voltage regulator is out of service, the Generator Operator shall use an alternative method to control the generator voltage and reactive output to meet the voltage or Reactive Power schedule directed by the Transmission Operator.

R2.2. When directed to modify voltage, the Generator Operator shall comply or provide an explanation of why the schedule cannot be met.

1. Dynegy Request

22. Dynegy requested clarification whether there are implicit requirements for the voltage schedule, and associated tolerance band, provided by the transmission operator to be technically based, reasonable and practical for a generator to maintain.[22] According to Dynegy, the NERC Rules of Procedure require that each Reliability Standard be based on "sound engineering and operating judgment, analysis, or experience[.]" [23] Dynegy asserts that Reliability Standards must be implemented to meet such a standard and that transmission owners must have a technical basis for the specified voltage or reactive power schedule and associated tolerance band. Dynegy predicts that generator operator compliance with the schedule and tolerance band will be improved if the generator understands the technical basis for the instructions.

23. Dynegy argues that the lack of a technical basis could result in arbitrary target values or overly narrow or overly wide tolerance bands and that such flaws could reduce system reliability. For instance, Dynegy hypothesizes that overly narrow tolerance bands could cause a generator to make numerous short term responses to voltage fluctuations that do not improve system reliability, while overly broad tolerance bands could result in voltage fluctuations that jeopardize system reliability during system disturbances. Dynegy states that voltage schedules must be reasonable and that a tolerance band that fails to account for measurement error is unreasonable. Dynegy states that, if the voltages or reactive power schedule and associated tolerance band are to have a technical basis and be reasonable, then NERC must develop measures to objectively evaluate compliance with the requirement.[24] According to Dynegy, such a measure should state that the voltage schedule and tolerance band should either be (1) consistent with the historical variation of system voltage, normalized to eliminate abnormal voltage fluctuations such as those caused by system disturbances; or (2) consistent with the historical variation of system voltage when the plant/unit is not operating, which variation would be normalized to eliminate abnormal voltage fluctuations such as those caused by system disturbances. According to Dynegy, if either of these conditions is not met, a transmission operator should be required to have a technical study or analysis that justifies a different voltage or reactive power schedule and associated tolerance band.

2. NERC Proposed Interpretation

24. NERC's proposed interpretation rejects the suggestion that there are implicit requirements within VAR–001–1, and finds, as well, that there are no requirements in VAR–001–1 to issue a technically based, reasonable and practical to maintain voltage or reactive power schedule and associated tolerance band, and, consequently, the Reliability Standard needs no measures to implement such requirements. According to NERC:

> Since there are no requirements in VAR–001–1 to issue a "technically based, reasonable and practical to maintain voltage or reactive power schedule and associated tolerance band", there are no measures or associated compliance elements in the standard.[25]

The interpretation concludes by citing VAR–002–1, Requirement 2, which provides that a generator must meet the voltage schedule or provide an explanation why it cannot do so.

25. The NERC Board requested additional information to address a concern whether a generator operator could be in violation of VAR–001–1 if it deviated from its schedule in order to protect its equipment. NERC provided supplemental information, which is not part of the formal interpretation, pointing out that VAR–002–1 requires a generator to maintain the voltage directed by the transmission operator "within applicable Facility Ratings" and permits a generator to deviate from the voltage schedule with an explanation.[26] NERC also cited VAR–002–1, section A(3), stating that the purpose of the Reliability Standard is "To ensure generators provide reactive and voltage control necessary to ensure voltage levels, reactive flows, and reactive resources are maintained *within applicable Facility Ratings to protect equipment* and the reliable operation of the Interconnection." [27]

26. Finally, NERC's transmittal letter also provides additional instructive information, which is not part of the interpretation, noting that VAR–001–1, Requirement R2 states, "Each Transmission Operator shall acquire sufficient reactive resources within its area to protect the voltage levels under normal and Contingency conditions." NERC states that, in order to fulfill Requirement R2, the transmission operator must perform a valid analysis of the system, using models that accurately represent equipment capabilities. Therefore, according to NERC, while it supports the formal interpretation of Requirement R4 including the finding that a requirement cannot establish implicit obligations, the issue on which Dynegy seeks clarification is better resolved through an examination of Requirement R2.[28]

27. According to NERC, the interpretation supports the intent of the requirement and the goal of VAR–001–1, because it reinforces that the transmission operator is responsible for identifying voltage schedules and associated bandwidth necessary to meet the objectives of the Reliability Standard.

28. In the ballot process, NERC responded to a negative comment arguing that the requirements of VAR–001–1 do imply that there will be a technical justification for a reactive power schedule. According to NERC, the drafting team responded that an implied requirement is not a stated

[21] When a Generator is operating in manual control, reactive power capability may change based on stability considerations and this will lead to a change in the associated Facility Ratings. [Footnote in original.]

[22] Dynegy's request is provided in the NERC Petition, Exhibit B–3, along with the VAR–001–1 interpretation development record.

[23] Dynegy request at 2 (citing NERC Rules of Procedure, section 302.5, "Each reliability standard shall be based upon sound engineering and operating judgment, analysis, or experience, as determined by expert practitioners in that particular field.").

[24] *Id.* at 4 (citing NERC Rules of Procedure, section 302.4).

[25] NERC proposed Interpretation of NERC Standard VAR–001–1 at 1.

[26] NERC Petition at 12–13.

[27] *Id.* at 12 (emphasis in original).

[28] *Id.* at 14.

requirement that can be objectively measured.

29. The interpretation was approved by ballot in January 2008 and by the Board, upon receipt of the additional information, in March 2008.

3. Commission Proposal

30. The Commission proposes to remand NERC's interpretation of VAR–001–1, Requirement R4. The Commission disagrees with the interpretation's suggestion that there is no requirement that a voltage schedule have a sound technical basis. On the contrary, in Order No. 693, the Commission stated that all Reliability Standards must be designed to achieve a specified reliability goal and must contain a technically sound means to achieve this goal.[29] Therefore, the Commission disagrees with NERC's proposed interpretation insofar as it suggests that a transmission operator could deliver a voltage schedule that lacked any technical basis. A voltage schedule should reflect technical analysis, i.e., sound engineering, as well as operating judgment and experience.[30]

31. In Order No. 693, moreover, the Commission reviewed each Reliability Standard and approved those containing Requirements that are sufficiently clear as to be enforceable and that do not create due process concerns.[31] In approving VAR–001–1 in Order No. 693, the Commission included VAR–001–1 as among the Reliability Standards that are sufficiently clear to inform transmission operators what is required of them.[32] While the Commission has elsewhere declined to specify in detail how a registered entity should implement a Reliability Standard, this does not mean that an entity seeking to comply with a Reliability Standard may act in a manner that is not technically sound, i.e., in a manner that is not grounded in sound engineering, and thus, not reasonable and practical.[33] NERC's proposed interpretation, however, implies that the voltage schedules provided under VAR–001–1, Requirement R4 need not have any technical basis, and thus need not be reasonable and practical.

32. Based on this analysis, the Commission proposes to remand NERC's proposed VAR–001–1, Requirement R4 interpretation, in order that NERC may reconsider its interpretation consistent with this order. With regard to Dynegy's assertion that NERC needs to develop evaluation measures to review the technical basis for voltage schedules, in the Commission's view, this proposal is beyond the scope of the interpretation process and would be better discussed pursuant to a standards authorization request under the NERC Reliability Standards Development Procedures.

33. The Commission invites comment on its proposal.

III. Information Collection Statement

34. The Office of Management and Budget (OMB) regulations require that OMB approve certain reporting and recordkeeping (collections of information) imposed by an agency.[34] The information contained here is also subject to review under section 3507(d) of the Paperwork Reduction Act of 1995.[35]

35. As stated above, the Commission previously approved, in Order No. 693, each of the Reliability Standards that are the subject of the current rulemaking. This NOPR proposes to approve one interpretation to a previously approved Reliability Standard developed by NERC as the ERO, and to remand another interpretation. The proffered interpretations relate to existing Reliability Standards and do not change these standards; therefore, they do not add to or otherwise increase entities' current reporting burden. Thus, the current proposal would not materially and adversely affect the burden estimates relating to the currently effective version of the Reliability Standards presented in Order No. 693. The BAL–003–0 Reliability Standard that is the subject of the approved interpretation was approved in Order No. 693, and the related information collection requirements were reviewed and approved, accordingly.[36]

36. For example, the proposed interpretation of BAL–003–0 does not modify or otherwise affect the collection of information already in place. With respect to BAL–003–0, the interpretation clarifies that the minimum frequency bias setting applies to systems that employ a variable bias methodology. Incorporating a minimum frequency bias setting into the determination of frequency response under automatic generation control does not change the information that a balancing authority reports because the same logs, data, or measurements would be maintained. The Commission is proposing to remand the interpretation of VAR–001–1. As a result, information collection requirements for that Reliability Standard will not change at this time. Thus, the proposed interpretations of the current Reliability Standards at issue in this proposed rule will not increase the reporting burden nor impose any additional information collection requirements.

37. However, we will submit this proposed rule to OMB for informational purposes.

Title: Electric Reliability Organization Interpretations of Frequency Response and Bias and Voltage and Reactive Control Reliability Standards.

Action: Proposed Collection.

OMB Control No.: 1902–0244.

Respondents: Businesses or other for-profit institutions; not-for-profit institutions.

Frequency of Responses: On Occasion.

Necessity of the Information: This proposed rule would approve an interpretation of the specific requirements of one Commission-approved Reliability Standard. The proposed rule would find the interpretation just, reasonable, not unduly discriminatory or preferential, and in the public interest. In addition,

[29] Order No. 693 at P 5 ("[A] Reliability Standard must provide for the Reliable Operation of Bulk-Power System facilities and may impose a requirement on any user, owner or operator of such facilities. It must be designed to achieve a specified reliability goal and must contain a technically sound means to achieve this goal. The Reliability Standard should be clear and unambiguous regarding what is required and who is required to comply. The possible consequences for violating a Reliability Standard should be clear and understandable to those who must comply. There should be clear criteria for whether an entity is in compliance with a Reliability Standard. While a Reliability Standard does not necessarily need to reflect the optimal method for achieving its reliability goal, a Reliability Standard should achieve its reliability goal effectively and efficiently."); *see also* Order No. 672 at P 324.

[30] *Id.*; *accord* NERC Rules of Procedure, section 302.5.

[31] *See* Order No. 693 at P 274. In reviewing specific Reliability Standards, the Commission identified for certain Reliability Standards implicit obligations that should be incorporated into those Reliability Standards and directed NERC to revise the standards to explicitly incorporate the obligations; *see Mandatory Reliability Standards for Critical Infrastructure Protection*, Order No. 706, 73 FR 7368 (Feb. 7, 2008), 122 FERC ¶ 61,040, at P 75 (2008) (directing the ERO to modify the CIP Reliability Standards to incorporate an obligation to implement plans, policies and procedures); Order No. 693 at P 1787 ("In the NOPR, the Commission identified an implicit assumption in the TPL Reliability Standards that all generators are required to ride through the same types of voltage disturbances and remain in service after the fault is cleared. This implicit assumption should be made explicit."); *Facilities Design, Connections and Maintenance Reliability Standards*, Order No. 705, 73 FR 1770 (Jan. 9, 2008), 121 FERC ¶ 61,296, at P 54 (2007) ("although the TPL Reliability Standards implicitly require the loss of a shunt device to be addressed, they do not do so explicitly").

[32] Order No. 693 at P 275.

[33] As noted above, Reliability Standards should reflect sound engineering. *See id.* at P 5; Order No. 672 at P 324; *accord* NERC Rules of Procedure, section 302.5.

[34] 5 CFR 1320.11.

[35] 44 U.S.C. 3507(d).

[36] *See* Order No. 693 at P 1901–07.

this proposed rule would remand an additional proposed interpretation for further consideration.

Internal Review: The Commission has reviewed the proposed Reliability Standard interpretations and made a determination that the proposed BAL–003–1 interpretation is necessary to implement section 215 of the FPA. The interpretation conforms to the Commission's policy for frequency response and bias within the energy industry as reflected in BAL–003–1.

38. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Michael Miller, Office of the Executive Director, Phone: (202) 502–8415, fax: (202) 273–0873, e-mail: *michael.miller@ferc.gov*].

39. For submitting comments concerning the collection(s) of information and the associated burden estimate(s), please send your comments to the contact listed above and to the Office of Information and Regulatory Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone (202) 395–7345, fax: (202) 395–7285, e-mail: *oira_submission@omb.eop.gov*].

IV. Environmental Analysis

40. 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 human environment.[37] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[38] The actions proposed herein fall within this categorical exclusion in the Commission's regulations.

V. Regulatory Flexibility Act Analysis

41. The Regulatory Flexibility Act of 1980 (RFA)[39] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and that minimize any significant economic impact on a substantial number of small entities. The Small Business Administration's Office of Size Standards develops the numerical definition of a small business. (*See* 13 CFR 121.201.) For electric utilities, a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding 12 months did not exceed 4 million megawatt hours. The RFA is not implicated by this proposed rule because the interpretations discussed herein will not have a significant economic impact on a substantial number of small entities.

42. In Order No. 693, the Commission adopted policies to minimize the burden on small entities, including approving the ERO compliance registry process to identify those entities responsible for complying with mandatory and enforceable Reliability Standards. The ERO registers only those distribution providers or load serving entities that have a peak load of 25 MW or greater and are directly connected to the bulk electric system or are designated as a responsible entity as part of a required under-frequency load shedding program or a required under-voltage load shedding program. Similarly, for generators, the ERO registers only individual units of 20 MVA or greater that are directly connected to the bulk electric system, generating plants with an aggregate rating of 75 MVA or greater, any blackstart unit material to a restoration plan, or any generator that is material to the reliability of the Bulk-Power System. Further, the ERO will not register an entity that meets the above criteria if it has transferred responsibility for compliance with mandatory Reliability Standards to a joint action agency or other organization. The Commission estimated that the Reliability Standards approved in Order No. 693 would apply to approximately 682 small entities (excluding entities in Alaska and Hawaii), but also pointed out that the ERO's Compliance Registry Criteria allow for a joint action agency, generation and transmission (G&T) cooperative or similar organization to accept compliance responsibility on behalf of its members. Once these organizations register with the ERO, the number of small entities registered with the ERO will diminish and, thus, significantly reduce the impact on small entities.[40]

43. Finally, as noted above, this proposed rule addresses an interpretation of the BAL–003–0 Reliability Standard, which was already approved in Order No. 693, and, therefore, does not create an additional regulatory impact on small entities.[41]

VI. Comment Procedures

44. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due December 26, 2008. Comments must refer to Docket No. RM08–16–000, and must include the commenters' name, the organization they represent, if applicable, and their address in their comments.

45. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov*. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

46. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission; 888 First Street, NE.; Washington, DC 20426.

47. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VII. Document Availability

48. 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

[37] *Regulations Implementing the National Environmental Policy Act*, Order No. 486, FERC Stats. & Regs. ¶ 30,783 (1987).

[38] 18 CFR 380.4(a)(2)(ii).

[39] 5 U.S.C. 601–12.

[40] To be included in the compliance registry, the ERO determines whether a specific small entity has a material impact on the Bulk-Power System. If these small entities should have such an impact then their compliance is justifiable as necessary for Bulk-Power System reliability.

[41] The Commission proposes to remand the interpretation of the VAR–001–1 Reliability Standard.

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.

49. 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.

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

By direction of the Commission.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28087 Filed 11–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 40

[Docket No. RM08–12–000]

Western Electricity Coordinating Council Regional Reliability Standard Regarding Automatic Time Error Correction

November 20, 2008.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: Pursuant to section 215(d)(2) of the Federal Power Act (FPA), the Federal Energy Regulatory Commission proposes to approve a regional Reliability Standard, BAL–004–WECC–01 (Automatic Time Error Correction), submitted to the Commission by the North American Electric Reliability Corporation (NERC). As a separate action, pursuant to section 215(d)(5) of the FPA, the Commission proposes to direct WECC to develop several modifications to the regional Reliability Standard. The proposed regional Reliability Standard would require balancing authorities within the Western Interconnection to maintain interconnection frequency within a predefined frequency profile and ensure that time error corrections are effectively conducted in a manner that does not adversely affect the reliability of the Interconnection.

DATES: Comments are due January 12, 2009.

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

- *Agency Web Site: http://ferc.gov.* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- *Mail/Hand Delivery:* Commenters unable to file comments electronically must mail or hand deliver an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT:

Jonathan First (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8529.

Katherine Waldbauer (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8232.

E. Nick Henery (Technical Information), Office of Electric Reliability, Division of Policy Analysis and Rulemaking, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8636.

SUPPLEMENTARY INFORMATION:

1. Pursuant to section 215(d)(2) of the Federal Power Act (FPA), the Federal Energy Regulatory Commission proposes to approve a regional Reliability Standard, BAL–004–WECC–01 (Automatic Time Error Correction), submitted to the Commission by the North American Electric Reliability Corporation (NERC). As a separate action, pursuant to section 215(d)(5) of the FPA, the Commission proposes to direct the Western Electricity Coordinating Council (WECC) to develop several modifications to the regional Reliability Standard. The proposed regional Reliability Standard would require balancing authorities within the WECC region to implement an automatic time error correction procedure for the purpose of maintaining Interconnection frequency within a predefined frequency profile and ensuring that time error corrections are effectively conducted in a manner that does not adversely affect reliability.[1]

2. The proposed Reliability Standard would benefit the reliable operation of the Bulk-Power System by creating an operating environment that encourages system operators to minimize the difference between the net actual and net scheduled interchanges, thus reducing the number of manual time error corrections required by the Western Interconnection Time Monitor, and reducing accumulated inadvertent interchange energy between Western Interconnection balancing authorities. The Commission also proposes to accept three related definitions for inclusion in the NERC Reliability Standards Glossary (NERC glossary). The Commission further proposes modifications to the violation risk factors for the regional Reliability Standard. Pursuant to Order No. 672,[2] the Commission may accept two types of regional Reliability Standards that differ from continent-wide NERC Reliability Standards, provided they are otherwise just, reasonable, not unduly discriminatory or preferential and in the public interest, as required under the statute: (1) A regional difference that is more stringent than the continent-wide Reliability Standard, including a regional difference that addresses matters that the continent-wide Reliability Standard does not, and (2) a regional Reliability Standard that is necessitated by a physical difference in the Bulk-Power System. As discussed below, the Commission is proposing to find that the regional Reliability Standard proposed by WECC is more stringent than the applicable continent-wide NERC Reliability Standard.

I. Background

3. Section 215 of the FPA requires a Commission-certified Electric Reliability Organization (ERO) to develop mandatory and enforceable Reliability Standards, which are subject to Commission review and approval. Once approved, the Reliability Standards may be enforced by the ERO, subject to Commission oversight, or by the Commission independently.[3]

[1] The proposed regional Reliability Standard will be in effect within the Western Interconnection-wide WECC Regional Entity. In this proceeding, the Commission proposes to take action to make mandatory the regional Reliability Standard as it applies within the U.S. portion of the Western Interconnection.

[2] *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 (2006), *order on reh'g*, Order No. 672–A, FERC Stats. & Regs. ¶ 31,212 (2006).

[3] *See* FPA 215(e)(3), 16 U.S.C. 824o(e)(3).

4. In February 2006, the Commission issued Order No. 672, implementing section 215 of the FPA. Pursuant to Order No. 672, the Commission certified one organization, NERC, as the ERO.[4] Reliability Standards that the ERO proposes to the Commission may include Reliability Standards that are proposed to the ERO by a Regional Entity.[5] When the ERO reviews a regional Reliability Standard that would be applicable on an Interconnnection-wide basis and that has been proposed by a Regional Entity organized on an Interconnection-wide basis, the ERO must rebuttably presume that the regional Reliability Standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest.[6]

5. In reviewing the ERO's submission, the Commission will give due weight to the ERO's technical expertise, except concerning the effect of a proposed Reliability Standard on competition.[7] The Commission will also give due weight to the technical expertise of a Regional Entity organized on an Interconnection-wide basis with respect to a proposed Reliability Standard to be applicable within that Interconnection.[8]

6. The Commission may approve a proposed Reliability Standard if the Commission finds it is just, reasonable, not unduly discriminatory or preferential, and in the public interest.[9] In addition, the Commission explained in Order No. 672 that "uniformity of Reliability Standards should be the goal and the practice, the rule rather than the exception." [10] Yet, the Commission recognized that "the goal of greater uniformity does not, however, mean that regional differences cannot exist." [11] The Commission then provided the following guidance:

> As a general matter, we will accept the following two types of regional differences, provided they are otherwise just, reasonable, not unduly discriminatory or preferential, and in the public interest, as required by the statute: (1) a regional difference that is more stringent than the continent-wide Reliability Standard, including a regional difference that addresses matters that the continent-wide Reliability Standard does not; and (2) a regional Reliability Standard that is necessitated by a physical difference in the Bulk-Power System.[12]

7. On March 16, 2007, the Commission issued Order No. 693, approving 83 of the 107 Reliability Standards originally proposed by NERC.[13] In addition, pursuant to section 215(d)(5) of the FPA, the Commission directed NERC to develop modifications to 56 of the 83 approved Reliability Standards.[14] Relevant to the immediate proceeding, the Commission approved continent-wide Reliability Standard BAL–004–0 (Time Error Correction), but noted that WECC's regional approach appears to serve as a more effective means of accomplishing time error corrections.[15]

8. On April 19, 2007, the Commission approved delegation agreements between NERC and each of the eight Regional Entities, including WECC.[16] Pursuant to such agreements, the ERO delegated responsibility to the Regional Entities to enforce the mandatory, Commission-approved Reliability Standards. In addition, the Commission approved, as part of each delegation agreement, a Regional Entity process for developing regional Reliability Standards. In the Delegation Agreement Order, the Commission accepted WECC as a Regional Entity organized on an Interconnection-wide basis and accepted WECC's Standards Development Manual which sets forth the process for development of WECC's Reliability Standards.[17]

9. In a June 2007 Order, the Commission approved eight regional Reliability Standards that apply in the WECC region.[18]

The Proposed WECC Regional Reliability Standard

A. NERC Filing

10. On July 29, 2008, NERC submitted for Commission approval, in accordance with section 215(d)(1) of the FPA,[19] regional Reliability Standard BAL–004–WECC–01, which would apply to balancing authorities within the Western Interconnection. NERC states that the primary purpose of the regional Reliability Standard is to reduce the number of time error corrections imposed on the Western Interconnection by requiring balancing authorities that operate synchronously to the Western Interconnection to automatically correct for their contribution to time error. According to NERC, BAL–004–WECC–01 provides the added benefit of a superior approach over the current NERC manual time error correction (BAL–004–0) for assigning costs and providing the equitable payback of inadvertent interchange.[20]

11. NERC states that Automatic Time Error Correction or "ATEC" has been a regional reliability practice in WECC, effectively reducing manual time error corrections, reducing the number of hours of manual time error correction for the Western Interconnection, and reducing the accumulated inadvertent interchange in the Western Interconnection since 2003. NERC asserts that the proposed WECC regional Reliability Standard is more stringent or covers matters not addressed by NERC's continent-wide Reliability Standards, BAL–004–0 and BAL–006–1 (Inadvertent Interchange).

12. Proposed regional Reliability Standard BAL–004–WECC–01 contains four requirements, summarized as follows:

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[4] *See North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (*ERO Certification Order*), *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006).

[5] 16 U.S.C. 824o(e)(4).

[6] 16 U.S.C. 824o(d)(3); 18 CFR 39.5(b).

[7] 16 U.S.C. 824o(d)(2).

[8] *Id.*

[9] *Id.*

[10] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 290.

[11] *Id.* P 291.

[12] *Id.*

[13] *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g*, Order No. 693–A, 120 FERC ¶ 61,053 (2007).

[14] 16 U.S.C. 824o(d)(5). Section 215(d)(5) provides, "The Commission * * * may order the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out this section."

[15] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 377, 382. The Commission also directed NERC to develop a modification to BAL–004–0 to include Levels of Non-Compliance and additional Measures for Requirement R3.

[16] *See North American Electric Reliability Corp.*, 119 FERC ¶ 61,060, *order on reh'g*, 120 FERC ¶ 61,260 (2007) (Delegation Agreement Order).

[17] *Id.* PP 469–470.

[18] *North American Electric Reliability Corp.*, 119 FERC ¶ 61,260.

[19] 16 U.S.C. 824o (2006).

[20] The NERC glossary defines "interchange" as the energy transfers that cross balancing authority boundaries, and defines "inadvertent interchange" as the difference between the balancing authority's net actual interchange and its net scheduled interchange. Within a synchronous Interconnection, during real-time operations, a balancing authority may engage in "inadvertent interchange," if it experiences an operational problem that prevents its net actual interchange of energy from matching its net scheduled interchange with other balancing authorities within the Interconnection. This discrepancy will indicate what is referred to as a "time error"—i.e., because the Interconnection will operate at a frequency (number of cycles per second) that is different from the Interconnection's scheduled frequency of 60 Hz (60 cycles per second). Time error also serves as a means to measure of how much and which balancing authority within the Interconnection is at fault. To correct the time error using the ATEC method, it is necessary for the balancing authority that was at fault to adjust the Interconnection's frequency so that it equalizes its prior inadvertent energy exchange with the Interconnection.

13. Requirement R1. Based on the ATEC methodology, this requirement is necessary to ensure that all balancing authorities continuously participate in Automatic Time Error Correction through their automatic generation control systems. The sub-requirement (R1.1.) limits the payback amount to minimize any operating metric violations, while R1.2. addresses actions for cases when invalidated implementation of the ATEC methodology occurs and requires adjustments.

14. Requirement R2. Requires a balancing authority that operates in any automatic generation control operating mode other than ATEC to notify all other balancing authorities of its operating mode. To avoid large accumulation of inadvertent interchanges, Requirement R2 limits a balancing authority's use of operating modes other than ATEC to a maximum of 24 hours per calendar quarter.

15. Requirement R3. Requires balancing authorities to have the capability to switch between different automatic generation control operating modes in case of islanding or loss of frequency telemetry.

16. Requirement R4. Requires each balancing authority to calculate and record its hourly "Primary Inadvertent Interchange" when hourly checkout is complete.

17. NERC also proposes the following three new definitions.

18. Automatic Time Error Correction: A frequency control automatic action that a Balancing Authority uses to offset its frequency contribution to support the Interconnection's scheduled frequency.

19. Primary Inadvertent Interchange: The component of area (n) inadvertent interchange caused by the regulating deficiencies of area (n) itself.

20. Secondary Inadvertent Interchange: The component of area (n) inadvertent interchange caused by the regulating deficiencies of area (i).

21. In its filing, NERC asserts that the ATEC procedure set forth in the proposed regional Reliability Standard has been effective in mitigating three problems relating to correction of time errors in the Western Interconnection. First, the ATEC procedure has reduced the need for the WECC Time Monitor to conduct manual time error corrections from 216 manual time error corrections in 2003 to 106 manual time error corrections in 2007. Second, since time error is directly related to inadvertent interchange, the ATEC procedure reduces both time error and accumulated inadvertent interchange. Third, according to NERC, the ATEC procedure better identifies the balancing authorities responsible for inadvertent interchange and provides a more equitable and more immediate payback of the inadvertent interchange to the balancing authorities that should receive it (i.e., the balancing authorities that did not cause the inadvertent interchange and supported the interconnection's scheduled frequency) than the current NERC time error correction process in BAL–004–0.

22. NERC also states that the proposed regional Reliability Standard satisfies the factors set forth in Order No. 672 that the Commission considers when determining whether a proposed Reliability Standard is just, reasonable, not unduly discriminatory or preferential and in the public interest.[21] According to NERC, BAL–004–WECC–01 is clear and unambiguous regarding what is required and who is required to comply (balancing authorities). NERC also states that the proposed regional Reliability Standard has clear and objective measures for compliance and achieves a reliability goal (namely, creating an operating environment that encourages system operators to minimize the difference between the net actual and net scheduled interchanges, and to better control frequency) effectively and efficiently.

23. NERC notes that, during the NERC posting process, one commenter criticized the proposed regional Reliability Standard as using intentionally imbalanced interchange schedules to correct time error without adjusting the scheduled interconnection frequency, and offered another approach. According to NERC, WECC considered the commenter's concerns and respectfully disagrees, explaining that the two approaches produce only a very slight variability in the calculation of the Control Performance Standard1 (CPS1).[22]

B. Development of the Regional Reliability Standard

24. NERC states that on August 7, 2007, WECC submitted a request to NERC to approve, and submit to the Commission for approval, BAL–004–WECC–01. NERC states that WECC developed the regional Reliability Standard following its Process for Developing and Approving WECC Standards and, therefore, NERC rebuttably presumes that the standard is just, reasonable, and not unduly discriminatory or preferential, and in the public interest. According to NERC, the proposed regional Reliability Standard establishes requirements that are more stringent than, or covers areas not covered by, current continent-wide NERC Reliability Standards, thereby meeting the Commission criteria for consideration of a regional Reliability Standard.

25. Upon receipt of WECC's request, NERC commenced an evaluation of the regional Reliability Standard and initiated a 45-day public comment period. WECC responded to the comments presented during the NERC posting and requested NERC to present the regional Reliability Standard for board of trustees approval. During the evaluation, NERC identified shortcomings that WECC agreed to address by submitting a revised version of the regional Reliability Standard to the NERC board, which approved the regional Reliability Standard on March 26, 2008.

II. Discussion

26. The Commission proposes to approve BAL–004–WECC–01, effective as proposed by NERC (the first quarter after approval by the Commission). In addition, the Commission proposes to direct modifications of BAL–004–WECC–01 pursuant to the Process for Developing and Approving WECC Standards and relevant NERC Rules of Procedure. The Commission also proposes to approve the three proposed new definitions, Automatic Time Error Correction, Primary Inadvertent Interchange and Secondary Inadvertent Interchange. The Commission proposes to approve the Violation Risk Factors, but proposes specific modifications to the Violation Risk Factors as well.

A. Regional Reliability Standard

27. Pursuant to section 215(d) of the FPA, the Commission proposes to approve BAL–004–WECC–01 as just, reasonable, not unduly discriminatory or preferential and in the public interest. Further, the Commission proposes to find that the regional Reliability Standard is more stringent than the related continent-wide NERC Reliability Standard, BAL–004–1 (Time Error Correction).[23] Pursuant to section 215(d)(5) of the FPA, the Commission also proposes to direct modifications to

[21] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 323–337.

[22] A balancing authority's Area Control Error (ACE) equation shows the instantaneous difference between a balancing authority's net actual interchange and net scheduled interchange. The Control Performance Standard (CPS1) is a statistical measure of the variability of a balancing area's ACE equation over a specified period. Thus, the balancing authority's CPS1 serves as an operating metric that demonstrates how closely the balancing authority is operating to the interconnection's frequency schedule.

[23] *See* Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 291.

BAL–004–WECC–01, as discussed below.

28. Pursuant to the continent-wide NERC Reliability Standard BAL–004–1, when accumulated time error increases to a predetermined level, the Interconnection's "time monitor" instructs all balancing authorities in the Interconnection to manually change the scheduled Interconnection's frequency until the Interconnection's accumulated time error has been reduced to a set level. However, the requirements of BAL–004–1 do not require each balancing authority to determine what portion of the Interconnection's time error that it alone caused.

29. Under the proposed WECC ATEC methodology, each balancing authority in the Western Interconnection is required to calculate its "primary inadvertent interchange" [24] and enter its "primary inadvertent interchange" into its ACE equation. When all balancing authorities input their portion of "primary inadvertent interchange" into their ACE equation,[25] they continuously correct for their own "primary time error" and, in turn, reduce the Western Interconnection's total time error.

30. This differs from the methodology used in NERC's BAL–004–1, in that ATEC is designed to place the responsibility to correct primary time error on the balancing authority that causes it. Further, as explained by NERC, the proposed regional Reliability Standard is more stringent or covers matters not addressed by the related continent-wide NERC Reliability Standards BAL–004–0 and BAL–006–1. It appears that the proposed regional Reliability Standard provides for automatic correction of time error, using a more refined primary inadvertent interchange term than that included in the continent-wide NERC Reliability Standards for manual correction of time error.[26] The Commission is proposing to find that the regional Reliability Standard proposed by WECC is more stringent than the continent-wide NERC Reliability Standard, because it provides for continuous capture of inadvertent interchange, and thereby (1) contributes to better operation of balancing authorities by operators, and (2) ensures that discrepancies between a balancing area's net scheduled interchange and its net actual interchange are adjusted more quickly and accurately. Based on this understanding, pursuant to section 215(d) of the FPA, the Commission proposes to approve BAL–004–WECC–01 as just, reasonable, not unduly discriminatory or preferential and in the public interest.

31. During the NERC posting of the WECC ATEC standard, one commenter asserted that BAL–004–WECC–01 does not maintain the integrity of the CPS1 reliability requirement because the WECC ATEC methodology uses intentionally imbalanced interchange schedules to correct time error without adjusting the scheduled interconnection frequency, and thus the adjustment to the scheduled frequency is not transparent. Contending that the failure to have balanced interchange schedules causes a failure to comply with necessary conditions to maintain the integrity of the CPS1 criteria, the commenter argues, the WECC ATEC methodology poses a threat to the reliability of the Interconnection.

32. According to NERC, WECC disagrees with the commenter because the increase in variability of CPS1 measurement that occurs with the use of the ATEC methodology is still well within the threshold defined by NERC's Reliability Standard BAL–001–0 (Real Power Balancing Control Performance), and the only difference between the two methods is a slight variability in the calculation of CPS1.[27] When balancing the slight loss of precision in CPS1 scores with the benefit of fewer manual time error corrections, WECC does not believe the ultimate impact of using the ATEC procedure is a threat to reliability.[28] According to NERC and WECC, empirical data from the use of the ATEC procedure over the past four years confirm this view. Further, WECC states, implementation of the commenter's proposed alternative—requiring each WECC balancing authority to undertake significant changes to Automatic Generation Control technology—could have a potential cost in excess of $1 million, for a marginal increase in precision (not accuracy) of calculation of the operating metric CPS1.

33. Order No. 672 provides that a Reliability Standard must be designed to achieve a specified reliability goal and must contain a technically sound means to achieve this goal.[29] Likewise, the Reliability Standard should be based on actual data and lessons learned from actual operations.[30] The Commission believes that the ATEC procedure satisfies these considerations. NERC and WECC make clear that balancing authorities in the Western Interconnection have applied the ATEC methodology since 2003, improving time error and reducing the need for manual adjustments. Moreover, the ACE equation with ATEC currently being used in the Western Interconnection to maintain the interconnection frequency is identical in value to the ACE equation with ATEC recommended by the commenter, and differs from the commenter's proposed ACE equation with ATEC only in form.[31] Thus, we consider the use of the ATEC procedure to be compliant with Order No. 672's directive that the proposed Reliability Standard achieves a reliability goal and contains a technically sound means to achieve the goal, and is based on actual data and lessons learned.

B. Proposed Definitions

34. As mentioned above, the Commission proposes to accept the three new definitions, Automatic Time Error Correction, Primary Inadvertent Interchange and Secondary Inadvertent Interchange.

C. Modifications Required by the Commission

35. While the Commission is satisfied with the substance of the regional Reliability Standard, the Commission has identified a number of concerns with regard to the style and format of the Standard.[32]

36. Requirement R1.2 provides in part, " [l]arge accumulations of primary inadvertent [energy] point to an invalid implementation of ATEC, loose control, metering or accounting errors. A

[24] The balancing authority causing the frequency error is said to have created "primary time error" and caused "primary inadvertent interchange." The other balancing authorities in the Interconnection responding to correct system frequency are said to have created "secondary time error" and caused "secondary inadvertent interchange."

[25] *See* n.20, *supra*.

[26] NERC filing at 10.

[27] NERC filing at 31.

[28] *Id.*

[29] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 324.

[30] *Id.*

[31] As noted at footnote 22, *supra*, CPS1 is the operating metric that demonstrates how well a balancing authority is controlling its area (i.e., the extent to which a balancing authority is meeting the Interconnection's scheduled frequency and preventing inadvertent interchange). To comply with NERC Standard BAL–001, the balancing authority must operate in such a way that CPS1 will be calculated to be equal to or greater than 100 percent. The commenter's recommended ACE equation with ATEC term allows CPS1 to be calculated with slightly greater precision than the WECC-proposed ACE equation with ATEC. However, WECC points out and NERC agrees, that "[p]resent Balancing Authority CPS1 scores in the Western Interconnection are generally well above the 100% minimum NERC requirement" (NERC filing at 20; *see also http://www.nerc.com/filez/cps.html*, showing that as of May 2007, the average CPS1 score of the WECC entities is 185 percent, and the lowest is 156 percent). Thus, any reductions in CPS1 due to the above calculation issue would have only a minimal effect on the measurement of overall interconnection reliability.

[32] *Cf., North American Electric Reliability Corporation*, 119 FERC ¶ 61,260 at P 54–55.

[balancing authority] in such a situation should identify the source of the error(s) and make the corrections." [33] The phrases "large accumulation" and "in such a situation" are not defined and thus, while likely obvious in many circumstances, leaves to individual interpretation when a "large" amount of primary inadvertent has accumulated. Likewise, the phrase "in such a situation" is not sufficiently clear. The Commission proposes to direct WECC to develop revisions to this provision so that a balancing authority will know with specificity the circumstances that trigger the actions required by Requirement R1.2.

37. Requirement R2 states that "[e]ach [balancing authority] while synchronously connected to the Western Interconnection will be allowed to have ATEC out of service for a maximum of 24 hours per calendar quarter, for reasons including maintenance and testing" [34] (emphasis added). The Commission proposes to direct WECC to develop a modification that clarifies whether the "maximum of 24 hours per calendar quarter" refers to a single occurrence of up to 24 hours in the calendar quarter, or whether several occurrences are permitted as long as they add up to 24 hours or less within a calendar quarter.

D. Violation Risk Factors

1. Background

38. As part of its compliance and enforcement program, NERC must assign a "lower," "medium," or "high" violation risk factor to each Requirement of each mandatory Reliability Standard to associate a violation of the Requirement with its potential impact on the reliability of the Bulk-Power System. Violation risk factors are defined as follows:

39. High Risk Requirement: (a) Is a requirement that, if violated, could directly cause or contribute to Bulk-Power System instability, separation, or a cascading sequence of failures, or could place the Bulk-Power System at an unacceptable risk of instability, separation, or cascading failures; or (b) is a requirement in a planning time frame that, if violated, could, under emergency, abnormal, or restorative conditions anticipated by the preparations, directly cause or contribute to Bulk-Power System instability, separation, or a cascading sequence of failures, or could place the Bulk-Power System at an unacceptable risk of instability, separation, or cascading failures, or could hinder restoration to a normal condition.

40. Medium Risk Requirement: (a) Is a requirement that, if violated, could directly affect the electrical state or the capability of the Bulk-Power System, or the ability to effectively monitor and control the Bulk-Power System, but is unlikely to lead to Bulk-Power System instability, separation, or cascading failures; or (b) is a requirement in a planning time frame that, if violated, could, under emergency, abnormal, or restorative conditions anticipated by the preparations, directly affect the electrical state or capability of the Bulk-Power System, or the ability to effectively monitor, control, or restore the Bulk-Power System, but is unlikely, under emergency, abnormal, or restoration conditions anticipated by the preparations, to lead to Bulk-Power System instability, separation, or cascading failures, nor to hinder restoration to a normal condition.

41. Lower Risk Requirement: Is administrative in nature and (a) is a requirement that, if violated, would not be expected to affect the electrical state or capability of the Bulk-Power System, or the ability to effectively monitor and control the Bulk-Power System; or (b) is a requirement in a planning time frame that, if violated, would not, under the emergency, abnormal, or restorative conditions anticipated by the preparations, be expected to affect the electrical state or capability of the Bulk-Power System, or the ability to effectively monitor, control, or restore the Bulk-Power System.[35]

42. In the Violation Risk Factor Order, the Commission addressed violation risk factors filed by NERC for Version 0 and Version 1 Reliability Standards. In that order, the Commission used five guidelines for evaluating the validity of each violation risk factor assignment: (1) Consistency with the conclusions of the Blackout Report, (2) consistency within a Reliability Standard, (3) consistency among Reliability Standards with similar Requirements, (4) consistency with NERC's proposed definition of the violation risk factor level, and (5) assignment of violation risk factor levels to those Requirements in certain Reliability Standards that co-mingle a higher risk reliability objective and a lower risk reliability objective.[36]

43. The Commission notes that in NERC's July 29, 2008 petition, a "lower" violation risk factor is assigned to only the main Requirements and no violation risk factor is assigned to any of the sub-Requirements. The Commission understands that NERC, and WECC, will apply the violation risk factor for the main Requirement to any violation of a sub-Requirement, unless separate violation risk factors are assigned to the Requirement and the sub-Requirement. The Commission also notes that neither NERC nor WECC provided in the petition a discussion explaining the justification of the proposed violation risk factor assignments.

2. Commission Proposal

44. The Commission proposes to direct the ERO to modify the violation risk factor assigned to BAL–004–WECC–01, Requirements R1, R2, R3, and R4 from "lower" to "medium" as discussed below. In the absence of justification for the proposed violation risk factor assignments, the Commission generally believes that each of the subject Requirements provides an element necessary for a balancing authority's participation in time error correction within the Western Interconnection. As such, the Commission believes that the potential reliability risk that a violation of any of the subject Requirements presents with regard to participation in time error correction in the Western Interconnection is the same.

3. Requirements R1, R2, R3, and R4

45. Proposed regional Reliability Standard BAL–004–WECC–01, Requirements R1, R2, R3, and R4, collectively, have the reliability objective to provide for a balancing authority's participation in time error correction within the Western Interconnection. Requirement R1 specifies a methodology and establishes that a balancing authority must continuously operate utilizing time error correction methodology in its automatic generation control system. Requirement R2 establishes that a balancing authority that operates its automatic generation control using any other methodology other than time error correction methodology must notify all other balancing authorities of its operating mode. Requirement R3 establishes that a balancing authority must have the capability to switch between different automatic generation control modes. Requirement R4 establishes that each balancing authority must calculate and record its hourly primary inadvertent interchange to correct the time error.

46. The continent-wide NERC Reliability Standard BAL–004–0, Requirement R3 shares the same reliability objective as the proposed

[33] NERC filing, Exhibit A at 4.

[34] *Id.*

[35] *North American Electric Reliability Corp.*, 119 FERC ¶ 61,145, at P 9 (Violation Risk Factor Order), *order on reh'g*, 120 FERC ¶ 61,145 (2007) (Violation Risk Factor Rehearing Order).

[36] For a complete discussion of each factor, *see* the Violation Risk Factor Order at P 19–36.

regional Reliability Standard: Namely, to provide for participation of all balancing authorities in time error correction. The Commission has previously determined that participation in an interconnection's time error correction is critical and can directly affect the state of the Bulk-Power System.[37] The Commission explained that, "[i]f a balancing authority does not participate in time error correction when called upon, coordinated actions with the other balancing authorities to correct the deviation will not reflect that balancing authority's contribution to the deviation and, thus, those corrective actions will not be fully effective, thereby adversely affecting the state of the Bulk-Power System." [38] The Commission determined that the potential reliability risk that a violation of Reliability Standard BAL–004–0, Requirement R3 presents is consistent with the definition of a "medium" violation risk factor. Accordingly, BAL–004–0, Requirement R3 is assigned a "medium" violation risk factor.

47. The Commission expects consistency among violation risk factor assignments of Requirements that share the same reliability objective.[39] As explained previously in the NOPR, BAL–004–WECC–01, Requirements R1, R2, R3, and R4, collectively, and Reliability Standard BAL–004–0, Requirement R3 have the same reliability objective—to ensure a balancing authority's participation in time error correction. BAL–004–WECC–01 seeks to accomplish this objective regionally through automatic correction, and BAL–004–0 seeks to do so nationally through manual correction. Therefore, consistent with Guideline 3, the Commission proposes to direct the ERO to modify the assigned violation risk factor for BAL–004–WECC–01, Requirements R1, R2, R3, and R4 from "lower" to "medium" and requests comment on this proposal.

E. Violation Severity Levels

48. For each Requirement of a Reliability Standard, NERC states that it will also define up to four violation severity levels—lower, moderate, high and severe—as measurements of the degree to which the Requirement was violated. For a specific violation of a particular Requirement, NERC or the Regional Entity will establish the initial value range for the base penalty amount by finding the intersection of the applicable violation risk factor and violation severity level in the Base Penalty Amount Table in Appendix A of NERC's Sanction Guidelines.[40]

49. In its July 29, 2008 petition, NERC proposes violation severity levels that apply generally to all violations of the Requirements of BAL–004–WECC–01 and not to any one specific Requirement. Therefore, the Commission proposes to direct the ERO to submit new violation severity levels for each Requirement and sub-Requirement that has been assigned a violation risk factor. With regard to the assignment of violation risk factors, the Commission reiterates that it understands that NERC and WECC will apply the violation risk factor for the main Requirement to any violation of a sub-Requirement, unless separate violation risk factors are assigned to the Requirement and the sub-Requirement.

50. In summary, proposed Regional Reliability Standard BAL004–WECC–01 appears to be just, reasonable, not unduly discriminatory or preferential, and in the public interest. Accordingly, the Commission proposes to approve regional Reliability Standard BAL004–WECC–01 as mandatory and enforceable. In addition, the Commission proposes to direct the ERO to modify the proposed regional reliability standard and the proposed violation risk factors and violation severity levels, as described above. The Commission invites comments on these proposals.

III. Information Collection Statement

51. The Office of Management and Budget (OMB) regulations require approval of certain information collection requirements imposed by agency rules.[41] Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of an agency rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number. The Paperwork Reduction Act (PRA) [42] requires each federal agency to seek and obtain OMB approval before undertaking a collection of information directed to ten or more persons, or continuing a collection for which OMB approval and validity of the control number are about to expire.[43]

52. This order approves and requires modifications of one regional Reliability Standard that was submitted by NERC as the ERO. Section 215 of the FPA authorizes the ERO to submit Reliability Standards to provide for the reliable operation of the Bulk-Power System. Pursuant to the statute, the ERO must submit each Reliability Standard that it proposes to be made effective to the Commission for approval.[44]

53. The proposed regional Reliability Standard, which applies to approximately 35 balancing authorities in the U.S. portion of the Western Interconnection, does not require balancing authorities to file information with the Commission. It does require balancing authorities to develop and maintain certain information for a specified period of time, subject to inspection by WECC. However, the Commission does not believe that approval of the WECC regional Reliability Standard will result in an increase in reporting burdens as compared to current practices in WECC. As NERC indicates, since 2003, WECC has used the automatic time error correction practice set forth in BAL–004–WECC–01. Thus, the Commission finds that the requirement to develop and maintain information in the regional Reliability Standard mirrors customary and usual business practice and, therefore, imposes minimal burden on balancing authorities and eliminates any possible confusion between current industry practice and the standard, and that the proposed modifications to the current Reliability Standard effected by this proposed rule will not increase the reporting burden nor impose any additional information collection requirements.

54. The Commission does not foresee any impact on the reporting burden for small businesses. However, we will submit this proposed rule to OMB for informational purposes.

55. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Michael Miller, Office of the Executive Director, Phone: (202) 502–8415, fax: (202) 273–0873, e-mail: *michael.miller@ferc.gov*]. Comments on the requirements of this order may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington,

[37] *North American Electric Reliability Corporation*, 121 FERC ¶ 61,179, at P 43 (2007).

[38] *Id.*

[39] Violation risk factor Guideline 3.

[40] *See North American Electric Reliability Corp.*, 119 FERC ¶ 61,248, at P 74 (2007) (directing NERC to develop up to four violation severity levels (lower, moderate, high, and severe) as measurements of the degree of a violation for each requirement and sub-requirement of a Reliability Standard and submit a compliance filing by March 1, 2008).

[41] 5 CFR 1320.8.

[42] 44 U.S.C. 3501–3520.

[43] 44 U.S.C. 3502(3)(A)(i), 44 U.S.C. 3507(a)(3).

[44] *See* 16 U.S.C. 824(d).

DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission], e-mail: *oira_submission@omb.eop.gov.*

IV. Environmental Analysis

56. 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 human environment.[45] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[46] The actions proposed herein fall within this categorical exclusion in the Commission's regulations.

V. Regulatory Flexibility Act Certification

57. The Regulatory Flexibility Act of 1980 (RFA)[47] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and that minimize any significant economic impact on a substantial number of small entities. The Small Business Administration's Office of Size Standards develops the numerical definition of a small business. (*See* 13 CFR 121.201.) For electric utilities, a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million megawatt hours.

58. In drafting a rule an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analyses available for public comment.[48] In its NOPR, the agency must either include an initial regulatory flexibility analysis (initial RFA)[49] or certify that the proposed rule will not have a "significant impact on a substantial number of small entities."[50]

59. As noted above, the Commission has determined that the regional Reliability Standard will not impose any new burden on balancing authorities within the Western Interconnection, as the practice has been used in the region since 2003. Further, the regional reliability standard would apply to about 35 balancing areas in the Western Interconnection. The Commission estimates that of these balancing areas, approximately two to four qualify as small entities, because the total electric output of each of these entities for the preceding twelve months did not exceed four million megawatt hours. Thus, few small entities are impacted by the proposed rule. Therefore, the Commission certifies, for informational purposes only, that the regional Reliability Standard will not have a significant impact on a substantial number of small entities.

VI. Comment Procedures

60. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due January 12, 2009. Comments must refer to Docket No. RM08–12–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

61. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

62. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

63. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VII. Document Availability

64. 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 FERC's Home Page (*http://www.ferc.gov*) and in FERC'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.

65. From FERC'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.

66. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov*, or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the Public Reference Room at *public.referenceroom@ferc.gov.*

List of Subjects in 18 CFR Part 40

Electric power, Electric utilities, Reporting and recordkeeping requirements.

By direction of the Commission.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28088 Filed 11–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2008–1095]

RIN 1625–AA09

Drawbridge Operation Regulation; Chehalis, Hoquiam, and Wishkah Rivers, Aberdeen and Hoquiam, WA, Schedule Change

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to modify the drawbridge operation regulation for the Washington State drawbridges across the Chehalis, Hoquiam, and Wishkah Rivers at Grays

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[45] Order No. 486, *Regulations Implementing the National Environmental Policy Act of 1969*, 52 FR 47,897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,783 (1987).

[46] 18 CFR 380.4(a)(2)(ii).

[47] 5 U.S.C. 601–612.

[48] 5 U.S.C. 601–604.

[49] 5 U.S.C. 603(a).

[50] 5 U.S.C. 605(b).

Harbor, Washington. The change is necessary to reduce staffing requirements during the night when openings are infrequent. The rule will do so by modifying the number of hours of advance notice required for draw openings and establishing the telephone as the only means of contact for openings at night.

DATES: Comments and related material must reach the Coast Guard on or before January 26, 2009.

ADDRESSES: You may submit comments identified by the Coast Guard docket number USCG–2008–1095 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Online: http://www.regulations.gov.*

(2) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Room W12–140 on the Ground Floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call Austin Pratt, Chief, Bridge Section, Waterways Management Branch, 13th Coast Guard District, telephone 206–220–7282. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's "Privacy Act" paragraph below.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking USCG–2008–1095, indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* at any time. Enter the docket number for this rulemaking (USCG–2008–1095) in the search box, and click "Go>>." You may also visit either the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays or the 13th Coast Guard District Waterways Management Branch at 915 Second Avenue, Seattle, WA 98174–1067 between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can 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 the Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://DocketsInfo.dot.gov.*

Public Meeting

We do not now plan to hold a public meeting, but you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that a public meeting would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

The proposed rule will enable the Washington State Department of Transportation, the owner of the drawbridges across the Chehalis, Hoquiam, and Wishkah Rivers at Grays Harbor, Washington, to reduce the staffing of the Chehalis Bridge, which currently maintains a radio watch during the night hours when advance notice is required for openings of the draws of all of those bridges.

One-hour notice is currently required for openings of the Chehalis River Bridge from one hour after sunset to one hour before sunrise and for all openings of the Simpson Avenue Bridge, Hoquiam River mile 0.5, the Riverside Avenue Bridge, Hoquiam River mile 0.9, the Heron Street Bridge, Wishkah River mile 0.2, and the Wishkah Street Bridge, Wishkah River, mile 0.4.

The reduction in staffing is appropriate because the draws of those bridges rarely have to been opened during the period affected. In fact, during the entire year of 2007 only 50 openings were requested for the bridges between 9 p.m. and 5 a.m., which equates to an average of less than one opening per week during those hours. Furthermore, most of the requests were made by telephone.

Discussion of Proposed Rule

The proposed rule will amend 33 CFR 117.1031 by changing the hours when advanced notification is required to open the draw of the Chehalis Bridge from one hour after sunset to one hour before sunrise. This would be changed to 9 p.m. to 5 a.m. The proposed rule will also limit the means of advance notification to telephone alone and change the sound signal to request an opening of the draw of the bridge from 5 a.m. to 9 p.m. from two short blasts followed by one prolonged blast to the general signal of one prolonged blast followed by one short blast.

The proposed rule will amend 33 CFR 117.1047 and 117.1065 so that the means of notification to request an opening of the draw of the Simpson Avenue Bridge, Riverside Avenue Bridge, Heron Street Bridge, or Wishkah Street Bridge will be limited to telephone alone.

These changes are necessary to allow the Washington State Department of Transportation to reduce the staffing of the Chehalis Bridge as noted above.

Regulatory Analyses

We developed this proposed rule after considering numerous statutes and

executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This proposed rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation is unnecessary. We reached this conclusion because the draws of the bridges rarely have to been opened during the period affected, the draws will still be opened in a reasonable amount of time, and most vessel operators already use the telephone to request openings of the draws.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: The owners or operators of vessels needing to transit the bridges during the period affected. This action will not have a significant economic impact on a substantial number of small entities, however, because the bridges rarely have to be opened during the period affected, the draws will still be opened in a reasonable amount of time, and most vessel operators already use the telephone to request openings of the draws.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how, and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Austin Pratt, Chief, Bridge Section, Waterways Management Branch, 13th Coast Guard District, at (206) 220–7282. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is not likely to have a significant effect on the human environment because it simply promulgates the operating regulations or procedures for drawbridges. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

2. Revise § 117.1031 to read as follows:

§ 117.1031 Chehalis River.

The draw of the SR 101 highway bridge, mile 0.1, at Aberdeen shall open on signal from 5 a.m. to 9 p.m., except that from 7:15 a.m. to 8:15 a.m. and 4:15 p.m. to 5:15 p.m., Monday through Friday, except federal holidays, the draw need not open for vessels of less than 5000 gross tons. At all other times, the draw shall open on signal if at least one hour notice is given by telephone to the Washington State Department of Transportation. The opening signal is one prolonged blast followed by one short blast.

3. In § 117.1047 revise paragraphs (c) and (d) to read as follows:

§ 117.1047 Hoquiam River.

* * * * *

(c) The draw of the Simpson Avenue Bridge, mile 0.5, at Hoquiam, shall open on signal if at least one hour notice is given by telephone to the Washington State Department of Transportation. The opening signal is two prolonged blasts followed by one short blast.

(d) The draw of the Riverside Avenue Bridge, mile 0.9, at Hoquiam, shall open on signal if at least one hour notice is given by telephone to the Washington State Department of Transportation. The opening signal is two prolonged blasts followed by two short blasts.

4. In § 117.1065 revise paragraph (c) to read as follows:

§ 117.1065 Wishkah River.

* * * * *

(c) The draw of the Heron Street Bridge, mile 0.2 and the Wishkah Street Bridge, mile 0.4, at Aberdeen, shall open on signal if at least one hour notice is given by telephone to the Washington State Department of Transportation. The opening signal for both bridges is one prolonged blast followed by two short blasts.

Dated: November 12, 2008.

J.P. Currier,

Rear Admiral, U.S. Coast Guard, Commander, Thirteenth Coast Guard District.

[FR Doc. E8–28135 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF EDUCATION

34 CFR Part 5

RIN 1880–AA84

[Docket ID ED–2008–OM–0011]

Availability of Information to the Public

AGENCY: Office of Management, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations governing the Department's compliance with the Freedom of Information Act, as amended (FOIA or the Act). The proposed regulations are intended to update the Department's current regulations to reflect the changes in the FOIA over recent years.

DATES: We must receive your comments on or before December 26, 2008. Comments received after this date will not be considered.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

The Department scans all first-class and priority mail using an irradiation process, which can result in lengthy delays in mail delivery. Please keep this in mind when submitting your comments and consider using the Federal eRulemaking Portal, commercial delivery services, or hand delivery.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under "How To Use This Site."
- *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments about these proposed regulations, address them to Delores J. Barber, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202–4536.

Privacy Note: The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at *http://www.regulations.gov*. Therefore, commenters should be careful to include, in their comments, only information that they wish to make publicly available on the Internet.

FOR FURTHER INFORMATION CONTACT: Delores J. Barber, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202–4536. Telephone: (202) 401–8365 or via Internet: *EDFOIAManager@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Invitation to Comment

We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the FOIA program.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You may also inspect the comments, in person, in the FOIA e-Reading Room, National Library of Education, 400 Maryland Avenue SW., Plaza Level (Level B, Room BE101), Washington, DC 20202–4536 between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Background

The regulations proposed in this Notice of proposed rulemaking (NPRM) implement changes made to the FOIA (5 U.S.C. 552) in recent years and articulate more clearly, to the public, the Department's policy for processing FOIA requests for publicly available records in the most cost-effective and efficient manner. In developing this NPRM, we have rewritten the Department's existing regulations to be consistent with the FOIA, including its amendments.[1]

Significant Proposed Regulations

We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory provisions that are technical or otherwise minor in effect.

Subpart A—General Provisions

Statute: Section 552(a)(1) of title 5, United States Code provides the general framework for the disclosure of agency records to the public, and requires each agency to promulgate rules to effect such public disclosures for that agency.

Current Regulations: Current §§ 5.1 (Act), 5.2 (Department), and 5.5 (Records) define terms that are necessary to understand what Department records are covered by the FOIA. Current § 5.6 (Statutory definitions) states that the definitions in the FOIA and the Office of Management and Budget's (OMB) "Uniform FOIA Fee Schedule and Guidelines" (OMB Guidelines), 52 FR 10012 (March 27, 1987) apply to the Department's FOIA regulations. Current §§ 5.11 (Purpose and scope) and 5.12 (General policy) state the purpose and scope of the Department's FOIA regulations, as well as the Department's general policy regarding public access to agency records. Current § 5.74 (Further disclosures) addresses discretionary disclosures made by the Department.

Proposed Regulations: Proposed §§ 5.1, 5.2, and 5.3 would not substantially alter the regulations in current subpart A.

Proposed § 5.1 (Purpose) would revise and combine current §§ 5.1 and 5.11, and would state the Department's purpose in promulgating FOIA regulations—that is, to inform the public of the regulations that the Department follows for processing FOIA requests. In addition, current §§ 5.71(a) (Protection of personal privacy) and 5.73 (Records not available) would be removed because proposed § 5.1 would expressly reference the exemptions to disclosure set out in the FOIA, which cover the protection of personal privacy and records not publicly available under the FOIA.

Proposed § 5.2 (General policy) would incorporate current § 5.12 and would update current § 5.74, and would state the Department's general policy to make information publicly available, limited only by the obligations of confidentiality and the administrative necessities recognized by the Act, or unless otherwise exempted from disclosure pursuant to law.

Proposed § 5.3 (Definitions) would consolidate the definitions in current §§ 5.1, 5.2, and 5.5, except that proposed § 5.3(d)(1) and (d)(2) would clarify that *agency records* include records in electronic format and records maintained for the Department by an entity under government contract. Proposed § 5.3 would also define the terms *component* and *FOIA request.*

Reasons: Proposed §§ 5.1 and 5.2 are intended to condense and clarify the general purpose of the Department's FOIA regulations and the Department's policy for implementation of the FOIA. Proposed § 5.1 expressly references the exemptions to disclosure listed in the FOIA to ensure public understanding of the bases on which the Department may not release information under the FOIA. With this specific reference to the FOIA's exemptions, we believe it is unnecessary to include in these regulations separate provisions on the protection of personal privacy and a description of records not available under the FOIA.

The Department proposes to consolidate the definitions applicable to this part in a single section (proposed § 5.3) following the statement of the purpose and policy of the regulations to facilitate public understanding of the Department's FOIA regulations. In addition, we would clarify, in proposed § 5.3(e)(2)(i) and (ii), that agency records include records in electronic format and records maintained for the Department by a contractor. We propose to make these changes to the Department's definition of *agency records* to ensure that the definition conforms with the statutory changes made to the definition of the term "record" under the FOIA.

Proposed § 5.2 would update the language in current § 5.74 regarding discretionary disclosures of agency records because the Department believes the proposed language would provide the public with a clearer understanding of the considerations the Department gives when determining whether to disclose agency records under the FOIA.

Finally, the proposed regulations in subpart A would not include the language from current § 5.6, which states that the definitions in the FOIA and the OMB Guidelines apply to the Department's regulations, because the Department does not believe that this statement is necessary, as the proposed regulations incorporate by reference definitions in both the FOIA and the OMB Guidelines, where appropriate.

Subpart B—Agency Records Available to the Public Statute

Section 552(a)(2) of title 5, United States Code requires each agency to ensure that certain categories of information are available for public inspection and copying. These categories of information include final opinions and orders made in the adjudication of cases; statements of policy and interpretations of policy adopted by the agency and not

[1] Numerous changes have been made to the FOIA since the Department last updated its FOIA regulations in 34 CFR Part 5. Most significantly, Congress passed the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA Amendments) (Pub. L. 104–231) and the OPEN Government Act of 2007 (Pub. L. 110–175), both of which amended the FOIA. Under the E-FOIA Amendments, electronic records were explicitly made subject to the FOIA and agencies were required to make all reading room records created after November 1, 1996 electronically available. The OPEN Government Act of 2007 made a number of amendments to procedural issues affecting FOIA administration, including the protection of fee status for news media, time limits for agencies to act upon FOIA requests, the availability of agency records maintained by a private entity, the establishment of a FOIA Public Liaison and FOIA Requester Service Center, and the requirement to describe the exemptions authorizing the redaction of material provided under the FOIA.

published in the **Federal Register**; administrative staff manuals; copies of all records, in any form or format, that have been disclosed and are likely to be the subject of future FOIA requests; and an index of such commonly-requested records. Moreover, the Electronic Freedom of Information Act Amendments of 1996 (Pub. L. 104–231) (E–FOIA Amendments) require agencies to make reading room records created after November 1, 1996, available to the public in electronic format.

Current Regulations: The bulk of subpart B and subpart F of the current regulations address what agency records of the Department are covered by the FOIA and how the Department manages those records.

Current § 5.13 (Records available) addresses what types of records at the Department are publicly available under the FOIA. Current § 5.14 (Published documents) establishes that published records of the Department are available for examination. Current § 5.15 (Creation of records) states that the Department is not required to create records by compiling requested items from files. Current § 5.16 (Deletion of identifying details) allows the Department to delete information from records made available pursuant to section 552(a)(2) of title 5, United States Code if disclosing the information would constitute a clearly unwarranted invasion of personal privacy. Current § 5.17 (Records in records centers) states that a requester may obtain records stored by the Department in the National Archives or other record centers of the General Services Administration. Current § 5.18 (Destroyed records) addresses the destruction of records pursuant to law.

Current §§ 5.70 through 5.74 address the availability and unavailability of specific types of records (current §§ 5.70, 5.72, and 5.73), and the protection of personal privacy and proprietary information (current § 5.71).

Proposed Regulations: Proposed § 5.10 (Public reading room) would replace current §§ 5.13, 5.14, 5.16, and 5.17 by consolidating much of the content from these sections and incorporating changes made to the FOIA by the E–FOIA Amendments.

Proposed § 5.11 (Business information) would replace and significantly update current § 5.71(b) consistent with Executive Order 12600, 52 FR 23781 (June 25, 1987). Executive Order 12600 directs agencies to establish procedures to notify submitters if the agency has determined that it may be required to disclose the submitter's business information under the Act.

Proposed § 5.12 (Creation of agency records not required) would be substantively the same as current § 5.15 (Creation of records) in that both sections make clear that the Department is not required to create new agency records in response to a FOIA request.

Proposed § 5.13 (Preservation of records) would, consistent with changes in the FOIA, replace current § 5.18 (Destroyed records) and clarify that the Department does not destroy records that are the subject of a pending FOIA request, appeal, or lawsuit.

Reasons: Proposed § 5.10 would condense and clarify the substance of current §§ 5.13(b) and (c), 5.14 and 5.17 by focusing on the FOIA reading room requirements. The proposed regulations would provide detailed access instructions and would identify the agency records available for public inspection and copying in the reading rooms, including information required to be made available in electronic reading rooms and previously released agency records that the Department has determined are likely to be the subject of future FOIA requests. The proposed regulations would not include the substance of current § 5.13(a) because the Department believes that the substance of current § 5.13(a) is addressed sufficiently in the FOIA at 5 U.S.C. 552(a). In addition, the proposed regulations would not specifically include the substance of current §§ 5.14 (Published documents) and 5.17 (Records in records centers) because we believe that questions about these issues are best addressed on a case-by-case basis. Finally, the proposed regulations would not include the substance of current § 5.16 (Deletion of identifying details) because we believe that this issue is more appropriately addressed through internal Departmental guidance.

Proposed § 5.11 (Business information) would significantly update and replace current § 5.71(b) to describe the process by which the Department discloses business information submitted to the Department as a result of a FOIA request, consistent with Executive Order 12600.

Whereas current § 5.71(b) only states that business information will not be disclosed if it is considered to be confidential, proposed § 5.11 would describe in detail the process by which the Department would respond to FOIA requests for agency records containing business information submitted to the Department.

Under proposed § 5.11(c), submitters would be required to use good faith efforts to designate, at the time of submission, business information it considers to be protected from disclosure under Exemption 4 of the Act (5 U.S.C. 552(b)(4)). If the Department receives a FOIA request for agency records containing information that the submitter has designated as "business information," pursuant to proposed § 5.11(d), the Department would notify the submitter if the Department determines that it may be required to disclose this information, unless one of the exceptions in proposed § 5.11(a) applies.

Where the Department notifies a submitter that it may be required to disclose information the submitter has designated as "business information," the Department would, at that time, give the submitter an opportunity under proposed § 5.11(e) to object to the proposed disclosure. If the submitter objected to part or all of the disclosure within the requisite time period, the Department would, unless one of the exceptions in proposed § 5.11(g) applies, consider the objections and inform the submitter, in writing, of its final decision regarding disclosure under proposed § 5.11(f). Proposed § 5.11(g) describes the instances when the Department is not required to give the submitter notice that it may be required to disclose information the submitter has designated as "business information." These include the following: (a) If the Department does not disclose the information, (b) if the Department has previously lawfully published the information, (c) if the information has been made publicly available, (d) if the disclosure is required by law (other than the FOIA), or (e) if the designations made by the submitter are determined by the Department to be frivolous. Moreover, this proposed section also ensures that the Department notifies (1) submitters of any FOIA lawsuits filed by requesters (proposed § 5.11(h)), (2) requesters of submitters' opportunity to object to disclosure (proposed § 5.11(i)), and (3) requesters of any reverse FOIA lawsuits filed by submitters (proposed § 5.11(j)).

Proposed § 5.12 (Creation of agency records not required) would update, but not make any substantive changes to, current § 5.15. We have retained the substance of the current § 5.15 because we believe it is important to inform the public that the Department is not obligated to create new agency records when responding to FOIA requests. The FOIA only requires that the Department produce records that exist at the time it receives a FOIA request.

Proposed § 5.13 (Preservation of records) would replace current § 5.18 (Destroyed records), which states that the Department destroys records in

accordance with the requirements in the Records Disposal Act of 1943 (44 U.S.C. 366 through 380), the Federal Property Management Regulations (41 CFR parts 101 through 111), and the Records Control Schedules. Proposed § 5.13 more accurately states the requirements regarding the limitation on the destruction of agency records.

We have not included current §§ 5.70 (Policy) and 5.72 (Records available), which address the types of records available under the FOIA, in the proposed regulations. Because the scope of the FOIA has expanded over the years, current §§ 5.70 and 5.72 no longer accurately reflect the legal requirements governing the availability of records under the FOIA.

Subpart C—Procedures for Requesting Access to Agency Records and Disclosure of Agency Records

Statute: Section 552(a) of title 5, United States Code details the basic requirements of the process by which a requester can request access to publicly available records and the process by which an agency must disclose such records.

Current Regulations: Current §§ 5.19, 5.32, 5.51, 5.52, and 5.53 address the procedures by which FOIA requests are made and procedures used by the Department to respond to FOIA requests.

Current § 5.19 (Records of other departments and agencies) states that FOIA requests for records originating in or concerning another agency may be referred to that agency for processing and that requesters in those instances will be so notified. Current § 5.51 (Procedure) addresses the procedure by which a requester should make a request. It further states that a determination whether to release or to deny access to requested records will be made within 10 working days and that the Department may only extend this deadline by an additional 10 working days. Current § 5.52 (Copies of records) states that the Department produces copies of records releasable under the FOIA promptly after receipt of fees. Current § 5.53 (Denial of requests for records) addresses the procedure by which the Department denies a FOIA request for records, specifically indicating that the denial shall be in writing and must include the reasons for the denial and notice of appeal rights. This section, along with current § 5.32 (Freedom of information officer), vests authority to deny a FOIA request in the Department's Freedom of Information Officer.

Proposed Regulations: Proposed §§ 5.20 and 5.21 would consolidate much of the substance of current § 5.19, 5.32, 5.51, and 5.53. The proposed regulations would not only provide more explicit instructions to aid in the public's understanding of how to make a FOIA request and how the Department processes such FOIA requests, but also would update the regulations to make them consistent with changes made to the FOIA in recent years.

Proposed § 5.20 (Requirements for making FOIA requests) would replace current § 5.51(a) through (c) and would provide additional information regarding the specific requirements that must be met for the Department to deem a FOIA request sufficient for processing.

Proposed § 5.21 (Procedures for processing FOIA requests) would substantially incorporate current §§ 5.19, 5.32, 5.51, and 5.53, but would also reflect a number of changes. Current § 5.51(b) states that the Department will refer FOIA requesters to the appropriate office within the Department in cases when the information sought by the requester is not located in the office where the FOIA request has been made. Proposed § 5.21 would not include the substance of current § 5.51(b); instead, it would allow for the Department to handle referrals of FOIA requests received by one component to an appropriate component (*i.e.*, the component responsible for maintaining the information sought under the FOIA request) within the Department. Further, proposed § 5.21 would not incorporate the requirement, reflected in current § 5.51(c), that envelopes containing written FOIA requests be clearly marked as such. Finally, the time limits for processing FOIA requests (in proposed § 5.21(c)) also have been updated from the time limits in current § 5.51(d) and § 5.51(e).

Reasons: We propose to amend the regulatory sections regarding FOIA requests for agency records and the Department's process for release of publicly available information to clarify the process for the public.

Proposed § 5.20 would update and expand current § 5.51(a) through (c) by stating that a FOIA request must be made in writing and must be transmitted to the Department as indicated on the Department's Web site. Proposed § 5.20 would require that the request reasonably describe the agency records sought and would explain what kinds of information about records are helpful to enable the Department to identify the requested records and respond to the FOIA request. Under proposed § 5.20(c), if a request does not reasonably describe the requested records, the Department would either administratively close it as insufficient or request clarification from the requester. Proposed § 5.20(d) would also cross-reference Departmental regulations under the Privacy Act of 1974 that require the verification of the requester's identity where the requester seeks records pertaining to the requester, a minor, or an individual who is legally incompetent.

We believe that the changes reflected in proposed § 5.20, which provide more detail on how to make a FOIA request, would assist the public in understanding the requirements for making a FOIA request and ultimately alleviate some processing delays resulting from insufficient FOIA requests.

Proposed § 5.21 would describe the process by which the Department processes FOIA requests. Whereas current §§ 5.19, 5.32, 5.51, and 5.53 provide limited information on the processes used by the Department and do not reflect recent amendments to the Act, proposed § 5.21 describes in detail the processes used by the Department to respond to FOIA requests.

Under proposed § 5.21(a) and (b), upon receipt of a FOIA request the Department would promptly notify the requester of the Department's receipt of the request and make a determination whether to grant the request within 20 working days. While current § 5.51 states that the Department will respond within 10 working days, as was originally required by the Act, proposed § 5.21(e) would conform to a change in the Act that now provides for determinations to be made within 20 working days. See 5 U.S.C. 552(a)(6)(A)(i). The proposed section would reflect the language of the Act regarding the commencement date of this 20-day time limit. Proposed § 5.21(d) also would state, consistent with the Act, that the Department may contact the requester to seek additional information concerning the FOIA request and may toll the 20-day time limit until it receives the requested information. See 5 U.S.C. 552(a)(6)(A)(ii).

Consistent with current § 5.19, proposed § 5.21(b) provides that, if the FOIA request seeks agency records created or maintained by another agency, the Department would either respond to the request after consultation or refer the request to the other agency for processing.

Proposed § 5.21(e) would substantially incorporate current § 5.51(d) by listing examples of the unusual circumstances under which the Department could extend the time limit for processing FOIA requests and would

provide for notification to the requester of the extended time limit. Proposed § 5.21(e) would not include the language from current § 5.51(d) that limits the Department's ability to extend the time period for processing FOIA requests to "no longer than an additional 10 working days," as this limitation does not accurately reflect the requirements of the Act. See 5 U.S.C. 552(a)(6)(B)(ii). In addition, proposed § 5.21(e) would specifically explain that this notification is made to afford the requester the opportunity to modify the FOIA request or to arrange an alternate time limit for the Department to respond to the FOIA request. The Department believes that providing this information to the requester would facilitate communication with the requester about the scope of FOIA requests that constitute "unusual circumstances" and that, ultimately, this would speed the processing of those FOIA requests.

Proposed § 5.21(f) would also provide contact information for the Department's FOIA Public Liaison and FOIA Requester Service Center, as set forth in the Act. We propose to add these provisions to conform the Department's FOIA regulations with sections 552(a)(6)(B)(ii) and 552(a)(7)(B) of title 5, United States Code, which were amended on December 31, 2007, to require that agencies provide contact information for their respective FOIA Public Liaisons and FOIA Requester Service Centers.

Proposed § 5.21(h) would substantially incorporate and expand upon current §§ 5.32 and 5.53, by identifying who is authorized to deny a FOIA request on behalf of the Department, by describing the process by which the requester is given notification of the denial, and by providing examples of determinations that constitute a denial of a FOIA request. Specifically, proposed § 5.21(h) would differ from current § 5.53 in that it would state that denials of FOIA requests, in whole or in part, must not only be made in writing and include the name and title or position of the denying employee or officer, a statement of the reasons for the denial, and a statement of appeal rights, but also include an estimate of the volume of records denied and an indication of the exemption under which any deletions have been made. The Department believes that by providing additional information regarding denials of FOIA requests the Department will eliminate much of the confusion experienced by requesters whose FOIA requests are denied in whole or in part.

Finally, proposed § 5.21(i) (Timing of responses to FOIA requests) is a new section that describes the Department's processing of FOIA requests. Specifically, proposed § 5.21(i)(1) describes the Department's use of multitrack processing of FOIA requests, pursuant to section 552(a)(6)(D) of title 5, United States Code, and proposed § 5.21(i)(2) would describe the Department's use of expedited processing, pursuant to section 552(a)(6)(E) of title 5, United States Code. Under proposed § 5.21(i)(2)(iii) and (i)(2)(iv), a request for expedited processing must contain a detailed explanation of the basis for such request, and the Department would make a determination on such request within 10 calendar days of receipt. Expedited processing would only occur if the Department determines that the FOIA request involves one or more of the following: (1) A circumstance in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; (2) a circumstance in which an urgent need of a person primarily engaged in disseminating information exists to inform the public about an actual or alleged Federal Government activity; or (3) other circumstances that the Department determines demonstrate a compelling need for expedited processing.

These proposed regulations would not include the substance of current § 5.52, as we believe that issues regarding multiple duplications and the provision of copies of agency records published or available for sale are best addressed on a case-by-case basis.

We believe that adding specificity to the Department's current regulations regarding its process for responding to FOIA requests will result in the public having a better understanding of this process. We also believe that the requirements for requesting expedited processing of FOIA requests, reflected in proposed § 5.21(i)(2), will alleviate delays resulting from insufficient FOIA requests for expedited processing of FOIA requests.

Subpart D—Fees

Statute: Section 552(a)(4)(A) of title 5, United States Code requires agencies to promulgate regulations specifying the fee schedule and establishing the procedures and guidelines for waiver or reduction of fees. Specifically, the FOIA requires each agency's fee schedule to conform to the OMB Guidelines. The FOIA further states that agency records are provided at a reduced fee or without a fee if disclosure is in the public interest. Moreover, an agency may require advance payment of fees where fees are determined or expected to exceed $250 or where a requester has previously failed to timely pay fees. Lastly, the FOIA limits fees to direct costs of search, duplication, and review.

Current Regulations: Current subpart E establishes the fees and charges assessed by the Department when processing a FOIA request.

Current § 5.60 (Schedule of fees) establishes the manner in which fees are charged for agency records searches, review of agency records, duplication of agency records, certification of agency records, and other charges established for services provided in response to a FOIA request. Current § 5.61 (Notification of estimated fees) provides for notification to the requester when the estimated fees for the FOIA request exceed $25 or the maximum amount specified in the FOIA request, whichever is greater. Current § 5.62 (Advance payment of fees) addresses the circumstances under which the Department requires advance payment of estimated fees from FOIA requesters. Current § 5.63 (Payment of fees and interest) allows the Department to assess interest on FOIA request fees that remain outstanding 30 days after the date the billing was sent, provides for the collection of FOIA request fees under the Debt Collection Act of 1982, as amended and states the form and manner in which FOIA fees must be paid. Current § 5.64 (Waiver or reduction of fees) states the circumstances under which FOIA request fees may be reduced or waived.

Proposed Regulations: Proposed § 5.30 (Fees generally) would provide the general basis by which the Department will assess fees, and would partially incorporate the substance of current § 5.63(b), establishing the form of payment required but omitting the address to which fee payments must be sent and the requirement that payment made by personal check or bank draft be drawn on a bank in the United States.

Proposed § 5.31 (Fee definitions) is new and would define various activities applicable to the Department's processing of FOIA requests (*i.e.*, "duplication" (proposed § 5.31(c)), "review" (proposed § 5.31(g)), and "search" (proposed § 5.31(h))). This section would also define the terms "commercial use request" (proposed § 5.31(a)), "direct costs" (proposed § 5.31(b)), "educational institution" (proposed § 5.31(d)), "noncommercial scientific institution" (proposed § 5.31(e)), and "representative of the news media" or "news media requester" (proposed § 5.31(f)).

Proposed § 5.32 (Assessment of fees) would incorporate language from

current §§ 5.60, 5.61, 5.62, and 5.63. First, the proposed regulations would outline the types of fees and the process by which they are assessed. Current § 5.60 (Schedule of fees) distinguishes between manual and computer search fees, which are calculated using the basic rate of pay of the employee(s) doing the search plus 16 percent, with an additional charge of $287 per hour for computer searches. Proposed § 5.32 would specify that search fees include only the time spent searching for the requested responsive agency records and consist of the direct costs of the search. Thus, the proposed regulations do not include the additional $287 fee per hour for computer searches, but rather establishes that FOIA requesters are charged the direct costs of the computer search. Proposed § 5.32(a)(2) would incorporate the substance of § 5.60(a)(2), which states that review fees include the actual costs of the initial review of the responsive records and that review fees are charged only for commercial use FOIA requests. However, proposed § 5.32 would clarify that review costs are assessed at the administrative appeal level unless the review includes records not reviewed, or exemptions not asserted, initially.

Second, under proposed § 5.32(a)(3), once the search and review are completed, duplication costs would be assessed at $0.20 per page, an increase from the $0.10 per page fee reflected in current § 5.60(a)(3). Proposed § 5.32(a)(3) would also include a fee of $3.00 per CD for documents recorded on CD, which would provide requesters with an additional FOIA request processing option that is not available under the current regulations.

Third, proposed § 5.32(b) would describe certain limitations on the fees charged by the Department for responding to FOIA requests. Specifically, proposed § 5.32(b)(1) would incorporate current § 5.60(a)(1), which states that fees assessed for non-commercial use FOIA requests made by an educational or noncommercial scientific institution or the news media are limited to duplication costs only. Moreover, consistent with current § 5.60(a)(1), proposed § 5.32(b)(2) would establish that the Department would not assess fees for the first two hours of search time and the first 100 pages of copying for any FOIA request other than commercial use requests. Proposed § 5.32(b)(3) would update current § 5.60(c) by increasing from $5 to $25 the threshold amount of fees a FOIA request must accumulate before the Department charges a FOIA requester for those fees.

Fourth, proposed § 5.32(c) would state that if the Department anticipates the fees for a request to be in excess of $25 and the requester has not stated a willingness to pay such fees, the Department would notify the requester of the fees before processing. Proposed § 5.32(c) substantially incorporates current § 5.61 and would clarify that such FOIA requests would not be deemed received by the Department until the requester agrees to the payment of fees or pays such fees.

Fifth, proposed § 5.32(d) would update current § 5.60(a)(4) by reserving to the Department the right to provide special services (*e.g.*, certification of records) to a requester at the direct cost of such services.

Sixth, proposed § 5.32(e) would incorporate the substance of current § 5.63(a), but would indicate that interest is charged on unpaid fees, pursuant to the Debt Collection Act of 1982, as amended (Pub. L. 97–365), beginning on the 31st day after the billing date.

Seventh, proposed § 5.32(f) would incorporate without substantial alteration current § 5.60(d) by stating that the Department may aggregate FOIA requests for purposes of assessing fees when the FOIA requests are related in purpose and the Department reasonably believes that FOIA requests were submitted separately to avoid or reduce applicable fees.

Eighth, proposed § 5.32(g) would describe when and how the Department requests advance payment before processing a FOIA request. Proposed § 5.32(g)(2) would incorporate current § 5.62(a), which states that if a fee is more than $250, the Department notifies the requester of the cost and obtains payment assurance from requesters with a history of prompt payment or requires advance payment of fees if the requester has no history of payment. Proposed § 5.32(g)(3) would substantially incorporate current § 5.62(b), which provides that when a requester has previously failed to timely pay a fee, the Department does not process the request until the payment is received in full. Consistent with current § 5.62(c), proposed § 5.32(g)(4) clarifies that when the Department requires advance payment of fees for a FOIA request, the request is not considered received until payment is received by the Department.

Ninth, proposed § 5.32(h) would add, consistent with section 552(a)(6)(A)(iii)(II) of title 5, United States Code, a provision that the time limit for responding to a FOIA request would be tolled where it is necessary for the Department to clarify issues regarding fee assessment with the requester.

Lastly, proposed § 5.32(i) would state that the fee schedule described in this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for producing particular types of agency records.

Proposed § 5.33 (Requirements for waiver or reduction of fees) would update current § 5.64 (Waiver or reduction of fees) by providing more detail as to what factors the Department considers to determine whether a waiver or reduction of fees is warranted and whether applicable fee waiver criteria have been met. First, proposed § 5.33(a) would state the two requirements for a reduction or waiver of fees, *i.e.* when disclosure is (1) in the public interest and (2) not primarily in the commercial interest of the requester. Second, proposed § 5.33(b) would detail the factors taken into account to determine if the disclosure is in the public interest and proposed § 5.33(c) would detail the factors taken into account to determine whether disclosure is primarily in the commercial interest of the requester. Third, proposed § 5.33(d) would clarify that if a fee waiver requirement is met only for a portion of a FOIA request, the Department waives or reduces fees only for that portion of the request. Fourth, proposed § 5.33(e) would clarify that a requester seeking a fee waiver or reduction must submit evidence demonstrating that the FOIA request meets the criteria set forth in current § 5.33(a) through (c). Finally, proposed § 5.33(f) would clarify that the Department does not grant standing fee waivers, but rather considers each waiver request on a case by case basis.

Reasons: The amended fee provisions are intended to update the fee assessment and waiver processes to be consistent with the current law and government practice, as well as the OMB Guidelines, and to clarify them for the public. We believe that clarifying the Department's current regulations and providing additional information are necessary to ensure public understanding of the processes by which fees are assessed and by which the Department may waive or reduce these fees.

Proposed § 5.30, which partially incorporates current § 5.63(b), would omit the address to which fee payments must be sent. Proposed § 5.30 would no longer require that payments made by personal check or bank draft be drawn on a bank in the United States. We removed these requirements in current § 5.63(b) in order to permit the

Department to adapt to technological changes that would enable us to collect fees via other methods.

Proposed § 5.31 (Fee definitions) is a new section and is intended to promote transparency and public understanding by defining key terms that are used to assess fees for different types of FOIA requests (*e.g.*, commercial use FOIA requests, FOIA requests made by educational institutions, FOIA requests made by noncommercial scientific institutions, and FOIA requests made by a representative of a news media). The amount of fees charged, if any, depends on the type of request (commercial or non-commercial), whether the request is made by an educational institution, noncommercial scientific institution or representative of the news media, and the nature of the request (*e.g.*, FOIA requests requiring one or more of the following: the search, review and duplication of copies of agency records). The proposed regulations would define terms (*e.g.*, "commercial use request," "direct costs," "duplication," "educational institution," "representative of the news media," "review" and "search") that are essential to understanding when fees are assessed for a FOIA request and what those fees will be.

Proposed § 5.32 (Assessment of fees) would provide to the public a comprehensive breakdown of fees charged when the Department responds to a FOIA request, consistent with the OMB Guidelines. Proposed § 5.32(a)(1) establishes that FOIA requesters will be charged the direct costs of the computer search and eliminates the specified $287 hourly search charge in current § 5.60(a)(1)(iii) to account for changes in technology that have occurred since the current regulations were drafted. Proposed § 5.32(a)(1) also would clarify that, for purposes of calculating fees, time spent searching for agency records in response to a FOIA request includes time spent searching for the records, regardless of whether the search results in finding the requested records and regardless of whether the Department releases the records under the Act. We believe this language is necessary to assist the public in better understanding the costs associated with a search in response to a FOIA request.

Proposed § 5.32(a)(2) largely tracks current § 5.60(a)(2), which states that review fees include the actual costs of the initial review of the responsive records and that review fees are charged only for commercial use FOIA requests. However, proposed § 5.32 would clarify that review costs are assessed at the administrative appeal level where the review includes records not reviewed, or exemptions not asserted, initially. We propose to make this clarification to assist the public in better understanding the costs associated with an administrative appeal of an initial FOIA request decision.

Proposed § 5.32(a)(3) would increase the fees for duplication from $0.10 per page to $0.20 per page, and proposed § 5.32(b)(3) would increase the threshold amount of total fees a FOIA request must accumulate from $5 to $25 before the Department charges a FOIA requester for those fees. Proposed § 5.32(a)(3) also would establish a $3.00 fee per CD for documents recorded on CD, and at the direct cost for duplication for electronic copies and other forms of duplication. The Department proposes to make these changes in the regulations to address inflation in the years since the current regulations were issued and to account for new technology in the reproduction of copies in electronic formats, including CD.

Proposed § 5.32(c) would also establish that if the Department estimates or determines that the fees for a FOIA request exceed $25, the FOIA requester must agree in writing to pay these fees before the Department will consider the FOIA request received. We believe this provision is necessary to allow the Department to avoid spending time and resources processing FOIA requests that will not be completed due to the requester's refusal to pay the assessed fees. In addition, proposed § 5.32(d) (Charges for other services) would update current § 5.60(a)(4), which specifies that the cost of certification of records is $5, and consolidate it with current § 5.60(a)(5) by establishing that the Department will charge the FOIA requester the direct costs of other services, including the certification of agency records. We believe this expansion is necessary to allow for flexibility in pricing in accordance with standard rates.

Proposed § 5.32(e) (Charging interest) would incorporate current § 5.63, with no substantive changes.

Proposed § 5.32(g) substantially tracks § 5.62, but with one minor clarification. Current § 5.62(b) states that if a requester has previously failed to pay a fee in a timely fashion, the Department does not process the FOIA request until the requester pays the arrears in full and makes an advance payment of the estimated fees for the new request. Proposed § 5.32(g)(3) would clarify what is meant by paying a fee in a "timely fashion." Specifically, it would provide the Department with the ability to require a requester who has previously failed to pay a properly assessed FOIA fee within 30 calendar days of the billing date to pay in advance the full amount of estimated or actual fees before it further processes a new or pending FOIA request from that requester.

Proposed § 5.32(h) would establish that the time limit for responding to a FOIA request is tolled where it is necessary for the Department to clarify issues regarding fee assessment with the requester. We propose to add this provision because we believe it is necessary to comply with section 552(a)(6)(A)(iii)(II) of title 5, United States Code.

We have included proposed § 5.32(i) to clarify for the public that the fee schedule in this part would not apply to fees charged under any statute that specifically requires an agency to set and collect fees for producing particular types of agency records, consistent with the Act. See 5 U.S.C. 552(a)(4)(A)(vi).

Proposed § 5.33 would incorporate the requirements of current § 5.64, but would provide additional information regarding the factors considered by the Department to determine whether applicable fee waiver criteria have been met. We believe this information is necessary to provide requesters with a clear understanding of the criteria they must meet to qualify for a fee waiver and reduction.

Subpart E—Administrative Review

Statute: Section 552(a)(6)(A) through (C) of title 5, United States Code require agencies to make determinations on appeal within 20 working days, although this deadline may be extended under "unusual circumstances." These provisions of the FOIA also provide a right to judicial review after the exhaustion of administrative remedies.

Current Regulations: Current subpart G establishes the procedure used by the Department to conduct administrative reviews of FOIA requests.

Current § 5.80 (Review of denial of a record) provides for the review of a denial of a written FOIA request.

Current §§ 5.81 (Time for initiation of request for review) and 5.82 (By whom review is made) state that a requester whose FOIA request has been denied may initiate an administrative review of the denial by filing a written request addressed to the Secretary within 30 days of receipt of the full or partial denial.

Current § 5.83 (Contents of request for review) states that requests for review must include a copy of the written FOIA request and the denial. Current § 5.84 (Consideration on review) provides that administrative reviews will be limited to the written record, including any

written argument submitted by the requester.

Current § 5.85 (Decisions on review) details the process by which the Department makes a decision on review, providing for the Department's issuance of a written determination within 20 working days from receipt of the appeal, with a 10-day extension of the deadline permitted where no extension was granted during the initial review. Under this provision, the Department's decision must state the reasons for the decision and, where an appeal is denied in whole or in part, it must also notify the requester of the right to judicial review of the decision. Failure to comply with the applicable time limits constitutes exhaustion of the FOIA requester's administrative remedies.

Proposed Regulations: The proposed regulation for § 5.40 would provide a more condensed and user-friendly version of the regulations reflected in current subpart G. Proposed § 5.40(b) would change the time period within which an administrative review of a denial of a FOIA request must be made from 30 days of receipt of the determination to deny (as stated in current § 5.81) to 35 calendar days of the date on the determination letter to deny the FOIA request. No other substantive changes have been made to this section.

Reasons: We believe that establishing a 35-day time period from the date of the determination letter to deny a FOIA request will allow both the Department and the FOIA requester to determine more clearly the deadline by which an appeal must be filed. The Department proposes to establish a 35-day time period from the date on the determination letter because we believe that a period of 35 days from the date of the letter is consistent with the time afforded under the current regulations (*i.e.*, 30 days from the date of receipt of the determination letter). We have added 5 more days to the time period to allow adequate time for delivery of the determination letter.

Executive Order 12866

1. Potential Costs and Benefits

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those we have determined to be necessary for implementing the FOIA effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits would justify the costs.

Elsewhere in the preamble, under the heading SIGNIFICANT PROPOSED REGULATIONS, we discuss the potential costs and benefits of these proposed regulations.

2. Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "§" and a numbered heading; for example, § 5.1 Purpose.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the **ADDRESSES** section of this preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

The proposed regulations would reduce the burden on FOIA requesters, including small entities as defined by the Regulatory Flexibility Act of 1980, as amended, by providing detailed information and instruction on obtaining access to publicly available Department records and by ensuring that the Department's regulations conform to the current FOIA.

Paperwork Reduction Act of 1995

These proposed regulations do not contain any information collection requirements.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

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(Category of Federal Domestic Assistance Number does not apply.)

List of Subjects in 34 CFR Part 5

Freedom of information.

Dated: November 17, 2008.

Margaret Spellings,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend title 34 of the Code of Federal Regulations by revising part 5 to read as follows:

PART 5—AVAILABILITY OF INFORMATION TO THE PUBLIC

Subpart A—General Provisions

SEC.

Subpart B—Agency Records Available to the Public

Authority: 5 U.S.C. 552.

Subpart A—General Provisions

§ 5.1 Purpose.

This part contains the regulations that the United States Department of Education follows in processing requests for records under the Freedom of Information Act, as amended, 5 U.S.C. 552. These regulations must be read in conjunction with the FOIA, including its exemptions to disclosure, and, when appropriate, in conjunction with the Privacy Act of 1974, as amended, 5 U.S.C. 552a, and its implementing regulations in 34 CFR part 5b.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

§ 5.2 General policy.

The Department's policy is to make information publicly available, limited only by the obligations of confidentiality and the administrative necessities recognized by the Act, as defined in § 5.3(a), or unless otherwise exempted from disclosure pursuant to law. As a matter of policy, the Department makes discretionary disclosures of agency records or information exempt under the Act only after full and deliberate consideration of the institutional, commercial, law enforcement, and personal privacy interests that could be implicated by disclosure of the information. This policy does not, however, create any right or benefit, substantive or procedural, enforceable by any person against the Department. Information routinely provided to the public in the ordinary course of the Department's official business (*e.g.*, press releases) is not subject to the requirements in this part.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

§ 5.3 Definitions.

As used in this part:

(a) *Act* or *FOIA* means the Freedom of Information Act, as amended, 5 U.S.C. 552.

(b) *Department* means the United States Department of Education.

(c) *Component* means each separate bureau, office, board, division, commission, service, administration, or other organizational entity of the Department.

(d) *FOIA request* means a written request for agency records that reasonably describes the agency records sought, made by any person, including a member of the public (U.S. or foreign citizen/entity), partnership, corporation, association, and foreign or domestic governments (excluding Federal agencies).

(e)(1) *Agency records* are documentary materials regardless of physical form or characteristics that—

(i) Are either created or obtained by the Department; and

(ii) Are under the Department's control at the time it receives a FOIA request.

(2) *Agency records* include—

(i) Records created, stored, and retrievable in electronic format;

(ii) Records maintained for the Department by a private entity under a records management contract with the Federal Government; and

(iii) Documentary materials preserved by the Department as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Department or because of the informational value of data contained therein.

(3) *Agency records* do not include tangible, evidentiary objects or equipment; library or museum materials made or acquired and preserved solely for reference or exhibition purposes; extra copies of documents preserved only for convenience of reference; stocks of publications; and personal records created for the convenience of an individual and not used to conduct Department business or incorporated into the Department's recordkeeping system or files.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

Subpart B—Agency Records Available to the Public

§ 5.10 Public reading room.

(a) *General.* Pursuant to 5 U.S.C. 552(a)(2), the Department maintains a public reading room containing agency records that the FOIA requires to be made regularly available for public inspection and copying. Published records of the Department, whether or not available for purchase, are made available for examination. The Department's public reading room is located at the National Library of Education, 400 Maryland Avenue, SW., Plaza Level (Level B), Washington, DC 20202–0008. The hours of operation are 9:00 a.m. to 5:00 p.m., Monday through Friday (except Federal holidays).

(b) *Reading room records.* Agency records maintained in the public reading room include final opinions and orders in adjudications, statements of policy and interpretations adopted by the Department and not published in the **Federal Register**, administrative staff manuals and instructions affecting the public, and copies of all agency records regardless of form or format released to the public pursuant to a FOIA request that the Department determines are likely to be the subject of future FOIA requests.

(c) *Electronic access.* The Department makes reading room records created on or after November 1, 1996, available through its electronic reading room, located on the Department's FOIA Web site at *http://www.ed.gov/policy/gen/leg/foia/foiatoc.html.*

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(2), 20 U.S.C. 3474)

§ 5.11 Business information.

(a) *General.* The Department discloses business information it obtains from a submitter under the Act in accordance with this section.

(b) *Definitions.* For purposes of this section:

(1) *Business information* means commercial or financial information obtained by the Department from a submitter that may be protected from disclosure under 5 U.S.C. 552(b)(4) (Exemption 4 of the Act).

(2) *Submitter* means any person or entity (including corporations; State, local, and tribal governments; and foreign governments) from whom the Department obtains business information.

(c) *Designation of business information.* (1) A submitter must use good faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portion of its submission that it considers to be business information protected from disclosure under Exemption 4 of the Act.

(2) A submitter's designations are not binding on the Department and will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(3) A blanket designation on each page of a submission that all information contained on the page is protected from disclosure under Exemption 4 presumptively will not be considered a good faith effort.

(d) *Notice to submitters.* Except as provided in paragraph (g) of this section, the Department promptly

notifies a submitter whenever a FOIA request or administrative appeal is made under the Act seeking disclosure of the information the submitter has designated in good faith as business information protected from disclosure under paragraph (c) of this section, or the Department otherwise has reason to believe that it may be required to disclose information sought to be designated by the submitter as business information protected from disclosure under Exemption 4 of the Act. This notice includes either a description of the business information requested or copies of the requested agency records or portions of agency records containing the requested business information as well as a time period, consistent with § 5.21(c), within which the submitter can object to the disclosure pursuant to paragraph (e) of this section.

(e) *Opportunity to object to disclosure.* (1) If a submitter objects to disclosure, it must submit to the Department a detailed written statement specifying all grounds under Exemption 4 of the Act for denying access to the information, or a portion of the information sought.

(2) A submitter's failure to object to the disclosure by the deadline established by the Department in the notice provided under paragraph (d) of this section constitutes a waiver of the submitter's right to object to disclosure under paragraph (e) of this section.

(3) A submitter's response to a notice from the Department under paragraph (d) of this section may itself be subject to disclosure under the Act.

(f) *Notice of intent to disclose.* The Department considers a submitter's objections and submissions made in support thereof in deciding whether to disclose business information sought to be protected by the submitter. Whenever the Department decides to disclose information over a submitter's objection, the Department gives the submitter written notice, which includes:

(1) A statement of the reasons why the submitter's objections to disclosure were not sustained.

(2) A description of the information to be disclosed.

(3) A specified disclosure date that is a reasonable time subsequent to the notice.

(g) *Exceptions to notice requirements.* The notice requirements of paragraph (d) of this section do not apply if—

(1) The Department does not disclose the business information of the submitter;

(2) The Department has previously lawfully published the information;

(3) The information has been made available to the public by the requester or by third parties;

(4) Disclosure of the information is required by statute (other than the Act) or regulation issued in accordance with the requirements of Executive Order 12600 (52 FR 23781, 3 CFR, 1987 Comp., p. 235); or

(5) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous, except that, in such case, the Department must provide the submitter with written notice of any final administrative disclosure determination in accordance with paragraph (f) of this section.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of a submitter's business information, the Department promptly notifies the submitter.

(i) *Corresponding notice to requester.* The Department notifies the requester whenever it notifies a submitter of its opportunity to object to disclosure, of the Department's intent to disclose requested information designated as business information by the submitter, or of the filing of a lawsuit.

(j) *Notice of reverse FOIA lawsuit.* Whenever a submitter files a lawsuit seeking to prevent the disclosure of the submitter's information, the Department promptly notifies the requester, and advises the requester that its request will be held in abeyance until the lawsuit initiated by the submitter is resolved.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

§ 5.12 Creation of agency records not required.

In response to a FOIA request, the Department produces only those agency records that are not already publicly available and that are in existence at the time it receives a request. The Department does not create new agency records in response to a FOIA request by, for example, extrapolating information from existing agency records, reformatting available information, preparing new electronic programs or databases, or creating data through calculations of ratios, proportions, percentages, trends, frequency distributions, correlations, or comparisons.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

§ 5.13 Preservation of agency records.

The Department does not destroy agency records that are the subject of a pending FOIA request, appeal, or lawsuit.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

Subpart C—Procedures for Requesting Access to Agency Records and Disclosure of Agency Records

§ 5.20 Requirements for making FOIA requests.

(a) *Making a FOIA request.* Any FOIA request for an agency record must be in writing (via paper, facsimile, or electronic mail) and transmitted to the Department as indicated on the Department's Web site. See *http://www.ed.gov/policy/gen/leg/foia/request_foia.html.*

(b) *Description of agency records sought.* A FOIA request must reasonably describe the agency record sought, to enable Department personnel to locate the agency record or records with a reasonable amount of effort. Whenever possible, a FOIA request should describe the type of agency record requested, the subject matter of the agency record, the date, if known, or general time period when it was created, and the person or office that created it. Requesters who have detailed information that would assist in identifying and locating the agency records sought are urged to provide this information to the Department to expedite the handling of a FOIA request.

(c) *FOIA request deemed insufficient.* If the Department determines that a FOIA request does not reasonably describe the agency record or records sought, the FOIA request will be deemed insufficient under the Act. In that case, the Department informs the requester of the reason the FOIA request is insufficient and, at the Department's option, either administratively closes the FOIA request as insufficient without determining whether to grant the FOIA request or provides the requester an opportunity to modify the FOIA request to meet the requirements of this section.

(d) *Verification of identity.* In compliance with the Privacy Act of 1974, as amended, 5 U.S.C. 552a, FOIA requests for agency records pertaining to the requester, a minor, or an individual who is legally incompetent must include verification of the requester's identity pursuant to 34 CFR 5b.5.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

§ 5.21 Procedures for processing FOIA requests.

(a) *Acknowledgements of FOIA requests.* The Department promptly notifies the requester when it receives a FOIA request.

(b) *Consultation and referrals.* When the Department receives a FOIA request for a record or records created by or otherwise received from another agency of the Federal Government, it either responds to the FOIA request after

consultation with the other agency, or refers the FOIA request to the other agency for processing. When the Department refers a FOIA request to another agency for processing, the Department will so notify the requester.

(c) *Decisions on FOIA requests.* The Department determines whether to comply with a FOIA request within 20 working days after the appropriate component of the Department first receives the request. This time period commences on the date that the request is received by the appropriate component of the Department, but commences no later than 10 calendar days after the request is received by the component of the Department designated pursuant to § 5.20(a) to receive FOIA requests for agency records. The Department's failure to comply with these times limits constitutes exhaustion of the requester's administrative remedies for the purposes of judicial action to compel disclosure.

(d) *Requests for additional information.* The Department may make one request for additional information from the requester and toll the 20-day period while awaiting receipt of the additional information.

(e) *Extension of time period for processing a FOIA request.* The Department may extend the time period for processing a FOIA request only in unusual circumstances, as described in paragraphs (e)(1) through (e)(3) of this section, in which case the Department notifies the requester of the extension in writing. A notice of extension affords the requester the opportunity either to modify its FOIA request so that it may be processed within the 20-day time limit, or to arrange with the Department an alternative time period within which the FOIA request will be processed. For the purposes of this section, unusual circumstances include:

(1) The need to search for and collect the requested agency records from field facilities or other establishments that are separate from the office processing the request.

(2) The need to search for, collect, and review and process voluminous agency records responsive to the FOIA request.

(3) The need to consult with other agencies or agency components having a substantial interest in the determination on the FOIA request.

(f) *FOIA Public Liaison and FOIA Requester Service Center.* The Department's FOIA Public Liaison assists in the resolution of disputes between the requester and the Department. The Department provides information about the status of a FOIA request to the requester through the Department's FOIA Requester Service Center. Contact information for the Department's FOIA Public Liaison and FOIA Requester Service Center may be found at *http://www.ed.gov/policy/gen/leg/foia/contacts.html.*

(g) *Notification of determination.* Once the Department makes a determination to grant a FOIA request in whole or in part, it notifies the requester in writing of its decision.

(h) *Denials of FOIA requests.* (1) Only Departmental officers or employees delegated the authority to deny a FOIA request may deny a FOIA request on behalf of the Department.

(2)(i) The Department notifies the requester in writing of any decision to deny a FOIA request in whole or in part. Denials under this paragraph can include the following: A determination to deny access in whole or in part to any agency record responsive to a request; a determination that a requested agency record does not exist or cannot be located in the Department's records; a determination that a requested agency record is not readily retrievable or reproducible in the form or format sought by the requester; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver; and a denial of a request for expedited processing.

(ii) All determinations denying a FOIA request in whole or in part are signed by an officer or employee designated under paragraph (h)(1) of this section, and include:

(A) The name and title or position of the denying officer or employee.

(B) A brief statement of the reason or reasons for the denial, including any exemptions applicable under the Act.

(C) An estimate of the volume of agency records or information denied, by number of pages or other reasonable estimate (except where the volume of agency records or information denied is apparent from deletions made on agency records disclosed in part, or providing an estimate would harm an interest protected by an applicable exemption under the Act).

(D) Where an agency record has been disclosed only in part, an indication of the exemption under the Act justifying the redaction in the agency record (unless providing this information would harm an interest protected by an applicable exemption under the Act).

(E) A statement of appeal rights and a list of requirements for filing an appeal under § 5.40.

(i) *Timing of responses to FOIA requests*—(1) *Multitrack processing.* The Department may use two or more processing tracks to distinguish between simple and more complex FOIA requests based on one or more of the following: The time and work necessary to process the FOIA request, the volume of agency records responsive to the FOIA request, and whether the FOIA request qualifies for expedited processing as described in paragraph (i)(2) of this section.

(2) *Expedited processing.* (i) The Department gives expedited treatment to FOIA requests and appeals whenever the Department determines that a FOIA request involves one or more of the following:

(A) A circumstance in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.

(B) The urgent need of a person primarily engaged in disseminating information to inform the public about an actual or alleged Federal Government activity; or

(C) Other circumstances that the Department determines demonstrate a compelling need for expedited processing.

(ii) A requester may ask for expedited processing at the time of the initial FOIA request or at any time thereafter.

(iii) A request for expedited processing must contain a detailed explanation of the basis for the request, and must be accompanied by a statement certifying the truth of the circumstances alleged or other evidence of the requester's compelling need acceptable to the Department.

(iv) The Department makes a determination whether to grant or deny a request for expedited processing within 10 calendar days of its receipt by the component of the Department designated pursuant to § 5.20(a) to receive FOIA requests for agency records, and processes FOIA requests accepted for expedited processing as soon as practicable and on a priority basis.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

Subpart D—Fees

§ 5.30 Fees generally.

The Department assesses fees for processing FOIA requests in accordance with § 5.32(a), except where fees are limited under § 5.32(b) or where a waiver or reduction of fees is granted under § 5.33. Requesters must pay fees by check or money order made payable to the U.S. Department of Education, and must include the FOIA request number on the check or money order. The Department retains full discretion to limit or adjust fees.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(4)(A), 20 U.S.C. 3474)

§ 5.31 Fee definitions.

(a) *Commercial use request* means a request from or on behalf of a FOIA requester seeking information for a use or purpose that furthers the requester's commercial, trade, or profit interests, which can include furthering those interests through litigation. For the purpose of assessing fees under the Act, the Department determines, whenever reasonably possible, the use to which a requester will put the requested agency records.

(b) *Direct costs* mean those expenses that an agency actually incurs in searching for and duplicating (and, in the case of commercial use FOIA requests, reviewing) agency records to respond to a FOIA request. Direct costs include, for example, the pro rata salary of the employee(s) performing the work (*i.e.*, basic rate of pay plus 16 percent) and the cost of operating duplication machinery. The Department's other overhead expenses are not included in direct costs.

(c) *Duplication* means making a copy of the agency record, or of the information in it, as necessary to respond to a FOIA request. Copies can be made in several forms and formats, including paper and electronic records. The Department honors a requester's specified preference as to form or format of disclosure, provided that the agency record is readily reproducible with reasonable effort in the requested form or format.

(d) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To qualify as an educational institution under this part, a requester must demonstrate that an educational institution authorized the request and that the agency records are not sought for individual or commercial use, but are instead sought to further scholarly research. A request for agency records for the purpose of affecting a requester's application for, or prospect of obtaining, new or additional grants, contracts, or similar funding is presumptively a commercial use request.

(e) *Noncommercial scientific institution* means an institution that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. A noncommercial scientific institution does not operate for a "commercial use", as the term is defined in paragraph (a) of this section. To qualify as a noncommercial scientific institution under this part, a requester must demonstrate that a noncommercial scientific institution authorized the request and that the agency records are sought to further scientific research and not for a commercial use. A request for agency records for the purpose of affecting a requester's application for, or prospect of obtaining, new or additional grants, contracts, or similar funding is presumptively a commercial use request.

(f) *Representative of the news media*, or *news media requester*, means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. For the purposes of this section, the term "news" means information about current events or information that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals that qualify as disseminators of news and make their products available for purchase by, subscription by, or free distribution to the general public. To be regarded as a representative of the news media, a "freelance" journalist must demonstrate a solid basis for expecting publication, such as a publication contract or a past publication record. For inclusion in this category, a requester must not be seeking the requested agency records for a commercial use.

(g) *Review* means the examination of an agency record located in response to a FOIA request to determine whether any portion of the record is exempt from disclosure under the Act. Reviewing the record includes processing the agency record for disclosure and making redactions and other preparations for disclosure. Review costs are recoverable even if an agency record ultimately is not disclosed. Review time includes time spent considering any formal objection to disclosure but does not include time spent resolving general legal or policy issues regarding the application of exemptions under the Act.

(h) *Search* means the process of looking for and retrieving agency records or information responsive to a FOIA request. Searching includes page-by-page or line-by-line identification of information within agency records and reasonable efforts to locate and retrieve information from agency records maintained in electronic form or format, provided that such efforts do not significantly interfere with the operation of the Department's automated information systems.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(4)(A), 20 U.S.C. 3474)

§ 5.32 Assessment of fees.

(a) *Fees.* In responding to FOIA requests, the Department charges the following fees (in accordance with the Office of Management and Budget's "Uniform FOIA Fee Schedule and Guidelines," 52 FR 10012 (March 27, 1987)), unless it has granted a waiver or reduction of fees under § 5.33 and subject to the limitations set forth in paragraph (b) of this section:

(1) *Search.* The Department charges search fees, subject to the limitations of paragraph (b) of this section. Search time includes time spent searching, regardless of whether the search results in the location of responsive agency records and, if so, whether such agency records are released to the requester under the Act. The requester will be charged the direct costs, as defined in § 5.31(b), of the search. In the case of computer searches for agency records, the Department charges the requester for the direct cost of conducting the search, subject to the limitations set forth in paragraph (b) of this section.

(2) *Review.* (i) The Department charges fees for initial agency record review at the same rate as for searches, subject to the limitations set forth in paragraph (b) of this section.

(ii) No fees are charged for review at the administrative appeal level except in connection with—

(A) The review of agency records other than agency records identified as responsive to the FOIA request in the initial decision; and

(B) The Department's decision regarding whether to assert that an exemption exists under the Act that was not cited in the decision on the initial FOIA request.

(iii) Review fees are not assessed for FOIA requests other than those made for a "commercial use," as the term is defined in § 5.31(a).

(3) *Duplication.* The Department charges duplication fees at the rate of $0.20 per page for paper photocopies of agency records, $3.00 per CD for documents recorded on CD, and at the direct cost for duplication for electronic copies and other forms of duplication, subject to the limitations of paragraph (b) of this section.

(b) *Limitations on fees.*

(1) Fees are limited to charges for document duplication when agency

records are not sought for commercial use and the request is made by—

(i) An educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or

(ii) A representative of the news media.

(2) For FOIA requests other than commercial use FOIA requests, the Department provides the first 100 pages of agency records released (or the cost equivalent) and the first two hours of search (or the cost equivalent) without charge, pursuant to 5 U.S.C. 552(a)(4)(A)(iv)(II).

(3) Whenever the Department calculates that the fees assessable for a FOIA request under paragraph (a) of this section total $25.00 or less, the Department processes the FOIA request without charge to the requester.

(c) *Notice of anticipated fees in excess of $25.* When the Department estimates or determines that the fees for processing a FOIA request will total more than $25 and the requester has not stated a willingness to pay such fees, the Department notifies the requester of the anticipated amount of fees before processing the FOIA request. If the Department can readily anticipate fees for processing only a portion of a request, the Department advises the requester that the anticipated fee is for processing only a portion of the request. When the Department has notified a requester of anticipated fees greater than $25, the Department does not further process the request until the requester agrees in writing to pay the anticipated total fee.

(d) *Charges for other services.* When the Department chooses as a matter of administrative discretion to provide a special service, such as certification of agency records, it charges the requester the direct cost of providing the service.

(e) *Charging interest.* The Department charges interest on any unpaid bill assessed at the rate provided in 31 U.S.C. 3717. In charging interest, the Department follows the provisions of the Debt Collection Act of 1982, as amended (Pub. L. 97–365, 96 Stat. 1749), and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(f) *Aggregating FOIA requests.* When the Department reasonably believes that a requester, or a group of requesters acting together, is attempting to divide a FOIA request into a series of FOIA requests for the purpose of avoiding or reducing otherwise applicable fees, the Department may aggregate such FOIA requests for the purpose of assessing fees. The Department does not aggregate multiple FOIA requests involving unrelated matters.

(g) *Advance payments.* (1) For FOIA requests other than those described in paragraphs (g)(2) and (g)(3) of this section, the Department does not require the requester to pay fees in advance.

(2) Where the Department estimates or determines that fees for processing a FOIA request will total more than $250, it may require the requester to pay the fees in advance, except where the Department receives a satisfactory assurance of full payment from a requester with a history of prompt payment of FOIA fees.

(3) The Department may require a requester who has previously failed to pay a properly assessed FOIA fee within 30 calendar days of the billing date to pay in advance the full amount of estimated or actual fees before it further processes a new or pending FOIA request from that requester.

(4) When the Department requires advance payment of estimated or assessed fees, it does not consider the FOIA request received and does not further process the FOIA request until payment is received.

(h) *Tolling.* When necessary for the Department to clarify issues regarding fee assessment with the FOIA requester, the time limit for responding to the FOIA request is tolled until the Department resolves such issues with the requester.

(i) *Other statutory requirements.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for producing particular types of agency records.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(4)(A), 20 U.S.C. 3474)

§ 5.33 Requirements for waiver or reduction of fees.

(a) The Department processes a FOIA request for agency records without charge or at a charge less than that established under § 5.32(a) when the Department determines that—

(1) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

(2) Disclosure of the information is not primarily in the commercial interest of the requester.

(b) To determine whether a FOIA request is eligible for waiver or reduction of fees pursuant to paragraph (a)(1) of this section, the Department considers the following factors:

(1) Whether the subject of the request specifically concerns identifiable operations or activities of the government.

(2) Whether the disclosable portions of the requested information will be meaningfully informative in relation to the subject matter of the request.

(3) The disclosure's contribution to public understanding of government operations, *i.e.*, the understanding of the public at large, as opposed to an individual or a narrow segment of interested persons (including whether the requester has expertise in the subject area of the FOIA request as well as the intention and demonstrated ability to disseminate the information to the public).

(4) The significance of the disclosure's contribution to public understanding of government operations or activities, *i.e.*, the public's understanding of the subject matter existing prior to the disclosure must be likely to be enhanced significantly by the disclosure.

(c) To determine whether a FOIA request is eligible for waiver or reduction of fees pursuant to paragraph (a)(2) of this section, the Department considers the following factors:

(1) The existence of the requester's commercial interest, *i.e.*, whether the requester has a commercial interest that would be furthered by the requested disclosure.

(2) If a commercial interest is identified, whether the commercial interest of the requester is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(d) When the fee waiver requirements are met only with respect to a portion of a FOIA request, the Department waives or reduces fees only for that portion of the request.

(e) A requester seeking a waiver or reduction of fees must submit evidence demonstrating that the FOIA request meets all the criteria listed in paragraphs (a) through (c) of this section.

(f) A requester must seek a fee waiver for each FOIA request for which a waiver is sought. The Department does not grant standing fee waivers but considers each fee waiver request independently on its merits.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(4)(A), 20 U.S.C. 3474)

Subpart E—Administrative Review

§ 5.40 Appeals of adverse determinations.

(a) *In general.* A requester may seek an administrative review of an adverse determination on the FOIA request made by the requester by submitting an

appeal of the determination to the Department. Adverse determinations include denials of access to agency records, in whole or in part; "no agency records" responses; and adverse fee decisions, including denials of requests for fee waivers, and all aspects of fee assessments.

(b) *Appeal requirements.* A requester must submit an appeal within 35 calendar days of the date on the adverse determination letter issued by the Department or, where the requester has received no determination, at any time after the due date for such determination. An appeal must be in writing and must include a detailed statement of all legal and factual bases for the appeal. The requester's failure to comply with time limits set forth in this section constitutes exhaustion of the requester's administrative remedies for the purposes of initiating judicial action to compel disclosure.

(c) *Determination on appeal.* (1) The Department makes a written determination on an administrative appeal within 20 working days after receiving the appeal. The time limit may be extended in accordance with § 5.21(c) through (e). The Department's failure to comply with time limits set forth in this section constitutes exhaustion of the requester's administrative remedies for the purposes of initiating judicial action to compel disclosure.

(2) The Department's determination on an appeal constitutes the Department's final action on the FOIA request. Any Department determination denying an appeal in whole or in part includes the reasons for the denial, including any exemptions asserted under the Act, and notice of the requester's right to seek judicial review of the determination in accordance with 5 U.S.C. 552(a)(4). Where the Department makes a determination to grant an appeal in whole or in part, it processes the FOIA request subject to the appeal in accordance with the determination on appeal.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(6), 20 U.S.C. 3474)

[FR Doc. E8–28174 Filed 11–25–08; 8:45 am]
BILLING CODE 4000–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AM82

Community Residential Care Program

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its Community Residential Care regulations to update the standards for VA approval of facilities, including standards that would be adopted for fire safety and heating and cooling systems. This rule would also establish a single 12-month duration for VA approvals and would authorize provisional approval of certain facilities. Finally, this rule would eliminate the VA statement of needed care requirement in current regulations and clarify that it is the care providers at the facility that determine the services needed by a particular veteran. VA intends that the proposed amendments would help ensure that veterans are provided appropriate care at facilities that receive VA referrals.

DATES: *Comment Date:* Comments on the proposed rule must be received on or before January 26, 2009.

ADDRESSES: Written comments may be submitted through *http://www.regulations.gov;* by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to "RIN 2900–AM82—Community Residential Care Program." Copies of comments received will be available for public inspection in the Office of Regulations Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Daniel Schoeps, Office of Geriatrics and Extended Care (114), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; (202) 461–6763. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: This document proposes to amend the Community Residential Care regulations (referred to below as the regulations), which are set forth at 38 CFR 17.61 through 17.72. The regulations implement 38 U.S.C. 1730.

Under the provisions of 38 U.S.C. 1730, VA health care personnel may assist a veteran by referring such veteran for placement in a privately or publicly-owned community residential care facility if:

- At the time of initiating the assistance, the veteran is receiving VA medical services on an outpatient basis or receiving care at a VA medical center, domiciliary, or nursing home; or such services or care were furnished to the veteran within the preceding 12 months;
- Placement of the veteran in a community residential care facility is appropriate; and
- The facility has been approved in accordance with the regulations.

This program has evolved through the years to encompass: Medical Foster Homes, Assisted Living facilities, Personal Care Homes, Family Care Homes, and Psychiatric Community Residential Care Homes. Care must consist of room, board, assistance with activities of daily living, and supervision as determined on an individual basis. The cost of residential care is financed by the veteran's own resources. Placement is made in residential settings inspected and approved by the appropriate VA facility, but chosen by the veteran.

Approval of Community Residential Care Facilities

As a condition of approval in the community residential care program, current 38 CFR 17.63 requires that a facility meet the requirements of chapters 1–7, 22–23, 31, and Appendix A of the National Fire Protection Association (NFPA) 101, NFPA's Life Safety Code (1994 edition), and NFPA 101A, Guide on Alternative Approaches to Life Safety (1995 edition). The Office of the Federal Register approved our incorporation by reference of the NFPA Code and Guide in current § 17.63 under 5 U.S.C. 552(a) and 1 CFR part 51. We propose to amend § 17.63 to require community residential care facilities seeking VA approval to meet the requirements of chapters 1–11, 32–33, and 43 and Appendix A of the NFPA 101, the NFPA's Life Safety Code (2006 edition), and NFPA 101A, Guide on Alternative Approaches to Life Safety (2007 edition). These changes reflect updates regarding the same subject matter that is currently incorporated by reference. This action is necessary to ensure that facilities meet current industry-wide standards regarding fire safety. We will request that the Office of the Federal Register approve our incorporation by reference of the updated NFPA Code and Guide in proposed § 17.63.

These materials for which we are seeking incorporation by reference are available for inspection at the Department of Veterans Affairs, Office

of Regulations Management (02REG), Room 1068, 810 Vermont Avenue, NW., Washington, DC 20420, 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*. Copies may be obtained from the National Fire Protection Association, Battery March Park, Quincy, MA 02269. (For ordering information, call toll-free 1–800–344–3555.)

As a condition of approval, current 38 CFR 17.63(a)(3), among other things, requires facilities to have safe and functioning systems for heating. We propose to amend § 17.63 to require facilities seeking VA approval to have safe and functioning systems for "heating and/or cooling, as needed." We also propose to add language indicating that, in the county, parish, or similar jurisdiction where the facility is located, a heating or cooling system is deemed to be needed if VA determines that a majority of community residential care facilities and other extended care facilities have one. We have determined that safe and functioning heating and cooling would be needed in some facilities to avoid extremes in temperature that might impair the care provided to veterans referred by VA. Some facilities may not need heating and other facilities may not need cooling to properly care for referred veterans. In any event, we believe that if a majority of the community residential care facilities and other extended care facilities in the county, parish, or other similar jurisdiction where the facility is located have a heating or cooling system, this would be a good indication that it is needed to avoid extremes in temperature and should be available to provide comfortable living conditions for approved facilities.

Current 38 CFR 17.63(b) and (i)(2)(i) prescribe preparation of a statement of needed care for each veteran referred by VA to a facility for community residential care and that the facility must maintain a copy of the statement and assist residents in obtaining the statement from VA. Current 38 CFR 17.62(b) defines *statement of needed care* as a "written description of needed assistance in daily living activities devised by VA." We propose to amend §§ 17.62 and 17.63 to remove all of the provisions concerning statements of needed care. These amendments are necessary to clarify that VA does not determine or control the care that is provided to a veteran in an approved facility under this program. Rather, it is the health care professionals employed by the facility and other facility officials that determine the care that is needed for a particular veteran.

Exceptions to Standards in Community Residential Care Facilities

Current 38 CFR 17.64 prescribes exceptions to standards in community residential care facilities. This section provides criteria for utilizing or obtaining a "grandfather" clause for continued approval of facilities that participated in VA's community residential care program prior to the effective date of the regulations in 1989. There are no facilities that currently qualify for these exceptions and there are no facilities that could qualify for an exception in the future. Accordingly, we propose to remove § 17.64 because it is no longer relevant for the community residential care program.

Duration of Approval

Under current 38 CFR 17.65, facility approvals may be valid for up to 24 months if all the standards in § 17.63 are met. It also provides that facility approvals may be valid for shorter periods (15 months, 12 months, and 9 months) when VA finds specific deficiencies. We propose to amend the approval provisions to prescribe only that facility approvals would be valid for 12 months if inspections and monitoring establish that all the standards in 38 CFR 17.63 are met. This will help to ensure that approvals are based on more current information and should not impose an additional burden on VA or on facilities since our practice has been to inspect each facility at least once in each 12-month period. We also propose to change the approval provisions to state that, based on the report of a VA inspection and on any findings of necessary interim monitoring of the facility, the approving official may provide a community residential care facility with a provisional approval if the facility does not meet one or more of the standards in 38 CFR 17.63, provided that the deficiencies do not jeopardize the health or safety of the residents and that the facility management and VA have agreed to a plan for correcting any deficiencies in a specified amount of time. Under the proposal, a provisional approval would not be for more than 12 months, and would not be for more time than VA determines is reasonable for correcting the specific deficiencies. The provisional approval would allow VA to continue recommending facilities with some temporary deficiencies when it is in the best interest of residents to do so.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This document contains no collections of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a "significant regulatory action," requiring review by OMB unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action planned or taken by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, economic, legal, and policy implications of this proposed rule have been examined and it has been determined to be a not significant regulatory action under Executive Order 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. In addition to having an effect on individuals (veterans), the proposed

rule would have an insignificant economic impact on a few small entities. The proposed rule would likely affect fewer than 100 of the 2,800 community residential care facilities approved for referral of veterans under the regulations. Also, the additional costs for compliance with the proposed rule would constitute an inconsequential amount of the operational costs of such facilities. Accordingly, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.005, Grants to States for Construction of State Home Facilities; 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.016, Veterans State Hospital Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Incorporation by reference, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Approved: September 19, 2008.

James B. Peake,

Secretary of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to amend 38 CFR part 17 as set forth below:

PART 17—MEDICAL

1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, 1721, and as stated in specific sections.

§ 17.62 [Amended]

2. Amend § 17.62 by removing paragraph (b) and redesignating paragraphs (c) through (g) as paragraphs (b) through (f), respectively.

3. Amend § 17.63 by:

a. In paragraph (a)(2), removing "Office of Regulations Management (02D). Room 1154," and adding, in its place, "Office of Regulation Policy and Management (02REG), Room 1068," and by revising the first sentence.

b. Revising paragraph (a)(3).

c. Removing and reserving paragraph (b).

d. In paragraph (g), removing "specified in the statement of needed care".

e. In paragraph (i), removing paragraph (i)(2)(i) and redesignating paragraphs (i)(2)(ii) and (i)(2)(iii) as paragraphs (i)(2)(i) and (i)(2)(ii), respectively.

The revisions read as follows:

§ 17.63 Approval of community residential care facilities.

* * * * *

(a) * * *

(2) Meet the requirements of chapters 1–11, 32–33, and 43 and Appendix A of the NFPA 101, the National Fire Protection Association's Life Safety Code (2006 edition), and NFPA 101A, Guide on Alternative Approaches to Life Safety (2007 edition). * * *

(3) Have safe and functioning systems for heating and/or cooling, as needed (a heating or cooling system is deemed to be needed if VA determines that, in the county, parish, or similar jurisdiction where the facility is located, a majority of community residential care facilities or other extended care facilities have one), hot and cold water, electricity, plumbing, sewage, cooking, laundry, artificial and natural light, and ventilation.

* * * * *

§ 17.64 [Removed]

4. Remove and reserve § 17.64.

5. Revise § 17.65 to read as follows:

§ 17.65 Approvals and provisional approvals of community residential care facilities.

(a) An approval of a facility meeting all of the standards in 38 CFR 17.63 based on the report of a VA inspection and any findings of necessary interim monitoring of the facility shall be for a 12-month period.

(b) The approving official, based on the report of a VA inspection and on any findings of necessary interim monitoring of the facility, may provide a community residential care facility with a provisional approval if that facility does not meet one or more of the standards in 38 CFR 17.63, provided that the deficiencies do not jeopardize the health or safety of the residents, and that the facility management and VA agree to a plan of correcting the deficiencies in a specified amount of time. A provisional approval shall not be for more than 12 months and shall not be for more time than VA determines is reasonable for correcting the specific deficiencies.

(c) An approval may be changed to a provisional approval or terminated under the provisions of §§ 17.66 through 17.71 because of a subsequent failure to meet the standards of § 17.63 and a provisional approval may be terminated under the provisions of §§ 17.66 through 17.71 based on failure to meet the plan of correction or failure otherwise to meet the standards of § 17.63.

(Authority: 38 U.S.C. 1730.)

[FR Doc. E8–28122 Filed 11–25–08; 8:45 am]
BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2007–0209; FRL–8745–5]

Approval and Promulgation of Implementation Plans; Texas; Revisions to Chapters 39, 55, and 116 Which Relate to Public Participation on Permits for New and Modified Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing simultaneous limited approval and limited disapproval of revisions to the applicable implementation plan for the State of Texas which relate to public participation on air permits for new and modified sources. With noted exceptions, this proposed limited approval and limited disapproval affects portions of SIP revisions submitted by Texas on December 15, 1995; July 22, 1998; and the SIP revisions submitted October 25, 1999. EPA is taking comments on this proposal and plans to follow with a final action.

DATES: Any comments must arrive by January 26, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R06–OAR–2007–0209, by one of the following methods:

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

• *U.S. EPA Region 6 "Contact Us" Web site: http://epa.gov/region6/r6coment.htm.* Please click on "6PD" (Multimedia) and select "Air" before submitting comments.

• *E-mail:* Mr. Stanley M. Spruiell at *spruiell.stanley@epa.gov.*

• *Fax:* Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), at fax number 214–665–7263.

• *Mail:* Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.

• *Hand or Courier Delivery:* Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R06–OAR–2007–0209. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittals are also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–7212; fax number 214–665–7263; e-mail address *spruiell.stanley@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, the following terms have the meanings described below:

• "We," "us," and "our" refer to EPA.

• "NSR" means new source review.

• "PSD" means prevention of significant deterioration of air quality, as established under 40 CFR 51.166.

• "NNSR" means nonattainment area new source review.

• "Act" and "CAA" mean the Clean Air Act.

• "SIP" means State Implementation Plan.

• "TSD" means Technical Support Document for this action.

• "PAL" means Plantwide Applicability Limitation, as established under 40 CFR 51.165(f) or 51.166(w).

• "NAAQS" means National Ambient Air Quality Standards, as established under 40 CFR part 50.

Table of Contents

I. What regulations did Texas submit for inclusion into the SIP?

On October 25, 1999, Texas submitted revisions to Chapters 39, 55, and 116 which include rules that relate to public participation on air permits for authorization of new and modified sources, including amendments and renewals. In addition, portions of the submittals dated December 15, 1995, and July 22, 1998, contain provisions relevant to this action. Hereafter, we refer to these submittals as the "revised rules." These SIP packages include the following rules:

A. The December 15, 1995, submittal includes Texas' submittal of section 116.312—Public Notification and Comment Procedures. Section II.A of this preamble contains additional information on the December 15, 1995, submittal.

B. The July 22, 1998, submittal includes Texas' submittal of repeal and readoption (with nonsubstantive revisions) of section 116.312—Public Notification and Comment Procedures. Section II.A of this preamble contains additional information on the July 22, 1998, submittal.

C. The October 25, 1999, submittal includes the following revisions related to this action. Section II.A of this preamble contains additional information on the October 25, 1999, submittal.

• New rules affecting Chapter 39—Public Notice [1]—are as follows: Section 39.201—Application for a Preconstruction Permit; section 39.401—Purpose; section 39.403—Applicability; section 39.405—General Notice Provisions; section 39.409—Deadline for Public Comment, Requests for Reconsideration, contested Case Hearing, or Notice and Comment Hearing; section 39.411—Text of Public Notice; section 39.413—Mailed Notice; section 39.418—Notice of Receipt of Application and Intent to Obtain Permit;

[1] Texas submitted subsequent revisions to Chapter 39 on July 31, 2002; and March 9, 2006. These changes are parts of separate SIP revisions which are currently under review. EPA will address these changes to Chapter 39 in separate actions.

section 39.419—Notice of Application and Preliminary Determination; section 39.420—Transmittal of the Executive Director's Response to Comments and Decision; section 39.423—Notice of Contested Case Hearing; section 39.601—Applicability; section 39.602—Mailed Notice; section 39.603—Newspaper Notice; section 39.604—Sign-Posting; and section 39.605—Notice to Affected Agencies.

• New rules affecting Chapter 55—Requests for Reconsideration and Contested Case Hearing—are as follows: Section 55.1—Applicability; section 55.21—Requests for Contested Case Hearing, Public Comment; section 55.101—Applicability; section 55.103—Definitions; section 55.150—Applicability; section 55.152—Public Comment Period; section 55.154—Public Meetings; section 55.156—Public Comment Processing; section 55.200—Applicability; section 55.201—Requests for Reconsideration and Contested Case Hearing; section 55.203—Determination of Affected Person; section 55.205—Request by Group or Association; section 55.209—Processing Requests for Reconsideration or Contested Case Hearing; and section 55.211—Commission Action or Requests for Reconsideration and Contested Case Hearing.

• Rules revisions affecting Chapter 116—Control of Air Pollution by Permits for New Construction and Modification are—as follows: Section 116.111—General Application; section 116.114—Application Review Schedule; section 116.116—Changes to Facilities; section 116.183—Public Notice Requirements; section 116.312—Public Notification and Comment Procedures; and section 116.740—Public Notice.

• Texas submitted repeal of the following regulation: section 116.124—Public Notice of Compliance History.

The existing SIP-approved regulations which relate to public participation for air quality permits are as follows: Sections 116.130—Applicability; 116.131—Public Notification Requirements; 116.132—Public Notice Format; 116.133—Sign Posting Requirements; 116.134—Notification of Affected Agencies; 116.136—Public Comment Procedures; and 116.137—Notification of Final Agency Action. These regulations will now apply to air quality permits declared administratively complete before September 1, 1999. EPA proposes to add a notation, in addition to the applicability statement at section 39.403 of the revised rule, to this effect to the existing SIP. In addition, section 116.312—Public Notification and Comment Procedures, which applies to permit renewals, was amended to replace cross references to the public notification procedures in sections 116.130 through 116.137 with a cross reference to applicable procedure in Chapter 39.

The revised rules will replace the existing SIP rules for public participation for air quality permits declared administratively complete on or after September 1, 1999. The Texas public participation procedures were previously located in the subchapter of the SIP applicable to each type of permitting action. Chapter 39 of the Texas Administrative Code (TAC) consolidates public participation requirements for most air quality permitting actions (as well as permits issued under other environmental statutes). Applicability of the rules in Chapter 39 to different types of air permits is determined by the general applicability statement in subchapter H. Additional requirements that are specific to air quality permits are found in subchapter K. Section 39.403(b) lists the types of air quality permits subject to the public participation requirements in Chapter 39:

• Air quality permits under Texas Health and Safety Code (THSC), Section 382.0518 (preconstruction permit) and Section 382.055 (review and renewal of preconstruction permit).[2] See section 39.403(8).

• Applications for permit amendments to air quality permits under Section 116.116(b) (changes to facilities) that involve construction of a new facility; modification of an existing facility (as defined in Section 116.10)[3] that results in an increase in allowable emissions equal to or greater than 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO_X); or 25 tpy of volatile organic compounds (VOC) or sulfur dioxide (SO_2) or inhalable particulate matter (PM_{10}); or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen; or other changes within the discretion of the Executive Director.[4] See section 39.403(8).

• Initial issuance of flexible permits under Chapter 116, Subchapter G, and amendments to flexible permits under Sections 116.710(a)(2) and (3) that involve construction of a new facility, modification of an existing facility that results in an increase in allowable emissions equal to or greater than 250 tpy of CO or NO_X; or 25 tpy of VOC or SO_2 or PM_{10}; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen or other changes within the discretion of the Executive Director.[5] See section 39.403(8).

• Applications for construction or reconstruction subject to Chapter 116, Subchapter C for hazardous air pollutants.[6] See section 39.403(9).

• Concrete batch plants under Chapter 106 unless the facility is to be temporarily located in or contiguous to the right of way of a public works project. See section 39.403(10).[7]

• The Chapter 39 requirements also apply to PALs through a cross-reference at section 116.194.

II. What are we proposing?

A. Our Proposal

We have evaluated the revised rules for enforceability and consistency with the CAA, 40 CFR Part 51, and EPA policy and guidance. We have determined that the revised rules contain some provisions that meet or exceed federal requirements. We have also determined that some provisions are not consistent with federal requirements and therefore, are not fully approvable. The deficient provisions of the revised rule are not separable from the remainder of the rule. As authorized in sections 110(k)(3) and 301(a) of the Act, we are proposing simultaneous limited approval and limited disapproval of the revised rules. We are proposing limited approval because the rules, as a whole, strengthen the existing SIP and facilitate enforcement of the State's public participation requirements. We are simultaneously proposing limited disapproval because the provisions identified in section IV of

[2] Section 382.0518 and section 382.055 of the THSC currently apply to permit applications, modifications and renewals under Chapter 116 of the Texas SIP for minor and major new source review permits.

[3] Note that EPA has not acted on the definition of "modification of an existing facility" at section 116.10 and so it is not currently part of the approved SIP.

[4] Section 39.403(b)(8) refers to emission quantities defined in section 106.4(a)(1) of this title (relating to Requirements for Permitting by Rule) for sources defined in sections 106.4(a)(2) and (3). The defined emission quantities in Section 106.4 are emissions equal to or greater than 250 tpy of CO or NO_X; or 25 tpy of VOC or SO_2 or PM_{10}; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

[5] Note that this provision also refers to the emission quantities defined in Section 106.4 of the SIP.

[6] The provisions of Subchapter C were later recodified into Subchapter E in a separate SIP submittal. We will address this recodification in a separate action. Also see section VII.A of this document for further discussion on the provision for hazardous air pollutants.

[7] See discussion in section VI.G of this preamble for further information on public notice for concrete batch plants.

this preamble are not consistent with applicable federal requirements. Final limited approval will incorporate the revised rule in its entirety into the Texas SIP. We are not acting on the provisions of the submittal discussed in section VII of this notice. Note that some of the public participation rules we are considering today apply to other rules that have not yet been approved into the SIP. For example, we have not proposed action on Texas' NSR PAL, flexible permit, qualified facility or NSR reform rules, however some of the rules we are considering today are applicable to them. These other rules will be reviewed in separate actions. Our action on any provision of this rule which refers to or implements a provision that EPA has not approved does not imply EPA proposed action on the pending rule. The Chapter 39 revised rules consolidate public participation requirements applicable to the pending rules. Final action on the revised rule will facilitate review of the pending rules.[8]

Except where noted below, EPA proposes limited approval and limited disapproval (LALD) of the following regulations:

State citation	Title	Current SIP status	State submittal dates	Type of SIP revision	Proposed action
Chapter 39—Public Notice					
Subchapter D—Public Notice of Air Quality Permits					
Section 39.201	Application for a Preconstruction Permit.	Not in existing SIP	10/25/99	New rule	LALD.
Subchapter H—Applicability and General Provisions					
Section 39.401	Purpose	Not in existing SIP	10/25/99	New rule	LALD.
Section 39.403	Applicability	Not in existing SIP	10/25/99	New rule State did not submit paragraphs (b)(1) through (b)(7). No action on paragraph (b)(9). See section VII.	LALD. The SIP will not include paragraphs (b)(1) through (b)(7) and (b)(9).
Section 39.405	General Notice Provisions.	Not in existing SIP	10/25/99	New rule. State did not submit subsections (a) through (e) and paragraph (f)(2).	LALD. The SIP will not include subsections (a) through (e) and paragraph (f)(2).
Section 39.409	Deadline for Public Comment, Requests for Reconsideration, Contested Case Hearing, or Notice of Comment Hearing.	Not in existing SIP	10/25/99	New rule	LALD.
Section 39.411	Text of Public Notice	Not in existing SIP	10/25/99	New rule. State did not submit paragraph (b)(7). No action on paragraphs (b)(11), (b)(13), (b)(14), and (c)(7). See section VII.	LALD. The SIP will not include paragraphs (b)(7), (b)(11), (b)(13), (b)(14), and (c)(7).
Section 39.413	Mailed Notice	Not in existing SIP	10/25/99	New rule. State did not submit paragraphs (1) through (8), (10), and (13).	LALD. The SIP will not include paragraphs (1) through (8), (10), and (13).
Section 39.418	Notice of Receipt of Application and Intent to Obtain Permit.	Not in existing SIP	10/25/99	New rule. State did not submit paragraphs (b)(1) through (b)(2).	LALD. The SIP will not include paragraphs (b)(1) through (b)(2).
Section 39.419	Notice of Application and Preliminary Determination.	Not in existing SIP	10/25/99	New rule. State did not submit subsection (c).	LALD. The SIP will not include subsection (c).
Section 39.420	Transmittal of Executive Director's Response to Comments and Decision.	Not in existing SIP	10/25/99	New rule. State did not submit paragraph (c)(2) and subsection (e).	LALD. The SIP will not include paragraph (c)(2) and subsection (e).
Section 39.423	Notice of Contested Case Hearing.	Not in existing SIP	10/25/99	New rule	LALD.
Subpart K—Public Notice for Air Quality Permits					
Section 39.601	Applicability	Not in existing SIP	10/25/99	New rule	LALD.
Section 39.602	Mailed Notice	Not in existing SIP	10/25/99	New rule	LALD.
Section 39.603	Newspaper Notice	Not in existing SIP	10/25/99	New rule	LALD.

[8] See letter in the docket for this action from Glenn Shankle, Executive Director of TCEQ, to Larry Starfield, Deputy Regional Administrator for EPA Region 6, dated June 13, 2008, noting that action on TCEQ's public participation rule was necessary to resolve issues in another pending SIP submission.

State citation	Title	Current SIP status	State submittal dates	Type of SIP revision	Proposed action
Section 39.604	Sign-Posting	Not in existing SIP	10/25/99	New rule	LALD.
Section 39.605	Notice to Affected Agencies.	Not in existing SIP	10/25/99	New rule	LALD.
Chapter 55—Requests for Reconsideration and Contested Case Hearing Subchapter A—Applicability					
Section 55.1	Applicability	Not in existing SIP	10/25/99	New rule	No action. See section VII.
Subchapter B—Requests, Public Comment					
Section 55.21	Requests for Contested Case Hearing, Public Comment.	Not in existing SIP	10/25/99	New rule	No action. See section VII.
Subchapter D—Applicability and Definitions					
Section 55.101	Applicability	Not in existing SIP	10/25/99	New rule	No action. See section VII.
Section 55.103	Definitions	Not in existing SIP	10/25/99	New rule	No action. See section VII.
Subchapter E—Public Comment and Public Meetings					
Section 55.150	Applicability	Not in existing SIP	10/25/99	New rule	LALD.
Section 55.152	Public Comment Period.	Not in existing SIP	10/25/99	New rule. State did not submit paragraphs (a)(3) through (a)(5).	LALD. The SIP will not include paragraphs (a)(3) through (a)(5).
Section 55.154	Public Meetings	Not in existing SIP	10/25/99	New rule	LALD.
Section 55.156	Public Comment Processing.	Not in existing SIP	10/25/99	New rule	LALD.
Subchapter F—Requests for Reconsideration and Contested Case Hearing; Public Comment					
Section 55.200	Applicability	Not in existing SIP	10/25/99	New rule	No action. See section VII.
Section 55.201	Requests for Reconsideration and Contested Case Hearing.	Not in existing SIP	10/25/99	New rule	No action. See section VII.
Section 55.203	Determination of Affected Person.	Not in existing SIP	10/25/99	New rule	No action. See section VII.
Section 55.205	Request by Group or Association.	Not in existing SIP	10/25/99	New rule	No action. See section VII.
Section 55.209	Processing Requests for Reconsideration or Contested Case Hearing.	Not in existing SIP	10/25/99	New rule	No action. See section VII.
Section 55.211	Commission Action on Requests for Reconsideration and Contested Case Hearing.	Not in existing SIP	10/25/99	New rule	No action. See section VII.
Chapter 116—Control of Air Pollution by Permits for New Construction or Modification Subchapter B—New Source Review Permits Division 1—Permit Application					
Section 116.111	General Application	In existing SIP as approved 8/28/07, 72 FR 41998. The existing SIP does not include paragraph (a)(2)(K) and subsection (b).	10/25/99	Redesignated pre-existing text as subsection (a). This change was approved 9/6/06, 71 FR 52664. Added new subsection (b).	LALD to add new subsection (b). The SIP will not include paragraph (a)(2)(K).
Section 116.114	Application Review Schedule.	In existing SIP as approved 9/18/02, 67 FR 58709.	10/25/99	Revision to paragraphs (a)(2), (b)(1), and (b)(2); and the addition of new subsection (c).	LALD for all submitted SIP revisions.

State citation	Title	Current SIP status	State submittal dates	Type of SIP revision	Proposed action
Section 116.116	Changes to Facilities ..	In existing SIP as approved 11/14/03, 68 FR 64548. The existing SIP does not include sections 116.116(b)(3), (b)(4), (e), and (f).	10/25/99	Revised subsection (d) and paragraphs (d)(1) and (d)(2). This change was approved 11/14/03, 68 FR 64548. Added new paragraph (b)(4).	LALD for addition of paragraph (b)(4). The SIP will not include paragraph (b)(3) and subsections (e) through (f).
Division 2—Compliance History					
Section 116.124	Public Notice of Compliance History Section.	In existing SIP as approved 9/18/02, 67 FR 58709.	10/25/99	Section repealed	Removal of section 116.124 from the SIP.
Subchapter C—Hazardous Air Pollutants: Regulations Governing Constructed and Reconstructed Sources (FCAA, §112(g), 40 CFR Part 63)					
Section 116.183	Public Notice Requirements.	Not in existing SIP	7/22/98	EPA took no action on section 116.183 as submitted 7/22/98. See 67 FR 58699 (9/18/02).	No action on revision to section 116.183 as submitted 10/25/99. See section VII.
			10/25/99	Revision to change cross reference from sections 116.130 through 116.137 to applicable provisions in Chapter 39.	
Subchapter D—Permit Renewals					
Section 116.312	Public Notification and Comment Procedures.	In existing SIP as approved 3/10/06, 71 FR 12285.	12/15/95 and 7/22/98	7/22/98 submittal repealed and revised pre-existing section. Changes were non-substantive housekeeping changes to include cross references to current rule.	LALD for changes submitted 12/15/95, 7/22/98, and 10/25/99.
			10/25/99	Revised to change cross reference from Chapter 116 to Chapter 39.	
Subchapter G—Flexible Permits					
Section 116.740	Public Notice	Not in existing SIP	10/25/99	Revised to change cross reference from Chapter 116 to Chapter 39.	No action. See section VII.

B. What is limited approval and limited disapproval?

Under section 110(k)(3) of the CAA, EPA may fully approve or fully disapprove a State submittal. Where portions of the State submittal are separable, EPA may approve the portions of the submittal that meet the requirements of the CAA, and disapprove the portions of the submittal that do not meet the requirements of the CAA. When a submittal is not separable, EPA can adopt a limited approval and limited disapproval consistent with section 301(a) and 110(k)(3) of the Act.

A limited approval action applies to the entire rule because EPA finds that approval of the entire rule will strengthen the State's SIP. In proposing a limited approval, EPA simultaneously proposes a limited disapproval of the submittal because it contains deficiencies and, as such, does not fully meet all of the requirements of the Act. Under a final limited approval, the State's entire submittal is incorporated into the SIP and becomes fully federally enforceable. Where the submittal addresses a mandatory requirement of the Act, final limited disapproval starts a sanctions clock and a federal implementation plan (FIP) clock. Under section 179(a), if EPA disapproves a submittal of a requirement under the CAA, based on the submittal's failure to meet one or more of the elements required by the Act, the sanctions set forth in section 179(b) become applicable, unless the deficiency has been corrected within 18 months of disapproval. Section 179(b) of the Act and 40 CFR 52.31 of our regulations provide two sanctions available to the Agency: increasing the offset requirements and withholding highway funding. Moreover, the final limited disapproval may trigger a 24-month

clock to adopt a FIP requirement under section 110(c). If the State submits an approvable rule revision during the sanction clock period, EPA may propose approval of the rule and take interim final action, effective upon publication, to stay the sanctions. Final approval of the rule revision correcting the deficiency terminates the FIP clock.

III. How do the revised rules strengthen the existing SIP?

The SIP revisions submitted on December 15, 1995; July 22, 1998; and October 25, 1999, as a whole, strengthen the SIP compared to the corresponding provisions in the existing SIP. Below is a summary of some revisions that strengthen the SIP. The TSD includes detailed analyses of how the SIP is strengthened.

- The general requirement for publishing notice in section 116.130(a) was changed by section 39.418 to provide a uniform time for publication of the notice of the application (within 30 days of determination of administrative completeness).
- Previously, permit amendments were subject to notice at the discretion of the Executive Director of TCEQ, without specific criteria included in the rule (section 116.130(a)). This provision was removed, thus requiring notice of amendment applications (section 39.403(b)(8)).
- Previously, a copy of the application was required to be available for public inspection in Austin, TX, and the appropriate regional offices of the TCEQ (sections 116.131(b) and 116.132(7)). The revised rules also require a copy of the notice to be placed in a public place, available for inspection and copying, in the municipality in or nearest to the location of the facility that is the subject of the application. See section 39.405.
- The revised rules add the opportunity to request a public meeting and allow the Executive Director to determine whether significant public interest exists to hold a public meeting. If held, a written response is provided to oral comments made together with any timely written comments. In addition, this response to comments (RTC) is considered by the Commission if it considers any contested case hearing requests in a Commission Meeting. The RTC is provided to all commenters and persons who request to be on a mailing list related to the application. See sections 39.420, 55.152, 55.154, and 55.156.
- Notice of preliminary decision and draft permit was extended from applying only to NNSR and PSD permits (see section 116.132(a)(6)) to any minor permit or permit amendment for which a contested case hearing is requested by an affected person in response to the Notice of Receipt of Application and Intent to Obtain a Permit. See section 39.419.
- Note also that the Texas rule contains some provisions that exceed federal requirements, such as sign posting (section 39.604), a "display type" newspaper notice (section 39.603(c)(2)), and alternate language notice in newspaper and sign posting (sections 39.405(h) and 39.604(e)).

IV. What are the rule deficiencies?

Notwithstanding the fact that these rules strengthen the existing SIP, they do not meet all of the minimum applicable federal requirements that relate to public participation. Each notation below is discussed in detail in Section V.

A. New or Modified Minor NSR Sources

Generally, the minor NSR public participation rules identified below do not require *any* initial public participation for some permitting actions or do not require the TCEQ to provide the agency's air quality analysis and proposal to approve or disapprove the permit in other permitting actions.

- Under section 39.419(e), for new or modified minor NSR sources or minor modifications at major sources, the rules do not require public notice and the opportunity for comment on the State's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval, as required by 40 CFR 51.161(a) and (b), unless a contested case hearing is requested and not withdrawn after notice of application and intent to obtain a permit is published.
- Under section 39.403(b)(8), for a minor NSR permit amendment or minor modification under section 116.116(b), (where there is a change in the method of control of emissions; a change in the character of the emissions; or an increase in the emission rate of any air contaminant) the existing SIP requires the permit holder to apply for and receive approval of a permit amendment. However, the revised rules do not require *any* public participation as required by 40 CFR 51.161(a) and (b) unless the change involves construction of a new facility or modification of an existing facility that results in an increase in allowable emissions equal to or greater than 250 tpy of CO or NO_X; or 25 tpy of VOC or SO_2 or PM_{10}; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen or other changes within the discretion of the Executive Director.
- Under section 39.419(e)(1)(C), for any amendment, modification, or renewal of a major or minor source which requires a permit application, the rules do not require public notice and the opportunity for comment on the State's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval, as required by 40 CFR 51.161(a) and (b), if the amendment, modification, or renewal would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted unless the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.
- Also, section 39.403(b)(8), Applicability, of the revised rule refers to two State statutory provisions, THSC section 382.0518 (preconstruction permit) and section 382.055 (review and renewal of preconstruction permit). For clarity and for approvability into the SIP, section 39.403(b) should be revised to refer to the corresponding sections of the Texas SIP.

B. Projects Subject to PSD

The revised rules do not contain the following requirements for projects subject to the regulations for PSD:

- For a new or modified source subject to PSD, the revised rules do not require the TCEQ to provide an opportunity for a public hearing for interested persons to appear and submit written or oral comment on the air quality impact of the source, alternatives to it, the control technology required, and appropriate considerations and to provide notice of the opportunity for a public hearing, as required by 40 CFR 51.166(q)(v) and section 165(a)(2) of the Act.
- For a new or modified source subject to PSD, the revised rules do not require that the public notice of a PSD permit contain the degree of increment consumption that is expected from the source or modification as required by 40 CFR 51.166(q)(iii) and CAA section 165(a)(2).
- For a new or modified source subject to PSD, the revised rules do not require a copy of the public notice of a PSD permit to be sent to State and local air pollution control agencies, the chief

executives of the city and county where the source would be located and any State or Federal Land Manager or Indian Governing Body whose lands may be affected by emissions from the source or modification, as required by 40 CFR 51.166(q)(iv).

- For a new or modified source subject to PSD, the rules do not require that response to comments be available prior to final action on the PSD permit, as required by 40 CFR 51.166(q)(vi) and (viii).
- For a new or modified source subject to PSD, the revised rules do not contain a definition of a final appealable decision for a PSD permit. We request further information about how and when commenters are informed of the Agency's final decision, access to response to comments and timing for judicial appeal, in order to provide an opportunity for State court judicial review.

C. Project for a PAL

The revised rules do not meet the following provisions for PALs:

- For PALs for existing major stationary sources, there is no provision that PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11).
- For PALs for existing major stationary sources, there is no requirement that the State address all material comments before taking final action on the permit, consistent with 40 CFR 51.165(f)(5) and 51.166(w)(5).
- The applicability provision in section 39.403 does not include PALs, despite the cross-reference to Chapter 39 in Section 116.194.

D. Project for a Flexible Permit

The rules do not meet the following provisions for Flexible Permits:

- For initial issuance of a flexible permit to establish a minor NSR applicability cap or an increase in a flexible permit cap, the rules do not require 30-day notice and comment on information submitted by the owner or operator and the agency's analysis of the effect of the permit on ambient air quality, including the agency's proposed approval or disapproval as required by 40 CFR 51.161.
- Where PSD and NNSR terms and conditions are modified or eliminated when the permit is incorporated into a flexible permit, the rules do not require public participation consistent with 40 CFR 51.161 and 51.166(q).

V. Do Texas's public participation rules meet federal requirements?

A. Minor NSR Regulatory Requirements

1. What public participation requirements for minor NSR programs are necessary for approval of the SIP revision?

The CAA at section 110(a)(2)(C) requires states to include a minor NSR program in their SIP to regulate modifications and new construction of stationary sources within the area as necessary to assure the national ambient air quality standards (NAAQS) are achieved. EPA's implementing regulations at 40 CFR 51.160–51.164 are intended to ensure that new source growth is consistent with maintenance of the NAAQS. 40 CFR 51.160(e) requires states to identify types and sizes of facilities which will be subject to review under their minor NSR program. For sources identified under § 51.160(e), § 51.160(a) requires that the SIP include legally enforceable procedures that enable the State or local agency to determine whether construction or modification of a facility, building, structure or installation, or combination of these will result in a violation of applicable portions of the control strategy; or interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

Sources subject to the legally enforceable procedures under 40 CFR 51.160(a) are also subject to the minimum public participation requirements at 40 CFR 51.161, entitled Public Availability of Information. In particular, 40 CFR 51.161(a) requires a State to provide the opportunity for public comments on information submitted by owners and operators. 40 CFR 51.161(a) also requires the public information to include the agency's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval. 40 CFR 51.161(b) requires that the State ensure availability of the information submitted by the owner or operator and the State's analysis of the effect on air quality for public inspection in at least one location in the affected area, that the State provide a 30-day public comment period on that information and that notice of the public comment period should be by prominent advertisement in the area affected.

The minor NSR program is also important as a tool to implement changes related to major NSR, such as to adopt enforceable limitations on hours of operation and rates of production or the installation of pollution control equipment to limit potential to emit (PTE) to avoid major source applicability thresholds of NSR or title V permitting requirements. The minor NSR program also authorizes minor modifications at major sources, including netting demonstrations required by the PSD and NNSR major source program, or to establish a PAL to determine PSD or NNSR applicability.

EPA recognizes that, under the applicable Federal regulations, states have broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the NAAQS. The State has significant discretion to tailor minor NSR requirements that are consistent with the requirements of Part 51. The State may also provide a rationale for why the rules are at least as stringent as the Part 51 requirements where the revisions are different from Part 51. For further information, see recent SIP actions in other States concerning minor NSR approvals and disapprovals, such as 68 FR 2891 (January 22, 2003), where EPA approved Oregon's minor NSR program establishing categories of minor NSR permit actions. However, EPA disapproved or gave less than full approval to minor NSR public participation requirements that provided a blanket exemption from one or more public notice requirements of Part 51 to all minor NSR permitting actions. See 65 FR 2042 (January 13, 2000), disapproval of West Virginia minor NSR provisions providing 15-day public comment period for certain minor NSR permitting actions or 65 FR 2048 (January 13, 2000), limited approval of Delaware minor NSR public participation requirements because it strengthened the SIP, but limited disapproval of the rule due to less than 30-day comment period. See also the proposed approval of Review of New Sources and Modifications in Indian Country at 71 FR 48696 (August 21, 2006) and 72 FR 45378 (August 14, 2007). approval of Alaska minor NSR public participation provisions.

2. What are the Texas minor NSR program public participation requirements?

In general, the revised rules provide for two types of public notice and comment processes. These two public notices are Notice of Application and Intent to Obtain a Permit under section 39.418 (first notice) and Notice of

Application and Preliminary Decision (second notice) under section 39.419 and subchapter K. The first notice requires the permittee to publish notice of the permit application and provide a copy of the administratively complete application in the public record available for public comment. An administratively complete application may, but is not required to, contain the applicant's information on the air quality impacts from the facility. Under Section 39.419(e)(1)(B), no further notice is required for minor NSR permits unless a contested case hearing is requested and not withdrawn before the second notice is published. Under section 55.21, a contested case hearing may be requested by: (1) The Commission; (2) the Executive Director; (3) the applicant; (4) affected persons, when authorized by law; and (5) for applications for air quality permits, or standard exemptions required to provide public notice, a legislator from the general area of the proposed facility. The request must identify the person's personal justiciable interest affected by the application, including the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public. Requirements for a group or association to request a contested case hearing are found in section 55.23.[9] A contested case hearing is an evidentiary hearing before an administrative law judge at the State Office of Administrative Hearings (SOAH). If a contested case hearing is requested, the permittee must publish notice of the opportunity to comment on the complete application and the State's analysis of air quality impacts and the State's proposal to approve or disapprove the permit.

Section 39.418 of the revised rule requires the applicant for a minor NSR permit new source or modification, amendments or renewal under Chapter 116 to publish Notice of Receipt of Application and Intent to Obtain Permit (first notice) within 30 days after the Executive Director determines the application to be administratively complete. (The rule does not provide a definition of administrative completeness.) Under sections 55.152(a)(1) and (2), 39.405(f)(1), and 39.603, the notice of 30-day public comment period (15 days for renewals) must be published in a newspaper of general circulation in the municipality in which the facility is located or is proposed to be located or in the municipality nearest to the location or proposed location of the facility and State the end date of the public comment period. Section 39.405(e) requires the applicant to provide a copy of the notice to the TCEQ within 10 business days from the last date of publication. The applicant must also post a sign at the site of the existing or proposed facility declaring the filing of an application for a permit under section 39.604. The TCEQ is required to mail a copy of the notice to the State senator and representative who represent the area in which the facility is or will be located, the applicant, persons on a relevant mailing list, and any other person the Executive Director or Chief Clerk may elect to include under sections 39.413 and 39.602. The applicant is required to mail a copy of the notice to EPA, all local air pollution control agencies with jurisdiction in the county in which the construction is to occur, and the air pollution control agency of any nearby State in which air quality may be adversely affected by the emissions from the new or modified facility under section 39.605. The applicant is also required to make a copy of the application available for review and copying at a public place in the county in which the facility is located or proposed to be located. The applicant must indicate when confidential business information is excluded from the public file. See section 39.405(g). The public record available during the comment period includes the administratively complete permit application and any other documents submitted by the applicant, as required by section 39.405(g).

If a contested case hearing is requested by persons identified in section 55.21 or 55.23 in response to the Notice of Receipt of Application and Intent to Obtain Permit, and the request is not withdrawn before the date the preliminary decision is issued, section 39.419 requires the applicant to publish Notice of Application and Preliminary Decision (second notice) of issuance or modification of a minor NSR action and provide a 30-day notice and comment period on the public record, which includes the draft permit and the State's analysis of its preliminary decision to approve or disapprove the permit.

For minor and major sources authorized under section 116.116(b) of the approved SIP, a permittee must apply for and receive a prior permit amendment which authorizes a permittee to vary from terms of a permit if the change involves a change in the method of control of emissions, a change in the character of the emissions, or an increase in the emission rate of any air contaminant. Section 39.403(b)(8) requires public notice and the opportunity for comment only if the permit amendment involves construction of a new facility or modification of an existing facility that results in an increase in *allowable* emissions equal to or greater than 250 tpy of CO or NO_X; or 25 tpy of VOC or SO_2 or PM_{10}; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen or other changes within the discretion of the Executive Director. Therefore, permit amendments authorized under section 116.116(b) are not subject to any public participation requirements unless the amendment involved an emission increase of allowable emission above the thresholds in section 39.403(b)(8).

Under section 39.419(e)(1)(C), any amendment, modification, or renewal for a major or minor source that requires a permit application and would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted, is not required to provide second notice (which includes public notice and the opportunity for comment on the State's second notice which includes analysis of the effect of construction or modification on ambient air quality and includes the agency's proposed approval or disapproval) unless the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations. Therefore, amendments, modifications or renewals for minor or major sources are not required to provide an air quality analysis or the State's proposal to approve or disapprove the permit unless there was an increase in allowable emissions or the release of a new air contaminant.

3. Does the Texas minor NSR public participation rule meet federal requirements for approval?

The revised rules meet or exceed federal requirements for minor NSR public participation with four exceptions as described below.

First, under section 39.419(e)(1)(B), the requirement at 40 CFR 51.161(a) to provide opportunity for public comment on the State's analysis of the effect of construction or modification on ambient air quality from new minor sources or

[9] Section 55.23, Request by Group or Association, was not submitted in this SIP revision.

minor modification identified under 40 CFR 51.160, including the State's proposed approval or disapproval, is not met. Sources regulated under 40 CFR 51.160 are subject to the public participation requirements of 40 CFR 51.161. Under the Texas rule, sources subject to minor NSR requirements must publish the first notice, Notice of Receipt of Application and Intent to Obtain Permit, and provide a 30-day notice and comment period on the administratively complete permit application only. The publically available information during the comment period does not include and, the public notice fails to inform the public how to obtain, the State's analysis of air quality impacts and proposal to approve or disapprove the application. The public record for the first notice is required to contain only a copy of the administratively complete permit application as required by section 39.405(g). As a result, the public does not have an opportunity to adequately review and comment upon the potential air quality effects from the source and on the State's proposed action on the application. In order to obtain the State's air quality analysis, an interested person must request a contested case hearing. However, sections 55.21(b) and 55.23 limit who may request a contested case hearing before SOAH and so some members of the public may not be able to review and comment on air quality impacts from the facility. The request for a contested case hearing must be filed within the first notice public comment period and must be based solely upon information in the administratively complete application. EPA has concluded that the burden of requesting an evidentiary administrative hearing based solely on the information in the permit application does not provide the public with the minimum public information required by 40 CFR 51.161(a) and (b).

Second, section 39.403(b)(8) excludes permit amendments authorized by section 116.116(b) from any public participation requirements of Chapter 39, including the requirement to publish the first notice, unless the change involves construction of a new facility or modification of an existing facility that results in an increase in allowable emissions equal to or greater than 250 tpy of CO or NO_X; or 25 tpy of VOC or SO_2 or PM_{10}; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen or other changes within the discretion of the Executive Director. Changes that result in an increase in emissions are subject to a permit amendment under sections 116.110 or 116.116(a) or (b) of the approved SIP. As stated, section 39.403(b)(8) provides an exemption from public participation for sources otherwise required to obtain a permit amendment. As discussed in more detail above, sources regulated under 40 CFR 51.160(a) are subject to the minimal public participation requirements in 40 CFR 51.160(a) and (b). We also have concerns that this provision does not exclude public participation requirements for major modifications subject to PSD or NNSR permitting requirements, which are based on actual rather than allowable emissions and may be interpreted to apply to those permitting actions.[10] EPA has concluded that 39.403(b)(8) fails to provide the minimum public participation requirements of 40 CFR 51.161.

Third, under section 39.419(e)(1)(C), for any amendment, modification, or renewal application for a minor or major source, the revised rules do not require second notice, which includes the State's air quality analysis, unless the change would result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. The requirement at 40 CFR 51.161(a) to provide opportunity for public comment on the State's analysis of the effect of modification on ambient air quality from minor sources identified under 40 CFR 51.160, including State's proposed approval or disapproval, is not met. We recognize that States may tailor minor NSR programs to allow permit amendments for certain minor sources required to be based upon increases in allowable emissions. However, section 39.419(e)(1)(C) applies to major and minor sources required to obtain a permit amendment under Chapter 116 of the approved SIP. As described in the previous paragraph, sources required to obtain a permit under 40 CFR 51.160(a) are subject to the public participation requirements of 40 CFR 51.161. Under 40 CFR 51.161, a modification application for a major or minor source regulated under the SIP is subject to public notice and opportunity for public comment on the State's air quality analysis and proposal to approve or disapprove the permit. We also have concerns that this provision does not exclude public participation requirements for major modifications subject to PSD or NNSR permitting requirements, which are based on actual rather than allowable emissions and may be interpreted to apply to those permitting actions. EPA has concluded that section 39.419(e)(1)(c) fails to provide the minimum public participation requirements of 40 CFR 51.161.

Fourth, section 39.403(b) (Applicability) of the revised rule refers to two State statutory provisions, THSC section 382.0518 (preconstruction permit) and section 382.055 (review and renewal of preconstruction permit). For clarity and for approvability into the SIP, we recommend that section 39.403(b) be revised to refer to the corresponding sections of the Texas SIP.

In summary, EPA has determined that the Texas minor NSR public participation rules do not require that the publicly available information include the State's analysis of air quality impacts or the State's decision to approve or disapprove the permit. EPA's review of section 39.419(e)(1)(A) and (B) indicates that public notice of the State's analysis of air quality impacts for minor new sources or minor modifications is not required unless a contested case hearing is requested. We are concerned that the rules at sections 55.21 and 55.23 limit who may request a contested case hearing. In other words, the first notice (Notice of Application and Intent to Obtain a Permit) does not contain the agency's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval as required by 40 CFR 51.161(b). The only way to obtain that information is by requesting a contested case hearing and the rules limit which members of the public can do so. Moreover, we believe that the State's requirement to submit a request for an evidentiary administrative hearing in order to obtain the air quality analysis is too large a burden for potential commenters, may exclude some interested persons, and is not consistent with the minimum requirements of 40 CFR 51.161(a) and (b). We note that Texas did not provide a demonstration of how the Chapter 39 and 55 rules for public participation for minor NSR sources regulated under the SIP meet the public participation requirements of 40 CFR Part 51 with this SIP submittal.[11]

[10] See NSR Reform ruling, *New York* v. *EPA*, 413 F.3d 3 (D.C. Cir. June 24, 2005). The court held that the major NSR modification requirement, which incorporates by reference CAA § 111(a)(4), "unambiguously defines 'increases' in terms of actual emissions."

[11] See also correspondence between EPA Region 6 and TCEQ in the docket for this action.

B. PSD Regulatory Requirements

1. What public participation requirements for PSD programs are necessary for approval of the SIP revision?

The PSD provisions of the CAA emphasize the importance of public participation in permitting decisions. See section 160(5) of the CAA. The criteria for approval of a PSD program are set out in Section 165 of the CAA and 40 CFR 51.166. The requirements for public participation for an approved PSD program are found at 40 CFR 51.166(q). States may incorporate these requirements by reference or establish equivalent provisions. Section 307(b) of the CAA expressly provides an opportunity for judicial review of PSD permitting decisions when EPA is the permitting authority. In a federal PSD program, any member of the public who has participated in the public comment process and meets the threshold standing requirements of Article III of the U.S. Constitution may petition for administrative review of the permit within 30 days of issuance before the Environmental Appeals Board (EAB) and ultimately seek judicial review of the administrative disposition of the permit. We interpret the statute and regulations to require, at a minimum, an opportunity for State court judicial review of PSD permits under an approved PSD program. See 61 FR 1880, 1882 (Jan. 24, 1996) and 72 FR 72617, 72619 (December 21, 2007). The legislative history of the 1977 CAA amendments supports this interpretation.[12] Although permits issued under SIP approved programs are not subject to appeal to EPA's EAB, those actions are instead subject to the opportunities for review and appeal provided under State law.

40 CFR 51.166(q) requires, in part, that the permitting authority make available all the materials submitted by the applicant, a copy of the preliminary determination and a copy or summary of other materials considered in making the determination. The State must notify the public, by advertisement in a newspaper of general circulation, of the application, the preliminary determination, the degree of increment consumed, and of the opportunity to comment at a public hearing or in writing. The State must also provide a copy of the notice to any other State or local air pollution control agencies, the chief executive of the city and county where the source would be located, any regional land use planning agency, any State or Federal Land Manager or Indian Governing body whose lands may be affected. The State must also provide an opportunity for public hearing for interested persons to appear and submit written or oral comments on the air quality impacts of the source, alternatives to it, the control technology required, and other appropriate considerations. See CAA section 165(a)(2). The State must also consider all written and oral comments in making a final permitting decision and make all comments available for public inspection.

2. What are the Texas PSD program public participation requirements?

Under section 39.419, for sources subject to PSD or nonattainment NSR review the applicant must publish notice of two 30-day public comment periods, Notice of Application and Intent to Obtain a Permit (first notice) and Notice of Application and Preliminary Decision (second notice). The applicant must also mail a copy of the notices to the EPA Regional Administrator in Dallas, all local air pollution control agencies with jurisdiction in the county in which the construction is to occur, the air pollution control agency of any nearby State in which air quality may be adversely affected by the emissions from the new or modified facility, the applicant, persons who filed comments or hearing requests before the deadline, persons on a mailing list under Section 39.407 and the State senator or representative from the region where the source will be located. Under section 55.154, TCEQ may provide a public meeting if the Executive Director determines that there is a substantial or significant degree of public interest in an application or if a member of the legislature who represents the general area in which the facility is located or proposed to be located requests that a public meeting be held.

Texas provides an opportunity for judicial review of PSD permitting decisions under THSC 382.032, which states that a person affected by a ruling, order, decision, or other act of the Commission or of the Executive Director, if an appeal to the Commission is not provided, may appeal the action by filing a petition in a district court of Travis County. The petition must be filed within 30 days after the date of the Commission's or the Executive Director's action or, in the case of a ruling, order, or decision, within 30 days after the effective date of the ruling, order or decision. Note that Texas law requires exhaustion of administrative remedies, including requesting a contested case hearing, to appeal to State court.

3. Do the Texas PSD public participation requirements meet federal requirements for approval?

The Texas PSD program, including the public participation provisions, was approved in 1992. See 54 FR 52823, 826 (December 22, 1989 and 57 FR 28093 (June 24, 1992). This SIP revision replaces the public participation rules adopted under the approved PSD program and therefore, we review the rules for consistency with federal PSD requirements of 40 CFR 51.166(q). Our review of Chapters 39 and 55 indicates that the Texas rules meet or exceed federal requirements with the following exceptions. We have not identified provisions to satisfy the following federal requirements:

- A requirement that the State provide an opportunity for a public hearing for interested persons to appear and submit written or oral comment on the air quality impact of the source, alternatives to it, the control technology required, and appropriate considerations, along with public notice of the public hearing as required by 40 CFR 51.166(q)(v) and section 165(a)(2) of the CAA. The provision in section 55.154 that provides the Executive Director with discretion to hold a public meeting if the Executive Director determines that there is a substantial or significant degree of public interest in an application is not consistent with the federal requirements. Under the Texas rule, the decision to grant a public hearing is within the Executive Director's discretion and must be based upon substantial or significant public interest. In contrast, the CAA provides for the opportunity of interested persons to request a public hearing and public notice of that opportunity. Under section 55.154, the public is not guaranteed notice of such opportunity or that such an opportunity will be provided on request.
- A requirement that the public notice of a PSD permit contain the degree of increment consumption that is expected from the source or modification as required by 40 CFR 51.166(q)(iii).[13]

[12] See Staff of the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works, 95th Congress, 1st Session, A Section-by-section Analysis of S. 252 and S. 253, Clean Air Act Amendments 36 (1977), reprinted in 5 Legislative History of the Clean Air Act Amendments of 1977 (1977 Legislative History) 3892 (1977).

[13] EPA's final approval of the Texas PSD program (57 FR 28093, June 24, 1992) included a supplemental document that provided an enforceable commitment from Texas to implement the requirements of 40 CFR 51.166(q)(iii) (state the

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• A requirement to provide a copy of the public notice of a PSD permit to be sent to State and local air pollution control agencies, the chief executives of the city and county where the source would be located and any State or Federal Land Manager or Indian Governing Body whose lands may be affected by emissions from the source or modification, as required by 40 CFR 51.166(q)(iv) and CAA 165(d).[14]

• A requirement that response to comments be available prior to final action on the PSD permit, as required by 40 CFR 51.166(q)(vi) and (viii) and to facilitate the appeals process.

• For a new or modified source subject to PSD, the revised rules do not contain a definition of a final appealable decision for a PSD permit. We request further information about how and when the commenters are informed of the Agency's final decision, access to response to comments and timing for judicial appeal, in order to provide an opportunity for State court judicial review.

We request comments on an additional issue related to PSD permit public notice requirements. Under the approved SIP and under the revised rule, Texas requires the permit applicant to publish public notice for an air permit and to mail a copy of the notice to TCEQ and EPA. Although the federal PSD rules at 40 CFR 51.166(q)(2) State "* * * the reviewing authority shall * * * provide notice," we believe Texas has authority to delegate responsibility to publish notice to the applicant. Under Section 39.405(e), TCEQ allows 10 business days for the applicant to notify TCEQ and EPA that the public notice has been published. A review of the TCEQ permitting database indicates TCEQ generally receives a copy of the public notice within two weeks after the date of publication.[15] EPA has experienced delays in receiving the PSD public notice and we have received complaints from citizens that it is often not possible to identify the start and end date of a public comment period until much of the comment period has passed. While we believe that TCEQ does have authority to delegate responsibility to publish notice of a PSD permit to the applicant, we request comments on how the public information can be made available to ensure that interested persons can fully participate in the public comment process in accordance with the intent of the Act.

C. PAL Regulatory Requirements

1. What public participation requirements for PALs are necessary for approval?[16]

The Federal PAL rules at 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11) require PALs for existing major stationary sources to be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment. The State must address all material comments before taking final action on the permit.

2. What are the public participation requirements under the Texas PAL rule?

Texas PAL rules address public participation in section 116.194, which states:

> Applications for initial issuance of plant-wide applicability limit permits under this division are subject only to §§ 39.401, 39.405, 39.407 [17], 39.409, 39.411, 39.419, 39.420, and 39.605 of this title (relating to Purpose; General Notice Provisions; Mailing Lists; Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice of Contested case Hearing; Text of Public Notice; Notice of Application and Preliminary Decision; Transmittal of the Executive Director's Response to Comments and Decision; Applicability; Mailed Notice; Newspaper Notice; Sign-Posting; and Notice to Affected Agencies, respectively), except that any requests for reconsideration or contested case hearings in §§ 39.409 or 39.411 of this title shall not apply. Nothing in this section exempts an applicant for a new source review permit from the requirements of Subchapter B of this chapter (relating to New Source Review).

3. How does the Texas PAL rule meet Federal requirements for approval?

We are addressing public participation for PALs in this notice to facilitate our review of the Texas PAL rule SIP submittal that cross-references Chapter 39, even though the PAL rule was adopted after the revised rules.[18] We note that Texas did not make any revisions related to PALs to Chapter 39. The applicability section in Chapter 39.403 does not include PALs, despite the cross-reference to Chapter 39 in Section 116.194. Therefore, the two rules are not consistent. We believe Texas must revise the applicability section in Chapter 39.403 in order to make the Chapter 39 public participation requirements applicable to new permitting rules, such as the PAL rule.

Our review of the Chapter 39 requirements applicable to PALs indicates that public participation for initial issuance, renewal, or increase of a PAL is not consistent with the Federal requirements. Section 39.419(e)(3) does not require PAL permit applications to provide public notice and comment on the Agency's preliminary analysis and the draft permit unless a contested case hearing is requested. We have identified no provisions which address renewal or increase of a PAL. Furthermore, Texas provided no demonstration of how section 116.194, which cross references Chapter 39 requirements, is consistent with the Federal PAL rules at 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11). We have not identified provisions in Chapter 39 to comply with the following requirements of 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11):

• Public participation requirements for PALs existing major stationary sources to be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161.

• A requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment.

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degree of increment consumption in the public notice) and 51.166(q)(iv) (mail notice to affected agencies). The supplement remains a part of the Texas SIP. See 40 CFR 52.2270, EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP. We cite these requirements as missing from the Texas submittal because the adoption of Chapters 39 and 55 replaced all existing public participation requirements for PSD permits under the Texas PSD program as State law and seeks to repeal existing SIP PSD public participation requirements applicable to permit applications complete on or after September 1, 1999. Texas did not address the SIP supplement in its submittal. For several reasons, we believe these PSD requirements should be included as regulatory, rather than quasi-regulatory, requirements of the SIP. Given that the applicant rather than Texas publishes notice and sends the notice to affected agencies, we believe regulatory provisions in Chapter 39 would provide more clarity to the applicant and the public to ensure compliance with these requirements than a document that does not explicitly appear in the SIP. Also, we believe this approach will avoid confusion since section 39.605 of the revised rules lists some, but not all, agencies that must be notified under § 51.166(q)(iv).

[14] Ibid. at 13.

[15] The TCEQ permitting database can be accessed at *http://www4.tceq.state.tx.us/cid/CCD/index.cfm?fuseaction=main.SearchPublicNotice.*

[16] Texas' regulations for PALs are not in the existing Texas SIP. EPA will address approvability of the entire PAL requirements in a separate action.

[17] Section 39.407 was not submitted as a SIP revision. See discussion of the cross references to non-SIP rules in section VII.A of this preamble.

[18] See letter from Glenn Shankle, Executive Director of TCEQ, to Larry Starfield, Deputy Regional Administrator for EPA Region 6, dated June 13, 2008, noting that action on TCEQ's public participation rule was necessary to resolve issues in another pending SIP submission.

- A provision to require the State to address all material comments before taking final action on the PAL permit.
- An applicability provision in section 39.403 that subjects PALs to the requirements of Chapter 39.

D. Flexible Permits

1. What are the public participation requirements for Flexible Permits necessary for approval? [19]

EPA has recognized that States may provide a site-wide cap to determine minor NSR applicability, similar to the Federal PAL rule for major NSR applicability. See our proposed rule for Review of New Sources and Modifications in Indian Country, 71 FR 48696. 48705 or Evaluation of Implementation Experiences with Innovative Air Permits, Summary Report,[20] which discuss minor NSR applicability caps and public participation requirements at 40 CFR 51.160–51.164. 40 CFR 51.161(b) requires that the State ensure availability of the information submitted by the owner or operators and the State's analysis of the effect on air quality and proposal for approval or disapproval in at least one location in the affected area, that the State provide a 30-day public comment period on that information and that notice of the public comment period should be by prominent advertisement in the area affected.

2. What are the public participation requirements under the Texas Flexible Permit rule?

Section 39.403(b)(8)(A) and (B) states that initial issuance of a flexible permit is not required to comply with the public participation requirements of Chapter 39 unless the action involves new construction or an increase in allowable emissions equal to or greater than 250 tpy of CO or NO_X; or 25 tpy of VOC, SO_2, PM_{10}; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

When a flexible permit is established under the Texas rules in Subchapter G of Chapter 116, PSD or NNSR terms may be revised or eliminated when they are incorporated into the flexible permit. The rule does not provide for public participation for initial issuance of a flexible permit unless the action involves new construction or an increase in allowable emissions equal to or greater than 250 tpy of CO or NO_X; or 25 tpy of VOC, SO_2, or PM_{10}; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

3. Do the public participation requirements for Texas flexible permits meet the Federal requirements for approvability?

Sections 39.403(b)(8)(A) and (B), as they apply to the initial issuance of flexible permits do not meet the requirements in 40 CFR 51.161(a) and (b). Section 39.403 (Public Notice Applicability) fails to require 30-day public notice and comment on the State's analysis of the effects on ambient air quality and its proposed approval or disapproval. PSD and NNSR permit terms and conditions are not revised with public process required by sections 51.161(a) and (b) and 51.166(q).

VI. Other Public Participation Concerns

A. Cross References to Non-SIP Rules and Regulations

The following provisions cross reference to rules that are not in the federally approved SIP, nor submitted to EPA for SIP approval:

- Section 39.201(a)(1). Cross references to Chapter 30.
- Section 39.403(b)(8). Cross reference to State statutory provisions in THSC section 382.0518 and section 382.055 of the Texas Health and Safety Code.
- Section 39.403(b)(8). Cross references to Chapter 116, Subchapter G, sections 116.710(a)(2) and (3).
- Section 39.403(b)(8)(B). Cross reference to section 116.10(9).
- Section 39.409. Cross references to Chapter 50.
- Section 39.411(b)(10)—1st sentence. Cross references to § 39.403(b)(11).
- Section 39.413(11). Cross references to section 39.407.
- Section 39.419(e)(4). Cross references to § 90.30.

Approving a rule which cross references to a non-SIP provision is problematic because: (1) It could imply tacit approval of the non-SIP provision, without EPA's review of the cross referenced provision to verify whether it meets the requirements of the Act and of 40 CFR part 51; and (2) if the State later revises the cross referenced non-SIP provision, the revised cross referenced provision could be interpreted to be enforceable under the SIP even if such provision, as revised, does not meet the requirements of the Act and of 40 CFR part 51. Furthermore, there is no demonstration whether these cross referenced provisions are separable from the rules that are submitted. Texas should either remove the cross references to the non-SIP provisions or submit the cross referenced provisions to EPA for SIP approval. Note that our action on any provision which refers to or implements a provision that EPA has not approved does not imply EPA proposed approval of such non-SIP requirement.

B. Use of Undefined Acronyms.

Several sections use the acronyms "APA" "SOAH" and "WQMP." However, we do not see where these terms are defined.

C. Cross References to Obsolete Provision for Permits by Rule for Concrete Batch Plants

The following provisions cross reference to public notice provision for permit by rule for concrete batch plants: section 39.403(a)(3) and (b)(10); section 39.411(a)(10)(iv)(C); section 39.601; and section 55.152(a)(2). TCEQ has repealed all permits by rule for concrete batch plants and replaced them with a Standard Permit for concrete batch plants. This change is discussed in EPA's approval of this action at 71 FR 13549 (March 16, 2006). Texas has not revised these provisions in Chapters 39 and 55 to reflect the change that EPA approved March 16, 2006.

D. Cross Reference to Section 116.10(9)

Section 39.303(b)(8)(B) cross references section 116.10(9) which is the definition of "modification of existing facility" (later recodified as section 116.10(11)). Texas submitted this definition in separate SIP submittals which are currently under review. EPA will address this definition in a separate action.

E. Alternative Publication Procedures for Small Businesses

Section 39.603(e) provides an alternative requirement to publish a notice under section 39.603(a)(2)[21] if the applicant and source meet the definition of a small business stationary source in section 382.0365 of the Texas Health and Safety Code including, but not

[19] Texas' rules for Flexible Permits are not in the existing Texas SIP. EPA is reviewing the Texas' SIP submittal which relates to Flexible Permits and will address its concerns in a separate action.

[20] Report prepared by EPA Office of Air Quality Planning and Standards and OPEI at *http://www.epa.gov/ttn/oarpg/t5/memoranda/icp_eier.pdf.*

[21] Section 39.603(e)(1) refers to § 39.601(a)(2), which is not in the submitted rule. On July 31, 2002, Texas submitted a revision to Section 39.603 which revised subsection (e) to refer to paragraph (c)(2) rather than paragraph (a)(2). EPA is reviewing the July 31, 2002, SIP submittal and will address this change in a separate action. Paragraph (c)(2) refers to a different larger display notice that must be published in the same issue of the newspaper as the primary notice published under paragraph (c)(1).

limited to, those which: are not a major stationary source for federal air quality permitting; do not emit 50 or more tpy of any regulated pollutant; do not emit 75 or more tpy of all regulated pollutants; are owned or operated by a person that employs 100 or fewer individuals; and if the applicant's site meets emission limits in section 106.4(a), it will be considered to not have an effect on air quality. If all of the above conditions are met, the Executive Director may post information pending permit applications on its Web site, such as the permit number, project type, facility type, nearest city, county, date public notice authorized, information on comment periods, and information on how to contact the agency for further information.

The existing SIP has no provision for alternative public notice for small businesses. As a relaxation of the existing SIP, we request that Texas provide a demonstration of how this provision is consistent with section 110(l) of the Act. Section 30.603(e)(1)(A) refers to a definition of "small business stationary source in section 382.0365 of the Texas Health and Safety Code. For clarity and approvability into the SIP, § 39.603(e) should be revised to refer to corresponding provisions of the Texas SIP.

F. Relaxation of Sign Posting Requirements Under Section 39.604

We have identified two provisions which relax the sign posting requirements of the existing SIP.

- Section 39.604(c) includes a provision that the section's sign posting requirements do not apply to properties under the same ownership which are noncontiguous and/or separated by intervening public highway, street, or road, unless directly involved by the permit application. This exclusion from the sign posting requirements is not in the existing SIP. As a relaxation of the existing SIP, we request that Texas provide a demonstration how this provision is consistent with section 110(l) of the Act.
- Section 116.133(f)(1) provides that if the nearest elementary or middle school has waived out of the requirements of 19 TAC section 89.1205(a) under 19 TAC section 89.1205(g), the alternate language signs shall be published in the alternate languages in which the bilingual education program would have been taught had the school not waived out of the bilingual education program. We do not see where this provision is included in the revised rules. Because omission of this provision is a relaxation of the existing SIP, we request that Texas provide a demonstration how omission of this provision is consistent with section 110(l) of the Act.

VII. Why are we taking no action on some provisions of the submittal?

A. Provisions Which Implement Section 112(G) of the Act

There are cross references to Chapter 116, Subchapter C[22] of this title relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, § 112(g), 40 Code of Federal Regulations Part 63)) in the following provisions: sections 39.403(b)(9); 39.419(e)(3)(C); and 116.183. In an EPA SIP approval published September 18, 2002, we addressed the § 112(g) provisions (then located in Subchapter C of Chapter 116). We stated:

> We are taking no action on Subchapter C of Chapter 116—Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA Section 112(g), 40 CFR part 63) as submitted in 1998. The program for reviewing and permitting constructed and reconstructed major sources of HAP is regulated under section 112 of the Act and under 40 CFR part 63, subpart B. Under these provisions, States establish case-by-case determinations of maximum achievable control technology for new and reconstructed sources of HAP. The process for these provisions is carried out separately from the SIP activities. For the reasons discussed above, we are not approving Subchapter C of [Chapter] 116 as submitted in 1998.

67 FR 58699 (September 18, 2002).

Section 112(g) of the Act applies to the review and permitting of constructed and reconstructed major sources of hazardous air pollutants (HAP) under § 112 of the Act and 40 CFR part 63, subpart B. The process for implementing these provisions is carried out separately from the SIP. Because the requirements under section 112(g) are self-implementing under section 112 of the Act and under 40 CFR part 63, subpart B, EPA will take no action on sections 39.403(b)(9), 39.419(e)(3)(C), and 116.183.

B. Provisions Which Do Not Relate to Air Quality Permits

Texas submitted the following provisions to EPA for SIP approval which do not relate to air quality permits or to provisions that are not in the approved SIP:

- Section 39.411(b)(11)—Applies to radioactive material licenses under Chapter 336;
- Section 39.411(b)(13)—Applies to municipal solid waste applications;
- Section 39.411(b)(14)—Applies to class 3 modifications of hazardous industrial solid waste permits;
- Section 39.411(c)(7)—Applies to radioactive material licenses under Chapter 336
- Section 39.419(d)—Subsection (d) only relates to subsection (c), which was not submitted;

Because these provisions do not relate to air quality permitting or to any applicable requirement of the Clean Air Act, they are outside the scope of the SIP. The TCEQ should withdraw these provisions from this SIP submittal package. Consequently, EPA will take no action these provisions.

C. Portions of Chapter 55

The revised rules submitted to EPA include selected provisions from Chapter 55, Requests for Reconsideration and Contested Case Hearing. The existing SIP does not contain provisions which implement Texas' air permitting administrative appeal process. Note that PSD permits issued by EPA or States with a delegated PSD program provide appeal to the Environmental Appeals Board under 40 CFR Part 124. EPA interprets the CAA to require the opportunity for State court review under a State approved PSD program, as discussed in section V.B. of this notice, but the Act does not specifically require an administrative appeal process for an approved SIP PSD program. The requirements under 40 CFR part 124 are not applicable to State approved PSD programs. Therefore, we are taking no action today on the portions of this SIP submittal that relate to requests for reconsideration or contested case hearings. Specifically, we are taking no action today on section 55.1—Applicability; section 55.21—Requests for Contested Case Hearing, Public Comment; section 55.101—Applicability; section 55.103—Definitions; section 55.150—Applicability; section 55.201—Requests for Reconsideration and Contested Case Hearing; section 55.203—Determination of Affected Person; section 55.205—Request by Group or Association; section 55.209—Processing Requests for Reconsideration or Contested Case Hearing; and section 55.211—Commission Action or Requests for Reconsideration and Contested Case Hearing.

We propose to grant limited approval and limited disapproval to Subchapter E of Chapter 55 related to Public Comment and Public Meetings including sections 55.150—Applicability; section 55.152—Public

[22] These provisions were recodified from Subchapter C to Subchapter E of Chapter 116 in a SIP revision submitted February 1, 2006. EPA is currently reviewing the February 1, 2006, revisions and will address this provision in a separate action.

Comment Period; section 55.154—Public Meetings; section 55.156—Public Comment Processing.

D. Revisions to Section 116.740—Public Notice

The October 25, 1999, SIP submittal includes revisions to section 116.740—Public Notice in Chapter 116, Subchapter G which relates to Flexible Permits. This submittal revised earlier SIP submittals of this section as submitted November 29, 1994, and July 22, 1998. EPA is currently reviewing the November 29, 1994, and July 22, 1998, SIP submittals and will propose appropriate action on section 116.740 in a separate action. EPA will take no action on section 116.740 at this time.

VIII. Public Comment and Proposed Action

Under the CAA sections 110(k)(3) and 301(a) for the reasons stated above, EPA is proposing simultaneous limited approval and limited disapproval of portions of the SIP revisions identified in section II.A which Texas submitted on December 15, 1995; July 22, 1998; and October 25, 1999. EPA is taking no action on certain sections as identified in section VII because they are outside the scope of the SIP or because they revise a prior SIP submittal which is currently under review for approval or disapproval in a separate action. As discussed in this proposal, we have identified the following inconsistencies between the Texas revised rules and minimum Federal requirements for public participation. In summary, the provisions which preclude full approval of the revised rules include, but may not be limited to, the following:

A. Provisions Relating to Public Participation for Projects Subject to Minor NSR

- Section 39.419(e) fails to require the State's air quality analysis and proposed approval or disapproval in the publicly available information for new or modified minor NSR sources or minor modifications at major sources,
- Section 39.403(b)(8) fails to require any public participation for a minor NSR permit amendment or minor modification under section 116.116(b), unless the change involves construction of a new facility or modification of an existing facility that results in an increase in allowable emissions equal to or greater than 250 tpy of CO or NO_X; or 25 tpy of VOC or SO_2 or PM_{10}; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen or other changes within the discretion of the Executive Director.
- Section 39.419(e)(1)(C) fails to require the State's air quality analysis and proposed approval or disapproval in the publicly available information, for any permit amendment, modification, or renewal application of a major or minor source, unless the action would result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.
- Section 39.403(b)(8) (Applicability) references to two State statutory provisions, THSC Section 382.0518 (preconstruction permit) and section 382.055 (review and renewal of preconstruction permit) which are not part of the SIP.

B. Provisions Relating to Public Participation for Projects Subject to PSD

- The revised rules do not provide opportunity for a public hearing for interested persons to appear and submit written or oral comment on the air quality impact of the source, alternatives to it, the control technology required, and appropriate considerations and to provide notice of the opportunity for a public hearing for a PSD permit.
- Public notice of a PSD permit is not required by the revised rules to contain the degree of increment consumption that is expected from the source or modification.
- There is no requirement in the revised rules that a copy of the public notice of a PSD permit to be sent to State and local air pollution control agencies, the chief executives of the city and county where the source would be located and any State or Federal Land Manager or Indian Governing Body whose lands may be affected by emissions from the source or modification.
- There is no requirement in the revised rules that response to comments be available prior to final action on the PSD permit.
- There is no definition of a final appealable decision for a PSD permit in the revised rules. We request further information about how and when the commenters are informed of the Agency's final decision and how commenters are informed of access to response to comments and timing for judicial appeal, in order to provide an opportunity for State court judicial review.

C. Provisions Relating to Public Participation for Projects Subject to PALs

- There is no requirement in the revised rules that PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR 51.166(w)(5) and (11).
- There is no requirement in the revised rules that the State address all material comments before taking final action on the PAL permit, consistent with 40 CFR 51.166(w)(5).
- There is no reference to PALs in the applicability section in Chapter 39.403.

D. Provisions Relating to Public Participation for Projects Subject to Flexible Permits

- For initial issuance of a flexible permit to establish a minor NSR applicability cap or an increase in a flexible permit cap, there is no requirement in the revised rules for 30-day notice and comment on information submitted by the owner or operator and the agency's analysis of the effect of the permit on ambient air quality, including the agency's proposed approval or disapproval.
- Where PSD and NNSR terms and conditions are modified or eliminated when the permit is incorporated into a flexible permit, there is no requirement in the revised rules for public participation consistent with 40 CFR 51.161 and 51.166(q).

E. Other Concerns

- The issues identified in section VII of this preamble.

We are proposing simultaneous limited approval and limited disapproval of the revised rules because we have determined that the rules strengthen the existing SIP, but do not meet the minimum public participation requirements of the Act and our regulations. We request comments on this proposal. After review and response to public comment, EPA plans to take final action on the revised rules. Final limited approval would incorporate the revised rules identified in section II into the Texas SIP and the new public participation rules would become fully federally enforceable. Final limited disapproval would make a finding of how the revised rules fail to meet minimum criteria established by the Act and our regulations. If EPA determines that, for rules required by the CAA, the deficiencies forming the basis of final limited disapproval have not been corrected, the Agency may apply the sanctions listed in section 179(b) of the Act and 40 CFR 52.31 within 18 months of the finding. If the State submits an

approvable rule revision within 18 months of such a finding, EPA may take interim final action, effective upon publication, to stay the sanctions prior to proposing approval and taking comment on the submittal. Also, a FIP may be promulgated under section 110(c)(1) of the Act, if EPA finds that a SIP revision does not satisfy the minimum criteria established under section 110(k)(2) of the CAA. The FIP may be adopted at any time within 2 years of such a finding, unless the State corrects the deficiency and EPA approves the revision before the FIP is promulgated. Final approval of the revision correcting the identified deficiencies would terminate imposition of the FIP.

We will accept comments on this proposal for the next 60 days. After review of public comments, we intend to publish a rule to promulgate final limited approval and final limited disapproval of the provisions identified above into the Texas SIP.

IX. Statutory and Executive Order Reviews

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

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Lead, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: November 18, 2008.

Richard E. Greene,

Regional Administrator, Region 6.

[FR Doc. E8–28162 Filed 11–25–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 112

[EPA–HQ–OPA–2008–0546; FRL–8745–9]

RIN 2050–AG49

Oil Pollution Prevention; Non-Transportation Related Onshore Facilities

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to amend the dates by which facilities must prepare or amend Spill Prevention, Control, and Countermeasure (SPCC) Plans, and implement those Plans. The Agency is also proposing to establish dates for farms to prepare or amend their Spill Prevention, Control, and Countermeasure Plans (SPCC Plans), and implement those Plans. EPA had delayed establishing compliance dates for farms pending revisions to the SPCC rule that would specifically address this sector. Two different extension dates are proposed for farms and production facilities that meet the qualified facilities criteria. Elsewhere in this **Federal Register**, the Agency is finalizing certain tailored and streamlined requirements for facilities subject to the SPCC requirements.

DATES: Written comments must be received by December 26, 2008.

ADDRESSES: Comments should be directed to Docket ID No. EPA–HQ–OPA–2008–0546. Comments may be submitted by one of the following methods:

(1) *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments;

(2) *E-mail:* Comments may be sent by electronic mail (e-mail) to: *rcra-docket@epa.gov*, Attention Docket ID No. EPA–HQ–OPA–2008–0546.

(3) *Fax:* Comments may be faxed to 202–566–9744, Attention Docket ID No. EPA–HQ–OPA–2008–0546.

(4) *Mail:* The mailing address of the docket for this rulemaking is EPA Docket Center (EPA/DC), Docket ID No. EPA–HQ–OPA–2008–0546, mail code 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Attention Docket ID No. EPA–HQ–OPA–2008–0546.

(5) *Hand Delivery:* EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave. NW., Washington DC 20460. Attention Docket ID No. EPA–HQ–OPA–2008–0546. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Please note that 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 regulations.gov or e-mail.

The Federal regulations.gov Web site is an "anonymous access" system, which means that EPA will not know your identity or contact information unless you provide it in the body of your comment. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of the comment and along 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.*

Docket: All documents in the docket are listed in the docket index at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available (i.e., CBI or other information whose disclosure is restricted by a statute). Certain 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 at *http://www.regulations.gov* or in hard copy at the EPA Docket Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number to make an appointment to view the docket is (202) 566–0276.

FOR FURTHER INFORMATION CONTACT: For general information, contact the Superfund, TRI, EPCRA, RMP and Oil Information Center at (800) 424–9346 or TDD (800) 553–7672 (hearing impaired). In the Washington, DC metropolitan area, call (703) 412–9810 or TDD (703) 412–3323. For more detailed information on specific aspects of this proposed rule, contact either Vanessa Rodriguez at (202) 564–7913 (*rodriguez.vanessa@epa.gov*) or Mark W. Howard at (202) 564–1964 (*howard.markw@epa.gov*), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC, 20460–0002, Mail Code 5104A.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

Industry sector	NAICS code
Oil Production	211111
Farms	111, 112
Electric Utility Plants	2211
Petroleum Refining and Related Industries	324
Chemical Manufacturing	325
Food Manufacturing	311, 312
Manufacturing Facilities Using and Storing Animal Fats and Vegetable Oils	311, 325
Metal Manufacturing	331, 332
Other Manufacturing	31–33
Real Estate Rental and Leasing	531–533
Retail Trade	441–446, 448, 451–454
Contract Construction	23
Wholesale Trade	42
Other Commercial	492, 541, 551, 561–562
Transportation	481–488
Arts Entertainment & Recreation	711–713
Other Services (Except Public Administration)	811–813
Petroleum Bulk Stations and Terminals	4247
Education	61
Hospitals & Other Health Care	621, 622
Accommodation and Food Services	721, 722
Fuel Oil Dealers	45431
Gasoline stations	4471
Information Finance and Insurance	51, 52
Mining	212
Warehousing and Storage	493
Religious Organizations	813110
Military Installations	928110
Pipelines	4861, 48691
Government	92

The list of potentially affected entities in the above table may not be exhaustive. The Agency's goal is to provide a guide for readers to consider regarding entities that potentially could be affected by this action. However, this proposed action may affect other entities not listed in this table. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section titled **FOR FURTHER INFORMATION CONTACT**.

B. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

II. Authority

33 U.S.C. 1251 *et seq.*; 33 U.S.C. 2720; E.O. 12777 (October 18, 1991), 3 CFR, 1991 Comp., p.351.

III. Background

On July 17, 2002, the Agency published a final rule that amended the SPCC regulations (*see* 67 FR 47042). The rule became effective on August 16, 2002. The final rule included compliance dates in § 112.3 for preparing, amending, and implementing SPCC Plans. The original compliance dates were amended on January 9, 2003 (*see* 68 FR 1348), on April 17, 2003 (*see* 68 FR 18890), on August 11, 2004 (*see* 69 FR 48794), on February 17, 2006 (*see* 71 FR 8462), and on May 16, 2007 (*see* 72 FR 27444).

On December 26, 2006, EPA finalized a set of SPCC rule amendments that address certain targeted areas of the SPCC requirements based on issues and concerns raised by the regulated community (71 FR 77266). While EPA worked to determine if the agriculture sector warranted specific consideration under the SPCC rule, it delayed the compliance dates for preparing, or amending and implementing SPCC Plans for farms subject to SPCC (*see* 71 FR 77266, December 26, 2006). Under the current provisions in § 112.3(a) and (b), the compliance dates for farms are delayed until the effective date of a rule that establishes SPCC requirements specifically for this sector or that otherwise establishes dates by which farms must comply with the provisions of this part.

On October 15, 2007 (*see* 72 FR 58378), EPA proposed to amend the SPCC rule in order to provide increased clarity, to tailor requirements to particular industry sectors (including farms), and to streamline certain requirements for a facility owner or operator subject to the rule. Elsewhere in this **Federal Register**, the Agency is promulgating amendments to the SPCC rule that tailor and streamline requirements for facilities subject to the SPCC rule.

IV. Proposal To Amend Compliance Dates

Under the current provisions in § 112.3(a) and (b), the owner or operator of a facility that was in operation on or before August 16, 2002 must make any necessary amendments to its SPCC Plan and fully implement it by July 1, 2009; the owner or operator of a facility that came into operation after August 16, 2002, but before July 1, 2009, must prepare and fully implement an SPCC Plan on or before July 1, 2009; and the owner or operator of a facility (excluding production facilities) that becomes operational after July 1, 2009 must prepare and implement a Plan before it begins operations (the owner of operator of a production facility must prepare and implement a Plan within six months after beginning operations). In addition, § 112.3(c) requires onshore and offshore mobile facilities to prepare or amend and implement SPCC Plans on or before July 1, 2009.

This proposed rule would amend the dates in § 112.3(a), (b) and (c) by which facilities must prepare or amend their SPCC Plans, and implement those Plans to establish a date one year from promulgation of the final rule amending 40 CFR part 112 published elsewhere in this **Federal Register**. Two different extension dates are also proposed for farms and production facilities that meet the qualified facilities criteria in § 112.3(g). Qualified facilities that are farms or production facilities would have two or five years respectively from promulgation of the final rule amending 40 CFR part 112 published elsewhere in this **Federal Register**.

A. Proposal To Extend Compliance Dates for All Facilities

Under the proposed revision to § 112.3(a)(1), the owner or operator of a facility that was in operation on or before August 16, 2002 would be required to make any necessary amendments to its SPCC Plan and fully implement it by November 20, 2009, while the owner or operator of a facility that came into operation after August 16, 2002, but before November 20, 2009, would be required to prepare and fully implement an SPCC Plan on or before November 20, 2009.

Under the proposed revision to § 112.3(b)(1), the owner or operator of a facility that becomes operational after November 20, 2009 would be required to prepare and implement an SPCC Plan before beginning operations. This rule similarly proposes to extend the compliance date in § 112.3(c) for mobile facilities. An owner or operator of a mobile facility would be required to prepare or amend and implement an SPCC Plan on or after November 20, 2009, or before beginning operations if operations begin after November 20, 2009.

The Agency believes that such an extension of the compliance dates is appropriate because it will provide the owner or operator of a facility the opportunity to fully understand the regulatory amendments offered by revisions to the 2002 SPCC rule promulgated on December 26, 2006 (71 FR 77266) [1] and with the revised SPCC requirements promulgated elsewhere in this **Federal Register**. This proposed extension will allow those potentially affected in the regulated community one full year to make changes to their facilities and to their SPCC Plans necessary to comply with the revised SPCC requirements. EPA believes that a one-year period provides sufficient time for the regulated community to understand the streamlined amendments to the SPCC rule finalized elsewhere in this **Federal Register**.

The Agency seeks comment on this proposed compliance date by which owners and operators of facilities would be required to prepare, amend, and implement SPCC Plans in accordance with amendments to the SPCC Rule. Any alternative dates presented must include appropriate rationale and supporting data in order for the Agency to be able to consider them for final action.

B. Proposal To Establish Compliance Dates for Farms and Extend Compliance Dates for Farms That Meet the Qualified Facility Criteria

Elsewhere in this **Federal Register**, EPA is promulgating a final set of SPCC rule amendments that targets certain areas of the SPCC requirements specific to farms. This proposed rule would establish the dates by which a facility, defined as a farm in § 112.2, would be required to prepare or amend and implement its SPCC Plan. EPA proposes that a farm in operation on or before August 16, 2002 would have to make any necessary amendments to its SPCC Plan and implement that Plan on or before November 20, 2009 and a farm that came into operation after August 16, 2002 would have to prepare and implement an SPCC Plan on or before November 20, 2009 (consistent with other facilities, as established in § 112.3(a)(1)). A farm that comes into operation after November 20, 2009 would have to prepare and implement an SPCC Plan before beginning operations (consistent with other facilities in § 112.3(b)(1)). However, for farms that meet the criteria for a qualified facility as described in § 112.3(g) EPA is proposing a separate compliance date in § 112.3(a)(2) and (b)(2). Under section § 112.3(g), a qualified facility is one that: has an aggregate aboveground storage capacity of 10,000 gallons or less; and has had no single discharge as described in § 112.1(b) exceeding 1,000 U.S. gallons or no two discharges as described in § 112.1(b) each exceeding 42 U.S. gallons within any twelve month period in the three years prior to the SPCC Plan certification date, or since becoming

[1] As stated in the rule, a facility owner or operator must maintain its existing Plan. A facility owner or operator who wants to take advantage of the 2002 and 2006 regulatory changes may do so, but will need to modify his existing Plan accordingly.

subject to Part 112 if the facility has been in operation for less than three years (other than discharges as described in § 112.1(b) that are the result of natural disasters, acts of war, or terrorism). If your onshore facility is a farm, as defined in § 112.2, that meets the criteria for a qualified facility as described in § 112.3(g), and was in operation on or before August 16, 2002, you must maintain your Plan, but would be required to amend it, if necessary to ensure compliance with this part, and implement the Plan no later than November 20, 2010. Likewise, if your onshore facility is a farm, as defined in § 112.2, that meets the criteria for a qualified facility as described in § 112.3(g), and becomes operational after August 16, 2002, through November 20, 2010, and could reasonably be expected to have a discharge as described in § 112.1(b), you would be required to prepare and implement a Plan on or before November 20, 2010.

The Agency is proposing this compliance date for farms proposed in this notice for several reasons. The original extension allowed the Agency to conduct additional information collection and analyses to determine if differentiated SPCC requirements may be appropriate for farms. The Agency worked with the U.S. Department of Agriculture (USDA) to collect data to more accurately characterize oil handling at these facilities, thus allowing the Agency to better tailor and streamline the SPCC requirements to address the concerns of the farming sector. The proposed compliance date would now provide facilities the necessary time to fully understand the regulatory amendments, including the 2002 and 2006 SPCC rule amendments, in addition to those finalized elsewhere in this **Federal Register**.[2] The proposed dates will allow this sector ample time to make changes to their facilities and to their SPCC Plans necessary to comply with the revised requirements.

The Agency believes the compliance date proposed in this notice for farms that meet the criteria for a qualified facility as described in § 112.3(g) is warranted to ensure adequate time for specific outreach activities by the United States Department of Agriculture (USDA) and others to the widely dispersed farming community. The qualified facility provisions allow individual owners or operators to develop their own SPCC Plans specific to their operations, and organized education programs at the farm level will be helpful to ensure successful utilization of these provisions of the SPCC regulation. Qualified facility farms are located throughout the country and, given this broad geographic reach, additional time is needed to conduct education programs and provide information to farms about their eligibility for qualified facility status and its provisions. The USDA, in concert with others, such as state extension services and the National Resources Conservation Service, will seek to provide this training and information in most counties across the country to the diverse farming community within the additional time proposed in this notice. The Agency seeks comment on the proposed compliance dates by which owners and operators of farms including those that meet the qualified facilities criteria, would be required to prepare or amend and implement their SPCC Plans in accordance with amendments to the SPCC rule. Any alternative dates presented must include appropriate rationale and supporting data in order for the Agency to be able to consider them for final action.

C. Proposal To Extend Compliance Dates for Production Facilities That Meet the Qualified Facility Criteria

The final set of SPCC rule amendments promulgated elsewhere in this **Federal Register**, also targets certain areas of the SPCC requirements specific to production facilities. EPA is proposing a separate compliance date for production facilities that meet the criteria for a qualified facility as described in 112.3(g). If your onshore facility is a production facility, as defined in § 112.2, that meets the criteria for a qualified facility as described in § 112.3(g), and was in operation on or before August 16, 2002, you must maintain your Plan, but would be required to amend it, if necessary to ensure compliance with this part, and implement the Plan no later than November 20, 2013. Likewise, if your onshore facility is a production facility, as defined in § 112.2, that meets the criteria for a qualified facility as described in § 112.3(g), and becomes operational after August 16, 2002, through November 20, 2013, and could reasonably be expected to have a discharge as described in § 112.1(b), you would be required to prepare and implement a Plan on or before November 20, 2013. If you are the owner or operator of an oil production facility, as defined in § 112.2, that meets the criteria for a qualified facility as described in § 112.3(g), and becomes operational after November 20, 2013, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan within six months after you begin operations.

The Agency is proposing this compliance date for production facilities for several reasons. The original extension allowed the Agency to conduct additional information collection and analyses to determine if additional differentiated SPCC requirements may be appropriate for production facilities. The proposed compliance date would now provide these facilities the necessary time to fully understand the regulatory amendments, including the 2002 and 2006 SPCC rule amendments, in addition to those finalized elsewhere in this **Federal Register**. The proposed dates will allow this sector ample time to make changes to their facilities and to their SPCC Plans necessary to comply with the revised requirements. This extension will also provide the Agency with sufficient time to initiate work with relevant trade associations, the Interstate Oil and Gas Compact Commission (IOGCC) and the Department of Energy (DOE) on outreach and compliance assistance tools to help qualified oil production facilities develop their self-certified Plans. Finally, given: (1) The large number of marginal or stripper wells in the U.S.[3]; (2) that they contribute a significant portion of the country's oil production; and (3) EPA's understanding of the production process, the particular aboveground oil storage container capacities, and the nature of the fluids handled and operations conducted at certain small oil production facilities, the Agency is proposing additional time for these facilities to come into compliance.

The Agency seeks comment on the proposed compliance dates by which owners and operators of production facilities that meet the qualified facilities criteria, would be required to prepare or amend and implement their SPCC Plans in accordance with amendments to the SPCC rule. Any alternative dates presented must include appropriate rationale and supporting data in order for the Agency to be able to consider them for final action.

[2] As stated in the rules, farms must maintain their existing Plans, to the extent they are required to have one. However, farms that want to take advantage of the regulatory changes finalized in a separate notice in this **Federal Register** may do so, but the owner and operator of the facility will need to modify their existing Plan accordingly.

[3] The Interstate Oil and Gas Compact Commission estimates that there are 422,255 marginal oil wells as of January 1, 2007 (IOGCC Marginal Wells: 2007 Report)

IV. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

This proposed action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

B. Paperwork Reduction Act

This proposed action does not impose an information collection burden under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). This proposed rule would merely extend the compliance dates for facilities subject to the rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

Small entity is defined as: (1) A small business as defined in the Small Business Administration's (SBA) regulations at 13 CFR 121.201—the SBA defines small businesses by category of business using North American Industry Classification System (NAICS) codes, and in the case of farms and production facilities, which constitute a large percentage of the facilities affected by this proposed rule, generally defines small businesses as having less than $500,000 in revenues or 500 employees, respectively; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, the Agency concludes that this proposed action would not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This proposed rule would defer the regulatory burden for small entities by extending the compliance dates in § 112.3. After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

This proposed action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA. This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This proposed rule would merely extend the compliance dates for facilities subject to the rule.

E. Executive Order 13132—Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This proposed rule does not have federalism implications. It would 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. Under CWA section 311(o), States may impose additional requirements, including more stringent requirements, relating to the prevention of oil discharges to navigable waters. EPA encourages States to supplement the Federal SPCC regulation and recognizes that some States have more stringent requirements (56 FR 54612, (October 22, 1991). This proposed rule would not preempt State law or regulations. Thus, Executive Order 13132 does not apply to this proposed rule.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

This proposed action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Today's proposed rule would not significantly or uniquely affect communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045—Protection of Children From Environmental Health and Safety Risk

This proposed action is not subject to Executive Order 13045 (62 FR19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866, and because the Agency does not believe the environmental health or safety risks addressed by this proposed action present a disproportionate risk to children. The public is invited to submit comments or identify peer-reviewed studies and data that assess effects of early life exposure to oil as affected by the proposed revision to compliance dates.

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

This proposed action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and

business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898—Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment.

List of Subjects in 40 CFR Part 112

Environmental protection, Oil pollution, Penalties, Reporting and recordkeeping requirements.

Dated: November 20, 2008.

Stephen L. Johnson,

Administrator.

For the reasons set forth in the preamble, title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

PART 112—OIL POLLUTION PREVENTION

1. The authority citation for part 112 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*; 33 U.S.C. 2720; E.O. 12777 (October 18, 1991), 3 CFR, 1991 Comp., p. 351.

2. Section 112.3 is amended by revising paragraphs (a), (b) and (c) to read as follows: *§ 112.3 Requirement to prepare and implement a Spill Prevention, Control, and Countermeasure Plan.*

* * * * *

(a)(1) Except as provided in (a)(2), (a)(3), and (a)(4), if your onshore or offshore facility was in operation on or before August 16, 2002, you must maintain your Plan, but must amend it, if necessary to ensure compliance with this part, and implement the Plan no later than November 20, 2009. If your onshore or offshore facility becomes operational after August 16, 2002, through November 20, 2009, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan on or before November 20, 2009.

(2) If your onshore facility is a farm, as defined in § 112.2, that was in operation on or before August 16, 2002, you must maintain your Plan, but must amend it, if necessary to ensure compliance with this part, and implement the Plan no later than November 20, 2009. If your onshore facility is a farm, as defined in § 112.2, that becomes operational after August 16, 2002, through November 20, 2009, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan on or before November 20, 2009.

(3) If your onshore facility is a farm, as defined in § 112.2, that meets the criteria for a qualified facility as described in § 112.3(g), and was in operation on or before August 16, 2002, you must maintain your Plan, but must amend it, if necessary to ensure compliance with this part, and implement the Plan no later than November 20, 2010. If your onshore facility is a farm, as defined in § 112.2, that meets the criteria for a qualified facility as described in § 112.3(g), and becomes operational after August 16, 2002, through November 20, 2010, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan on or before November 20, 2010.

(4) If your onshore facility is a production facility, as defined in § 112.2, that meets the criteria for a qualified facility as described in § 112.3(g), and was in operation on or before August 16, 2002, you must maintain your Plan, but must amend it, if necessary to ensure compliance with this part, and implement the Plan no later than November 20, 2013. If your onshore facility is a production facility, as defined in § 112.2, that meets the criteria for a qualified facility as described in § 112.3(g), and becomes operational after August 16, 2002, through November 20, 2013, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan on or before November 20, 2013.

(b)(1) If you are the owner or operator of an onshore or offshore facility (excluding oil production facilities) that becomes operational after November 20, 2009, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan before you begin operations.

(2) If your onshore facility is a farm, as defined in § 112.2, that becomes operational after November 20, 2009, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan before you begin operations. If your onshore facility is a farm, as defined in § 112.2, that meets the criteria for a qualified facility as described in § 112.3(g), and becomes operational after November 20, 2010, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan before you begin operations.

(3) If you are the owner or operator of an oil production facility that becomes operational after November 20, 2009, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan within six months after you begin operations. If you are the owner or operator of an oil production facility, as defined in § 112.2, that meets the criteria for a qualified facility as described in § 112.3(g), and becomes operational after November 20, 2013, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan within six months after you begin operations.

(c) If you are the owner or operator of an onshore or offshore mobile facility, such as an onshore drilling or workover rig, barge mounted offshore drilling or workover rig, or portable fueling facility, you must prepare, implement, and maintain a facility Plan as required by this section. You must maintain your Plan, but must amend and implement it, if necessary to ensure compliance with this part, on or before November 20, 2009. If your onshore or offshore mobile facility becomes operational after November 20, 2009, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan before you begin operations. This provision does not require that you prepare a new Plan each time you move the facility to a new site. The Plan may be a general Plan. When you move the mobile or portable facility, you must locate and install it using the discharge prevention practices outlined in the

Plan for the facility. The Plan is applicable only while the facility is in a fixed (non-transportation) operating mode.

* * * * *

[FR Doc. E8–28120 Filed 11–25–08; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 73, No. 229
Wednesday, November 26, 2008

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

Agricultural Marketing Service

[Docket # AMS–FV–07–0142]

United States Standards for Grades of Beet Greens

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: The Agricultural Marketing Service (AMS) is revising the voluntary United States Standards for Grades of Beet Greens. Specifically, AMS is removing the "Unclassified" category from the standards.

DATES: *Effective Date:* December 26, 2008.

FOR FURTHER INFORMATION CONTACT: Dr. Carl Newell, Standardization and Training Section, Fresh Products Branch, (540) 361–1120. The revised United States Standards for Grades of Beet Greens are available by accessing the Fresh Products Branch Web site at: *http://www.ams.usda.gov/freshinspection.*

SUPPLEMENTARY INFORMATION: Section 203(c) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1621–1627), as amended, directs and authorizes the Secretary of Agriculture "To develop and improve standards of quality, condition, quantity, grade and packaging and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices." AMS is committed to carrying out this authority in a manner that facilitates the marketing of agricultural commodities. AMS makes copies of official standards available upon request. The United States Standards for Grades of Fruits and Vegetables not connected with Federal Marketing Orders or U.S. Import Requirements no longer appear in the Code of Federal Regulations, but are maintained by USDA, AMS, Fruit and Vegetable Programs.

AMS is revising the United States Standards for Grades of Beet Greens using the procedures that appear in Part 36, Title 7 of the Code of Federal Regulations (7 CFR part 36). These standards were last revised June 1, 1959.

Background

Prior to undertaking detailed work to develop a proposed revision to the standards, AMS published a notice on February 19, 2008, in the **Federal Register** (73 FR 9086) soliciting comments on possible revisions to the United States Standards for Grades of Beet Greens, including an AMS proposal to remove the "Unclassified" category from the standards. No comments were received in response to the notice. A second notice was published on July 10, 2008, in the **Federal Register** (73 FR 39646) proposing to revise the standards to remove the "Unclassified" category from the standards. No comments were received in response to the second notice; accordingly, AMS is revising the grade standards for beet greens to include this revision.

The official grades of beet greens covered by these standards are determined by the procedures set forth in the Regulations Governing Inspection, Certification and Standards of Fresh Fruits, Vegetables and Other Products (7 CFR 51.1 to 51.62).

Authority: 7 U.S.C. 1621–1627.

Dated: November 20, 2008.

James E. Link,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–28079 Filed 11–25–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Forest Service

Humboldt Toiyabe National Forest; California and Nevada; Bridgeport Ranger District Travel Management

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Humboldt Toiyabe National Forest will prepare an Environmental Impact Statement to disclose the impacts associated with the following proposed actions:

- Restricting motor vehicles to designated roads and trails, consistent with the national travel management rule.
- Changes to the forest transportation system, including the recognition and designation of certain user-created routes for motor vehicle use.
- The Ranger District currently manages about 1500 miles of motor vehicle routes for public use. The proposed action would recognize and adopt an additional 300 additional miles of existing informal (user-created) roads and trails. Most of these have been in existence for many years, but have not been recognized as a part of the forest transportation system.

DATES: Comments concerning the scope of the analysis must be received within 30 days from the date this Notice of Intent is published in the **Federal Register.**

ADDRESSES: Send written comments to: Travel Management Team, Bridgeport Ranger District, HCR1, Box 1000, Bridgeport, CA 93517. E-mail comments may be submitted to *comments-intermtn-humboldt-toiyabe-bridgeport@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: David Loomis, Humboldt Toiyabe National Forest, 1536 S. Carson St. Carson City, NV 89701. Phone: 775–882–2766.

SUPPLEMENTARY INFORMATION:

Background

Over the past few decades, the availability and capability of motorized vehicles, particularly off-highway vehicles (OHVs) and sport utility vehicles (SUVs) has increased tremendously. Nationally, the number of OHV users has climbed sevenfold in the past 30 years, from approximately 5 million in 1972 to 36 million in 2000.

Unmanaged OHV use has resulted in unplanned roads and trails, erosion, watershed and habitat degradation, and impacts to cultural resource sites. Compaction and erosion are the primary effects of OHV use on soils. Riparian areas and aquatic dependent species are particularly vulnerable to OHV use. Unmanaged recreation, including impacts from OHVs, is one of "Four Key Threats Facing the Nation's Forests and Grasslands." (USDA Forest Service, June 2004).

On November 9, 2005, the Forest Service published final travel management regulations in the **Federal Register** (FR Vol. 70, No. 216—Nov. 9, 2005, pp 68264–68291). This final Travel Management Rule requires designation of those roads, trails, and areas that are open to motor vehicle use on National Forests. Designations will be made by class of vehicle and, if appropriate, by time of year. The final rule prohibits the use of motor vehicles off the designated system as well as use of motor vehicles on routes and in areas that are not designated.

On some NFS lands, long managed as open to cross-country motor vehicle travel, repeated use has resulted in unplanned, unauthorized, roads and trails. These routes generally developed without environmental analysis or public involvement, and do not have the same status as NFS roads and NFS trails included in the forest transportation system. Nevertheless, some unauthorized routes are well-sited, provide excellent opportunities for outdoor recreation by motorized and non-motorized users, and would enhance the National Forest system of designated roads, trails and areas. Other unauthorized routes are poorly located and cause unacceptable impacts. Only NFS roads and NFS trails can be designated for motorized vehicle use. In order for an unauthorized route to be designated, it must first be added to the national forest transportation system (NFTS).

The Bridgeport Ranger District recently completed an inventory of unauthorized routes on NFS lands and identified approximately 800 miles of unauthorized routes. The Bridgeport Ranger District then used an interdisciplinary process to conduct travel analysis that included working with the public to determine whether any of the unauthorized routes should be proposed for addition to the Bridgeport Ranger District transportation system in this proposed action. Travel analysis developed a number of routes which could be considered in this or future decisions on the NFTS as a part of travel management on the Bridgeport Ranger District. Roads, trails and areas that are currently part of the Bridgeport Ranger District transportation system and are open to motorized vehicle travel will remain designated for such use except as described below under Proposed Action. This proposal focuses only on the prohibition of motorized vehicle travel off designated routes and needed changes to the Bridgeport Ranger District transportation system, including the addition of some user-created routes to the Bridgeport Ranger District transportation. The proposed action is being carried forward in accordance with the Travel Management Rule (36 CFR Part 212).

Purpose and Need for Action

There is a need for regulation of unmanaged motorized vehicle travel by the public. Currently, motorized vehicle travel by the public is not prohibited off designated routes in much of the Ranger District. In their enjoyment of the National Forest, motorized vehicle users have created numerous unauthorized routes. The number of such routes continues to grow each year with many routes having environmental impacts and safety concerns that have not been addressed. The Travel Management Rule, 36 CFR Part 212, provides policy for ending this trend of unauthorized route proliferation and managing the Forest transportation system in a sustainable manner through designation of motorized NFS roads, trails and areas, and the prohibition of cross-country travel. There is a need for limited changes and additions to the Bridgeport Ranger District transportation system to provide motorized access to dispersed recreation opportunities (camping, hunting, fishing, hiking, horseback riding, etc.) and to provide for a diversity of motorized recreation opportunities (4×4 Vehicles, motorcyles, ATVs, passenger vehicles, etc.).

It is Forest Service policy to provide a diversity of road and trail opportunities for experiencing a variety of environments and modes of travel consistent with the National Forest recreation role and land capability (FSM 2353.03(2)). In meeting these needs the proposed action must also achieve the following purposes:

- Avoid impacts to cultural resources.
- Provide for public safety.
- Provide for a diversity of recreational opportunities.
- Assure adequate access to public and private lands.
- Provide for adequate maintenance and administration of designations based on availability of resources and funding to do so.
- Minimize damage to soil, vegetation and other forest resources.
- Avoid harassment of wildlife and significant disruption of wildlife habitat.
- Minimize conflicts between motor vehicles and existing or proposed recreational uses of NFS lands.
- Minimize conflicts among different classes of motor vehicle uses of NFS lands or neighboring federal lands.
- Assure compatibility of motor vehicle use with existing conditions in populated areas, taking into account sound, emissions, etc.
- Have valid existing rights of use and access (rights-of-way).

Proposed Action

The proposed action would restrict motor vehicles to designated roads and trails, consistent with the national travel management rule; and change the forest transportation system, including the recognition and designation of certain user-created routes for motor vehicle use.

The Ranger District currently manages about 1500 miles of motor vehicle routes for public use. Motor vehicles will continue to be welcome on these roads and trails. The proposed action would recognize and adopt an additional 300 additional miles of existing informal (user-created) roads and trails. Most of these have been in existence for many years, but have not been recognized as a part of the forest transportation system. Maps and tables describing the proposed action can found at *http://www.fs.fed.us/r4/htnf/projects/#bridgeport*. In addition, maps will be available for viewing at the Bridgeport Ranger District.

Responsible Official

Cheryl Probert, District Ranger, Bridgeport Ranger District, HCR1, Box 1000, Bridgeport, CA 93517.

Scoping Process

The first formal opportunity to comment on the Bridgeport Ranger District Travel Management Project is during the scoping process (40 CFR 1501.7), which begins with the issuance of this Notice of Intent. All comments, including the names, addresses and when provided, will be placed in the record and are available for public inspection. The Forest Service is seeking comments from individuals, organizations, and local, state, and Federal agencies that may be interested in or affected by the proposed action. Comments may pertain to the nature and scope of the environmental, social, and economic issues, and possible alternatives related to the development of the travel management plan and EIS.

A series of public open houses are scheduled to explain the proposed travel plan and route designation process and to provide an opportunity for public input.

- Hawthorne, Nevada: December 8, 4–6 p.m. Mineral County Public Library. 1st and A St., Hawthorne, NV.
- Bridgeport, California: December 9, 4–6 p.m. Memorial Hall, 100 Sinclair St., Bridgeport, CA.

• Smith Valley, Nevada: December 10, 6–8 p.m. Smith Valley High School Multi Purpose Room, 20 Day Lane, Smith, NV.

Times, dates and locations will also be posted through local public notice and on the project Web page at: *http://www.fs.fed.us/r4/htnf.* Written comments will be accepted at these meetings.

Early Notice of Importance of Public Participation in Subsequent Environmental Review

It is important that reviewers provide their comments at such times and in such a way that they are useful to the Agency's preparation of the EIS. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions. The submission of timely and specific comments can affect a reviewer's ability to participate in subsequent administrative review or judicial review.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, anonymous comments will not provide the respondent with standing to participate in subsequent administrative review or judicial review.

Dated: November 13, 2008.

Cheryl Probert,

Bridgeport District Ranger.

[FR Doc. E8–28142 Filed 11–25–08; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Emerging Technology and Research Advisory Committee; Notice of Partially Closed Meeting

The Emerging Technology and Research Advisory Committee (ETRAC) will meet on December 8, 2008, 1:30 p.m., Room 3884, in the Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on emerging technology and research activities, including those related to deemed exports.

Agenda

Open Session

1. ETRAC charge.
2. ETRAC discussion on path forward.
3. Subcommittees—Discussion.

(a) Biology, biotech and health sciences
(b) Chemical and materials sciences
(c) Communications, advanced computing and software
(d) Nuclear technologies and directed energy research
(e) Space and remote sensing technologies
(f) Nanotechnologies and microelectronics

4. Public Comments and Questions.

Closed Session

5. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yspringer@bis.doc.gov* no later than December 1, 2008.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate the distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via e-mail.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on November 10, 2008, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 §§ (10)(d)), that the portion of the meeting dealing with matters the disclosure of which would be likely to frustrate significantly implementation of an agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)1 and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: November 20, 2008.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. E8–28059 Filed 11–25–08; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Regulations and Procedures Technical Advisory Committee; Notice of Partially Closed Meeting

The Regulations and Procedures Technical Advisory Committee (RPTAC) will meet December 10, 2008, 9 a.m., Room 4830, in the Herbert C. Hoover Building, 14th Street between Constitution and Pennsylvania Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on implementation of the Export Administration Regulations (EAR) and provides for continuing review to update the EAR as needed.

Agenda

Public Session

1. Opening remarks by the Chairman.
2. Presentation of papers or comments by the Public.
3. Opening remarks by Bureau of Industry and Security.
4. Export Enforcement update.
5. Regulations update.
6. Working group reports.
7. Automated Export System (AES) update.

Closed Session

8. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yspringer@bis.doc.gov* no later than December 3, 2008.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate the distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via e-mail.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on October 30, 2008, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 §§ (10)(d)), that the portion of the meeting dealing

with matters the disclosure of which would be likely to frustrate significantly implementation of an agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: November 20, 2008.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. E8–28060 Filed 11–25–08; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–904

Certain Activated Carbon from the People's Republic of China: Extension of Time Limits for Preliminary Results of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: November 26, 2008.

FOR FURTHER INFORMATION CONTACT: Julia Hancock, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone: (202) 482–1394.

SUPPLEMENTARY INFORMATION:

Background

On June 4, 2008, the Department of Commerce ("the Department") published a notice of initiation of an administrative review of the antidumping duty order on certain activated carbon from the People's Republic of China ("PRC") covering the period October 11, 2006, through March 31, 2008. See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 73 FR 31813 (June 4, 2008).

On August 5, 2008, the Department selected three mandatory respondents in the above–referenced administrative review pursuant to section 777A(c)(2)(B) of the Tariff Act of 1930, as amended ("the Act"). See Memorandum to James C. Doyle, Director, Office 9, from Paul Walker, Senior Case Analyst, RE: Antidumping Duty Administrative Review of Certain Activated Carbon from the People's Republic of China: Selection of Respondents for Individual Review (August 5, 2008).

On October 14, 2008, because one of the three original mandatory respondents notified the Department that it would not participate in the above–referenced administrative review, the Department selected an additional company as a voluntary respondent pursuant to section 782(a) of the Act. See Memorandum to James C. Doyle, Director, Office 9, from Julia Hancock, Senior Case Analyst, RE: Antidumping Duty Administrative Review of Certain Activated Carbon from the People's Republic of China: Selection of Voluntary Respondent (October 14, 2008). The preliminary results of this administrative review are currently due on December 31, 2008.

Statutory Time Limits

Section 751(a)(3)(A) of the Act requires the Department to issue the preliminary results of an administrative review within 245 days after the last day of the anniversary month of an order for which a review is requested. Consistent with section 751(a)(3)(A) of the Act, the Department may extend the 245-day period to 365 days if it is not practicable to complete the review within a 245-day period.

Extension of Time Limit of Preliminary Results

The Department determines that completion of the preliminary results of the administrative review within the original time period is not practicable. This administrative review covers two mandatory respondents and one voluntary respondent, and to conduct the sales and factor analyses for each company and their numerous suppliers requires the Department to gather and analyze a significant amount of information pertaining to each respondent's sales practices and manufacturing methods. Moreover, the Department requires additional time to analyze complicated affiliation issues.

Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time limit for issuing the preliminary results by 120 days until April 30, 2009. The final results continue to be due 120 days after the publication of the preliminary results.

This notice is published pursuant to sections 751(a)(3)(A) and 777(i)(1) of the Act and 19 CFR 351.213(h)(2).

Dated: October 24, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–28196 Filed 11–25–08; 8:45 am]

BILLING CODE: 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–834]

Purified Carboxymethylcellulose from Mexico: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce

SUMMARY: On August 7, 2008, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on purified carboxymethylcellulose from Mexico. *See Purified Carboxymethylcellulose from Mexico: Notice of Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 45937 (August 7, 2008) (*Preliminary Results*). The review covers one producer/exporter, Quimica Amtex S.A. de C.V. The period of review (POR) is July 1, 2006, through June 30, 2007. We invited interested parties to comment on our Preliminary Results. The Department received no comments concerning our Preliminary Results; therefore, our final results remain unchanged from our *Preliminary Results*. The final results are listed in the section "Final Results of Review" below.

EFFECTIVE DATE: November 26, 2008.

FOR FURTHER INFORMATION CONTACT: Mark Flessner or Robert James, AD/CVD Operations Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–6312 or (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 7, 2008, the Department published the preliminary results of this review in the **Federal Register**. *See Preliminary Results*. We invited parties to comment on the *Preliminary Results*. We received no comments or requests for a hearing.

Scope of the Order

The merchandise covered by the order is all purified carboxymethylcellulose (CMC), sometimes also referred to as purified sodium CMC, polyanionic cellulose, or cellulose gum, which is a white to off–white, non–toxic, odorless, biodegradable powder, comprising sodium CMC that has been refined and purified to a minimum assay of 90 percent. Purified CMC does not include unpurified or crude CMC, CMC

Fluidized Polymer Suspensions, and CMC that is cross–linked through heat treatment. Purified CMC is CMC that has undergone one or more purification operations which, at a minimum, reduce the remaining salt and other by–product portion of the product to less than ten percent. The merchandise subject to this order is classified in the Harmonized Tariff Schedule of the United States at subheading 3912.31.00. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope of the order is dispositive.

Final Results of Review

As noted above, the Department received no comments concerning the *Preliminary Results*. As there have been no changes from or comments on the *Preliminary Results*, there is no decision memorandum accompanying this **Federal Register** notice. For further details of the issues addressed in this proceeding, *see Preliminary Results*. The final weighted–average dumping margin for the period July 1, 2006, through June 30, 2007, is as follows:

Producer/Exporter	Weighted–Average Margin (Percentage)
Quimica Amtex, S.A. de C.V	1.44

Assessment

The Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review.

We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer–specific assessment rate calculated in the final results of this review is above *de minimis* (*i.e.*, at or above 0.50 percent). Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis* (*i.e.*, less than 0.50 percent).

The Department clarified its "automatic assessment" regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know their merchandise was destined for the United States. This clarification will also apply to POR entries of subject merchandise produced by companies for which we rescind the review based on certifications of no shipments, because these companies certify that they made no POR shipments of subject merchandise for which they had knowledge of U.S. destination. In such instances, we will instruct CBP to liquidate unreviewed entries at the "all–others" rate established in the LTFV investigation if there is no rate for the intermediate company(ies) involved in the transaction.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of purified CMC from Mexico entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided for by section 751(a)(2)(C) of the Tariff Act of 1930, as amended (the Act): (1) The cash deposit rate for the reviewed company will be the rate shown above; (2) if the exporter is not a firm covered in this review, or the LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (3) the cash deposit rate for all other manufacturers or exporters will continue to be 12.61 percent, the "all–others" rate established in the LTFV investigation. These deposit requirements shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility, under 19 CFR 351.402(f)(2), to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/ destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: November 18, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–28143 Filed 11–25–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XL99

Endangered Species; File No. 1506

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

ACTION: Notice; receipt of application for modification

SUMMARY: Notice is hereby given that Blair E. Witherington, Ph D., Florida Fish and Wildlife Conservation Commission, Fish and Wildlife Research Institute, Melbourne Beach Field Laboratory, 9700 South A1A, Melbourne Beach, FL 32951, has requested an modification to scientific research Permit No. 1506–01.

DATES: Written, telefaxed, or e-mail comments must be received on or before December 26, 2008.

ADDRESSES: The modification request and related documents are available for review by selecting "Records Open for Public Comment" from the Features box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov/index.cfm*, and then selecting File No. 1506–02 from the list of available applications. These documents are also available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and

Southeast Region, NMFS, 263 13th Ave South, St. Petersburg, FL 33701; phone (727)824–5312; fax (727)824–5309.

Written comments or requests for a public hearing on this request should be submitted to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources,

NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular modification request would be appropriate.

Comments may also be submitted by facsimile at (301)427–2521, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 1506.

FOR FURTHER INFORMATION CONTACT: Amy Hapeman or Kate Swails, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject modification to Permit No. 1506, issued on March 23, 2005 (70 FR 20530) is requested under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

Permit No. 1506–01 authorizes the permit holder to study neonate and juvenile loggerhead (*Caretta caretta*), green (*Chelonia mydas*), Kemp's ridley (*Lepidochelys kempii*), hawksbill (*Eretmochelys imbricata*) and leatherback (*Dermochelys coriacea*) sea turtles in the waters of the Gulf of Mexico and the Atlantic Ocean off the coast of Florida. The purpose of the research is to identify developmental habitat, evaluate the extent of ingestion of marine debris, and provide insight into juvenile sea turtle movements and dive patterns. Dr. Witherington may capture up to 250 loggerhead, 100 green, 50 hawksbill, 50 Kemp's ridley, and 10 leatherback sea turtles by handheld dip nets annually. All turtles are measured and released. A subset of green and loggerhead turtles may be transported to a lab and examined with high resolution magnetic resonance interferometry or computerized tomography, held for 3–4 days and released to determine their level of anthropogenic debris ingestion. Annually, four of each species of green, hawksbill, and Kemp's ridley sea turtles may have sonic transmitters and data loggers attached to measure movements and dive patterns, be recaptured after 24 hours to remove the transmitter and released.

The permit holder requests authorization to annually flipper tag and passive integrated transponder tag all captured sea turtles, biopsy sample up to 100 loggerhead, 100 green, and 50 hawksbill sea turtles, and lavage up to 50 loggerhead, 50 green, 50 hawksbill, 50 Kemp's ridley, and 10 leatherback sea turtles. The permit holder also requests authorization to attach harnessed satellite transmitters to 10 Kemp's ridley sea turtles each year. Imaging activities and attachment of sonic transmitters and data loggers would no longer be authorized for any species. No increase in the total number of turtles taken would be authorized. These additional activities would provide information on the genetic origin, diet, movement, and dive patterns of sea turtles in this area. The amendment would be valid until the permit expires on March 31, 2010.

Dated: November 21, 2008.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–28181 Filed 11–25–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XL78

Marine Mammals; File No. 764–1703–02

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 the National Museum of Natural History, Smithsonian Institution, Washington, D.C. 20008–2598 [Principal Investigator: Charles Potter], has been issued an amendment to scientific research Permit No. 764–1703–01.

ADDRESSES: The amendment and related documents are available for review upon written request or by appointment in the following office:

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.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Amy Sloan (301)713–2289.

SUPPLEMENTARY INFORMATION: The requested permit amendment has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*).

The Permit authorizes the National Museum of Natural History to collect, obtain, and import/export samples taken from marine mammals of the Orders Pinnipedia (except walrus) and Cetacea for research purposes. This amendment extends the expiration date of the permit to December 31, 2009.

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.

Issuance of this permit, as required by the ESA, was based on a finding that such permit: (1) was applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: November 19, 2008.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–28182 Filed 11–25–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2008–OS–0140]

Proposed Collection; Comment Request

AGENCY: Defense Finance and Accounting Service, DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Defense Finance and Accounting Service announces the proposed extension of a public information collection and seeks public comment on the provisions thereof. 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 information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by January 26, 2009.

ADDRESSES: You may submit comments, identified by docket 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, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Finance and Accounting Service—Cleveland, ATTN: Ms. Theresa A Matthes, DFAS–CL/JFRA, 1240 E. 9th Street, Cleveland, OH 44199, or call Ms. Theresa A Matthes, (216) 204–2383.

Title, Associated Form, and OMB Number: Child Annuitant's School Certification, DD Form 2788; OMB Control Number 0730–0001.

Needs and Uses: In accordance with 10 U.S.C. 1447 and DoD Financial Management Regulation, 7000.14–R, Volume 7B, a child annuitant between the age of 18 and 22 years of age must provide evidence of intent to continue study or training at a recognized educational institution. The certificate is required for the school semester or other period in which the school year is divided.

Affected Public: Individuals or households.

Annual Burden Hours: 720 hours.

Number of Respondents: 3,600.

Responses per Respondent: 1.

Average Burden per Response: 12 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The Child Annuitant's School Certification form is submitted to the child for completion and return to this agency. The child will certify as to his or her intent for future enrollment and a school official must certify on the past or present school enrollment of the child. By not obtaining school certification, overpayment of annuities to children would exist. This information may be collected from some schools which are non-profit institutions such as religious institutions. If information is not received after the end of each school enrollment, over-disbursements of an annuity would be made to a child who elected not to continue further training or study.

Dated: November 18, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–27953 Filed 11–25–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket No. DoD–2008–DARS–0095]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by December 26, 2008.

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 217, Special Contracting Methods, and related provisions and clauses at DFARS 252.217; OMB Control Number 0704–0214.

Type of Request: Extension.

Number of Respondents: 54,181.

Responses per Respondent: 2.0065.

Annual Responses: 108,714.

Average Burden per Response: 10.23901 hours.

Annual Burden Hours: 1,113,124.

Needs and Uses: Contracting officers need the information required by DFARS Part 217 and the related provisions and clauses to determine the economic advantage of exchange (trade-in) of personal property; to permit definitization of contract actions; to determine the reasonableness of proposed prices; to determine that a contractor is adequately insured; to determine the appropriate course of action in the event of loss or damage to a vessel; to provide for competition in future acquisitions; and to determine the need for "over and above" work.

Affected Public: Business or other for-profit; not-for-profit institutions.

Frequency: On Occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: November 18, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–28137 Filed 11–25–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket No. DoD–2008–OS–0107]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of

information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by December 26, 2008.

Title, Form, and OMB Number: Commissary Evaluation and Utility Surveys—Generic, OMB Control Number 0704–0407.

Type of Request: Extension.

Number of Respondents: 6633.

Responses per Respondent: 1.

Annual Responses: 6633.

Average Burden per Response: 1.34 Minutes.

Annual Burden Hours: 148 Hours.

Needs and Uses: The Defense Commissary Agency will conduct a variety of surveys on an as needed basis. The survey population will include, but is not limited to, persons eligible to use the commissary throughout the world. The surveys will be used to assess the customers' satisfaction with various aspects of the commissary operation and obtain their opinions of various commissary issues. Surveys will also be used to help determine individual commissary market potential and commissary size requirements.

Affected Public: Individuals or households, businesses or other for profit.

Frequency: On occasion

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: November 18, 2008.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–28138 Filed 11–25–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket No. DoD–2008–OS–0097]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by December 26, 2008.

Title, Form, and OMB Number: Secretary of Defense Biennial Review of Defense Agencies and DoD Field Activities; OMB Control Number 0704–0422.

Type of Request: Extension.

Number of Respondents: 2,500.

Responses per Respondent: 1.

Annual Responses: 2,500.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 625 hours.

Needs and Uses: Section 192(c) of Title 10, U.S.C., requires that the Secretary of Defense review the services and supplies provided by each Defense Agency and DoD Field Activity. The purposes of the Biennial Review are to ensure the continuing need for each Agency and Field Activity and to ensure that the services and supplies provided by each entity is accomplished in a more effective, economical, or efficient manner than by the Military Departments. A standard organizational customer survey process serves as the principal data-gathering methodology in the Biennial Review. As such, it provides valuable information to senior officials in the Department regarding the levels of satisfaction held by the organizational customers of the approximately 30 Defense Agencies and DoD Field Activities covered by the Biennial Review.

Affected Public: Business or other for profit; Not-for-profit institutions.

Frequency: Biennially.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DoD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: November 18, 2008.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–28144 Filed 11–25–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Proposed Collection; Comment Request

AGENCY: Office of the Secretary of Defense.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Defense Security Service (DSS) announces an upcoming public information collection and seeks public comments on the provision thereof. Comments are invited on: (a) Whether the proposed collection 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 hours of the information to be collected; and (c)

ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents.

DATES: Consideration will be given to all comments received by January 26, 2009.

ADDRESSES: You may submit comments, identified by docket 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 agency name, docket number and title for this **Federal Register** document. The general policy of comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov*as they are received without change, including any personal identifiers or contract information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Security Service, ATTN: Ms. Helmut Hawkins, Industrial Security Program Policy, Clearance Oversight Office, 1340 Braddock Place, Alexandria, VA 22314.

Title; Associated Form; and OMB Number: Industry Cost Collection Report Survey; OMB Control Number 0704–TBD.

Needs and Uses: Executive Order 12829, "National Industrial Security Program" requires the Department of Defense to account each year for the costs associated with implementation of the National Industrial Security Program and report those costs to the Director of the Information Security Oversight Office (ISOO). In furtherance of this requirement, and pursuant with 32 CFR, Subpart F, section 2001.61(b); Classified National Security Information; Final Rule, the Secretary of Defense, acting as executive agent for the NISP, is obligated to collect cost estimates for classification-related activities of contractors, licensees, certificate holders, and grantees and report them to ISOO annually. The cost collection methodology employed since 1996 was validated with the ISOO in December 2007. Participation in the survey is strictly voluntary. Input is integrated into a total cost figure for the President and is never associated with a specific facility.

Affected Public: A statistical sample of active and cleared businesses, or other profit and non-profit organizations under Department of Defense Security Cognizance, approved for storage of classified materials.

Annual Burden Hours: 125.

Number of Respondents: 749.

Responses per Respondent: 1.

Average Burden per Response: 10 minutes.

Frequency: Annually.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

Collection of this data is required to comply with the reporting requirements of Executive Order 12829, "National Industrial Security Program." This collection of information requests the assistance of the Facility Security Officer to provide estimates of annual security labor cost in burdened, current year dollars and the estimated percentage of security labor dollars to the total security costs for the facility. Security labor is defined as personnel whose positions exist to support operations and staff in the implementation of government security requirements for the protection of classified information. Guards who are required as supplemental controls are included in security labor. This data will be incorporated into a report produced to ISOO for the estimated cost of securing classified information within industry. The survey will be distributed electronically via a Web-based commercial survey tool.

Dated: November 19, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–28145 Filed 11–25–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2008–HA–0098]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by December 26, 2008.

Title and OMB Number: Health Insurance Claim Form, UB–04 CMS–1450, OMB Control Number 0720–0013.

Type of Request: Extension.

Number of Respondents: 8,500,000.

Responses per Respondent: 1.

Annual Responses: 8,500,000.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 2,125,000.

Needs and Uses: The information collection requirement is necessary for a medical institution to claim benefits under the Defense health program TRICARE, which includes the Civilian Health and Medical Program for the Uniform Services (CHAMPUS). The information collected will be used by TRICARE/CHAMPUS to determine beneficiary eligibility, other health insurance liability, certification that the beneficiary received the care, and that the provider is authorized to receive TRICARE/CHAMPUS payments. The form will be used by TRICARE/CHAMPUS and its contractors to determine the amount of benefits to be paid to TRICARE/CHAMPUS institutional providers.

Affected Public: Business or other for profit; Not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Mr. John Kraemer.

Written comments and recommendations on the proposed information collection should be sent to Mr. Kraemer at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: November 18, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–28149 Filed 11–25–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Health Board (DHB) Meeting

AGENCY: Department of Defense.

ACTION: Notice of 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, and in accordance with section 10(a)(2) of Public Law, the following meeting of the Defense Health Board (DHB) is announced:

DATES: December 15, 2008 (8 a.m.–2:30 p.m. (Open Session)) and December 16, 2008 (8 a.m.–9 a.m. (Open Session)).

ADDRESSES: Ronald Reagan Building and International Trade Center, 1300 Pennsylvania Avenue, NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Colonel Roger L. Gibson, Executive Secretary, Defense Health Board, Five Skyline Place, 5111 Leesburg Pike, Suite 810, Falls Church, Virginia 22041–3206, (703) 681–8448, EXT. 1228, Fax: (703) 681–3317, *roger.gibson@ha.osd.mil.*

Additional information, agenda updates, and meeting registration are available online at the Defense Health Board Web site, *http://www.ha.osd.mil/dhb.* The public is encouraged to register for the meeting. If special accommodations are required to attend (sign language, wheelchair accessibility) please contact Ms. Lisa Jarrett at (703) 681–8448 ext. 1280 by December 5, 2008. Written statements may be mailed to the above address, e-mailed to *dhb@ha.osd.mil* or faxed to (703) 681–3317.

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: The purpose of the meeting is to provide briefings and updates for Board members on topics related to ongoing Board business.

Agenda: On December 15–16, 2008, the Board will receive updates on the activities from the following Defense Health Board subcommittees: Traumatic Brain Injury Family Caregiver's Panel Update, Traumatic Brain Injury External Advisory Subcommittee, Psychological Health Subcommittee, Military Occupational/Environmental Health & Medical Surveillance Subcommittee, DHB Task Force on the Review of the DoD Biological Defense Research Program, Health Care Delivery Subcommittee, DHB Review Panel for the Establishment of the Joint Pathology Center, and the National Capital Region Base Realignment and Closure (NCR BRAC) Advisory Panel. The Board will also hold an administrative session in concert with the meeting.

Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165 and subject availability of space, the Defense Health Board meeting from 8 a.m. to 2:30 p.m. on December 15, 2008 and from 8 a.m. to 9 a.m. on December 16, 2008 is open to the public. Any member of the public wishing to provide input to the Defense Health Board should submit a written statement in accordance with 41 CFR 102–3.140(C) and section 10(a)(3) of the Federal Advisory Committee Act, and the procedures described in this notice. Written statement should be not longer than two type-written pages and must address the following detail: The issue, discussion, and a recommended course of action. Supporting documentation may also be included as needed to establish the appropriate historical context and to provide any necessary background information.

Individuals desiring to submit a written statement may do so through the Board's Designated Federal Officer at the address detailed below at any point. However, if the written statement is not received at least 10 calendar days prior to the meeting, which is subject to this notice, then it may not be provided to or considered by the Defense Health Board until the next open meeting.

The Designated Federal Officer will review all timely submissions with the Defense Health Board Chairperson, and ensure they are provided to members of the Defense Health Board before the meeting that is subject to this notice. After reviewing the written comments, the Chairperson and the Designated Federal Officer may choose to invite the submitter of the comments to orally present their issue during an open portion of this meeting or at a future meeting.

The Designated Federal Officer, in consultation with the Defense Health Board Chairperson, may, if desired, allot a specific amount of time for members of the public to present their issues for review and discussion by the Defense Health Board.

Dated: November 19, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–28146 Filed 11–25–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

U.S. Nuclear Command and Control System Comprehensive Review Advisory Committee

AGENCY: Department of Defense.

ACTION: Notice of meeting.

SUMMARY: On November 17, 2008 (73 FR 67841–67842), the Department of Defense announced a closed meeting of the U.S. Nuclear Command and Control System Comprehensive Review Advisory Committee. The notice is being published to provide a change in the meeting location. All other information remains the same.

DATES: December 3, 2008 (0830–1630) and December 4, 2008 (0830–1700).

ADDRESSES: Northrop Grumman Meeting Facility, 1000 Wilson Blvd., Arlington, VA.

FOR FURTHER INFORMATION CONTACT: Mr. William L. Jones, (703) 681–8681, U.S. Nuclear Command and Control System Support Staff (NSS), Skyline 3, 5201 Leesburg Pike, Suite 500, Falls Church, Virginia 22041.

Dated: November 19, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–28147 Filed 11–25–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Renewal of Department of Defense Federal Advisory Committees

AGENCY: Department of Defense.

ACTION: Renewal of Federal Advisory Committee.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972, (5 U.S.C. Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.65, the Department of Defense gives notice that it is renewing the charter for the Veterans' Advisory Board on Dose Reconstruction (hereafter referred to as the Board).

The Board is a non-discretionary federal advisory committee established

by Section 601(c) of Title VI of Public Law 108–183. The Board provides review and oversight of the Radiation Dose Reconstruction Program, and makes such recommendations on modifications in the mission or procedures of the Radiation Dose Reconstruction Program as it considers appropriate as a result of the audits conducted under the authority of Section 601(c)(3)(A) of Title VI of Public Law 108–183.

Specifically, the Board shall—

1. Conduct periodic, random audits of dose reconstructions under the Radiation Dose Reconstruction Program and of decisions by the Department of Veterans Affairs on claims for service connection of radiogenic diseases;

2. Assist the Department of Veterans Affairs and the Defense Threat Reduction Agency in communicating to veterans information on the mission, procedures, and evidentiary requirements of the Radiation Dose Reconstruction Program;

3. Carry out such other activities with respect to the review and oversight of the Radiation Dose Reconstruction Program as the Secretary of Defense and Secretary of Veterans Affairs shall jointly specify; and

4. Make recommendations on modifications to the mission and procedures of the Dose Reconstruction Program as the Board considers appropriate as a result of the audits.

The Under Secretary of Defense (Acquisition, Technology & Logistics) or designee, as well as, the Department of Veterans Affairs may act upon the Board's advice and recommendations.

The Board Membership shall be composed of—

1. At least one expert in historical dose reconstruction of the type conducted under the Radiation Dose Reconstruction Program;

2. At least one expert in radiation health matters;

3. At least one expert in risk communications matters;

4. A representative of the Defense Threat Reduction Agency and a representative of the Department of Veterans Affairs; and

5. At least three veterans, including at least one veteran who is a member of an atomic veterans group.

Board Members appointed by the Secretary of Defense, who are not full-time federal officers or employees, shall be appointed as experts and consultants under the authority of 5 U.S.C. 3109. These individuals, serving as Special Government Employees, shall be appointed on an annual basis by the Secretary of Defense, and shall with the exception of travel and per diem for official travel, shall serve without compensation, unless otherwise authorized by the appointing authority.

The Chairperson of the Board shall be selected by the sponsors, the Department of Veterans Affairs and the Defense Threat Reduction Agency.

The Board shall be authorized to establish subcommittees, as necessary and consistent with its mission, and these subcommittees or working groups shall operate under the provisions of the Federal Advisory Committee Act of 1972, the Government in the Sunshine Act of 1976, and other appropriate federal regulations.

Such subcommittees or workgroups shall not work independently of the chartered Veterans' Advisory Board on Dose Reconstruction, and shall report all their recommendations and advice to the Board for full deliberation and discussion. Subcommittees or workgroups have no authority to make decisions on behalf of the chartered Board nor can they report directly to the Department of Defense or any federal officers or employees who are not Board members.

FOR FURTHER INFORMATION CONTACT: Contact Jim Freeman, Deputy Committee Management Officer for the Department of Defense, 703–601–6128.

SUPPLEMENTARY INFORMATION: The Board shall meet at the call of the Board's Designated Federal Officer, in consultation with the Board's chairperson. The Designated Federal Officer, pursuant to DoD policy, shall be a full-time or permanent part-time DoD employee, and shall be appointed in accordance with established DoD policies and procedures. The Designated Federal Officer or duly appointed Alternate Designated Federal Officer shall attend all committee meetings and subcommittee meetings.

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the Veterans' Advisory Board on Dose Reconstruction membership about the Board's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Veterans' Advisory Board on Dose Reconstruction.

All written statements shall be submitted to the Designated Federal Officer for the Veterans' Advisory Board on Dose Reconstruction, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Veterans' Advisory Board on Dose Reconstruction's Designated Federal Officer can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

The Designated Federal Officer, pursuant to 41 CFR 102–3.150, will announce planned meetings of the Veterans' Advisory Board on Dose Reconstruction. The Designated Federal Officer, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

Dated: November 19, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–28148 Filed 11–25–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2008–0059]

Notice of Proposed Information Collection; Comment Request

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Navy Recruiting Command announces a proposed extension of an approved public information collection and seeks public comment on the provisions thereof. 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 information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by January 26, 2009.

ADDRESSES: You may submit comments, identified by docket 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, docket

number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request additional information or to obtain a copy of the proposal and associated collection instruments, write to Commander, Navy Recruiting Command (N35B), 5722 Integrity Drive, Millington, TN 38054–5057, or call at (901) 874–9048.

Title, Form Number, and OMB Number: Enlistee Financial Statement: NAVCRUIT Form 1130/13; OMB Control Number 0703–0020.

Needs and Uses: All persons interested in entering the U.S. Navy or U.S. Navy Reserve, who have someone either fully or partially dependent on them for financial support, must provide information on their current financial situation which will determine if the individual will be able to meet their financial obligations on Navy pay. The information is provided on NAVCRUIT Form 1130/13 by the prospective enlistee during an interview with a Navy recruiter.

Affected Public: Individuals or households.

Annual Burden Hours: 47,630.

Number of Respondents: 86,600.

Responses Per Respondent: 1.

Average Burden Per Response: 33 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The information provided on the NAVCRUIT Form 1130/13 is used by the Navy recruiter and by recruiting management personnel in assessing the Navy applicant's ability to meet financial obligations, thereby preventing the enlistment of, and subsequent management difficulties with people who cannot reasonably expect to meet their financial obligations on Navy day.

Dated: November 18, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–28136 Filed 11–25–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: An emergency review has been requested in accordance with the Act (44 U.S.C. Chapter 3507(j)), since public harm is reasonably likely to result if normal clearance procedures are followed. Approval by the Office of Management and Budget (OMB) has been requested by December 22, 2008.

ADDRESSES: Written comments regarding the emergency review should be addressed to the Office of Information and Regulatory Affairs, Attention: Bridget C. Dooling, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Director of OMB provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The Office of Management and Budget (OMB) may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. ED invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner, (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected, and (5) how might the Department minimize the burden of this collection on respondents, including through the use of information technology.

Dated: November 21, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Elementary and Secondary Education

Type of Review: New.

Title: Emergency Clearance of Homeless Education Disaster Assistance Application.

Abstract: The Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 provides 15 million dollars to ED to award to local educational agencies (LEAs) that had an increase in children and youth made homeless by Federally-declared major natural disasters in calendar year 2008 to partially compensate them for serving the educational and related needs of all homeless students in their district consistent with section 723(d) of the McKinney-Vento Homeless Assistance Act (McKinney-Vento Act). The information is collected in the form of a single electronic application submitted by LEAs. ED plans to award grants to applicants (LEAs and consortia of LEAs) based on verifiable counts of increases in homeless student enrollment in kindergarten through grade twelve directly tied to natural disasters in calendar year 2008.

Additional Information: The Homeless Education Disaster Assistance program (HEDA) was established in the "Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009," which the President signed into law on September 30, 2008 (Pub. L. 110–329) and which stipulates that ED should award HEDA funds to LEAs within 120 days. The Department is requesting emergency processing with a requested approval date of December 22, 2008. Using the regular clearance process would put ED well past the 120-day mark for awarding the HEDA funds that is specified in the Act, which would clearly go against Congress's intent. In sum, not approving this emergency request would cause

harm to many LEAs and the homeless students they serve and would delay ED's ability to award the funds well passed 120 days. ED intends to publish the **Federal Register** application notice on or about January 5, 2009 with an application deadline on February 4, 2009.

Frequency: One time.

Affected Public: State, local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 500.
Burden Hours: 10,000.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 3914. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–28117 Filed 11–25–08; 8:45 am]
BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before January 26, 2009.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: November 21, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Planning, Evaluation and Policy Development

Type of Review: Reinstatement.

Title: Study of the Implementation of the Safe and Drug-Free Schools and Communities Act (SDFSCA) State Grants.

Frequency: On Occasion.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 11,825.
Burden Hours: 5,919.

Abstract: The collection will allow the U.S. Department of Education to: (a) Assess the overall quality of activities that are being implemented by Safe and Drug-Free Schools and Communities Act Program grantees and (b) provide follow-up data for performance measures to meet Government Performance and Results Act (GPRA) and the Program Assessment Rating Tool review requirements for the Program. The respondents are public elementary and secondary school personnel, school district personnel, and prevention program developers.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 3906. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–28121 Filed 11–25–08; 8:45 am]
BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before January 26, 2009.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of

Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: November 21, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: Revision.
Title: Federal Family Education Loan (FFEL) Program: Deferment Request Forms.
Frequency: On Occasion.
Affected Public: Individuals or household.
Reporting and Recordkeeping Hour Burden:

Responses: 2,399,196.
Burden Hours: 383,871.

Abstract: These forms serve as the means by which borrowers in the FFEL Program may request deferment of repayment on their loans if they meet certain statutory and regulatory eligibility requirements. The holders of a borrower's FFEL Program loans use the information collected on these forms to determine whether a borrower meets the eligibility requirements for the specific deferment type that the borrower has requested.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 3916. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–28230 Filed 11–25–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Questions Concerning Technology Transfer Practices at DOE Laboratories

AGENCY: Department of Energy.

ACTION: Notice of Inquiry; Technology transfer practices at Department of Energy (DOE) laboratories.

SUMMARY: DOE hereby publishes the following questions concerning technology practices at DOE laboratories. Interested parties are requested to answer some or all of the questions at their discretion. In answering the questions parties are requested to identify whether they represent a large business (> 500 employees), a small business, a non-profit organization, a university, or other.

DATES: Written comments are to be received at the address listed below no later than January 26, 2009.

ADDRESSES: Comments may be submitted electronically at: *GC–62@hq.doe.gov*; or by mail at: Office of the Assistant General Counsel for Technology Transfer and Intellectual Property, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585. ATTN: TECHNOLOGY TRANSFER QUESTIONS.

FOR FURTHER INFORMATION CONTACT: Paul A. Gottlieb, Assistant General Counsel for Technology Transfer and Intellectual Property, U.S. Department of Energy, Forrestal Building, Room 6F–067, 1000 Independence Ave., SW., Washington, DC 20585; Telephone: (202) 586–3439.

SUPPLEMENTARY INFORMATION:

Questions About DOE Laboratory Technology Transfer Seeking Input From All Parties Including Industry, Universities, Non-Profits and the General Public

As part of an ongoing review of technology partnering agreements at Department of Energy (DOE) laboratories and facilities, DOE solicits input from all parties including industry, universities, non-profits and the general public on the following questions related to technology partnering mechanisms utilized by DOE Laboratories and facilities:

1. Existing and Other Agreements (4 sub questions): The DOE labs currently offer CRADAs, WFO Agreements, and User Agreements, all briefly referenced below. The DOE Orders and model agreements for CRADAs, WFO and User Agreements can be found at *http://www.gc.doe.gov/lab_partnering.htm. Questions for Comment:* (i) What improvements to the existing transactions (e.g. CRADAs, WFOs, User Agreements, etc.) would you suggest that DOE consider? (ii) Are there terms and conditions that are troublesome and what steps might DOE take to streamline these agreements? (iii) Are there other types of research agreements or mechanisms that should be offered at DOE labs? (iv) How would such new agreement types or mechanisms be an improvement on or augment the existing agreements

2. Best Practices (2 sub questions) DOE is interested in improving the ways the laboratories collaborate, and improving the transfer and deployment of laboratory technologies into the marketplace. *Question for Comment:* (i) Are there other agency, industry, non-profit or university technology transfer "best practices" DOE should consider adopting? (ii) What are they and how would they improve DOE's current technology transfer program??

3. U.S. Competitiveness: (6 sub questions) Under Cooperative Research and Development Agreements (CRADAs) with DOE labs and under license agreements to lab inventions, the relevant statutes require that a "preference" be given to companies who agree to manufacture new inventions made under those agreements substantially in the U.S. As a matter of DOE policy, DOE has imposed a stricter standard than that required by statute under which every partner must agree to manufacture new technology substantially in the U.S. or make a legally binding commitment to provide an "alternate net benefit to the U.S. economy." The DOE policy is more fully described in the DOE model

CRADA at Article XXII and the guidance provided for that Article. This standard is also more stringent than the standard imposed under 35 U.S.C. Sec. 200 *et seq.* ("Bayh-Dole") for funding agreements with Federal agencies. Bayh-Dole recipients may take ownership of new technologies without limitation on their own manufacture, but must agree not to assign or exclusively license those new technologies to other parties who do not agree to substantially manufacture in the U.S. DOE maintains its commitment to the U.S. economy, but is open to streamlining negotiation of the U.S. Competitiveness issue in view of the practical realities of a global economy. *Questions for Comment:* (i) What alternate approaches to addressing U.S. competitiveness would you suggest DOE consider? (ii) How would these alternatives help transactions/interface with DOE facilities? (iii) background: For example, one possible way to streamline this process is to forego a legally binding commitment from any partner that has a "substantial presence" in the U.S. This could be accomplished in a number of ways, such as where a partner indicates in writing that it or its intended suppliers will make best efforts to manufacture products resulting from the agreement in the U.S., and provides factually supported statements that it satisfies at least two of the following three factors: (1) The partner has or plans to have a manufacturing facility in the U.S. where its products resulting from the agreement will be manufactured; (2) more than half of the partner's assets are located in the U.S. or it derives more than half of its revenue or profits from the U.S.; and (3) significant design and development (other than the CRADA) will be done in the U.S. in an existing U.S. research facility. Another alternative would be to limit the legally binding commitment for substantially manufacturing in the U.S. to a specified number of years, *e.g.*, 5 years. That would give the U.S. manufacturing facility a head start on sales (and setting up supply chains) before manufacturing might be moved offshore, as well provide some certain benefit to U.S. competitiveness. (iii) Would any of these three be a useful approach to industry to better streamline the process of the U.S. Competitiveness negotiation process? (iv) Does DOE's current implementation of U.S. Competitiveness have a negative impact on technology transfer? How? (v) Would approaches taken by other Federal Agencies with regard to U.S. Competitiveness in CRADAs be useful? If so, (vi) what are those approaches and how are they implemented?

4. The Intellectual Property Rights disposition in Work For Others (WFO) Agreements: (4 sub questions) Under WFO Agreements with DOE labs, the sponsor may access highly specialized or unique DOE facilities, services, or technical expertise. The sponsor pays the full cost of the research with non-federal funds, and, with very limited exceptions may elect ownership in any new inventions by lab employees. Those new inventions are subject to a Government use license, March-In Rights, and U.S. preference provisions in licensing of the patent rights. In addition, at many laboratories the sponsor may mark all newly generated data as proprietary. The current DOE model provides that the sponsor retains title to lab inventions because the sponsor pays full cost and bears all of the risk. On the other hand, one might argue that the laboratory contractor should own the IP it develops because it would allow the laboratory to better ensure full utilization of the intellectual property for the benefit of the public and provide additional benefits to inventors through laboratory royalty sharing policies. If the laboratory owns such inventions, as is the norm under sponsored research at most universities, it could also provide free use of the inventions to non-profit research organizations and universities. As a matter of general policy, the latter position is reflected in the provisions in Bayh-Dole when government funding is involved. One proposal aimed at satisfying both sides of the issue is to modify the terms and conditions of DOE's WFO Agreements so that the labs may retain title to lab employee inventions but grant the sponsor a nonexclusive, royalty-free, non-transferrable, non-sublicensable worldwide license in a field of use with no requirements concerning U.S. manufacture, no Government use license where the Government is not a likely user of the technology, and no March-In Rights. In addition, the sponsor would be offered the opportunity to negotiate an exclusive license in a field of use for reasonable compensation and consideration of U.S. competitiveness. *Question for Comment:* (i) How would these proposed changes affect the attractiveness of WFO Agreements? (ii) What other options do you recommend for DOE to consider? (iii) What is the desirable disposition of IP rights that would stimulate working with a DOE laboratory or facility? (iv) Do the Government reserved license in Sponsor inventions. March-In Rights, and U.S. preference clauses pose any problems for a successful project?

5. Negotiable or Non-negotiable User Agreements: (3 sub questions) DOE labs also offer User Facility Agreements under which parties may gain access to designated unique lab equipment and facilities to perform their own experiments. Under the Non-proprietary User Agreement, which is aimed primarily at non-commercial, basic science research, a user may access lab equipment/facilities and may collaborate with lab scientists in carrying out its research. The user and the lab share the costs of the research by each absorbing their own costs, the lab and the user may elect to retain ownership of their respective new inventions, and the research data is made publicly available. The Proprietary User Agreement permits the sponsor to conduct proprietary research using unique lab equipment/facilities. In this case, the user pays the full cost of the research, and the user retains ownership of research data and inventions. User Agreements have been used successfully at labs for over 25 years. Typically User Agreements have relatively short durations, their terms and conditions are non-negotiable, and labs are authorized to enter into the agreements without additional DOE approval. As such, execution takes relatively little time. The most recent changes to these agreements permit some terms and conditions to be negotiable, but changes require DOE approval. These new Interim User Agreements and the class patent waivers to which they are attached can be found at *http://www.gc.doe.gov/1002.htm.* Comments are solicited on the terms of these agreements. *Question for Comments:* (i) Do you think these new DOE-wide standardized User Agreement formats which allow for some negotiation will promote more timely placement of User Agreements? (ii) Should DOE allow some negotiability of the terms or utilize agreements that are non-negotiable? (iii) Please describe the pros and cons of each approach.

6. Are there any other issues, concerns, or experiences that could make working with DOE laboratories and facilities more effective and efficient.

Disclaimer

This RFI is issued solely for information and planning purposes and does not constitute a solicitation. In accordance with FAR 15.202(e) responses to this notice are not offers and cannot be accepted by the Government to form a binding contract.

Respondents are solely responsible for all expenses associated with responding to this RFI. Respondents should not include any confidential information in any information they furnish. Responses to the RFI will not be returned. Respondents will not be notified of the result of the review.

Issued in Washington, DC, on November 20, 2008.

Devon Streit,

Office of Science.

[FR Doc. E8–28187 Filed 11–25–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

November 20, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP96–331–019.

Applicants: National Fuel Gas Supply Corporation.

Description: National Fuel Gas Supply Corp. submits Eighth Revised Sheet No. 12 to FERC Gas Tariff, Fourth Revised Volume No. 1 etc., to be effective 12/1/08.

Filed Date: 11/18/2008.

Accession Number: 20081119–0366.

Comment Date: 5 p.m. Eastern Time on Monday, December 1, 2008.

Docket Numbers: RP09–83–000.

Applicants: Transcontinental Gas Pipe Line Corp.

Description: Transcontinental Gas Pipe Line Corp. submits Twenty-Eighth Revised Sheet No. 1 *et al.* to FERC Gas Tariff, Original Volume No. 2. to be effective 11/17/08.

Filed Date: 11/17/2008.

Accession Number: 20081118–0107.

Comment Date: 5 p.m. Eastern Time on Monday, December 1, 2008.

Docket Numbers: RP09–86–000.

Applicants: White River Hub, LLC.

Description: White River Hub, LLC submits First Revised Sheet 4 to its FERC Gas Tariff, Original Volume 1, to be effective 12/22/08.

Filed Date: 11/18/2008.

Accession Number: 20081119–0370.

Comment Date: 5 p.m. Eastern Time on Monday, December 1, 2008.

Docket Numbers: CP07–367–004.

Applicants: Columbia Gas Transmission Corporation.

Description: Columbia Gas Transmission Corporation submits abbreviated application for authorization to amend its certificate.

Filed Date: 11/14/2008.

Accession Number: 20081118–0108.

Comment Date: 5 p.m. Eastern Time on Monday, December 1, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.

Deputy Secretary.

[FR Doc. E8–28022 Filed 11–25–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

November 19, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP96–359–038.

Applicants: Transcontinental Gas Pipe Line Corp.

Description: Transcontinental Gas Pipeline Corp. submits Service Agreements that contain negotiated rates re Sentinel Expansion Project Phase I.

Filed Date: 11/17/2008.

Accession Number: 20081118–0106.

Comment Date: 5 p.m. Eastern Time on Monday, December 1, 2008.

Docket Numbers: RP99–513–047.

Applicants: Questar Pipeline Company.

Description: Questar Pipeline Company submits Forty-Fifth Revised Sheet 7 *et al.* to First Revised Volume 1, effective 12/17/2008.

Filed Date: 11/17/2008.

Accession Number: 20081118–0087.

Comment Date: 5 p.m. Eastern Time on Monday, December 1, 2008.

Docket Numbers: RP08–374–001.

Applicants: Maritimes & Northeast Pipeline, L.L.C.

Description: Maritimes & Northeast Pipeline, LLC submits First Revised Sheet 268 *et al.* to FERC Gas Tariff, First Revised Volume 1, to be effective 11/15/08.

Filed Date: 11/14/2008.

Accession Number: 20081118–0046.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 26, 2008.

Docket Numbers: RP08–523–003.

Applicants: Southeast Supply Header, LLC.

Description: Southeast Supply Header, LLC submits First Revised Sheet No. 332A to FERC Gas Tariff, Original Volume No. 1, to be effective 12/17/08.

Filed Date: 11/17/2008.

Accession Number: 20081118–0105.

Comment Date: 5 p.m. Eastern Time on Monday, December 1, 2008.

Docket Numbers: RP09–80–000.

Applicants: Guardian Pipeline, L.L.C.

Description: Guardian Pipeline, LLC submits Eighteenth Revised Sheet 5 *et al.* to FERC Gas Tariff, Original Volume 1, to be effective 12/31/08.

Filed Date: 11/14/2008.

Accession Number: 20081118–0045.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 26, 2008.

Docket Numbers: RP09–81–000.
Applicants: Guardian Pipeline, L.L.C.
Description: Guardian Pipeline, LLC submits Second Revised Sheet 21 *et al.* in compliance with the G-II Certificate Order compliance filing, proposed to be effective 12/31/08.
Filed Date: 11/14/2008.
Accession Number: 20081118–0044.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 26, 2008.

Docket Numbers: RP09–82–000.
Applicants: Guardian Pipeline, L.L.C.
Description: Guardian Pipeline, LLC submits an application for authorization to construct and operate the proposed G-II Expansion Project, to be effective 12/31/08.
Filed Date: 11/14/2008.
Accession Number: 20081118–0043.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 26, 2008.

Docket Numbers: RP09–84–000.
Applicants: Destin Pipeline Company, L.L.C.
Description: Destin Pipeline Co., LLC submits Title Sheet *et al.* to FERC Gas Tariff, Original Volume No. 1, to be effective 12/18/08.
Filed Date: 11/17/2008.
Accession Number: 20081118–0104.
Comment Date: 5 p.m. Eastern Time on Monday, December 1, 2008.

Docket Numbers: RP09–85–000.
Applicants: Northwest Pipeline GP.
Description: Northwest Pipeline GP submits Second Revised Sheet No. 7 to FERC Gas Tariff, Fourth Revised Volume No. 1, to be effective 1/1/09.
Filed Date: 11/17/2008.
Accession Number: 20081118–0103.
Comment Date: 5 p.m. Eastern Time on Monday, December 1, 2008.

Docket Numbers: CP08–8–001.
Applicants: Leaf River Energy Center LLC.
Description: Leaf River Energy Center, LLC submits its application for amendment of certificate to permit modification of Pro form FERC Gas Tariff.
Filed Date: 11/14/2008.
Accession Number: 20081118–0047.
Comment Date: 5 p.m. Eastern Time on Monday, December 1, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

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Nathaniel J. Davis, Sr.,
Deputy Secretary.

[FR Doc. E8–28023 Filed 11–25–08; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM07–20–000]

Fuel Retention Practices of Natural Gas Companies

Issued November 20, 2008.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice Terminating Proceeding.

SUMMARY: The Federal Energy Regulatory Commission is terminating its notice of inquiry regarding its policy on the in-kind recovery of fuel and lost and unaccounted-for gas by natural gas pipeline companies and will consider any changes to the application of such policy in individual cases.

EFFECTIVE DATE: November 26, 2008.

FOR FURTHER INFORMATION CONTACT: Anna Fernandez (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6682.

SUPPLEMENTARY INFORMATION:

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

1. On September 30, 2007, the Commission issued a Notice of Inquiry concerning its current policy on the in-kind recovery of fuel and lost and unaccounted-for gas by natural gas pipeline companies.[1] The Commission sought comments on whether it should change its current policy to provide pipelines a greater incentive to reduce their fuel use and lost and unaccounted-for gas and to minimize pipeline over-recoveries of these costs. For the reasons discussed below, the Commission is terminating this proceeding.

I. Background

2. A detailed discussion of the Commission's current policy regarding in-kind fuel retention by natural gas pipeline companies is contained in the NOI and will not be repeated here. Briefly, interstate natural gas pipelines frequently require that customers contribute in-kind a small percentage of the volumes of natural gas tendered for transportation service to provide fuel for compressors and to make up for lost and unaccounted-for gas. Each pipeline states the percentage of gas it retains in its tariff.

3. The Commission established its current policy concerning a pipeline's in-kind recovery of fuel use and lost and unaccounted-for gas in *ANR Pipeline Company* (*ANR*).[2] In its January 2005 order in the *ANR* case,[3] the Commission stated that pipelines have two options to recover these costs. The first option is to establish a fixed fuel retention percentage in a general Natural Gas Act (NGA) section 4 rate case, and leave that

[1] *Fuel Retention Practices of Natural Gas Companies*, FERC Stats. & Regs. ¶ 35,556 (2007) (NOI).

[2] *ANR Pipeline Co., order on compliance filing*, 108 FERC ¶ 61,050, *order inviting comments*, 109 FERC ¶ 61,038 (2004), *order on reh'g and compliance filing*, 110 FERC ¶ 61,069, *order on reh'g and compliance filing*, 111 FERC ¶ 61,290 (2005).

[3] 110 FERC ¶ 61,069 at P 18–28.

percentage unchanged until the pipeline files its next general section 4 rate case. That option is consistent with the Commission's general ratemaking policy, set forth in section 284.10(c)(2) of the Commission's regulations,[4] that pipelines must design their rates based on estimated units of service without any type of tracker or true-up mechanism. That policy provides pipelines an incentive to minimize costs, by allowing them to retain any cost over-recoveries between rate cases, while putting them at risk for cost under-recoveries.[5] The second recovery option is for the pipeline to include in its tariff a mechanism permitting periodic changes in its fuel retention percentage outside of a general section 4 rate case, as allowed by section 154.403 of the Commission's regulations.[6] *ANR* held that, if a pipeline chooses the second option, it must include in its tariff a mechanism to true-up any over- and under-recoveries of fuel, absent agreement otherwise by all interested parties.

4. In *ANR*,[7] the Commission also left open the possibility that a pipeline could include an incentive mechanism in a fuel cost tracker, if the pipeline made the proposal pursuant to the Commission's incentive ratemaking policy. The Commission's current policy on incentive rates is set forth in *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines (1996 Incentive Ratemaking Policy Statement)*.[8]

5. In the NOI, the Commission sought comments on whether it should change its current in-kind fuel retention policy for the purpose of (a) minimizing pipeline over-recoveries of fuel and lost and unaccounted-for gas or (b) providing pipelines with a greater incentive to reduce their fuel use and lost and unaccounted-for gas, for example by permitting pipelines with fuel trackers and true-up mechanisms to include a profit or loss sharing mechanism.[9]

6. Thirty-two parties filed comments in response to the NOI.[10] Shippers and end-users generally argued that the Commission should require all pipelines to use a tracker with a true-up in order to prevent over-recovery of costs. The pipelines, however, argued that the Commission should retain its current policy and continue to permit pipelines to choose whether a fixed retention percentage established in a section 4 rate case or a tracker is best suited to their particular circumstances. Most parties stated that including some form of incentive mechanism in a tracker true-up mechanism could encourage greater efficiency. However, the parties asserted that the Commission should consider such mechanisms on a case-by-case basis rather than imposing any generic requirements.

II. Discussion

7. After carefully reviewing the comments, the Commission has determined to terminate this proceeding and consider any changes to the application of the Commission's policy concerning fuel recovery in individual cases.

8. As described above, a number of non-pipeline commenters contend that the Commission should require all pipelines to recover their fuel costs through trackers with true-up mechanisms in order to minimize pipeline over-recovery of fuel costs. However, the Commission would have to act under NGA section 5 to require pipelines which currently have fixed fuel charges established in general section 4 rate cases to adopt trackers and true-up mechanisms. In order to do that, the Commission would have to find that all fixed fuel charges are unjust and unreasonable and that the only just and reasonable method for pipelines to recover fuel costs is through a tracker with a true-up mechanism. The commenters have failed to provide the Commission a basis to take such generic action under NGA section 5.

9. Recovery of fuel costs through a fixed charge established in a general section 4 rate case is consistent with the Commission's general ratemaking policy for open access pipelines, set forth in section 284.10(c)(2) of the Commission's regulations, that pipelines design their rates based on estimated units of service, without any type of true-up mechanism.[11] The non-pipeline commenters' only basis for requiring all pipelines to recover their fuel costs in a manner contrary to that policy is that (1) fixed fuel charges present too much potential for pipelines to over-recover their fuel costs and (2) remedying such over-recoveries through complaints under NGA section 5 is too difficult.[12] However, the courts have insisted that the Commission not "compromise section 5's limits on its power to revise rates."[13] Requiring pipelines to recover their fuel costs through a tracker and true-up mechanism based solely on the alleged difficulty of remedying cost overrecoveries under NGA section 5, and without any other independent policy justification, would be contrary to the court's holding that the Commission may not order pipelines to make section 4 filings in order "to avoid the 'insufficient protection' afforded by section 5, *i.e.*, to avoid its procedural constraints."[14]

10. Accordingly, if a shipper believes that a particular pipeline is over-recovering its fuel costs, it should file a complaint under NGA section 5, pursuant to the procedures set forth in section 385.206 of the Commission's procedural regulations. While several shippers commented that section 5 does not provide an adequate remedy,[15] in fact, section 5 complaints have resulted in significantly reduced fuel charges on several pipelines. *National Fuel*[16] and *Dominion*[17] are two examples of how actual or potential section 5 complaints can cause pipelines to reduce their fuel retention percentages.

11. In addition, the changes recently enacted by the Commission to the financial reporting requirements for natural gas pipelines should assist shippers who wish to file a section 5 complaint involving fuel cost over-recovery. In March 2008, the Commission issued Order No. 710,[18] a

[4] 18 CFR 284.10(c)(2).

[5] See *Canyon Creek Compression Co.*, 99 FERC ¶ 61,351, at P 14 (2002).

[6] 18 CFR 154.403.

[7] 110 FERC ¶ 61,069 at P 39.

[8] 74 FERC ¶ 61,076, at 61,237–38 (1996).

[9] NOI at P 23–26.

[10] The parties are listed in Appendix A.

[11] In Order No. 436, the Commission explained that this requirement means that the pipeline is at risk for under-recovery of its costs between rate cases, and may retain any over-recovery. This gives the pipeline an incentive both to minimize its costs and maximize the service it provides. A cost tracker would undercut these incentives by guaranteeing the pipeline a set revenue recovery. *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, *order on reh'g*, Order No. 636–A, FERC Stats. & Regs. ¶ 30,950, *order on reh'g*, Order No. 636–B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636, 78 FERC ¶ 61,186 (1997).

[12] Industry Associations at 7–8 ("Although the Commission and pipeline customers are entitled to bring Section 5 complaints, such complaints require the complainant to carry the burden of proof, can be extremely expensive, and only offer prospective relief."). *See also* Ameren, TVA, and Texas Producers.

[13] *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993).

[14] *Public Service Commission of New York v. FERC*, 866 F.2d 487, 491 (D.C. Cir. 1989).

[15] *See, e.g.*, comments of the American Public Gas Association at 3–4.

[16] *National Fuel Gas Supply Corporation*, 118 FERC ¶ 61,091 (2007) (*National Fuel*) (settlement agreement followed section 5 complaint).

[17] *Dominion Transmission, Inc.*, 111 FERC ¶ 61,285 (2005) (*Dominion*) (settlement agreement came about in response to potential section 5 complaint).

[18] *Revisions to Forms, Statements and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, 73 FR 19389 (Apr. 10, 2008), FERC Stats. &

Final Rule to change the financial forms and reporting requirements for natural gas pipelines in order to enhance the transparency of financial reporting by interstate natural gas pipelines and better reflect the current market and cost information. Among the changes were new reporting requirements that require natural gas companies to provide detailed information regarding the acquisition and disposition of fuel use and lost and unaccounted-for gas.[19] With this new information, shippers will be better able to use the section 5 complaint process to address fuel cost over-recovery by a pipeline.

12. Finally, the operation of the interstate pipeline system involves a significant amount of fuel use and lost and unaccounted-for gas to deliver supplies to market. Fuel gas charges now make up a greater percentage of the overall interstate transportation rate than they have in the past. Such considerations reinforce the need to improve the efficiency of our existing infrastructure. While the parties generally commented that fuel savings incentive mechanisms could be helpful in reducing fuel use and, therefore, fuel costs, they believed that such mechanisms should be developed by the parties in individual proceedings. In light of those comments, the Commission will take a case-by-case approach at this time. In a recent order, the Commission ordered a technical conference to consider a three-year experimental fuel incentive mechanism proposed by Texas Gas Transmission, L.L.C. and what changes, if any, might be necessary or appropriate.[20] The Commission concludes that case-by-case consideration of incentive proposals will assist in the development of the Commission's policies concerning pipelines' recovery of fuel costs, and encourages pipelines to work with their customers to develop these mechanisms.

13. For these reasons, Docket No. RM07–20–000 is terminated.

The Commission orders:

Docket No. RM07–20–000 is terminated.

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

Appendix A

List of Parties

Ameren Energy Generating Company, Central Illinois Public Service Company, Central Illinois Light Co., Illinois Power Co., and Union Electric Company (Ameren)
American Chemistry Council
American Gas Association
American Public Gas Association
Apache Corporation
Atmos Energy Corporation
Boardwalk Pipeline Partners, LP, Gulf Crossing Pipeline Company LLC, Gulf South Pipeline Company, LP, and Texas Gas Transmission, LLC
Calpine Corporation
Columbia Gas Transmission Corporation, Columbia Gulf Transmission Company, Crossroads Pipeline Company, Granite State Gas Transmission, Inc., and Central Kentucky Transmission Company
Dominion Resources, Inc.
El Paso Corporation
Enbridge, Inc. and Enbridge Energy Partners, L.P.
FPL Group, Inc.
Honda of America Mfg., Inc.
Interstate Natural Gas Association of America
Independent Oil & Gas Association of West Virginia
The Independent Petroleum Association of America, The Process Gas Consumers Group, The American Forest & Paper Association and The American Iron and Steel Institute (Industry Associations)
Kinder Morgan Interstate Gas Transmission, LLC, Natural Gas Pipeline Company of America, Trailblazer Pipeline Company, and TransColorado Gas Transmission
Louisville Gas and Electric Company
MidAmerican Energy Company and PacifiCorp
Middle Tennessee Natural Gas Utility District
National Fuel Gas Supply Corporation
Natural Gas Supply Association
Northern Natural Gas Company and Kern River Gas Transmission Company
The Ohio Oil & Gas Association
Public Service Commission of New York
Sequent Energy Management, L.P.
Spectra Energy Transmission, LLC
Tennessee Valley Authority (TVA)
Texas Independent Producers and Royalty Owners Association (Texas Producers)
Transwestern Pipeline Company, LLC
Williston Basin Interstate Pipeline Company

[FR Doc. E8–28021 Filed 11–25–08; 8:45 am]

BILLING CODE 6717–01–P

Regs. ¶ 31,267 (2008), *reh'g and clarification*, Order No. 710–A, 123 FERC ¶ 61,278 (June 20, 2008).

[19] Order No. 710 at P 16.

[20] *See Texas Gas Transmission, LLC*, 125 FERC ¶ 61,134 (2008).

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2008–0872; FRL–8745–1]

Board of Scientific Counselors (BOSC), Executive Committee Meeting—December 2008

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meetings.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the Environmental Protection Agency, Office of Research and Development (ORD), gives notice of one meeting of the Board of Scientific Counselors (BOSC) Executive Committee.

DATES: The meeting (a teleconference) will be held on Wednesday, December 17, 2008, from 10 a.m. to 12 p.m. EDT. The meeting may adjourn early if all business is finished. Requests for the draft agenda or for making oral presentations at the meeting will be accepted up to one business day before the meeting.

ADDRESSES: The meeting will be held via teleconference only. Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2008–0872, by one of the following methods:

- *www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *E-mail:* Send comments by electronic mail (e-mail) to: *ORD.Docket@epa.gov*, Attention Docket ID No. EPA–HQ–ORD–2008–0872.
- *Fax:* Fax comments to: (202) 566–0224, Attention Docket ID No. EPA–HQ–ORD–2008–0872.
- *Mail:* Send comments by mail to: Board of Scientific Counselors (BOSC), Executive Committee Meeting—2008 Docket, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–ORD–2008–0872.
- *Hand Delivery or Courier.* Deliver comments to: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Ave., NW., Washington, DC, Attention Docket ID No. EPA–HQ–ORD–2008–0872. Note: this is not a mailing address. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2008–0872. 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, 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.*

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Board of Scientific Counselors (BOSC), Executive Committee Meeting—December 2008 Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer via mail at: Heather Drumm, Mail Code 8104–R, Office of Science Policy, Office of Research and Development, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; via phone/voice mail at: (202) 564–8239; via fax at: (202) 565–2911; or via e-mail at: *drumm.heather@epa.gov.*

SUPPLEMENTARY INFORMATION:

General Information

Any member of the public interested in receiving a draft BOSC agenda or making a presentation at the meeting may contact Heather Drumm, the Designated Federal Officer, via any of the contact methods listed in the **FOR FURTHER INFORMATION CONTACT** section above. In general, each individual making an oral presentation will be limited to a total of three minutes.

Proposed agenda items for the teleconference include, but are not limited to: Discussion of what charge question(s) should be asked regarding investment efficiency in BOSC program reviews, and what materials should be provided by ORD in order for the BOSC to make an assessment of efficiency. The meeting is open to the public.

Information on Services for Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Heather Drumm at (202) 564–8239 or *drumm.heather@epa.gov.* To request accommodation of a disability, please contact Heather Drumm, preferably at least ten days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: November 20, 2008.

Mary Ellen Radzikowski,

Acting Director, Office of Science Policy.

[FR Doc. E8–28126 Filed 11–25–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0143; FRL–8390–6]

State Issues Research and Evaluation Group (SFIREG) Full Committee; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Association of American Pesticide Control Officials (AAPCO)/State FIFRA Issues Research and Evaluation Group (SFIREG) Full Committee will hold a 2–day meeting, beginning on December 8, 2008 and ending December 9, 2008. This notice announces the location and times for the meeting and sets forth the tentative agenda topics.

DATES: The meeting will be held on Monday, December 8, 2008 from 8:30 a.m. to 5:00 p.m. and 8:30 a.m to 12 noon on Tuesday December 9, 2008

To request accommodation of a disability, please contact the person listed under **FOR FURTHER INFORMATON CONTACT**, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

ADDRESSES: The meeting will be held at EPA. One Potomac Yard (South Bldg.) 2777 Crystal Dr., Arlington VA. 4th Floor South Conference Room.

FOR FURTHER INFORMATION CONTACT: Ronald Kendall, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5561 fax number: (703) 308–1850; e-mail address: *kendall.ronald@epa.gov.* or Grier Stayton, SFIREG Executive Secretary, P.O. Box 466, Milford DE 19963; telephone number (302) 422–8152; fax (302) 422–2435; e-mail address: *grierstaytonaapco-sfireg@comcast.net.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are interested in SFIREG information exchange relationship with EPA regarding important issues related to human health, environmental exposure to pesticides, and insight into EPA's decision-making process. You are invited and encouraged to attend the meetings and participate as appropriate. Potentially affected entities may include, but are not limited to:

Those persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug and Cosmetics Act (FFDCA), or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established a docket for this action under docket ID number EPA–HQ–OPP–2008–0143. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal

holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr.*

II. Background

1. Regional Reports/Issues from the State Reps
2. SFIREG Pesticide Operations and Management Working Committee Meeting
3. Pyrethroids, Picloram, AM HVAC Labeling, Registrant Stewardship
4. Programs, Web Distributed Labeling
5. Green labeling (stand alone with AMD), rodenticides, use by statements
6. SFIREG Water Quality and Pesticide Disposal Working Committee Meeting
7. Sampling, Analytical Methodology, Health risk from semi-volatile pesticides, WC Name Change
8. Registration Division Label Quality Assurance Update
9. Thiencarbazone Label trial
10. 25b Update
11. Reg 1 Issue Paper, Green Labeling, HVAC
12. Total Release Foggers
13. Tribal Pesticide Program Council Update
14. American Association of Pesticide Safety Educators Update
15. Pesticide Regulatory Education Program Course Calendar
16. Office of Pesticide Program Update
17. Chemigation PR Notice, LAW
18. Office of Enforcement and Compliance Program Update
19. PIRT Schedule
20. Regional Issue Paper Discussion

III. How Can I Request to Participate in this Meeting?

You may submit a request to participate in this meeting to the person listed under **FOR FURTHER INFORMATION CONTACT.** Do not submit any information in your request that is considered CBI. Requests to participate in the meeting, identified by docket ID number EPA–HQ–OPP–2008–0143, must be received on or before October 21, 2008 **Federal Register.**

List of Subjects

Environmental protection.

Dated: November 12, 2008.

William R. Diamond,

Director, Field and External Affairs Division, Office of Pesticide Programs.

[FR Doc. E8–27758 Filed 11–25–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2008–0820; FRL–8746–4]

Proposed Approval of the Central Characterization Project's Remote-Handled Transuranic Waste Characterization Program at Oak Ridge National Laboratory

AGENCY: Environment Protection Agency.

ACTION: Notice of availability; opening of public comment period.

SUMMARY: The Environmental Protection Agency (EPA or we) is announcing the availability of, and soliciting public comments for 45 days on, the proposed approval of the radioactive, remote-handled (RH), transuranic (TRU) waste characterization program implemented by the Central Characterization Project (CCP) at Oak Ridge National Laboratory (ORNL) in Oak Ridge, Tennessee. This waste is intended for disposal at the Waste Isolation Pilot Plant (WIPP) in New Mexico.

In accordance with the WIPP Compliance Criteria, EPA evaluated the characterization of RH TRU debris waste from ORNL–CCP during an inspection conducted on June 30—July 2, 2008. Using the systems and processes developed as part of the U.S. Department of Energy's (DOE's) Carlsbad Field Office (CBFO) program, EPA verified whether DOE could adequately characterize RH TRU waste consistent with the Compliance Criteria. The results of EPA's evaluation of ORNL–CCP's RH program and its proposed approval are described in the Agency's inspection report, which is available for review in the public dockets listed in **ADDRESSES.** We will consider public comments received on or before the due date mentioned in **DATES.**

This notice summarizes the waste characterization processes evaluated by EPA and EPA's proposed approval. As required by the 40 CFR 194.8, at the end of a 45-day comment period EPA will evaluate public comments received, and if appropriate, finalize the reports responding to the relevant public comments, and issue a final report and approval letter to DOE.

DATES: Comments must be received on or before January 12, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2008–0820, by one of the following methods:

- *www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *E-mail*: to *a-and-r-docket@epa.gov*
- *Fax*: 202–566–1741
- *Mail*: Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Instructions: Direct your comments to Attn: Docket ID No. EPA–HQ–OAR–2008–0820. The Agency'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, 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.*

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *www.regulations.gov.* As provided in EPA's regulations at 40 CFR part 2, and in accordance with normal EPA docket procedures, if copies of any docket materials are requested, a reasonable fee may be charged for photocopying.

FOR FURTHER INFORMATION CONTACT: Rajani Joglekar or Ed Feltcorn, Radiation

Protection Division, Center for Waste Management and Regulation, Mail Code 6608J, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC, 20460; telephone number: 202–343–9601; fax number: 202–343–2305; e-mail address: *joglekar.rajani@epa.gov* or *feltcorn.ed@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

II. Background

DOE is developing the WIPP, near Carlsbad in southeastern New Mexico, as a deep geologic repository for disposal of TRU radioactive waste. As defined by the WIPP Land Withdrawal Act (LWA) of 1992 (Pub. L. 102–579), as amended (Pub. L. 104–201), TRU waste consists of materials that have atomic numbers greater than 92 (with half-lives greater than twenty years), in concentrations greater than 100 nanocuries of alpha-emitting TRU isotopes per gram of waste. Much of the existing TRU waste consists of items contaminated during the production of nuclear weapons, such as rags, equipment, tools, and sludges.

TRU waste is itself divided into two categories, based on its level of radioactivity. Contact-handled (CH) TRU waste accounts for about 97 percent of the volume of TRU waste currently destined for the WIPP. It is packaged in 55-gallon metal drums or in metal boxes and can be handled under controlled conditions without any shielding beyond the container itself. The maximum radiation dose at the surface of a CH TRU waste container is 200 millirems per hour. CH waste primarily emits alpha particles that are easily shielded by a sheet of paper or the outer layer of a person's skin.

Remote-handled (RH) TRU waste emits more radiation than CH TRU waste and must therefore be both handled and transported in shielded casks. Surface radiation levels of unshielded containers of remote-handled transuranic waste exceed 200 millirems per hour. RH waste primarily emits gamma radiation, which is very penetrating and requires concrete, lead, or steel to block it.

On May 13, 1998, EPA issued a final certification of compliance for the WIPP facility. The final rule was published in the **Federal Register** on May 18, 1998 (63 FR 27354). EPA officially recertified WIPP on March 29, 2006 (71 FR 18015). Both the certification and recertification determined that WIPP complies with the Agency's radioactive waste disposal regulations at 40 CFR part 191, subparts B and C, and is therefore safe to contain TRU waste.

The final WIPP certification decision includes conditions that (1) prohibit shipment of TRU waste for disposal at WIPP from any site other than the Los Alamos National Laboratories (LANL) until the EPA determines that the site has established and executed a quality assurance program, in accordance with §§ 194.22(a)(2)(i), 194.24(c)(3), and 194.24(c)(5) for waste characterization activities and assumptions (Condition 2 of Appendix A to 40 CFR part 194); and (2) (with the exception of specific, limited waste streams and equipment at LANL) prohibit shipment of TRU waste for disposal at WIPP (from LANL or any other site) until EPA has approved the procedures developed to comply with the waste characterization requirements of § 194.22(c)(4) (Condition 3 of Appendix A to 40 CFR part 194). The EPA's approval process for waste generator sites is described in § 194.8 (revised July 2004).

Condition 3 of the WIPP Certification Decision requires EPA to conduct independent inspections at DOE's waste generator/storage sites of their TRU waste characterization capabilities before approving their program and the waste for disposal at the WIPP. EPA's inspection and approval process gives EPA (a) discretion in establishing technical priorities, (b) the ability to accommodate variation in the site's waste characterization capabilities, and (c) flexibility in scheduling site waste characterization inspections.

As described in Section 194.8(b), EPA's baseline inspections evaluate each waste characterization process component (equipment, procedures, and personnel training/experience) for its adequacy and appropriateness in characterizing TRU waste destined for disposal at WIPP. During an inspection, the site demonstrates its capabilities to characterize TRU waste(s) and its ability to comply with the regulatory limits and tracking requirements under (194.24. A baseline inspection may describe any limitations on approved waste streams or waste characterization processes [§ 194.8(b)(2)(iii)]. In addition, a baseline inspection approval must specify what subsequent waste characterization program changes or expansion should be reported to EPA [§ 194.8(b)(4)]. The Agency is required to assign Tier 1 (T1) and Tier 2 (T2) designations to the reportable changes depending on their potential impact on data quality. A T1 designation requires that the site must notify EPA of proposed changes to the approved components of an individual waste characterization process (such as radioassay equipment or personnel), and EPA must also approve the change before it can be implemented. A waste characterization element with a T2 designation allows the site to implement changes to the approved components of individual waste characterization processes (such as visual examination procedures) but requires EPA notification. The Agency may choose to inspect the site to evaluate technical adequacy before approval. EPA inspections conducted to evaluate T1 or T2 changes are follow-up inspections under the authority of § 194.24(h). In addition to the follow-up inspections, if warranted, EPA may opt to conduct

continued compliance inspections at TRU waste sites with a baseline approval under the authority of § 194.24(h).

The site inspection and approval process outlined in § 194.8 requires EPA to issue a **Federal Register** notice proposing the baseline compliance decision, docket the inspection report for public review, and seek public comment on the proposed decision for a period of 45 days. The report must describe the waste characterization processes EPA inspected at the site, as well as their compliance with § 194.24 requirements.

III. Proposed Baseline Compliance Decision

EPA has performed a baseline inspection of RH TRU waste characterization activities at ORNL–CCP (EPA Inspection No. EPA–ORNL–CCP–RH–4.08–8). The purpose of EPA's inspection was to verify that the waste characterization program implemented at ORNL–CCP for characterizing RH TRU, retrievably-stored, debris waste is technically adequate and meets the regulatory requirements at 40 CFR 194.24.

The RH waste that DOE is proposing for WIPP disposal is generated from operation of the Radiochemical Engineering Development Center (REDC) hot cell laboratory at ORNL. The REDC was used primarily to recover and purify curium for fabrication into targets. The same facility and apparatus were used to separate, purify and store transcurium [1] radionuclides produced by irradiation of curium targets in the ORNL High Flux Isotope Reactor (HFIR) from 1991 until February 2007 for a variety of commercial and federal applications. The REDC also processed Mark-42 target assemblies to recover plutonium, americium and curium isotopes that were shipped to the Los Alamos National Laboratory (LANL). A target is a material that was placed within the HFIR primarily for defense programs (see attached inspection report for more information on this topic).

ORNL–CCP stores RH waste from the REDC in concrete casks, boxes, and drums at ORNL. These wastes are transferred to the TRU Waste Processing Center (TWPC) hot cells for repackaging into 55-gallon (208-liter) drums for characterization. ORNL-CCP was expecting EPA to evaluate for approval RH debris waste from three time periods (April 1972–November 1978, December 1978–October 1991, and November 1991–February 2007). Early in the inspection, EPA inspectors concluded that ORNL—CCP had done limited characterization work for the first two time periods and the available information for the earlier periods was not complete. As a result, EPA inspectors informed the Carlsbad Area Field Office (CBFO) and ORNL–CCP that the scope of the inspection would only cover debris waste generated from November 1991–February 2007. Today's proposed baseline approval, therefore, is limited to retrievably-stored RH TRU debris wastes that were generated during this specific time frame.

ORNL initially stored these wastes in 32 concrete casks. ORNL–CCP presented preliminary information regarding RH TRU debris wastes that had been generated in two other time periods; the Pre-Solvent Extraction Test Facility (SETF) period from April 1972–November 1978 and the SETF period from December 1978–October 1991. At the time of this inspection, characterization of the Pre-SETF and SETF wastes had not begun and there was insufficient objective evidence to support their approval. ORNL–CCP has stated that they will present these wastes for EPA approval in the future and EPA will evaluate each of these as Tier 1 (T1) changes in accordance with the tiering described in the accompanying inspection report.

The EPA inspection team identified four concerns related to waste characterization processes ORNL–CCP had implemented to characterize retrievably-stored RH debris waste (see Attachment B of the accompanying inspection report). ORNL–CCP revised specific documents to address the concerns and submitted them for EPA review following the initial onsite inspection. The EPA inspection team completed their review of the revised documents and determined that the revised documents adequately addressed all aspects of the four EPA concerns.

EPA has determined that the ORNL–CCP RH waste characterization program was technically adequate and that all concerns have been resolved. Therefore, EPA is proposing to approve the ORNL–CCP RH waste characterization program for ORNL RH Waste Stream OR–REDC–RH–HET that was evaluated during this baseline inspection, as described and documented in the accompanying inspection report. The proposed approval includes the following:

(1) The AK process for the RH retrievably-stored TRU debris waste stream designated as Waste Stream OR–REDC–RH–HET that was generated from REDC activities conducted between November 1991 and February 2007 that is currently stored at ORNL and will be repackaged into 55-gallon drums.

(2) The radiological characterization process using DTC and scaling factors for assigning radionuclide values to Waste Stream OR–REDC–RH–HET that is documented in CCP–AK–ORNL–501, Revisions 0 and 1, and detailed in this report.

(3) The VE process to identify waste material parameters and the physical form of the waste.

(4) The WWIS to submit data for both characterization and certification for RH TRU waste.

(5) The attainment of pertinent data quality objectives (DQOs).

ORNL–CCP must report and receive EPA approval of any Tier 1 (T1) changes to the ORNL–CCP waste characterization activities from the date of the baseline inspection, and ORNL–CCP must notify EPA regarding Tier 2 (T2) changes according to Table 1, below. Table 1 in this report closely follows the format used in recent CH and RH baseline approval reports.

[1] Transcurium isotopes are elements with atomic numbers (No.) greater than that of Curium (Cm), 96, i.e., berkelium (Bk), atomic No. 97; californium (Cf), atomic No. 98; einsteinium (Es), atomic No. 99; fermium (Fm), atomic No. 100; and mendelevium (Md), atomic No. 101. By definition, these are potentially TRU, depending on their radioactive emission (alpha, beta, or gamma) and half-life, even though they may contain small or immeasurable concentrations of plutonium and/or americium isotopes normally associated with TRU wastes.

TABLE 1—TIERING OF RH TRU WASTE CHARACTERIZATION PROCESSES IMPLEMENTED BY ORNL–CCP, BASED ON JUNE 30–JULY 2, 2008 BASELINE INSPECTION

RH WC Process elements	ORNL–CCP RH WC Process—T1 Changes	ORNL—CCP RH WC Process—T2 Changes [a]
Acceptable Knowledge (AK)	Addition of any new waste streams not approved under this baseline (AK–1).	Notification to EPA when updates are made to the documents included in AK–1, AK–2, AK–3, AK–4, AK–6, AK–9, AK–13, AK–14 and AK–15, outside of the specific T1 changes listed in the previous column.
	Modification of the approved population of the OR–REDC–RH–HET wastes to include any containers not included in the CCP–AK–ORNL–501, Revision 1 analysis (AK–1).	Notification to EPA of availability of and/or revisions to Add Container Memoranda (AK–3).
	Modification(s) resulting from incorporation of new information specific to the approved RH debris waste (OR–REDC–RH–HET) population to the following documents: CSSF (AK–1 and AK–2); CCP–AK–ORNL–501 (AK–1); CCP–AK–ORNL–500 (AK–2 and AK–9); AKSR (AK–6); CTP (AK–9); AK Accuracy Reports (AK–1 and AK–15); and the WSPF (AK–14).	Notification to EPA of availability of documentation of RH sample reclassified as CH and subject to confirmatory analyses via NDA (AK–9).
	Implementation of load management (AK–16)	Notification to EPA of availability of DRF(s) or data limitation information pertaining to CCP's assessment of ORNL's original radiological characterization of wastes generated post-1999 (AK–13).
Radiological Characterization, Dose-to-Curie (DTC) and the application of radionuclide-specific scaling factors.	Application of new scaling factors for isotopic determination other than those documented in CCP–AK–ORNL–501 (RC–3).	Revisions of CCP–AK–ORNL–501 or CCP–TP–504 that require CBFO approval (RC–3), (RC–4), (RC–8).
	Use of any alternate radiological characterization procedure other than DTC, with established scaling factors as documented in CCP–TP–504, Revision 6, or substantive modification of the DTC procedure [b] (RC–4)	Results from the any RH TRU container(s) that qualify as CH and are subject to NDA (RC–8).
	Any new waste stream not approved under this baseline or addition of containers to Waste Stream OR–REDC–RH–HET that requires changing the documented radionuclide scaling factors in CCP–AK–ORNL–501 (RC–4).	
Visual Examination (VE)	Implementation of VE by any system other than two operators performing VE [c] (VE–2).	Changes to VE procedure(s) that require CBFO approval (VE–1).
		Addition of new Sample Category Groups to the VE process that is subject to this proposed approval (VE–2).
WIPP Waste Information System (WWIS).	None at this time	Changes to WWIS procedure(s) that require CBFO approval (WWIS–1).
		Changes to the Excel spreadsheet titled, WWIS Data Entry Summary Characterization and Certification (WWIS–2).

[a] Upon receiving EPA approval, ORNL–CCP will report all T2 changes to EPA at the end of each fiscal quarter.
[b] "Substantive changes" means changes with the potential to impact the site's waste characterization activities or documentation thereof, excluding changes that are solely related to ES&H, nuclear safety, or RCRA, or that are editorial in nature.
[c] Modifications to approved equipment include all changes with the potential to affect NDA data relative to waste isolation and exclude minor changes, such as the addition of safety-related equipment.

IV. Availability of the Baseline Inspection Report for Public Comment

EPA has placed the report discussing the results of the Agency's inspection of the ORNL–CCP Site in the public docket as described in **ADDRESSES**. In accordance with 40 CFR 194.8, EPA is providing the public 45 days to comment on these documents. The Agency requests comments on the proposed approval decision, as described in the inspection report. EPA will accept public comment on this notice and supplemental information as described in Section 1.B. above. EPA will not make a determination of compliance before the 45-day comment period ends. At the end of the public comment period, EPA will evaluate all relevant public comments and revise the inspection report as necessary. If appropriate, the Agency will then issue a final approval letter and inspection report, both of which will be posted on the WIPP Web site.

Information on the certification decision is filed in the official EPA Air Docket, Docket No. A–93–02 and is available for review in Washington, DC, and at the three EPA WIPP informational docket locations in Albuquerque, Carlsbad, and Santa Fe, New Mexico. The dockets in New Mexico contain only major items from the official Air Docket in Washington, DC, plus those documents added to the

official Air Docket since the October 1992 enactment of the WIPP LWA.

Dated: November 18, 2008.

Elizabeth Cotsworth,

Director, Office of Radiation and Indoor Air.

[FR Doc. E8–28124 Filed 11–25–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0387; FRL–8365–9]

Intent to Suspend Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of issuance of Notice of Intent to Suspend; Suspension Order.

SUMMARY: This Notice, pursuant to section 6(f)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, announces that EPA has issued a Notice of Intent to Suspend pursuant to sections 3(c)(2)(B) and 4 of FIFRA. The Notice was issued following issuance of a Section 4 Reregistration Data Requirements Notice by the Agency and the failure of the registrant subject to the Section 4 Reregistration Data Requirements Notice to take appropriate steps to secure the data required to be submitted to the Agency. This Notice includes the text of a Notice of Intent to Suspend, absent specific chemical, product, or factual information. Table 1 of this Notice further identifies the registrant to whom the Notice of Intent to Suspend was issued, the date the Notice of Intent to Suspend was issued, the active ingredient(s) involved, and the EPA registration numbers and names of the registered product(s) which are affected by the Notice of Intent to Suspend. Moreover, Table 2 of this Notice identifies the basis upon which the Notice of Intent to Suspend was issued. Finally, matters pertaining to the timing of requests for hearing are specified in the Notice of Intent to Suspend and are governed by the deadlines specified in section 3(c)(2)(B). As required by section 6(f)(2), the Notice of Intent to Suspend was sent by certified mail, return receipt requested, to the affected registrant at its address of record. The Notice of Intent to Suspend described in this Notice was received by the registrant and the products have been suspended by operation of law. The Notice of Intent to Suspend has become an effective suspension order.

FOR FURTHER INFORMATION CONTACT: Bonnie Adler, Special Review and Reregistration Division, 7508P, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8523; fax number: (703) 308–8005; e-mail address: *adler.bonnie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. Although this action may be of particular interest to persons who produce or use pesticides, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0387. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the**Federal Register** listings at*http://www.epa.gov/fedrgstr.*

II. Text of a Notice of Intent to Suspend

The text of a Notice of Intent to Suspend, absent specific chemical, product, or factual information follows:

United States Environmental Protection Agency
Office of Prevention, Pesticides and Toxic Substances
Washington, DC 20460

Certified Mail
Return Receipt Requested

SUBJECT: Suspension of Registration of Pesticide Product(s) Containing _____ for Failure to Comply with the Section 4 Phase 5 Reregistration Eligibility Decision Data Call-In Notice

Dear Sir/Madam:

This letter gives you notice that the pesticide product registration(s) listed in Attachment I will be suspended 30 days from your receipt of this letter unless you take steps within that time to prevent this Notice from automatically becoming a final and effective order of suspension. The Agency's authority for suspending the registrations of your products is section 3(c)(2)(B) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Upon becoming a final and effective order of suspension, any violation of the order will be an unlawful act under section 12(a)(2)(J) of FIFRA.

You are receiving this Notice of Intent to Suspend because you have failed to comply with the terms of the Phase 5 Reregistration Eligibility Decision Data Call-In Notice imposed pursuant to section 4(g)(2)(B) and section 3(c)(2)(B) of FIFRA. The specific basis for issuance of this Notice is stated in the Explanatory Appendix (Attachment III) to this Notice. The affected product(s) and the requirement(s) which you failed to satisfy are listed and described in the following three attachments:

Attachment I Suspension Report — Product List

Attachment II Suspension Report — Requirement List

Attachment III Suspension Report — Explanatory Appendix

The suspension of the registration of each product listed in Attachment I will become final unless at least one of the following actions is completed.

1. You may avoid suspension under this Notice if you or another person adversely affected by this Notice properly request a hearing within 30 days of your receipt of this Notice. If you request a hearing, it will be conducted in accordance with the requirements of section 6(d) of FIFRA and the Agency's Procedural Regulations in 40 CFR Part 164.

Section 3(c)(2)(B), however, provides that the only allowable issues which may be addressed at the hearing are whether you have failed to take the actions which are the bases of this Notice and whether the Agency's decision regarding the disposition of existing stocks is consistent with FIFRA. Therefore, no substantive allegation or legal argument concerning other issues, including but not limited to the Agency's original decision to require the submission of data or other information, the need for or utility of any of the required data or other information or deadlines imposed, any allegations of errors or unfairness in any proceedings before an arbitrator, and the risks and benefits associated with continued registration of the affected product, may be considered in the proceeding. The Administrative Law Judge shall by order dismiss any objections which have no bearing on the allowable issues which may be considered in the proceeding.

Section 3(c)(2)(B)(iv) of FIFRA provides that any hearing must be held and a determination issued within 75 days after receipt of a hearing request. This 75–day period may not be extended unless all parties in the proceeding stipulate to such an extension. If a hearing is properly requested, the Agency will issue a final order at the conclusion of the hearing governing the suspension of your product(s).

A request for a hearing pursuant to this Notice must 1) include specific objections

which pertain to the allowable issues which may be heard at the hearing, 2) identify the registrations for which a hearing is requested, and 3) set forth all necessary supporting facts pertaining to any of the objections which you have identified in your request for a hearing. If a hearing is requested by any person other than the registrant, that person must also state specifically why he asserts that he would be adversely affected by the suspension action described in this Notice. Three copies of the request must be submitted to:

Hearing Clerk, 1900
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington. DC 20460

and an additional copy should be sent to the signatory listed below. The request must be *received* by the Hearing Clerk by the 30th day from your receipt of this Notice in order to be legally effective. The 30–day time limit is established by FIFRA and cannot be extended for any reason. Failure to meet the 30–day time limit will result in automatic suspension of your registration(s) by operation of law and, under such circumstances, the suspension of the registration for your affected product(s) will be final and effective at the close of business 30 days after your receipt of this Notice and will not be subject to further administrative review.

The Agency's Rules of Practice at 40 CFR 164.7 forbid anyone who may take part in deciding this case, at any stage of the proceeding, from discussing the merits of the proceeding *ex parte* with any party or with any person who has been connected with the preparation or presentation of the proceeding as an advocate or in any investigative or expert capacity, or with any of their representatives. Accordingly, the following EPA offices, and the staffs thereof, are designated as judicial staff to perform the judicial function of EPA in any administrative hearings on this Notice of Intent to Suspend: the Office of the Administrative Law Judges, the Office of the Environmental Appeals Board, the Administrator, the Deputy Administrator, and the members of the staff in the immediate offices of the Administrator and Deputy Administrator. None of the persons designated as the judicial staff shall have any *ex parte* communication with trial staff or any other interested person not employed by EPA on the merits of any of the issues involved in this proceeding, without fully complying with the applicable regulations.

2. You may also avoid suspension if, within 30 days of your receipt of this Notice, the Agency determines that you have taken appropriate steps to comply with the section 3(c)(2)(B) Data Call-In Notice. In order to avoid suspension under this option, you must satisfactorily comply with Attachment II, Requirement List, for each product by submitting all required supporting data/information described in Attachment II and in the Explanatory Appendix (Attachment III) to the following address (preferably by certified mail):

Office of Pesticide Programs
Special Review and Reregistration Division (7508P)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

For you to avoid automatic suspension under this Notice, the Agency must also determine within the applicable 30–day period that you have satisfied the requirements that are the bases of this Notice and so notify you in writing. You should submit the necessary data/information as quickly as possible for there to be any chance the Agency will be able to make the necessary determination in time to avoid suspension of your product(s).

The suspension of the registration(s) of your company's product(s) pursuant to this Notice will be rescinded when the Agency determines you have complied fully with the requirements which were the bases of this Notice. Such compliance may only be achieved by submission of the data/information described in the attachments to the signatory below.

Your product will remain suspended, however, until the Agency determines you are in compliance with the requirements which are the bases of this Notice and so informs you in writing.

After the suspension becomes final and effective, the registrant subject to this Notice, including all supplemental registrants of product(s) listed in Attachment I, may not legally distribute, sell, use, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person, the product(s) listed in Attachment I.

Persons other than the registrant subject to this Notice, as defined in the preceding sentence, may continue to distribute, sell, use, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person, the product(s) listed in Attachment I.

Nothing in this Notice authorizes any person to distribute, sell, use, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person, the product(s) listed in Attachment I in any manner which would have been unlawful prior to the suspension.

If the registration(s) for your product(s) listed in Attachment I are currently suspended as a result of failure to comply with another section 3(c)(2)(B) Data Call-In Notice or Section 4 Data Requirements Notice, this Notice, when it becomes a final and effective order of suspension, will be in addition to any existing suspension, i.e., all requirements which are the bases of the suspension must be satisfied before the registration will be reinstated.

You are reminded that it is your responsibility as the basic registrant to notify all supplementary registered distributors of your basic registered product that this suspension action also applies to their supplementary registered products and that you may be held liable for violations committed by your distributors.

If you have any questions about the requirements and procedures set forth in this suspension notice or in the subject section 3(c)(2)(B) Data Call-In Notice, please contact Linda S. Propst at (703) 308–8165.

III. Registrant Receiving and Affected by Notices of Intent to Suspend; Date of Issuance; Active Ingredient and Products Affected

The following is a list of products for which a letter of notification has been sent.

TABLE 1.—LIST OF PRODUCTS

Registrant Affected	EPA Registration Number	Active Ingredient	Product Name	Date Issued
The Scotts Company	538–160	MCPA	Turf Builder Plus 2 W/S For Grass	4/3/08*
The Scotts Company	538–218	MCPA	Scott's Lawn Pro Lawn Weed Control Plus	4/3/08*
The Scotts Company	538–222	MCPA	Scott's Lawn Pro Weed N' Feed	4/3/08*

*The Notice was received by The Scotts Company on April 14, 2008, as evidenced by the signed and dated U.S. Postal Service return receipt. The Notice of Intent to Suspend has since become an effective order of suspension as of May 14, 2008, as the registrant has neither requested a hearing nor brought its affected registrations into compliance within the statutory time period.

IV. Basis for Issuance of Notice of Intent; Requirement List

The Scotts Company failed to submit the following required data or information.

TABLE 2.—LIST OF REQUIREMENTS

OPPTS Harmonized Guideline #	Requirement Name	Test Substance	Due Date
830.1550	Product Identity and Composition	TGAI, MP, EP	November 15, 2006
830.1600	Description of Materials Used to Produce the Product	TGAI, MP, EP	November 15, 2006
830.1620	Description of Production Process	TGAI	November 15, 2006
830.1650	Description of Formulation Process	MP, EP	November 15, 2006
830.1670	Discussion of Formation Impurities	TGAI	November 15, 2006
830.1700	Preliminary Analysis	TGAI	November 15, 2006
830.1750	Certified Limits	TGAI, MP, EP	November 15, 2006
830.1800	Enforcement Analytical Method	TGAI, MP, EP	November 15, 2006
830.6302	Color	TGAI, MP, EP	November 15, 2006
830.6303	Physical State	TGAI, MP, EP	November 15, 2006
830.6304	Odor	TGAI, MP, EP	November 15, 2006
830.6313	Stability to Sunlight, Normal and Elevated Temperatures, Metals and Metal Ions	TGAI	November 15, 2006
830.6314	Oxidation/Reduction: Chemical Incompatibility	MP, EP	November 15, 2006
830.6315	Flammability/Flame Extension	MP, EP	November 15, 2006
830.6316	Explodability	MP, EP	November 15, 2006
830.6317	Storage Stability of Product	MP, EP	November 15, 2006
830.6319	Miscibility	MP, EP	November 15, 2006
830.6320	Corrosion Characteristics	MP, EP	November 15, 2006
830.6321	Dielectric Breakdown Voltage	EP	November 15, 2006
830.7000 830.7100	pH of Water Solution or Suspensions Viscosity	TGAI, MP, EP MP, EP	November 15, 2006 November 15, 2006
830.7200	Melting Point/Melting Range (only required if product is a solid)	TGAI	November 15, 2006
830.7220	Boiling Point/Boiling Range (only required if product is a liquid)	TGAI	November 15, 2006
830.7300	Density/Relative Density	TGAI, MP, EP	November 15, 2006
870.1100	Acute Oral Toxicity	TGAI, MP, EP	November 15, 2006
870.1200	Acute Dermal Toxicity	TGAI, MP, EP	November 15, 2006
870.1300	Acute Inhalation Toxicity	TGAI, MP, EP	November 15, 2006
870.2400	Acute Eye Irritation	TGAI, MP, EP	November 15, 2006
870.2500	Acute Dermal Irritation	TGAI, MP, EP	November 15, 2006
870.2600	Skin Sensitization	TGAI, MP, EP	November 15, 2006

EP = End Use Product
MP = Manufacturing Product
TGAI = Technical Grade Active Ingredient

V. Attachment III Suspension Report–Explanatory Appendix

A discussion of the basis for the Notices of Intent to Suspend follows.

On March 3, 2006, the Agency issued the Phase 5 Reregistration Eligibility Decision (RED) Data Call-In Notice pursuant to sections 4(g)(2)(B) of FIFRA which required registrants of products containing MCPA used as an active ingredient to develop and submit certain data. The data/information was determined to be necessary to satisfy the reregistration requirements of section 4(g) of FIFRA. Failure to comply with the requirements of a Phase 5 Reregistration Eligibility Decision Product Data Call-In Notice (PDCI) is a basis for suspension under section 3(c)(2)(B) of FIFRA.

The Scotts Company (Scotts) received the MCPA RED on March 6, 2006 (as evidenced by the signed and dated U.S. Postal Service domestic return receipt card). They did not respond to the PDCI with the required 90–day PDCI response for any of the three products, nor with the required 8–month responses with the required data. A letter from Linda Propst to Sheila Kendricks of Scotts was sent on November 14, 2006, which indicated that the Agency had not received the required data by the established due dates. It also stated that if data were not submitted within 15 days, a Notice of Intent to Suspend would be initiated. The return receipt for that letter was postmarked on November 20, 2006. On March 20, 2007, a second letter from Linda Propst to Sheila Kendricks of Scotts was sent indicating that data had still not been received and a Notice of Intent to Suspend will be forthcoming if data were not received in 10 days. The return receipt for that letter was postmarked on March 27, 2007. That letter was our second and final attempt to obtain the necessary documentation to support these products.

Since neither the required 90–day nor 8–month responses have been submitted for the MCPA PDCI, this Notice of Intent to Suspend is being issued.

VI. Conclusions

EPA issued a Notice of Intent to Suspend on the date indicated and the Notice of Intent to Suspend was received by the registrant on April 14, 2008. The Notice of Intent to Suspend became an effective suspension order on May 14, 2008. Any further information regarding this Notice or the suspension order may be obtained from the contact person noted above.

List of Subjects

Environmental protection.

Dated: November 13, 2008.

Steven Bradbury

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E8–28128 Filed 11–25–08; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's Web site (*http://www.fmc.gov*) or contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov*.

Agreement No.: 011962–006.

Title: Consolidated Chassis Management Pool Agreement.

Parties: The Ocean Carrier Equipment Management Association and its member lines; the Association's subsidiary Consolidated Chassis Management LLC and its affiliates; China Shipping Container Lines Co., Ltd.; Companhia Libra de Navegacao; Compania Libra de Navegacion Uruguay; Matson Navigation Co.; Mediterranean Shipping Co., S.A.; Midwest Consolidated Chassis Pool LLC; Norasia Container Lines Limited; Westwood Shipping Lines; and Zim Integrated Shipping Services Ltd.

Filing Party: Jeffrey F. Lawrence, Esq.; Sher & Blackwell LLP; 1850 M Street, NW; Suite 900; Washington, DC 20036.

Synopsis: The amendment would add the Chicago Ohio Valley Consolidated Chassis Pool LLC as a party to the agreement.

Agreement No.: 012056.

Title: WWL/EUKOR Joint Operating Agreement.

Parties: EUKOR Car Carriers, Inc. and Wallenius Wilhemsen Logistics AS.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell, LLP; 1850 M Street NW Suite 900; Washington, DC 20036.

Synopsis: The agreement would authorize the parties to engage in a broad range of operational and commercial cooperation in the U.S. foreign commerce.

Agreement No.: 012057.

Title: CMA CGM /Maersk Line Space Charter, Sailing and Cooperative Working Agreement Asia to USEC and PNW-Suez/PNW & Panama Loops.

Parties: A.P. Moller-Maersk A/S, and CMA CGM S.A.

Filing Party: Wayne R. Rohde, Esq.; Sher and Blackwell LLP; 1850 M Street, NW Suite 900; Washington, DC 20036.

Synopsis: The agreement authorizes the parties to share vessel space in the trades between the U.S. East and West Coasts and Asia.

Agreement No.: 200866–006.

Title: Lease and Operating Agreement between Broward County and King Ocean Service de Venezuela, S.A. and King Ocean Services, Ltd.

Parties: Broward County, King Ocean Service de Venezuela, S.A., and King Ocean Services, Ltd.

Filing Party: Candace J. Running; Broward County Board of County Commissioners; Office of the County Attorney; 1850 Eller Drive, Suite 502; Fort Lauderdale, FL 33316.

Synopsis: The amendment changes the location of Lessee's existing container terminal facility from Midport to Southport, Port Everglades and extends the lease term for an additional one year period.

Agreement No.: 201170–002.

Title: The Los Angeles and Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement.

Parties: Port of Los Angeles and Port of Long Beach.

Filing Party: C. Jonathan Benner, Esq.; Troutman Sanders, LLP; 401 9th Street Suite 1000; Washington, DC 20004–2134.

Synopsis: The amendment confirms that the parties' authority to adopt joint measures regarding the terms and conditions of a concession does not extend to measures that require employee status for drivers of Drayage Trucks or permit or exclude independent owner-operator drivers from providing or operating Drayage Trucks in either Port.

Agreement No.: 201196–002.

Title: Los Angeles and Long Beach Marine Terminal Agreement.

Parties: City of Los Angeles and City of Long Beach.

Filing Party: Matthew J. Thomas, Esq.; Troutman Sanders LLP; 401 9th Street NW Suite 1000; Washington, DC 20004.

Synopsis: The amendment confirms that the parties' authority to adopt joint measures regarding terms and conditions of a concession does not extend to measures that require employee status for drivers of Drayage Trucks or permit or exclude independent owner-operator drivers from providing or operating Drayage Trucks in either Port.

By Order of the Federal Maritime Commission.

Dated: November 21, 2008.

Karen V. Gregory,

Secretary.

[FR Doc. E8–28141 Filed 11–25–08; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel Operating Common Carrier Ocean Transportation Intermediary Applicant:

CN Link Freight Services Inc. dba C & U Logistics, 182–16 149th Rd, Ste. 218, Jamaica, NY 11413. Officer: Luyin Zhang, President (Qualifying Individual).

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicant:

Space Cargo USA, LLC, 230 SW 192 Terrace, Pembroke Pines, FL 33029. Officer: Jose A. Romero, Director (Qualifying Individual).

Karen V. Gregory,

Secretary.

[FR Doc. E8–28139 Filed 11–25–08; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the State Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2009 Through September 30, 2010

AGENCY: Office of the Secretary, DHHS.

ACTION: Notice.

SUMMARY: The Federal Medical Assistance Percentages and Enhanced Federal Medical Assistance Percentages for Fiscal Year 2010 have been calculated pursuant to the Social Security Act (the Act). These percentages will be effective from October 1, 2009 through September 30, 2010. This notice announces the calculated "Federal Medical Assistance Percentages" and "Enhanced Federal Medical Assistance Percentages" that The U.S. Department of Health and Human Services (HHS) will use in determining the amount of Federal matching for State medical assistance (Medicaid) and State Children's Health Insurance Program (SCHIP) expenditures, and Temporary Assistance for Needy Families (TANF) Contingency Funds, the Federal share of Child Support Enforcement collections, Child Care Mandatory and Matching Funds of the Child Care and Development Fund, Foster Care Title IV–E Maintenance payments, and Adoption Assistance payments. The table gives figures for each of the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Programs under title XIX of the Act exist in each jurisdiction. Programs under titles I, X, and XIV operate only in Guam and the Virgin Islands, while a program under title XVI (Aid to the Aged, Blind, or Disabled) operates only in Puerto Rico. Programs under title XXI began operating in fiscal year 1998. The percentages in this notice apply to State expenditures for most medical services and medical insurance services, and assistance payments for certain social services. The statute provides separately for Federal matching of administrative costs.

Sections 1905(b) and 1101(a)(8)(B) of the Act require the Secretary, HHS to publish the Federal Medical Assistance Percentages each year. The Secretary is to calculate the percentages, using formulas in sections 1905(b) and 1101(a)(8)(B), from the Department of Commerce's statistics of average income per person in each State and for the Nation as a whole. The percentages are within the upper and lower limits given in section 1905(b) of the Act. The percentages to be applied to the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands are specified in statute, and thus are not based on the statutory formula that determines the percentages for the 50 States.

The "Federal Medical Assistance Percentages" are for Medicaid. Section 1905(b) of the Act specifies the formula for calculating Federal Medical Assistance Percentages as follows:

> "Federal medical assistance percentage" for any State shall be 100 per centum less the State percentage; and the State percentage shall be that percentage which bears the same ratio to 45 per centum as the square of the per capita income of such State bears to the square of the per capita income of the continental United States (including Alaska) and Hawaii; except that (1) the Federal medical assistance percentage shall in no case be less than 50 per centum or more than 83 per centum, (2) the Federal medical assistance percentage for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa shall be 50 per centum. * * *

Section 4725(b) of the Balanced Budget Act of 1997 amended section 1905(b) to provide that the Federal Medical Assistance Percentage for the District of Columbia for purposes of titles XIX and XXI shall be 70 percent. For the District of Columbia, we note under the table of Federal Medical Assistance Percentages the rate that applies in certain other programs calculated using the formula otherwise applicable, and the rate that applies in certain other programs pursuant to section 1118 of the Social Security Act.

Section 2105(b) of the Act specifies the formula for calculating the Enhanced Federal Medical Assistance Percentages as follows:

> The "enhanced FMAP", for a State for a fiscal year, is equal to the Federal medical assistance percentage (as defined in the first sentence of section 1905(b)) for the State increased by a number of percentage points equal to 30 percent of the number of percentage points by which (1) such Federal medical assistance percentage for the State, is less than (2) 100 percent; but in no case shall the enhanced FMAP for a State exceed 85 percent.

The "Enhanced Federal Medical Assistance Percentages" are for use in the State Children's Health Insurance Program under title XXI, and in the Medicaid program for certain children for expenditures for medical assistance described in sections 1905(u)(2) and 1905(u)(3) of the Act. There is no specific requirement to publish the Enhanced Federal Medical Assistance Percentages. We include them in this notice for the convenience of the States.

DATES: *Effective Dates:* The percentages listed will be effective for each of the 4 quarter-year periods in the period beginning October 1, 2009 and ending September 30, 2010.

FOR FURTHER INFORMATION CONTACT: Thomas Musco or Carrie Shelton, Office of Health Policy, Office of the Assistant Secretary for Planning and Evaluation, Room 447D—Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201 (202) 690–6870.

(Catalog of Federal Domestic Assistance Program Nos. 93.558: TANF Contingency Funds; 93.563: Child Support Enforcement; 93–596: Child Care Mandatory and Matching Funds of the Child Care and Development Fund; 93.658: Foster Care Title IV–E; 93.659: Adoption Assistance; 93.769: Ticket-to-Work and Work Incentives Improvement Act (TWWIIA) Demonstrations to Maintain Independence and Employment; 93.778: Medical Assistance Program; 93.767: State Children's Health Insurance Program)

Dated: October 30, 2008.

Michael O. Leavitt,

Secretary of Health and Human Services.

Federal Medical Assistance Percentages and Enhanced Federal Medical Assistance Percentages, Effective October 1, 2009–September 30, 2010

[Fiscal year 2010]

State	Federal medical assistance percentages	Enhanced federal medical assistance percentages
Alabama	68.01	77.61
Alaska	51.43	66.00
American Samoa*	50.00	65.00
Arizona	65.75	76.03
Arkansas	72.78	80.95
California	50.00	65.00
Colorado	50.00	65.00
Connecticut	50.00	65.00
Delaware	50.21	65.15
District of Columbia**	70.00	79.00
Florida	54.98	68.49
Georgia	65.10	75.57
Guam*	50.00	65.00
Hawaii	54.24	67.97
Idaho	69.40	78.58
Illinois	50.17	65.12
Indiana	65.93	76.15
Iowa	63.51	74.46
Kansas	60.38	72.27
Kentucky	70.96	79.67
Louisiana	67.61	77.33
Maine	64.99	75.49
Maryland	50.00	65.00
Massachusetts	50.00	65.00
Michigan	63.19	74.23
Minnesota	50.00	65.00
Mississippi	75.67	82.97
Missouri	64.51	75.16
Montana	67.42	77.19
Nebraska	60.56	72.39
Nevada	50.16	65.11
New Hampshire	50.00	65.00
New Jersey	50.00	65.00
New Mexico	71.35	79.95
New York	50.00	65.00
North Carolina	65.13	75.59
North Dakota	63.01	74.11
Northern Mariana Islands*	50.00	65.00
Ohio	63.42	74.39
Oklahoma	64.43	75.10
Oregon	62.74	73.92
Pennsylvania	54.81	68.37
Puerto Rico*	50.00	65.00
Rhode Island	52.63	66.84
South Carolina	70.32	79.22
South Dakota	62.72	73.90
Tennessee	65.57	75.90
Texas	58.73	71.11
Utah	71.68	80.18
Vermont	58.73	71.11
Virgin Islands*	50.00	65.00
Virginia	50.00	65.00
Washington	50.12	65.08
West Virginia	74.04	81.83
Wisconsin	60.21	72.15
Wyoming	50.00	65.00

*For purposes of section 1118 of the Social Security Act, the percentage used under titles I, X, XIV, and XVI will be 75 per centum.

**The values for the District of Columbia in the table were set for the state plan under titles XIX and XXI and for capitation payments and DSH allotments under those titles. For other purposes, including programs remaining in Title IV of the Act, the percentage for D.C is 50.00.

[FR Doc. E8–28233 Filed 11–25–08; 8:45 am]
BILLING CODE 4150–28–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): CDC Grants for Public Health Research, Panel B, Funding Opportunity Announcement (FOA) PAR07–231

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting.

Time ond Dote: 10 a.m.–12 p.m., January 15, 2009 (Closed).

Ploce: Teleconference.

Stotus: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Motters To Be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to "CDC Grants for Public Health Research Dissertation, Panel B, FOA PAR07–231."

Contact Person for More Information: Susan B. Stanton, D.D.S., Health Scientist, Office of the Director, Office of the Chief Science Officer, CDC, 1600 Clifton Road, NE., Mailstop D74, Atlanta, GA 30333, Telephone: (404) 639–4640.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: November 20, 2008.

Elaine L. Baker,

Director, Manogement Anolysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E8–28155 Filed 11–25–08; 8:45 am]
BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): CDC Grants for Public Health Research, Panel A, Funding Opportunity Announcement (FOA) PAR07–231

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting.

Time ond Dote: 2 p.m.–5 p.m., January 15, 2009 (Closed).

Ploce: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Motters To Be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to "CDC Grants for Public Health Research Dissertation, Panel A, FOA PAR07–231."

Contoct Person for More Informotion: Susan B. Stanton, D.D.S., Health Scientist, Office of the Director, Office of the Chief Science Officer, CDC, 1600 Clifton Road, NE., Mailstop D74, Atlanta, GA 30333, Telephone: (404) 639–4640.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: November 20, 2008.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Diseose Control and Prevention.

[FR Doc. E8–28156 Filed 11–25–08; 8:45 am]
BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Diseases Transmitted Through the Food Supply Correction

A notice of the annual update of list of infectious and communicable diseases that are transmitted through handling the food supply and the methods by which such diseases are transmitted was published in the **Federal Register** on November 17, 2008 (73 FR 67871). This notice is corrected as follows:

On page 67872, first column: the second sentence "The Centers for Disease Control and Prevention (CDC) published a final list on August 16, 1991 (56 FR 40897) and updates on September 8, 1992 (57 FR 40917); January 13, 1994 (59 FR 1949); August 15, 1996 (61 FR 42426); September 22, 1997 (62 FR 49518–9); September 15, 1998 (63 FR 49359), September 21, 1999 (64 FR 51127); September 27, 2000 (65 FR 58088), September 10, 2001 (66 FR 47030), and September 27, 2002 (67 FR 61109)."

Should now read: "The Centers for Disease Control and Prevention (CDC) published a final list on August 16, 1991 (56 FR 40897) and updates on September 8, 1992 (57 FR 40917); January 13, 1994 (59 FR 1949); August 15, 1996 (61 FR 42426); September 22, 1997 (62 FR 49518–9); September 15, 1998 (63 FR 49359), September 21, 1999 (64 FR 51127); September 27, 2000 (65 FR 58088), September 10, 2001 (66 FR 47030), September 27, 2002 (67 FR 61109), and September 26, 2006 (71 FR 56152)."

Dated: November 19, 2008.

James D. Seligman,

Chief Informotion Officer, Centers for Diseose Control and Prevention.

[FR Doc. E8–28151 Filed 11–25–08; 8:45 am]
BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Fees for Sanitation Inspections of Cruise Ships

AGENCY: Centers for Disease Control and Prevention, U.S. Department of Health and Human Services.

ACTION: Notice.

SUMMARY: This notice announces fees for vessel sanitation inspections for fiscal year 2009 (October 1, 2008, through September 30, 2009).

DATES: *Effective Date:* October 1, 2008.

CONTACT INFORMATION: Chief Jaret Ames, Vessel Sanitation Program, National Center for Environmental Health, Centers for Disease Control and Prevention, 4770 Buford Highway, NE., Mailstop F–23, Atlanta, Georgia 30341–3724, Telephone 770–488–3139, E-mail *jfa0@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Purpose and Background

The fee schedule for sanitation inspections of passenger cruise ships inspected under the Vessel Sanitation Program (VSP) was first published in the **Federal Register** on November 24, 1987 (52 FR 45019). The Centers for Disease Control and Prevention (CDC) began collecting fees on March 1, 1988. Since then, CDC has annually published the fee schedule. This notice announces fees that are effective October 1, 2008.

The following formula is used to determine the fees:

$$\text{Average cost per inspection} = \frac{\text{Total cost of VSP}}{\text{Weighted number of annual inspections}}$$

The average cost per inspection is multiplied by size and cost factors to determine the fee for vessels in each size category. The size and cost factors were established in the proposed fee schedule published in the **Federal Register** on July 17, 1987 (52 FR 27060). The fee schedule was twice revised and was published in the **Federal Register** on November 28, 1989 (54 FR 48942) and on November 21, 2005 (70 FR 70078). The revised size and cost factors are presented in Appendix A.

Fee

The fee schedule (Appendix A) will be effective October 1, 2008, through September 30, 2009. If travel expenses continue to increase, the fees may need adjusting before September 30, 2009, because travel constitutes a sizable portion of VSP's costs. If an adjustment is necessary, a notice will be published in the **Federal Register** 30 days before the effective date.

Applicability

The fees will apply to all passenger cruise vessels for which inspections are conducted as part of CDC's VSP.

Dated: November 19, 2008.

James D. Seligman,

Chief Information Officer, Centers for Disease Control and Prevention.

APPENDIX A

Vessel size	GRT [1]	Approximate cost ($US) per GRT
Size/Cost Factor		
Extra Small	<3,001	0.25
Small	3,001–15,000	0.50
Medium	15,001–30,000	1.00
Large	30,001–60,000	1.50
Extra Large	60,001–120,000	2.00
Mega *	>120,001	3.00
Vessel size	**GRT [1]**	**Fee ($U.S.)**
Fee Schedule		
Extra Small	<3,000	1,300
Small	3,001–15,000	2,600
Medium	15,001–30,000	5,200
Large	30,001–60,000	7,800
Extra Large	60,001–120,000	10,400
Mega*	>120,001	15,600

* New Vessel Size Category.

[1] Gross register tonnage in cubic feet, as shown in Lloyd's Register of Shipping.

Inspections and reinspections involve the same procedures, require the same amount of time, and are therefore charged at the same rates.

[FR Doc. E8–28153 Filed 11–25–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Public Meeting

AGENCY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of public meeting.

SUMMARY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC) announces the following public meeting: "Partnerships to Advance the National Occupational Research Agenda (NORA)."

Public Meeting Time and Date: 10 a.m.–4 p.m. EST, January 22, 2009.

Place: Patriots Plaza, 395 E Street, SW., Conference Room 9000, Washington, DC 20201.

Purpose of Meeting: The National Occupational Research Agenda (NORA) has been structured to engage partners with each other and/or with NIOSH to advance NORA priorities. The NORA Liaison Committee continues to be an opportunity for representatives from organizations with national scope to learn about NORA progress and to suggest possible partnerships based on their organization's mission and contacts. This opportunity is now structured as a public meeting via the internet to attract participation by a larger number of organizations and to further enhance the success of NORA. Some of the types of organizations of national scope that are especially

encouraged to participate are employers, unions, trade associations, labor associations, professional associations, and foundations. Others are welcome.

This meeting will include updates from NIOSH leadership on NORA as well as updates from approximately half of the Sector Councils on their progress, priorities, and implementation plans to date, including the Agriculture, Forestry and Fishing Sector; Healthcare and Social Assistance Sector; Mining Sector; Mining—Oil and Gas Extraction Sub-Sector; and Transportation, Warehousing and Utilities Sector. After each update, there will be time to discuss partnership opportunities.

Status: The meeting is open to the public, limited only by the capacities of the conference call and conference room facilities. There is limited space available in the meeting room (capacity 34). Therefore, information to allow participation in the meeting through the internet (to see the slides) and a teleconference call (capacity 50) will be provided to registered participants. Participants are encouraged to consider attending by this method. Each participant is requested to register for the free meeting by sending an e-mail to noracoordinator@cdc.gov containing the participant's name, organization name, contact telephone number on the day of the meeting, and preference for participation by Web meeting (requirements include: computer, internet connection, and telephone, preferably with "mute" capability) or in person. An e-mail confirming registration will include the details needed to participate in the Web meeting. Non-US citizens are encouraged to participate in the Web meeting. Non-US citizens registering to attend in person after January 8 will not have time to comply with security procedures.

Background: NORA is a partnership program to stimulate innovative research in occupational safety and health leading to improved workplace practices. Unveiled in 1996, NORA has become a research framework for the nation. Diverse parties collaborate to identify the most critical issues in workplace safety and health. Partners then work together to develop goals and objectives for addressing those needs and to move the research results into practice. The NIOSH role is facilitator of the process. For more information about NORA, see *http://www.cdc.gov/niosh/nora/about.html.*

Since 2006, NORA has been structured according to industrial sectors. Eight sector groups have been defined using the North American Industrial Classification System (NAICS). After receiving public input through the Web and town hall meetings, NORA Sector Councils have been working to define sector-specific strategic plans for conducting research and moving the results into widespread practice. During 2008, most of these Councils have posted draft strategic plans for public comment. One has posted its finalized National Sector Agenda after considering comments on its draft. For more information, see the link above and choose "Sector-based Approach," "NORA Sector Councils," "Sector Agendas" and "Comment on Draft Sector Agendas" from the right-side menu.

Contact Person for Technical Information: Sidney C. Soderholm, Ph.D., NORA Coordinator, e-mail *noracoordinator@cdc.gov*, telephone (202) 245–0665.

Dated: November 19, 2008.

James D. Seligman,

Chief Information Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–28152 Filed 11–25–08; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention (CDC)

Request for Nominations of Candidates To Serve on the Advisory Committee on Immunization Practices (ACIP)

CDC is soliciting nominations for possible membership on ACIP. This committee provides advice and guidance to the Secretary, Department of Health and Human Services (HHS), and the Director, CDC, regarding the most appropriate application of antigens and related agents for effective communicable disease control in the civilian population. The committee reviews and reports regularly on immunization practices and recommends improvements in the national immunization efforts.

The committee also establishes, reviews, and as appropriate, revises the list of vaccines for administration to children eligible to receive vaccines through the Vaccines for Children (VFC) Program. Nominations are being sought for individuals who have expertise and qualifications necessary to contribute to the accomplishments of the committee's objectives. Nominees will be selected based upon expertise in the field of immunization practices; multi-disciplinary expertise in public health; expertise in the use of vaccines and immunologic agents in both clinical and preventive medicine; knowledge of vaccine development, evaluation, and vaccine delivery; or knowledge about consumer perspectives and/or social and community aspects of immunization programs.

Federal employees will not be considered for membership. Members may be invited to serve for up to four-year terms.

Consideration is given to representation from diverse geographic areas, both genders, ethnic and minority groups, and the disabled. Nominees must be U.S. citizens.

The following information must be submitted for each candidate: name, affiliation, address, telephone number, e-mail address and current curriculum vitae.

Nominations should be accompanied with a letter of recommendation stating the qualifications of the nominee and postmarked by December 15, 2008 to: Antonette Hill, Immunization Service Division, National Center for Immunization and Respiratory Diseases, CDC, 1600 Clifton Road, NE., Mailstop E–05, Atlanta, Georgia 30333, Telephone (404) 639–8836.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: November 18, 2008.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E8–28154 Filed 11–25–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0162]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Prescription Drug Product Labeling: Medication Guide Requirements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the

Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (the PRA).

DATES: Fax written comments on the collection of information by December 26, 2008.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974, or e-mailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0393. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3792.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance:

Prescription Drug Product Labeling: Medication Guide Requirements (OMB Control Number 0910–0393—Extension)

FDA regulations require the distribution of patient labeling, called Medication Guides, for certain prescription human drug and biological products used primarily on an outpatient basis that pose a serious and significant public health concern requiring distribution of FDA-approved patient medication information. These Medication Guides inform patients about the most important information they should know about these products in order to use them safely and effectively. Included is information such as the drug's approved uses, contraindications, adverse drug reactions, and cautions for specific populations, with a focus on why the particular product requires a Medication Guide. These regulations are intended to improve the public health by providing information necessary for patients to use certain medication safely and effectively.

The regulations contain the following reporting requirements that are subject to the PRA. The estimates for the burden hours imposed by the following regulations are listed in the table 1 of this document:

- 21 CFR 208.20—Applicants must submit draft Medication Guides for FDA approval according to the prescribed content and format.
- 21 CFR 208.24(e)—Each authorized dispenser of a prescription drug product for which a Medication Guide is required, when dispensing the product to a patient or to a patient's agent, must provide a Medication Guide directly to each patient unless an exemption applies under § 208.26 (21 CFR 208.26).
- 21 CFR 208.26(a)—Requests may be submitted for exemption or deferral from particular Medication Guide content or format requirements.
- 21 CFR 314.70(b)(3)(ii) and 21 CFR 601.12(f)—Application holders must submit changes to Medication Guides to FDA for prior approval as supplements to their applications.

In the **Federal Register** of March 18, 2008 (73 FR 14471), FDA published a 60-day notice requesting public comment on the information collection provisions. We received the following comments:

(*Comment 1*) The comments said that FDA's estimate of the hourly burden for pharmacists to comply with the Medication Guide requirements is inaccurate, and that pharmacists spend significantly more time determining whether a Medication Guide is required, tracking appropriate Medication Guides from manufacturers or distributors, explaining to the patient what the Medication Guide is, in addition to patient counseling. The comments noted that FDA's estimate that a pharmacist spends 0.0014 hours (5 seconds) to distribute each Medication Guide remains unchanged since the December 1, 1998, final rule entitled "Prescription Drug Product Labeling; Medication Guide Requirements," even though the Medication Guide program has continued to expand (63 FR 66378). The comments said that FDA's estimates are inadequate and fail to consider the operational realities pharmacists now face in complying with the program. The comments said that pharmacy personnel spend tens of thousands of hours obtaining and distributing Medication Guides for each new prescription and all refills for Medication Guide medications.

Response: FDA agrees with the comments. However, the comments did not suggest an alternative burden estimate for Medication Guide distribution by pharmacists. We are increasing the burden estimate for § 208.24(e) to 3 minutes for each Medication Guide distributed by pharmacists. If the commenters believe that this estimate is insufficient, we request comments on why an alternative estimate would be more accurate. We are also increasing to 25 the number of Medication Guides that FDA receives per year under § 208.20.

(*Comment 2*) The comments also said that there are distributor costs to comply with the Medication Guide requirements, and table 1 in the March 18, 2008, **Federal Register** notice omitted § 208.24(c), which provides that "Each distributor or packer that receives Medication Guides * * * shall provide those Medication Guides * * * to each authorized dispenser to whom it ships a container of drug product." The comments said that the burden to distributors and packers to distribute Medication Guides—the process of tracking, sorting, matching, and shipping multiple versions of Medication Guides for multiple products—should be included in the analysis.

Response: FDA agrees with the comments and is willing to include a burden estimate for § 208.24(c). We are requesting comments on specific estimates for this requirement.

(*Comment 3*) The remaining issues raised by the comments in response to the March 18, 2008, **Federal Register** notice are generally the same as the issues raised during FDA's public hearing on the use of Medication Guides to distribute drug risk information to patients (announced in the **Federal Register** of April 9, 2007 (72 FR 17559)) and the same as the comments submitted to that docket. (One commenter also referenced comments previously submitted to FDA in the "June 2006 White Paper on *Patient Safety Implications on Implementation of the Current FDA-Mandated Medication Guide Program*"). On July 2, 2007, FDA posted a "Summary of Public Hearing on FDA's Use of Medication Guides to Distribute Drug Risk Information to Patients" at *http://www.fda.gov/cder/meeting/SummaryPublicHearingMedicationGuides.htm*. The issues raised in conjunction with the public hearing, as well as the comments summarized below, are still under consideration at FDA, and we have not yet decided what actions we will take in response to suggestions to modify the Medication Guide program.

The following is a summary of the comments received on the March 18, 2008, notice; these comments do not pertain to the specific burden estimates, but were taken into consideration by FDA.

(*Comment 4*) The comments said that despite stating in the Medication Guide final rule that FDA will use Medication Guides sparingly, the agency continues to add new Medication Guides for drugs in a manner inconsistent with its

original intent. The comments said that FDA intended Medication Guides to be used only when a drug posed very serious or significant side effects, and that it anticipated the program to be limited to a small number of products, and not more than 5 to 10 products per year. The comments said that by 2004, about 20 products required Medication Guides, and that starting in 2005, FDA began requiring Medication Guides for entire medication classes, which have grown to include antidepressants, nonsteroidal anti-inflammatory drugs, and attention deficit hyperactivity disorder and sleep disorder drugs. The comments said that today almost 300 million prescriptions per year for over 10,000 separate drug products are subject to the Medication Guide requirement, and pharmacists are dispensing Medication Guides for substantially more drugs than originally estimated. The comments said that this has created significant burdens for pharmacists.

(*Comment 5*) The comments said that there is no evidence that a Medication Guide is a good vehicle for risk communication, and FDA has not provided evidence that the program is valuable to patients or improves the safe and effective use of prescription drugs. The comments said that given the amount of information patients are likely to receive with their prescriptions, they face a tremendous challenge in actually reading each piece of information. As a result, the comments said, many patients are likely to not read any material provided to them. Those patients that desire to gain additional information about their therapy but are unable to read each document are placed in a position of having to decide which document distributed to them is more important than the other. The comments said that FDA should first evaluate whether patients actually read the Medication Guides distributed to them, and then assess whether the information contained in a Medication Guide is easily understood by patients. The comments said that many patients are likely to find the information difficult to understand or confusing, and that many patients, especially older and disabled patients, have cognitive impairments that may pose tremendous challenges in understanding information contained in a Medication Guide. The comments also asked whether the information contained in the Medication Guide is already available to patients. For example, the comments said that pharmacists provide counseling on the safe and effective use of medication to their patients at the time of dispensing, and are able to translate highly complex information about a drug's characteristics, use parameters, side-effects and abuse potential. The comments said this counseling by pharmacists, coupled with other information already distributed to patients, such as consumer medication information and the patient package insert or the patient information sheet, raises questions about the need for the Medication Guide program. The comments also said that FDA has not made sufficient data available to the public to support the position that the Medication Guide program is important to communicate risk, and FDA should release all data from its surveys and studies for review and comment by health care provider groups. The comments said that this data will help generate a more accurate estimate of the burden imposed on the public as a result of the Medication Guide program.

(*Comment 6*) The comments said that pharmacists face difficulties in obtaining Medication Guides. The comments said that some Medication Guides are included with the product itself in the package insert, some are provided in tear-off sheets, and some are available electronically. The comments said that the lack of a standardized delivery model complicates efforts to operationally streamline dispenser and distribution systems for duplicating and providing Medication Guides. In addition, pharmacists at times need to call a toll-free number to order hard copies of the Medication Guides for distribution. The comments said that FDA should establish standards for manufacturer distribution of medication guides and establish a single toll-free number or Internet site for pharmacies to use to obtain Medication Guides.

(*Comment 7*) The comments said that FDA should waive certain Medication Guide formatting requirements to permit pharmacies to print Medication Guides through existing pharmacy computer systems. The comments said that permitting pharmacies to print Medication Guides would enhance their distribution and will free pharmacists' time to use for patient counseling and care. The comments also said FDA should permit pharmacies to e-mail Medication Guides to their patients.

(*Comment 8*) The comments said that a single, uniform Medication Guide should be used for all brand and generic versions of the same drug, or for drugs within the same therapeutic class, with similar risk warnings, and that each brand and generic manufacturer of the same drug or the same class of drug should not have to produce its own Medication Guide. The comments said that for medications that have unique and rare side effects that are not shared with the other drugs in the same class, FDA should consider having a class Medication Guide that specifically lists per paragraph each drug in the class while highlighting risk information that is unique to certain medications within that class.

(*Comment 9*) The comments said that Medication Guides should only be required the first time a prescription is filled, and thereafter only when requested by a patient for that prescription's refill.

(*Comment 10*) The comments said to eliminate duplication and enhance the usefulness of patient information, a single, manufacturer-produced, patient-oriented FDA-approved Medication Information Document should be developed for each drug that currently requires a Medication Guide. This single document could combine consumer medication information and Medication Guide information. The comments said they are willing to work with FDA and other interested stakeholders in designing and implementing such a program. Alternatively, the comments said that FDA should standardize the information that must be included in the Medication Guide and require a consistent format, look, and feel to Medication Guide information.

(*Comment 11*) The comments said that physicians and other providers should give the Medication Guide directly to the patient at the time the prescription is written. The comments said the physician is in the best position to discuss not only the possible risks associated with the medication but to also discuss alternative therapies if necessary. The comments also said that FDA should consider ways that prescribers could be better informed about medications that require Medication Guides.

(*Comment 12*) The comments said that the Medication Guide requirements were imposed on distribution and dispensing entities that were neither prepared nor operationally structured (for example, lack of space, staff, and equipment) to prepare and provide for their dissemination.

Based on the comments in "*Comment* (1)" of this document, FDA has revised the estimated annual reporting burden as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
208.20	25	1	25	320	8,000
208.24(e)	59,000	5,000	295,000,000	0.05	14,750,000
208.26(a)	1	1	1	4	4
314.70 (b)(3)(ii) and 601.12(f)	5	1	5	72	360
Total					14,758,364

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: November 19, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–28064 Filed 11–25–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0595]

Agency Information Collection Activities; Proposed Collection; Comment Request; Experimental Study: Toll-Free Number for Consumer Reporting of Drug Product Side Effects in Direct-to-Consumer Television Advertisements for Prescription Drugs

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on a proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on a study examining the impact on consumer comprehension of inclusion of a toll-free number to report side effects in direct-to-consumer (DTC) prescription drug television advertisements.

DATES: Submit written or electronic comments on the collection of information by January 26, 2009.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos,Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3792.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency 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, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Toll-Free Number for Consumer Reporting of Drug Product Side Effects in Direct-to-Consumer Television Advertisements for Prescription Drugs

The Federal Food, Drug, and Cosmetic Act (the act) requires that manufacturers, packers, and distributors (sponsors) who advertise prescription human and animal drugs, including biological products for humans, disclose in advertisements certain information about the advertised product's uses and risks. For prescription drugs and biologics, the act requires advertisements to contain "information in brief summary relating to side effects, contraindications, and effectiveness" (21 U.S.C. 352(n)). FDA is responsible for enforcing the act and implementing regulations.

On September 27, 2007, the President signed into law the Food and Drug Administration Amendments Act (FDAAA) (Public Law 110–85). Title IX of FDAAA amends section 502(n) of the act (21 U.S.C. 352) by requiring printed DTC advertisements for prescription drug products to include the following statement printed in conspicuous text: "You are encouraged to report negative side effects of prescription drugs to the FDA. Visit *www.fda.gov/medwatch*, or call 1–800–FDA–1088." Title IX of FDAAA also requires the Secretary of Health and Human Services (the Secretary), in consultation with the Risk Communication Advisory Committee (RCAC), to conduct a study not later than 6 months after the date of enactment of FDAAA to determine if this statement is appropriate for inclusion in DTC television advertisements for prescription drug products. As part of this study, the Secretary shall consider whether the information in the statement described previously in this paragraph would

detract from the presentation of risk information in a DTC television advertisement. If the Secretary determines that the inclusion of such a statement would be appropriate for television advertisements, FDAAA mandates the issuance of regulations implementing this requirement, and for the regulations to reflect a reasonable length of time for displaying the statement in television advertisements. Finally, FDAAA requires the Secretary to report the study's findings and any subsequent plans to issue regulations to Congress.

In accordance with the requirements of FDAAA, FDA convened a meeting of the RCAC on May 15 and 16, 2008. A draft design for studying this issue was proposed at that time and discussed by the Advisory Committee. Based on comments received at that meeting, changes were made to the proposed study design. The transcripts and materials from that meeting can be found online at *http://www.fda.gov/ohrms/dockets/ac/oc08.html#RCAC.*

Relevant Prior History and Research

Section 17 of the Best Pharmaceuticals for Children Act (the BPCA) (Public Law 107–109, January 4, 2002) required FDA to issue a final rule mandating the addition of a statement to the labeling of each drug product for which an application is approved under section 505 of the act (21 U.S.C. 355). Under the BPCA, the statements must include: (1) A toll-free number maintained by FDA for the purpose of receiving reports of adverse events regarding drugs; and (2) a statement that the number is to be used only for reporting purposes, and it should not be used to seek or obtain medical advice (the side effects statement).

On April 22, 2004, FDA published a proposed rule with a proposed side effects statement for certain prescription drug product labeling and a proposed side effects statement for certain over-the-counter drug product labeling (69 FR 21778). In the proposed rule, FDA solicited comments on a proposed statement that FDA believed comported with the previously mentioned mandate in the BPCA. The agency received 12 comments suggesting changes to the specific wording proposed. The agency also received several comments suggesting that FDA engage in research to study the wording of the proposed side effects statement with consumers. Among the reasons cited for testing the statement were to: (1) Determine the best and most precise wording for the statement, (2) evaluate consumer comprehension of the proposed statement, and (3) address concerns that consumers who read the statement will mistakenly call FDA in search of medical advice rather than seeking appropriate medical treatment. In addition, during the clearance process for the proposed rule, both the Office of Information and Regulatory Affairs of OMB and the Office of the Assistant Secretary for Planning and Evaluation of the Department of Health and Human Services suggested that FDA conduct focus groups or other consumer studies to inform the wording of the side effects statement.

During the spring of 2006, to assist in developing this study, FDA conducted two focus groups to gauge consumer understanding and preferences for a number of proposed side effects statements and to narrow the number of statements to be tested in subsequent experimental research. In addition to the information collected on which versions of the statements participants preferred, discussions showed that people varied in their understanding of when to call FDA or their health care practitioners and that some people would not call FDA even if they experienced a serious side effect. Several people in the focus groups suggested the addition of a Web site to report adverse side effects.

Based on the findings from the focus groups, nine statements were selected for quantitative testing. A labeling comprehension experiment was conducted with 1,674 men and women ranging in age from 21 to 95 with varying levels of education (OMB Control No. 0910–0497). The results from that quantitative test found that only one of the versions tested was rated as significantly less clear than the others, which were all rated as generally clear and understandable. The results also showed that participants reported they would not call FDA seeking medical advice. Further, among those participants who said they would call the FDA, the majority indicated they would call their doctor for medical advice, rather than FDA, regardless of the severity of the side effect. Finally, participants indicated they could distinguish between serious and non-serious side effects, reporting that they would seek emergency medical care in the case of serious side effects. The report of the study is available in the docket for the final rule, Docket No. FDA–2003–N–0313. The final rule, Toll-Free Number for Reporting Adverse Events on Labeling for Human Drug Products (TFNR) (73 FR 63886, October 28, 2008), is available online at *http://www.fda.gov/OHRMS/DOCKETS/98fr/E8–25670.pdf.*

Proposed Research

This study will examine the placement of the toll-free statement and the length of time the statement is presented on-screen in a DTC television advertisement for a prescription drug. The primary dependent measure of interest is consumer comprehension of the risk information in the advertisement. This study will also examine potential differences in comprehension based on the wording of the toll-free statement and the prominence of the statement.

The application of a new piece of information for viewers of DTC ads presents logistical challenges. From a research perspective, the primary issue under investigation is how to impart additional information without increasing "cognitive load," thus leading to information overload. Cognitive load is an index of the memory demands necessary to process a set of information. As cognitive load increases, more mental resources are necessary to process and understand the information.[1] DTC ads are already quite dense when compared to ads for other products. The risk information in the major statement of the ad should not be compromised by the addition of the toll-free statement. At the same time, it is preferable that the risk information and the toll-free statement information are presented in such a way that both are understandable. We have chosen a set of variables in the current study to investigate issues of cognitive load. They are described briefly in the following paragraphs before examining the details of the research design.

1. Placement

The location of the toll-free statement may facilitate or detract from the risk information in the major statement. We have chosen three locations for this information to test which location results in the greatest communication of the risks of the drug and the concept that side effects can be reported. It is possible that locating the toll-free statement before the major statement provides a "prime" for the risk information that follows; that is, the mention of side effects in the toll-free statement will cause consumers to start thinking about side effect-related information, which facilitates comprehension of the risk information that follows. In this case, the two conceptual pieces of information may flow together easily. Conversely, it is possible that locating the toll-free statement here confuses consumers or provides no information for them

[1] Chandler, P. and J. Sweller, "Cognitive Load Theory and the Format of Instruction." *Cognition and Instruction*, 8(4), 293–332, 1991.

because they have not yet heard any risk information. Thus, without context, the statement lacks applicability.

Placing the toll-free statement during the major statement likely reduces the comprehension of the risk information for the drug because it divides viewer's attention between two competing pieces of information. It is possible, however, that the juxtaposition of these two informational concepts are complimentary and therefore do not conflict.

The toll-free statement may serve the best role if it is located after the risk information has been presented. In this case, participants have been told about the risks and side effects of the drug before they are told they may report this information. This essentially primes the toll-free statement with the major statement. We do not expect this placement to interfere with the comprehension of risk information, as it is not present during the voicing of risks and has not been introduced to viewers at this point. The usefulness of the toll-free statement, however, may improve in this condition relative to those discussed above because viewers have been provided with context.

Over time, it is likely that the toll-free statement will become part of the background of the ads as people become accustomed to seeing this statement in all DTC ads. In this respect, people will have the statement as an option if needed but will be able to disregard it to focus on the risk information when desired. Thus, we are testing a condition in which the toll-free statement will be present during the entire ad. This test condition will control for the effect of novelty arising from the fact that consumers have not previously seen this type of statement in TV ads. Presence of the statement during the entire ad may increase noticeability of the toll-free statement initially, but will be unlikely to interfere with risk information in the long run.

2. Statement Wording

The second variable, *statement type*, will have two executions of statement language: The language from FDAAA versus the language used in the TFNR and previously tested by FDA. The wording from these two statements is as follows:

- "You are encouraged to report negative side effects of prescription drugs to the FDA. Visit *www.fda.gov/medwatch*, or call 1–800–FDA–1088." (FDAAA)
- "Call your doctor for medical advice about side effects. You may report side effects to FDA at 1–800–FDA–1088 or *www.fda.gov/medwatch.*" (TFNR)

We think it is important to test both the toll-free statement version in FDAAA and the version that we have previously tested with actual consumers. The most obvious reason for this is to make sure that the statement is maximally readable and understandable. It may be valuable, however, to test two statements for another reason.

If the toll-free statement is enacted in broadcast ads, it is possible that because of the boilerplate language, some amount of "burnout" will occur. That is, after viewers have seen the same language in multiple ads for multiple products, they may "tune out" and not pay attention to the toll-free statement at all. If we test two versions of the statement and find both acceptable, it would be possible to either allow sponsors to choose one statement versus another or to suggest some alternating of the two statements. This is a long-term idea, however, and finding appropriate wording is the primary goal of investigating this variable.

3. Duration

Congress specifically mandates that we investigate the duration of the display of the toll-free statement. As with placement, the length of time the toll-free statement is presented on-screen may influence the cognitive load in the ad. For experimental control, we will look at the duration of the statement while holding placement in the ad (after the major statement of risks) constant. Although this placement should not interfere with the processing of the risk information, it is possible that the duration influences the take away message from the ad. For example, having the statement on for a short amount of time may not give consumers enough time to read and process the message, resulting in lower comprehension of the message but no impact on the comprehension of the risk information. Alternatively, displaying the toll-free statement for a longer period of time may wipe away memory traces of the risks from the major statement, resulting in lower risk comprehension. Whether this longer duration increases the usefulness of the toll-free statement itself is an empirical question. We will compare these short and long durations to instances where the toll-free statement is present during the entire ad and where there is no toll-free statement at all.

4. Prominence

In addition to superimposing the toll-free statement on the screen during the ad, there are other methods available to increase the prominence of the statement. In particular, having the statement read aloud in the ad voiceover while the statement is on the screen may be considered particularly prominent. Does the additional prominence of the statement compromise the comprehension of the risk information in the major statement? If not, does the additional prominence result in a greater understanding of the toll-free statement itself? It is likely that there is a tradeoff between the gains of emphasizing the toll-free statement and the comprehension of the risk information, given the limited cognitive capacity of viewers. In examining this variable, we are exploring the parameters of this tradeoff.

Design Overview

The design will consist of three parts. Part one will be a between-subjects factorial design examining the placement of the toll-free statement by the type of statement. The first variable, placement, will have four levels: (1) Before the major statement of risks, (2) during the major statement of risks, (3) after the major statement of risks, or (4) continuously throughout the whole ad.

In each condition the toll-free statement will appear in the ad as superimposed text at the bottom of the screen. We will also include a control condition in which the statement does not appear.

PART ONE: PLACEMENT BY STATEMENT TYPE

4 x 2 + 1

	Statement Type	
Placement	FDAAA	TFNR
Before major statement of risks		
During major statement of risks		

PART ONE: PLACEMENT BY STATEMENT TYPE—Continued

4 x 2 + 1

	Statement Type	
Placement	FDAAA	TFNR
After major statement of risks		
During the whole ad		

Plus:

Control (no toll-free statement)

Part two of the study will examine four variations in the duration of the toll-free statement using the language from FDAAA: (1) Short (approximately 3 seconds after the major statement), (2) long (approximately 6 seconds after the major statement), (3) during the whole ad, and (4) the control condition of no toll-free statement included. These times were adopted by calculating how long it would take a person reading at an average reading speed to read the statement. As in the first part of this study series, the toll-free statement will appear as superimposed text and a control condition in which the toll-free statement does not appear will be included.

PART TWO: DURATION*

4 x 1

Short (Approximately 3 seconds)
Long (Approximately 6 seconds)
During the whole ad
Control (no toll-free statement)

*Using FDAAA statement

Part three of the study will examine two variations in the prominence of the toll-free statement using the language from FDAAA: Spoken with only the Web site and telephone number in superimposed text; or spoken with the full statement superimposed in text. Both variants in part three will place the toll-free statement after the major statement of risks. There will also be a control condition in which the statement does not appear at all.

PART THREE: PROMINENCE*

3 x 1

Audio Only (spoken after major statement of risks, website and phone number on screen)
Extra Prominent (spoken after major statement of risks, entire toll-free statement on screen)
Control (no toll-free statement)

*Using FDAAA statement

We will investigate these issues in one disease condition, high blood pressure, because high blood pressure has a high incidence rate in the population, is a public health concern, and is likely to occur in both males and females. Further, because there is little promotion for prescription treatment of high blood pressure, participants should be less familiar with DTC television ads for this type of drug, reducing the potential influence of prior experience.

Our primary dependent variable is comprehension of the risk information mentioned in the major statement. In addition to this variable, we will also examine comprehension of benefit information. We will also examine the noticeability and comprehension of the toll-free statement.

Procedure

Participants will see an advertising pod of four ads: Two non-DTC ads (fillers), a DTC ad for a fictitious high blood pressure medication, and a DTC ad for an unrelated medical condition with the same toll-free statement included. We include two DTC ads with the toll-free statement in our protocol because this better approximates what will happen if this statement is required to be implemented in DTC TV ads. That

is, viewers will see the statement in all DTC ads for all products. In this study, we want to avoid the suggestion that there is something particular about the high blood pressure drug class that causes the statement to be mandated. Thus, we will show multiple DTC ads but ask questions regarding only the ad which has been manipulated to test our hypotheses. To maximize response information, the test ad will always be the last ad participants see.

After viewing the ads, a structured interview will be conducted. Participants will answer questions about the high blood pressure DTC test ad they have seen. Questions will examine a number of important perceptions about the advertised product, including risk comprehension, risk recall, benefit comprehension, benefit recall, behavioral intention, noticeability of the toll-free statement, and comprehension of the toll-free statement.

Finally, demographic and health care utilization information will be collected. The entire procedure is expected to last approximately 15 minutes. A total of 1,600 interviews will be completed. This will be a one-time (rather than annual) information collection.

Participants

Data will be collected using an Internet protocol. Consumers over the age of 18 will be screened and recruited by the contractor to represent a range of education levels. Because the task presumes basic reading abilities, all selected participants must speak English as their primary language.

FDA proposes to conduct 2 rounds of pretesting with 200 consumers in each round to refine the questionnaire and the stimuli before fielding the main study.

FDA estimates the burden of this collection of information as follows:

FDA estimates that 2,400 individuals will need to be screened to obtain a respondent sample of 400 for the pretests and 1,600 for the study. The screener is expected to take 30 seconds, for a total screener burden of 20 hours. The ad viewing and questionnaire are expected to take 15 minutes for the participants in the pretest and the main study, for a cumulative study burden of 500 hours. The estimated total burden for this data collection effort is 520 hours. The respondent burden is provided in table 1 of this document:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
2,400 (screener)	1	2,400	.008	20
400 (pretest)	1	400	.25	100
1,600 (study)	1	1,600	.25	400
Total				520

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

Dated: November 19, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–28065 Filed 11–25–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0597]

Draft Guidance for Industry: Small Entities Compliance Guide for Renderers—Substances Prohibited From Use in Animal Food or Feed; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry #195, entitled "Draft Guidance for Industry: Small Entities Compliance Guide for Renderers—Substances Prohibited From Use in Animal Food or Feed." This small entities compliance guide aids renderers in complying with the requirements of the final rule published in the **Federal Register** of April 25, 2008 (73 FR 22720). FDA's goal is to strengthen existing safeguards to prevent the spread of bovine spongiform encephalopathy (BSE) in U.S. cattle and to reduce the risk of human exposure to the BSE agent.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit written or electronic comments on the draft guidance by January 26, 2009.

ADDRESSES: Submit written requests for single copies of the guidance to the Communications Staff (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Shannon Jordre, Division of Compliance, Center for Veterinary Medicine (HFV–230), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–9229, *Shannon.jordre@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry #195, entitled "Draft Guidance for Industry: Small Entities Compliance Guide for Renderers—Substances Prohibited From Use in Animal Food or Feed." In the **Federal Register** of April 25, 2008 (73 FR 22720), FDA published a final rule entitled "Substances Prohibited From Use in Animal Food or Feed." This

regulation is designed to further strengthen existing safeguards against the establishment and amplification of BSE, sometimes referred to as "Mad Cow Disease," through animal feed. The regulation prohibits the use of certain cattle origin materials in the food or feed of all animals.

FDA has prepared this draft Small Entities Compliance Guide in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act (Public Law 104–121). This document is intended to provide guidance to small businesses on the requirements of Title 21, Code of Federal Regulations, new § 589.2001 and amended § 589.2000.

II. Significance of Guidance

FDA is issuing this small entities compliance guide as a level 1 draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

III. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR 589.2001 have been approved under OMB Control Number 0910–0627.

IV. 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. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

IV. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/cvm* or *http://www.regulations.gov*.

Dated: November 20, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–28189 Filed 11–25–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0038]

Sex Differences in the Cardiovascular Device Trials; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

SUMMARY: The Food and Drug Administration (FDA) is announcing a public workshop entitled "Sex Differences in the Cardiovascular Device Trials." FDA is co-sponsoring the conference with the Advanced Medical Technology Association (AdvaMed). The purpose of the workshop is to facilitate discussion between FDA and other interested parties on the study and analysis of sex and gender differences in cardiovascular medical device trials, in anticipation of issuance of draft guidance on this subject.

DATES: The workshop will be held on December 9, 2008, from 9 a.m. to 5 p.m. Participants are encouraged to arrive early to ensure time for parking and security screening before the meeting. Security screening will begin at 8 a.m. and reception will begin at 8:30 a.m. Please register by December 2, 2008, using the instructions in this document. Non-U.S. citizens are subject to additional security screening and should register as soon as possible.

ADDRESSES: The workshop will be held at the FDA White Oak Campus, 10903 New Hampshire Ave., Silver Spring, MD 20993.

FOR FURTHER INFORMATION CONTACT: Kathryn O'Callaghan, Center for Devices and Radiological Health (HFZ–450), Food and Drug Administration, 9200 Corporate Blvd., rm. 230D, 240–276–4182, Rockville, MD 20850, *kathryn.ocallaghan@fda.hhs.gov*; or Ashley Boam, Center for Devices and Radiological Health (HFZ–450), Food and Drug Administration, 9200 Corporate Blvd., rm. 230J, 240–276–4188, Rockville, MD 20850, *ashley.boam@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Why Are We Holding This Public Workshop?

The purpose of the public workshop is to facilitate discussion between FDA and other interested parties on the study and analysis of sex and gender differences in cardiovascular medical device trials, in anticipation of issuance of draft guidance on this subject.

II. What Are the Topics We Intend to Address at the Public Workshop?

We hope to discuss a large number of issues at the public workshop, including, but not limited to:

- Current FDA perspective on sex/gender differences in pharmaceutical and medical device evaluation.
- Medical device development in the U.S. regulatory environment.
- Sex/gender-specific considerations in product design and clinical study design.
- The current state of cardiovascular treatment for women.
- Referral biases for women at risk for cardiovascular disease.
- The Clinical Research Organization and Institutional Review Board perspectives on inclusion, exclusion, recruitment, and retention issues related to women in clinical trials.
- The investigator/clinician perspective on the impact of sex/gender-specific issues on study design and conduct and available treatment options and limitations of use in women.
- The female patient perspective on enrollment and participation in clinical trials.
- The biostatistician perspective on statistical approaches and subgroup analysis in significant subpopulations.
- Case studies on gender-specific trials.

III. Is There a Fee and How Do I Register for the Public Workshop?

There is a modest fee to attend the conference to defray the costs of meals provided and other expenses. The fee for the meeting for registrants from industry is $125.00, and the fee for government registrants is $75.00. Fees will be waived for invited speakers and panelists. The registration process will be handled by AdvaMed, which has extensive experience in planning, executing, and organizing educational meetings. Register online at *http://www.AdvaMed.org*. Although the

facility is spacious, registration will be on a first-come, first-served basis. Non-U.S. citizens are subject to additional security screening, and should register as soon as possible.

If you need special accommodations because of a disability, please contact Kathryn O'Callaghan at least 7 days before the public workshop.

IV. Where Can I Find Out More About This Public Workshop?

Background information on the public workshop, registration information, the agenda, information about lodging, and other relevant information will be posted, as it becomes available, on the Internet at *http://www.AdvaMed.org* and *http://www.fda.gov/cdrh/dsma/workshop.html*.

Dated: November 19, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–28169 Filed 11–25–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, e-mail *paperwork@hrsa.gov* or call the HRSA Reports Clearance Officer on (301) 443–1129.

Comments are invited on: (a) The proposed collection of information for the proper performance of the functions of the agency; (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.

Proposed Project: Patient Navigator Outreach and Chronic Disease Prevention Demonstration Program Patient Data Collection Form—NEW

The purpose of the Patient Navigator Outreach and Chronic Disease Prevention (PN) Demonstration Program is to promote model "patient navigator" programs to improve health care outcomes for individuals with cancer and/or other chronic diseases, with a specific emphasis on health disparity populations. This program aims to coordinate comprehensive health services for patients in need of chronic disease care and management through enhanced chronic disease management provided by patient navigators.

In order to describe successful PN program models and make recommendations on the ability of such programs to improve patient outcomes, data is needed at the individual patient, patient navigator, and PN program levels. This information includes:

- Sociodemographics of patients (*e.g.*, insurance status, income, education level, gender, age, race and ethnicity, primary language, number of family dependents) served;
- Patient access barriers to standard chronic disease care (*e.g.*, access to pharmaceuticals, distance of patient's home from health care facilities utilized, primary mode of transportation to health care facilities utilized, cultural and linguistic barriers as well as literacy levels);
- Health care service utilization (*e.g.*, screening rates, compliance rate for appointments and follow-up exams, time interval between diagnosis or referral and resolution date);
- Patient health status (*e.g.*, type and stage of diagnosis, chronic disease status, final outcome or result); and
- Patient navigation data (*e.g.*, type of navigator, patient navigation training plans and outcomes, point at which patient navigator was brought into the process, number of patients referred, how patient barriers were resolved, patient satisfaction, follow-up outcomes—such as number of uninsured who get health coverage).

This information will be collected from patients or their designated caregiver, patient navigators, and PN program administrators. Maintaining confidentiality of patient medical information is a concern and thus all personal information will be de-identified to protect the confidentiality of all patients. Data collection and disclosure processes will abide by Health Insurance Portability and Accountability Act (HIPPA) Privacy Rule provisions and procedures. The estimated annual burden is as follows:

Form	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden hours
Navigated Patient [1] Data Intake Form	6,000	1	6,000	0.5	3,000
Navigated Patient Satisfaction Survey	6,000	1	6,000	0.25	1,500
SubTotal—Patient Burden	6,000	2	1,2000	0.75	4,500
Patient Navigator Survey	30	1	30	0.25	7.5
Patient Navigator Encounter/Tracking Log [2]	30	750	22,500	0.25	5,625
SubTotal—Patient Navigator Burden	30	751	22,530	0.5	5,632.5
Grantee PN Administrative Records [3]	6	1	6	0.5	3
Medical Record and Clinic Data [4]	6	2,000	12,000	2	24,000
SubTotal—Grantee Burden	12	2,001	12,012	2.5	24,006
Total Average Annual Burden	6,052	2,754	54,052	3.75	36,016

[1] Estimated number of navigated patients per year based on applications was rounded to 6000. See table below for projected numbers navigated by Grantee.

[2] Assumes 5 log entries of PN activities per patient.

[3] Includes administrative data related to PN recruitment, hiring, and training.
[4] Includes medical record abstraction and clinic database abstraction on individual patients (note: decreased to 2 hours per patient).

	Over 2 yrs	Annual
Goodwin	400	200
Lutheran	650	325
Northeast	6,000	3,000
Palmetto	3,000	1,500
South Broward	2,200	1,100
Texas Tech	500	250
Total	12,750	6,375

E-mail comments to *paperwork@hrsa.gov* or mail the HRSA Reports Clearance Officer, Room 10–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: November 20, 2008.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E8–28048 Filed 11–25–08; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Vaccine Injury Compensation Program; List of Petitions Received

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Health Resources and Services Administration (HRSA) is publishing this notice of petitions received under the National Vaccine Injury Compensation Program ("the Program"), as required by Section 2112(b)(2) of the Public Health Service (PHS) Act, as amended. While the Secretary of Health and Human Services is named as the respondent in all proceedings brought by the filing of petitions for compensation under the Program, the United States Court of Federal Claims is charged by statute with responsibility for considering and acting upon the petitions.

FOR FURTHER INFORMATION CONTACT: For information about requirements for filing petitions, and the Program in general, contact the Clerk, United States Court of Federal Claims, 717 Madison Place, NW., Washington, DC 20005, (202) 357–6400. For information on HRSA's role in the Program, contact the Director, National Vaccine Injury Compensation Program, 5600 Fishers Lane, Room 11C–26, Rockville, MD 20857; (301) 443–6593.

SUPPLEMENTARY INFORMATION: The Program provides a system of no-fault compensation for certain individuals who have been injured by specified childhood vaccines. Subtitle 2 of Title XXI of the PHS Act, 42 U.S.C. 300aa–10 *et seq.*, provides that those seeking compensation are to file a petition with the U.S. Court of Federal Claims and to serve a copy of the petition on the Secretary of Health and Human Services, who is named as the respondent in each proceeding. The Secretary has delegated his responsibility under the Program to HRSA. The Court is directed by statute to appoint special masters who take evidence, conduct hearings as appropriate, and make initial decisions as to eligibility for, and amount of, compensation.

A petition may be filed with respect to injuries, disabilities, illnesses, conditions, and deaths resulting from vaccines described in the Vaccine Injury Table (the Table) set forth at Section 2114 of the PHS Act or as set forth at 42 CFR 100.3, as applicable. This Table lists for each covered childhood vaccine the conditions which may lead to compensation and, for each condition, the time period for occurrence of the first symptom or manifestation of onset or of significant aggravation after vaccine administration. Compensation may also be awarded for conditions not listed in the Table and for conditions that are manifested outside the time periods specified in the Table, but only if the petitioner shows that the condition was caused by one of the listed vaccines.

Section 2112(b)(2) of the PHS Act, 42 U.S.C. 300aa–12(b)(2), requires that the Secretary publish in the **Federal Register** a notice of each petition filed. Set forth below is a list of petitions received by HRSA on January 2, 2008, through June 30, 2008.

Section 2112(b)(2) also provides that the special master "shall afford all interested persons an opportunity to submit relevant, written information" relating to the following:

1. The existence of evidence "that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition," and

2. Any allegation in a petition that the petitioner either:

(a) "Sustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Table but which was caused by" one of the vaccines referred to in the Table, or

(b) "Sustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine" referred to in the Table.

This notice will also serve as the special master's invitation to all interested persons to submit written information relevant to the issues described above in the case of the petitions listed below. Any person choosing to do so should file an original and three (3) copies of the information with the Clerk of the U.S. Court of Federal Claims at the address listed above (under the heading "For Further Information Contact"), with a copy to HRSA addressed to Director, Division of Vaccine Injury Compensation Program, Healthcare Systems Bureau, 5600 Fishers Lane, Room 11C–26, Rockville, MD 20857. The Court's caption (Petitioner's Name v. Secretary of Health and Human Services) and the docket number assigned to the petition should be used as the caption for the written submission. Chapter 35 of title 44, United States Code, related to paperwork reduction, does not apply to information required for purposes of carrying out the Program.

List of Petitions

1. Alex and Steven Padula on behalf of William Padula, Miami, Florida, Court of Federal Claims Number 08–0001V.

2. Gary Moraga, Santa Rosa, California, Court of Federal Claims Number 08–0002V.

3. Shayna Tatum and Donnell Villa on behalf of Michael Villa, Hawthorne, California, Court of Federal Claims Number 08–0008V.

4. Matt Daniels, Broderline, New Hampshire, Court of Federal Claims Number 08–0009V.

5. Rhonda Kay Rossi, Glendale, Arizona, Court of Federal Claims Number 08–0010V.

6. December and Danny Ledet on behalf of Dane Paul Ledet, Baton Rouge, Louisiana, Court of Federal Claims Number 08–0013V.

7. Megan and Shawn Brewer on behalf of Renee Brewer, Ft. Sill, Oklahoma, Court of Federal Claims Number 08–0014V.

8. Peter J. Dawson, Clifton Springs, New York, Court of Federal Claims Number 08–0016V.

9. Denise and Howard Greenberg on behalf of Joshua Greenberg, Kihei, Hawaii, Court of Federal Claims Number 08–0024V.

10. Michael Patrick Riley, Hamilton, Montana, Court of Federal Claims Number 08–0026V.

11. Kari Cupp on behalf of Raegan Cupp, Mt. Holly, North Carolina, Court of Federal Claims Number 08–0029V.

12. Sharon Brustmaker, Chula Vista, California, Court of Federal Claims Number 08–0030V.

13. Kersten and Scott Rojas on behalf of Cooper Rojas, Batavia, Illinois, Court of Federal Claims Number 08–0041V.

14. Melissa Butler on behalf of Elias Christian Butler, Inwood, West Virginia, Court of Federal Claims Number 08–0045V.

15. Tiffany Lee and Pavel Srnensky on behalf of NinaLee Srnensky, Clifton, New Jersey, Court of Federal Claims Number 08–0046V.

16. Melissa Butler on behalf of Nathan Wesley Butler, Inwood, West Virginia, Court of Federal Claims Number 08–0049V.

17. Elizabeth Farrelly, Brooklyn, New York, Court of Federal Claims Number 08–0052V.

18. Carrie and David Gaines on behalf of Davion Gaines, Tallahassee, Florida, Court of Federal Claims Number 08–0056V.

19. Stanley David Greene on behalf of Nicholas Greene, Bakersfield, California, Court of Federal Claims Number 08–0057V.

20. Gladys Dike, Fort Worth, Texas, Court of Federal Claims Number 08–0058V.

21. Andrea April Hughie on behalf of Micaiah Hughie, Deceased, Georgetown County, South Carolina, Court of Federal Claims Number 08–0061V.

22. Delilah Hurd on behalf of Anthony Hurd, Corinth, Mississippi, Court of Federal Claims Number 08–0065V.

23. Janis Walrond, Smyrna, Tennessee, Court of Federal Claims Number 08–0066V.

24. Kim and Michael Waters on behalf of Karsen Steele Waters, Kwajalein Island, Marshall Islands, Court of Federal Claims Number 08–0076V.

25. Deborah Talley on behalf of Michael Timothy Talley, Gwynn Oak, Maryland, Court of Federal Claims Number 08–0078V.

26. Monica and Roberto Puente on behalf of Gabriela Martinez-Oliver, Miami, Florida, Court of Federal Claims Number 08–0082V.

27. Rachel and Garry Williams on behalf of Madyson Lee Williams, Deceased, Springfield, Missouri, Court of Federal Claims Number 08–0083V.

28. Kathleen and Noel Downey on behalf of Patrick James Downey, Brooklyn, New York, Court of Federal Claims Number 08–0084V.

29. Kathleen and Noel Downey on behalf of Grace Elizabeth Downey, Brooklyn, New York, Court of Federal Claims Number 08–0085V.

30. Grant Heath on behalf of Quinn Heath, Goldsboro, North Carolina, Court of Federal Claims Number 08–0086V.

31. Melissa and Scott McGuire on behalf of William McGuire, Louisville, Kentucky, Court of Federal Claims Number 08–0089V.

32. Sonja Kennedy, Winston-Salem, North Carolina, Court of Federal Claims Number 08–0090V.

33. Chandra Price on behalf of Christopher Wynn, Summerville, South Carolina, Court of Federal Claims Number 08–0093V.

34. Joyce Miranda and Anthony Paul D'Alessandro on behalf of Anthony James D'Alessandro, Culver City, California, Court of Federal Claims Number 08–0097V.

35. Susie and Dan Knight on behalf of Joshua Knight, Somers Point, New Jersey, Court of Federal Claims Number 08–0098V.

36. Kevin Coyne on behalf of Olivia Ellison Coyne, Folsom, California, Court of Federal Claims Number 08–0100V.

37. Nicole Bougie on behalf of Makayla Ann Bougie, Tripler AMC, Hawaii, Court of Federal Claims Number 08–0102V.

38. Shirley Laundrie, Green Bay, Wisconsin, Court of Federal Claims Number 08–0107V.

39. Tiffany Ann Hardy-Bell and Harold Hardy on behalf of Holly Hardy, Lake Charles, Louisiana, Court of Federal Claims Number 08–0108V.

40. Nicole and Joseph Bougie on behalf of Makayla Ann Bougie, Ladson, South Carolina, Court of Federal Claims Number 08–0111V.

41. David Warren Duncan, Stillwater, Oklahoma, Court of Federal Claims Number 08–0112V.

42. Margaret Morgan and Donald Tobin Avant on behalf of Ella Grier Avant, Georgetown, South Carolina, Court of Federal Claims Number 08–0120V.

43. Denise and David Kanefield on behalf of Adam Jay Kanefield, Clovis, California, Court of Federal Claims Number 08–0122V.

44. Madeline Herrell on behalf of Brenton Boone, Fairhope, Alabama, Court of Federal Claims Number 08–0123V.

45. Mary Heller on behalf of Edward Ryan Heller, Greenbrae, California, Court of Federal Claims Number 08–0124V.

46. Amy and Steve Osborne on behalf of Thomas Osborne, Pittsboro, North Carolina, Court of Federal Claims Number 08–0125V.

47. Theresa and Shawn Fish on behalf of Noah Creed Fish, Elmira, New York, Court of Federal Claims Number 08–0126V.

48. Christine and Cody Bielawa on behalf of Evan Bielawa, Troy, New York, Court of Federal Claims Number 08–0131V.

49. Nancy and Will Braveman on behalf of Leo Alexander Braveman, Philadelphia, Pennsylvania, Court of Federal Claims Number 08–0137V.

50. Lucy Jerahian on behalf of Jeremy Jerahian, Riverside, California, Court of Federal Claims Number 08–0138V.

51. Sarah and James Palya on behalf of August Palya, Baden, Pennsylvania, Court of Federal Claims Number 08–0141V.

52. Rachel and James Elliott on behalf of Dylan Elliott, Yakima, Washington, Court of Federal Claims Number 08–0143V.

53. Robin Merlis on behalf of Joel Menache, Brooklyn, New York, Court of Federal Claims Number 08–0144V.

54. Diane Connelly and Christopher Eber Gowan on behalf of Conner Michael, Cumming, Georgia, Court of Federal Claims Number 08–0145V.

55. Lucy Medina on behalf of William Oberg, Martinez, California, Court of Federal Claims Number 08–0146V.

56. Laura and Yehuda Minchenberg on behalf of Shmuel Minchenberg, Tenafly, New Jersey, Court of Federal Claims Number 08–0148V.

57. Lauren and Mark Salzberg on behalf of Justin Salzberg, Potomac, Maryland, Court of Federal Claims Number 08–0149V.

58. Lisa Gorney on behalf of Lyndon Gorney, Lansing, Michigan, Court of Federal Claims Number 08–0150V.

59. Holly and Mike Witherby on behalf of Chase Witherby, LaPorte, Indiana, Court of Federal Claims Number 08–0152V.

60. Marguerita Foley on behalf of Matthew Peter Foley, Raleigh, North Carolina, Court of Federal Claims Number 08–0153V.

61. Jennifer and James Leese on behalf of Dylan James Leese, Newport Beach, California, Court of Federal Claims Number 08–0154V.

62. Kimiko Inoue on behalf of Matthew Musashi Drayton, Davie, Florida, Court of Federal Claims Number 08–0155V.

63. Lisa and Mark Shaver on behalf of Russell Shaver, Garden City, New York, Court of Federal Claims Number 08–0156V.

64. Maria and Stacey Cooper on behalf of Kaylen Cooper, Garden City,

New York, Court of Federal Claims Number 08–0157V.

65. Jennie and Ronald Pearson on behalf of Dillon Pearson, Nye, Nevada, Court of Federal Claims Number 08–0158V.

66. Mailene and Frank Emkey on behalf of Chad Emkey, Bunnell, Florida, Court of Federal Claims Number 08–0160V.

67. Ana and Eugene Carrizales on behalf of Christopher Alexander Carrizales, Hanford, California, Court of Federal Claims Number 08–0161V.

68. Kristen and Jesse Howarth on behalf of Noah Howarth, Garden City, New York, Court of Federal Claims Number 08–0162V.

69. Kristen and Jesse Howarth on behalf of Gavin Howarth, Garden City, New York, Court of Federal Claims Number 08–0163V.

70. Shefa Taha on behalf of Jamil H. Jamil, Fairview, New Jersey, Court of Federal Claims Number 08–0165V.

71. Sheila and Richard Lynard on behalf of Andrew Lynard, Bel Air, Maryland, Court of Federal Claims Number 08–0166V.

72. Jessica and Mark Harper on behalf of Andrew Harper, Garden City, New York, Court of Federal Claims Number 08–0167V.

73. Janine and Rick Allbritton on behalf of Joshua Allbritton, Garden City, New York, Court of Federal Claims Number 08–0168V.

74. Stephanie and Salvatore Barbatano on behalf of James Barbatano, Ann Arbor, Michigan, Court of Federal Claims Number 08–0170V.

75. Nelly and Leon Huppert on behalf of Michael Andrew Huppert, Garden City, New York, Court of Federal Claims Number 08–0171V.

76. Michelle and Jonathan Scott on behalf of Evan Phillip Scott, Garden City, New York, Court of Federal Claims Number 08–0172V.

77. Andrea and Michael Banks on behalf of Emily Banks, Flint, Michigan, Court of Federal Claims Number 08–0173V.

78. Denise Gingola on behalf of Nicholas Gingola, Milton, Massachusetts, Court of Federal Claims Number 08–0174V.

79. Shayla Edwards on behalf of Logan Edwards-Odom, Jacksonville, Florida, Court of Federal Claims Number 08–0175V.

80. Rose and Christopher Ziemba on behalf of Colin Ziemba, Plainfield, Illinois, Court of Federal Claims Number 08–0176V.

81. Filomena and Frank Laforgia on behalf of Dean Francis Laforgia, Oakland, New Jersey, Court of Federal Claims Number 08–0178V.

82. Felicia and Randall Dalme on behalf of Memphis Dalme, New Orleans, Louisiana, Court of Federal Claims Number 08–0179V.

83. Monica Bice on behalf of Jade Bice, New Port Richey, Florida, Court of Federal Claims Number 08–0180V.

84. Lisa and Jeff Carson on behalf of Ian Carson, Ormond Beach, Florida, Court of Federal Claims Number 08–0181V.

85. Jennifer Wirth on behalf of Mack Wirth, Jacksonville, Florida, Court of Federal Claims Number 08–0182V.

86. Kelly and Robert Speidel on behalf of Garrison Speidel, Garden City, New York, Court of Federal Claims Number 08–0183V.

87. Natalie and Keith Tucker on behalf of Austin Tucker, Jacksonville Beach, Florida, Court of Federal Claims Number 08–0184V.

88. Christina Loudermilk on behalf of James Holmes, Rockford, Illinois, Court of Federal Claims Number 08–0185V.

89. Catherine and Jerald O'Malley on behalf of Matthew O'Malley, South Easton, Massachusetts, Court of Federal Claims Number 08–0187V.

90. Christine and Frankie Schexnailder on behalf of Benjamin Schexnailder, Lafayette, Louisiana, Court of Federal Claims Number 08–0188V.

91. Traci and Matthew Gunning on behalf of Griffin Parker Gunning, Avon, Indiana, Court of Federal Claims Number 08–0189V.

92. William Boundroukas on behalf of Katerina Boundroukas, Niles, Illinois, Court of Federal Claims Number 08–0193V.

93. Zetta Black, Wescosville, Pennsylvania, Court of Federal Claims Number 08–0197V.

94. Shannon and Fuhpow Liew on behalf of Devin Liew, Littleton, Colorado, Court of Federal Claims Number 08–0199V.

95. Michelle Buddemeyer on behalf of Hayden Buddemeyer, Baltimore, Maryland, Court of Federal Claims Number 08–0200V.

96. Shirley and Scott Olthoff on behalf of Kristen Olthoff, Antioch, California, Court of Federal Claims Number 08–0201V.

97. Kristie and Aaron Burchit on behalf of Aidan Burchit, Riverside, California, Court of Federal Claims Number 08–0202V.

98. Stacy and James McAleer on behalf of Justin James McAleer, Oakland, New Jersey, Court of Federal Claims Number 08–0203V.

99. Rebecca and Jon Carroll on behalf of Jon Lucas Carroll, Blue Ridge, Georgia, Court of Federal Claims Number 08–0204V.

100. Kim and Michael Ryan on behalf of Christopher Ryan, Hooksett, New Hampshire, Court of Federal Claims Number 08–0205V.

101. Patricia and Craig Anderson on behalf of Ethan R. Anderson, Selah, Washington, Court of Federal Claims Number 08–0206V.

102. Bee Tan and Xiangdong He on behalf of Enoch He, Lewisville, Texas, Court of Federal Claims Number 08–0207V.

103. Bret Kreizenbeck on behalf of Connor James Kreizenbeck, Hanford, California, Court of Federal Claims Number 08–0209V.

104. Kasondra Jenkins on behalf of Trevor Shane Jenkins, Borger, Texas, Court of Federal Claims Number 08–0210V.

105. Crystal Ann Terwilleger on behalf of Michael Cyrel Terwilleger, Vancouver, Washington, Court of Federal Claims Number 08–0216V.

106. Susan Langsjoen on behalf of Mikael Langsjoen, Citrus Heights, California, Court of Federal Claims Number 08–0217V.

107. Jenny Shoop on behalf of Jacob Shoop, Little Rock, Arkansas, Court of Federal Claims Number 08–0219V.

108. Elizabeth and Paul Lawrence Starita on behalf of Matthew Anthony Clark Starita, Encinitas, California, Court of Federal Claims Number 08–0220V.

109. Debra and Joseph Key on behalf of Ryan Frances Key, San Dimas, California, Court of Federal Claims Number 08–0222V.

110. Dawn and Kenneth Berge on behalf of Zachary Berge, Eglin AFB, Florida, Court of Federal Claims Number 08–0223V.

111. Catherine Garcia-O'Malley and Jerald O'Malley on behalf of Maxwell O'Malley, South Easton, Massachusetts, Court of Federal Claims Number 08–0226V.

112. Angie Nelson and Jacob Staton on behalf of Johnny Staton, Greensboro, North Carolina, Court of Federal Claims Number 08–0227V.

113. Catherine Irene and George Corder on behalf of Catherine Irene Corder, Morgantown, West Virginia, Court of Federal Claims Number 08–0228V.

114. Richard Stiles, Richland, Washington, Court of Federal Claims Number 08–0232V.

115. Beatriz and Petros Kouracles on behalf of Petros Enzo Kouracles, Boston, Massachusetts, Court of Federal Claims Number 08–0233V.

116. Kimberly and Michael Corcoran on behalf of Michael Cocoran, III, Jaffrey, New Hampshire, Court of Federal Claims Number 08–0234V.

117. Raquel Fragoso, Highland Heights, Ohio, Court of Federal Claims Number 08–0236V.

118. Lesbia Backus on behalf of Sarah Backus, Montgomery, Alabama, Court of Federal Claims Number 08–0239V.

119. Anna and Michael Kirk on behalf of Ava Kirk, Maple Shade, New Jersey, Court of Federal Claims Number 08–0241V.

120. Richard Miller, Fort Hood, Texas, Court of Federal Claims Number 08–0242V.

121. Erin Patricia O'Neill, San Antonio, Texas, Court of Federal Claims Number 08–0243V.

122. Catherine and John Christiansen on behalf of William Christiansen, Bellmore, New York, Court of Federal Claims Number 08–0244V.

123. Karen McPhail, Everett, Washington, Court of Federal Claims Number 08–0245V.

124. Lynda Overton on behalf of JanaLee Nugent, Craig, Colorado, Court of Federal Claims Number 08–0247V.

125. Christine Hoso, Concord, New Hampshire, Court of Federal Claims Number 08–0248V.

126. Maria Agnes Calimag and Butch Rhandi Domingo on behalf of Alessandra, Domingo, Deceased, Lynnwood, Washington, Court of Federal Claims Number 08–0251V.

127. Dorothy and Kevin Lind on behalf of Nelson Lind, Torrance, California, Court of Federal Claims Number 08–0252V.

128. Fiona Jane and Eugene John Doskocz on behalf of Evan John Doskocz, Canton, Michigan, Court of Federal Claims Number 08–0253V.

129. Fiona Jane and Eugene John Doskocz on behalf of Tyler Charles Doskocz, Canton, Michigan, Court of Federal Claims Number 08–0254V.

130. Kimberly Lindsey on behalf of Merrick Lindsey, Vero Beach, Florida, Court of Federal Claims Number 08–0258V.

131. Brian Greubel on behalf of Brandon Greubel, Chula Vista, California, Court of Federal Claims Number 08–0259V.

132. Valiente Escalante, Juneau, Alaska, Court of Federal Claims Number 08–0264V.

133. Teresa Rappleyea on behalf of Charles R.H. Rappleyea, Charlottesville, Virginia, Court of Federal Claims Number 08–0265V.

134. Samuel Carrino, Somers Point, New Jersey, Court of Federal Claims Number 08–0266V.

135. Melisa and William McNabb on behalf of Meghan McNabb, McKees Rocks, Pennsylvania, Court of Federal Claims Number 08–0267V.

136. Ana Hope and Matthew Kirk Couser on behalf of David Andrew Couser, Murfreesboro, Tennessee, Court of Federal Claims Number 08–0268V.

137. Beth Sneed on behalf of Daniel Staten-Sneed, Hixson, Tennessee, Court of Federal Claims Number 08–0272V.

138. Shannon Deveney and Matthew Kalmenson on behalf of Jake Matthew, Kings Park, New York, Court of Federal Claims Number 08–0273V.

139. Janet and Vance Sorell on behalf of Abigail Sorell, Delmar, New York, Court of Federal Claims Number 08–0274V.

140. Samornrat and Michael Ponzio on behalf of Jason Ponzio, Fort Belvoir, Virginia, Court of Federal Claims Number 08–0276V.

141. Tisha and Ryan Mette on behalf of Ayden Patrick Mette, Pierre, South Dakota, Court of Federal Claims Number 08–0284V.

142. Roberta and Timothy Baumann on behalf of Thomas Josef Baumann, Long Beach, California, Court of Federal Claims Number 08–0285V.

143. Roberta DeMetsenare on behalf of Marcel DeMetsenare, Deceased, Lapeer, Michigan, Court of Federal Claims Number 08–0289V.

144. Allen Edwin Lane, Morristown, New Jersey, Court of Federal Claims Number 08–0292V.

145. Christy and Brad Attaway on behalf of Brad Attaway, Jr., Fort Walton Beach, Florida, Court of Federal Claims Number 08–0293V.

146. Heidi Brazus on behalf of Annalise Brazus, Mentor, Ohio, Court of Federal Claims Number 08–0295V.

147. Maria Futo and Kurt Rhoney on behalf of Delsin Rhoney, Somers Point, New Jersey, Court of Federal Claims Number 08–0296V.

148. Sheridan Star Sievers on behalf of Jennifer Sweeden, Covina, California, Court of Federal Claims Number 08–0297V.

149. Trudy Snyder and Thomas Seem on behalf of Riley Seem, Youngstown, Ohio, Court of Federal Claims Number 08–0300V.

150. Charles Bonner, Jr., Kings Point, New York, Court of Federal Claims Number 08–0301V.

151. Duane Bundy, Buffalo, New York, Court of Federal Claims Number 08–0302V.

152. Sherry and Barry Sellers on behalf of Casey Sellers, Kernersville, North Carolina, Court of Federal Claims Number 08–0303V.

153. Dorothy and Mark Clarke on behalf of Mary Clark, Minneapolis, Minnesota, Court of Federal Claims Number 08–0305V.

154. Heather Marr on behalf of Dominic Marr, Gladwin, Michigan, Court of Federal Claims Number 08–0306V.

155. Safia Weged and Hussein Hashi on behalf of Sahra Hashi, Marblehead, Massachusetts, Court of Federal Claims Number 08–0307V.

156. Safia Weged and Hussein Hashi on behalf of Osob Hashi, Marblehead, Massachusetts, Court of Federal Claims Number 08–0308V.

157. Indranie Ramnauth on behalf of Regina Mia Abigail Ramnauth, Garden City, New York, Court of Federal Claims Number 08–0309V.

158. Cesar Tricoche, Kissimmee, Florida, Court of Federal Claims Number 08–0310V.

159. Bridget and Jason Byers on behalf of Brooke Byers, Louisville, Kentucky, Court of Federal Claims Number 08–0311V.

160. Kristin Kauffman on behalf of Truman Kauffman, Wyoming, Michigan, Court of Federal Claims Number 08–0313V.

161. Mercedes and Gerardo Orozco on behalf of Karla Orozco, Greeley, Colorado, Court of Federal Claims Number 08–0315V.

162. Julie Rebello on behalf of Mackenzie Rebello, Walnut Creek, California, Court of Federal Claims Number 08–0316V.

163. Serina Kasparian on behalf of Sterling Kasparian, Las Vegas, Nevada, Court of Federal Claims Number 08–0317V.

164. Larissa and Benjamin Wozney on behalf of Cassandra Wozney, Glenview, Illinois, Court of Federal Claims Number 08–0322V.

165. James and Paula Bencivengo on behalf of James Bencivengo, White Plains, New York, Court of Federal Claims Number 08–0328V.

166. Lori and Raymond Zinar on behalf of Noah Graham Zinar, Keller, Texas, Court of Federal Claims Number 08–0333V.

167. Dina and Rodney Caudillo on behalf of Rodney P. Caudillo, Chula Vista, California, Court of Federal Claims Number 08–0334V.

168. Julie and Rufus Davis on behalf of Seth Davis, Fayetteville, Georgia, Court of Federal Claims Number 08–0335V.

169. Shelly Walker on behalf of Vance Walker, Deceased, Hayden, Idaho, Court of Federal Claims Number 08–0336V.

170. Cheri Martin, Scottsdale, Arizona, Court of Federal Claims Number 08–0339V.

171. Lisa Hughes on behalf of Eli Hughes, New Castle, Delaware, Court of Federal Claims Number 08–0341V.

172. Jennifer and Christopher Steelman on behalf of Hayden Steelman, Tooele, Utah, Court of Federal Claims Number 08–0344V.

173. Gregory Schwartz, M.D., Denver, Colorado, Court of Federal Claims Number 08–0346V.

174. Frances and Daniel Aull on behalf of William Daniel Blake Aull, Deceased, Owensboro, Kentucky, Court of Federal Claims Number 08–0347V.

175. Brenda Cook, Columbus, Ohio, Court of Federal Claims Number 08–0348V.

176. Rene-Ann and Rick Tedaldi on behalf of Ryan Tedaldi, Monroe, New York, Court of Federal Claims Number 08–0350V.

177. Tina Chorman on behalf of Kainoa Chorman, Kailua, Hawaii, Court of Federal Claims Number 08–0351V.

178. Jill and Gonzalo Martinez on behalf of Santiago Martinez, Baltimore, Maryland, Court of Federal Claims Number 08–0353V.

179. Jill and Jeffrey Hartman on behalf of Jake Patrik Hartman, Orlando, Florida, Court of Federal Claims Number 08–0355V.

180. Andrea and Jonathan Paz on behalf of Anastasia Paz, Miami, Florida, Court of Federal Claims Number 08–0361V.

181. Tracy Krueger and Michael Graveen on behalf of Jason Graveen, Jacksonville, Florida, Court of Federal Claims Number 08–0362V.

182. Irfan Ahmad on behalf of Suleman Ahmad, Brooklyn, New York, Court of Federal Claims Number 08–0363V.

183. Sabrina Bukowski on behalf of Derek Cruthers, Covington, Kentucky, Court of Federal Claims Number 08–0364V.

184. Albert Evans, Dallas, Texas, Court of Federal Claims Number 08–0365V.

185. Shelley and Dennis Anders on behalf of Hannah Nicole Anders, Chicago, Illinois, Court of Federal Claims Number 08–0369V.

186. Regina and Emmanuel Williams on behalf of Titus Williams, Bensalem, Pennsylvania, Court of Federal Claims Number 08–0370V.

187. Diane and David Rivard on behalf of Lindsay M. Rivard, Deceased, Fairfax, Virginia, Court of Federal Claims Number 08–0371V.

188. Audra Hyatt on behalf of Joshua Hyatt, Flint, Michigan, Court of Federal Claims Number 08–0372V.

189. Juan Manuel Briceno on behalf of Manuel Briceno, San Bernardino, California, Court of Federal Claims Number 08–0374V.

190. Jenny Schoonbee and Mark McClure on behalf of Tyler Mark McClure, Aloha, Oregon, Court of Federal Claims Number 08–0376V.

191. Benedetta and Brian Stillwell on behalf of Benjamin Stillwell, Covington, Kentucky, Court of Federal Claims Number 08–0377V.

192. Deborah and John Berninger on behalf of Olivia Berninger, Covington, Kentucky, Court of Federal Claims Number 08–0378V.

193. Deborah and John Berninger on behalf of Alexander Berninger, Covington, Kentucky, Court of Federal Claims Number 08–0379V.

194. Bonita and Mike Hodde on behalf of Travis Lawrence Hodde, Houston, Texas, Court of Federal Claims Number 08–0380V.

195. Cheryl and Mark Shafer on behalf of Andrew Jacob Shafer, Memphis, Tennessee, Court of Federal Claims Number 08–0381V.

196. Michele and Joseph Libertella on behalf of Joseph Libertella, West Islip, New York, Court of Federal Claims Number 08–0382V.

197. Tisha and Joey Gotte on behalf of Aaron Gotte, Marietta, Georgia, Court of Federal Claims Number 08–0383V.

198. Nachama and David Palace on behalf of Shneur Zalman Palace, Los Angeles, California, Court of Federal Claims Number 08–0388V.

199. Roberta and Doreen Camerota on behalf of Jolie Camerota, Blackwood, New Jersey, Court of Federal Claims Number 08–0389V.

200. James Noonan-Sloan, Boston, Massachusetts, Court of Federal Claims Number 08–0390V.

201. Melinda and Timothy Walsh on behalf of Clarissa Walsh, Clearwater, Florida, Court of Federal Claims Number 08–0391V.

202. Natalie and Daniel Carpentieri on behalf of Jake Carpentieri, Yonkers, New York, Court of Federal Claims Number 08–0392V.

203. Kami and Brandon Goldstein on behalf of Jake Goldstein, Gilbert, Arizona, Court of Federal Claims Number 08–0393V.

204. Galina and Boris Epelbaum on behalf of Mark Epelbaum, Morton Grove, Illinois, Court of Federal Claims Number 08–0394V.

205. Suzanne and Matthew Anderson on behalf of Natalie Christine Anderson, Wixom, Michigan, Court of Federal Claims Number 08–0396V.

206. Marie Nieve Osura on behalf of Ashley Giselle Peraza, Deceased, Fort Smith, Arkansas, Court of Federal Claims Number 08–0397V.

207. Nora and Richard Middleton on behalf of Bryce Middleton, Encinitas, California, Court of Federal Claims Number 08–0399V.

208. Criselda Holguin, Boston, Massachusetts, Court of Federal Claims Number 08–0401V.

209. Jamila and Rickey Harris on behalf of Morgan Marie Harris, Huntsville, Alabama, Court of Federal Claims Number 08–0402V.

210. Christina and Paul Calabro on behalf of Samantha Calabro, Ridgefield, Connecticut, Court of Federal Claims Number 08–0403V.

211. Debra and Jason Sussman on behalf of Sam Sussman, Ormond Beach, Florida, Court of Federal Claims Number 08–0404V.

212. Debra and Jason Sussman on behalf of Luke Sussman, Ormond Beach, Florida, Court of Federal Claims Number 08–0405V.

213. Tenzin and Mike Bottorhoff on behalf of Troy Bottorhoff, North Bend, Oregon, Court of Federal Claims Number 08–0411V.

214. Melissa and James Hendrix on behalf of Devan Jakob Hendrix, Dover, Delaware, Court of Federal Claims Number 08–0412V.

215. Amy and Stefan Hanson on behalf of Amory Evan Hanson, Huntington Beach, California, Court of Federal Claims Number 08–0413V.

216. Stacey and Brett Stubblefield on behalf of Riley Stubblefield, San Antonio, Texas, Court of Federal Claims Number 08–0414V.

217. Gena and Duane Graddy on behalf of Spencer Graddy, Tullahoma, Tennessee, Court of Federal Claims Number 08–0416V.

218. Robin and Michael Dooley on behalf of Nicholas Dooley, San Bernadino, California, Court of Federal Claims Number 08–0418V.

219. Susan Smith and Michael Greene on behalf of Aidan Alexander Greene, Brooklyn, New York, Court of Federal Claims Number 08–0421V.

220. Beth and Kenneth Mulholland on behalf of Connor David Mulholland, Redondo Beach, California, Court of Federal Claims Number 08–0422V.

221. Angela and John Kevin Queenan on behalf of John Taylor Queenan, Pleasanton, California, Court of Federal Claims Number 08–0423V.

222. Jennifer and Paul Bouckaert on behalf of Caleb Bouckaert, Wildwood, Missouri, Court of Federal Claims Number 08–0424V.

223. Doreen and Robert Camerota on behalf of Maria Camerota, Blackwood, New Jersey, Court of Federal Claims Number 08–0425V.

224. Rhonda and Dale Vega on behalf of Jessica Vega, Gardnerville, Nevada, Court of Federal Claims Number 08–0429V.

225. Luisanne Gonzalez on behalf of Kevin Quintero, Miami, Florida, Court of Federal Claims Number 08–0436V.

226. Laura and Dennis Taylor on behalf of Dennis Taylor, III, Covington, Kentucky, Court of Federal Claims Number 08–0437V.

227. Ana Mendez and Edwin Garcia on behalf of Cassandra Garcia, North Hollywood, California, Court of Federal Claims Number 08–0438V.

228. Clarence Harris, Jr. on behalf of Clarence Harris, III, Memphis, Tennessee, Court of Federal Claims Number 08–0440V.

229. Ina Bennett and Donald Cal on behalf of Donald Cal, Jr., Baraboo, Wisconsin, Court of Federal Claims Number 08–0445V.

230. Jeani and Robert Gillespie on behalf of Michael Gillespie, Overland Park, Kansas, Court of Federal Claims Number 08–0446V.

231. Laura Parsons on behalf of Jesalee Parsons, McCurtain County, Oklahoma, Court of Federal Claims Number 08–0447V.

232. Tanya and Steven Pyrdeck on behalf of Connor Pyrdeck, Chesterfield, Missouri, Court of Federal Claims Number 08–0448V.

233. Nia Hall on behalf of Asha Hall, Boston, Massachusetts, Court of Federal Claims Number 08–0451V.

234. Lana Khoulgnaeva on behalf of Nina Ekeev, Garden City, New York, Court of Federal Claims Number 08–0452V.

235. Monica and Lloyd Lewis on behalf of Lloyd Lewis, Jr., Greenville, North Carolina, Court of Federal Claims Number 08–0459V.

236. Mylene and Rosaurio Sabile on behalf of Micah Daniel Sabile, Vallejo, California, Court of Federal Claims Number 08–0461V.

237. Rachel and Joel Moyer on behalf of Sarah Moyer, Huber Heights, Ohio, Court of Federal Claims Number 08–0463V.

238. Mary Ann Zoccolillo, Toms River, New Jersey, Court of Federal Claims Number 08–0467V.

239. Virginia Adams, Monaca, Pennsylvania, Court of Federal Claims Number 08–0468V.

240. Syritta Mitchell on behalf of Jayden Bradford, Oakland, California, Court of Federal Claims Number 08–0469V.

241. Lynn Burklund on behalf of Joseph Burklund, Seattle, Washington, Court of Federal Claims Number 08–0471V.

242. Edward Novak on behalf of Dana Novak, Boston, Massachusetts, Court of Federal Claims Number 08–0472V.

243. Gary Bragg on behalf of Edgar Bragg, Deceased, Lafayette, Colorado, Court of Federal Claims Number 08–0477V.

244. Gabrielle Gourrier on behalf of Emmanuel Gourrier, Los Angeles, California, Court of Federal Claims Number 08–0478V.

Dated: November 19, 2008.

Elizabeth M. Duke,

Administrator.

[FR Doc. E8–28058 Filed 11–25–08; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Building Translational Research in Integrative Behavioral Science.

Date: December 15, 2008.

Time: 3 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Vinod Charles, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6151, MSC 9606, Bethesda, MD 20892–9606, 301–443–1606.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; F31/R36 Predoctoral Research Review.

Date: December 17, 2008.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Christopher S. Sarampote, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6148, MSC 9608, Bethesda, MD 20892, 301–443–1959, *csarampo@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: November 19, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–28047 Filed 11–25–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5191–N–40]

Notice of Proposed Information Collection: Comment Request Contractor's Requisition-Project Mortgages

AGENCY: Office of the Assistant Secretary for Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act.

The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date: January 26, 2009.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail *Lillian.L.Deitzer@HUD.gov* or telephone (202) 402–8048.

FOR FURTHER INFORMATION CONTACT: Joyce Allen, Director, Office of Multifamily Development, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–1142 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate

whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Contractor's Requisition-Project Mortgages.

OMB Control Number, if applicable: 2502–0028.

Description of the need for the information and proposed use: The information collection is used to obtain program benefits, consisting of distribution of insured mortgage proceeds when construction costs are involved. The information regarding completed work items is used by the Multifamily Hub Centers to ensure that payments from mortgage proceeds are made for work actually completed in a satisfactory manner. The certification regarding prevailing wages is used by the Multifamily Hub Centers to ensure compliance with prevailing wage rates.

Agency form numbers, if applicable: HUD–92448.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of responses, and hours of response: The number of burden hours is 93,600. The number of respondents is 1,300. The estimated number of annual responses is 15,600. The frequency of each response is monthly for each application submitted for mortgage insurance.

Status of the proposed information collection: This is an approved existing collection in use with an expiration date of January 31, 2009.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: November 18, 2008.

Ronald Y. Spraker,

Acting General Deputy Assistant Secretary for Housing Deputy Federal Housing Commissioner.

[FR Doc. E8–28067 Filed 11–25–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5187–N–64]

Proposed Information Collection: Family Unification Program (FUP)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Public Housing Agencies (PHA) application for funding of new Housing Choice Vouchers to promote family unification. The Family Unification Program (FUP) is a program under which vouchers are provided to families for whom the lack of adequate housing is a primary factor in the imminent placement of the family's child, or children, in out-of-home care; or the delay in the discharge of the child, or children, to the family from out-of-home care. Youths at least 18 years old and not more than 21 years old (have not reached 22nd birthday) who left foster care at age 16 or older and who do not have adequate housing are also eligible to receive housing assistance under the FUP. A FUP voucher issued to such a youth may only be used to provide housing assistance for the youth for a maximum of 18 months.

DATES: *Comments Due Date: December 26, 2008.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2577–NEW) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (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 agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Family Unification Program (FUP).

OMB Approval Number: 2577–NEW.

Form Numbers: HUD–52515, HUD–50058, HUD–96011, SF–424, SF–LLL, HUD–2993, HUD–2994–A and HUD–27061.

Description of the Need for the Information and Its Proposed Use: Public Housing Agencies (PHA) application for funding of new Housing Choice Vouchers to promote family unification. The Family Unification Program (FUP) is a program under which vouchers are provided to families for whom the lack of adequate housing is a primary factor in the imminent placement of the family's child, or children, in out-of-home care; or the delay in the discharge of the child, or children, to the family from out-of-home care. Youths at least 18 years old and not more than 21 years old (have not reached 22nd birthday) who left foster care at age 16 or older and who do not have adequate housing are also eligible to receive housing assistance under the FUP. A FUP voucher issued to such a youth may only be used to provide housing assistance for the youth for a maximum of 18 months.

Frequency of Submission: On occasion, annually.

	Number of respondents	Annual responses	x	Hours per response	=	Burden hours
Reporting Burden	200	1		26.78		5,357.2

Total Estimated Burden Hours: 5,357.2.

Status: New collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: November 20, 2008.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E8–28068 Filed 11–25–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5191–N–41]

Notice of Proposed Information Collection: Comment Request; Mortgagee's Certification/Application/ Monthly Summary of Assistance Payments Due

AGENCY: Office of the Assistant Secretary for Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* January 26, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048.

FOR FURTHER INFORMATION CONTACT: Vance T. Morris, Director, Office of Single Family Asset Management, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–1672 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Mortgagee's Certification/Application/Monthly Summary of Assistance Payments Due.

OMB Control Number, if applicable: 2502–0081.

Description of the need for the information and proposed use: This information is needed to determine a mortgagors eligibility to participate in the program and compute the amount of subsidy the mortgagor is eligible to receive.

Agency form numbers, if applicable: HUD–300 and HUD–93102.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 600. The number of respondents is 40, the number of responses is 960, the frequency of response is on occasion/monthly, and the burden hour per response is 1.25.

Status of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: November 18, 2008.

Ronald Y. Spraker,

Acting General Deputy Assistant Secretary for Housing—Deputy Federal Housing Commissioner.

[FR Doc. E8–28069 Filed 11–25–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5191–N–42]

Notice of Proposed Information Collection: Comment Request; Assistance Payment Contract Notice of Termination, Suspension or Reinstatement

AGENCY: Office of the Assistant Secretary for Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* January 26, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048.

FOR FURTHER INFORMATION CONTACT: Vance T. Morris, Director, Office of Single Family Asset Management, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–1672 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated

collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Assistance Payment Contract Notice of Termination, Suspension, or Reinstatement.

OMB Control Number, if applicable: 2502–0094.

Description of the need for the information and proposed use: If this information was not collected, a delay in advising HUD of the changes to the Section 235 mortgage could result in additional costs to HUD, and to the lender in adjusting records to correct the amount of assistance paid.

Agency form numbers, if applicable: HUD–93114.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 60. The number of respondents is 40, the number of responses is 80, the frequency of response is on occasion, and the burden hour per response is 1.50.

Status of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: November 18, 2008.

Ronald Y. Spraker,

Acting General Deputy Assistant Secretary for Housing—Deputy Federal Housing Commissioner.

[FR Doc. E8–28070 Filed 11–25–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5191–N–43]

Notice of Proposed Information Collection: Comment Request; Deed in Lieu of Foreclosure (Corporate Mortgagors or Mortgagors Owning More Than One Property)

AGENCY: Office of the Assistant Secretary for Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* January 26, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048.

FOR FURTHER INFORMATION CONTACT: Vance T. Morris, Director, Office of Single Family Asset Management, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–1672 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Deed-in-Lieu of Foreclosure (Corporate Mortgagors or Mortgagors Owning More than One Property.)

OMB Control Number, if applicable: 2502–0301.

Description of the need for the information and proposed use: If HUD did not collect this information, the consequence could possibly result in the Department paying claims, which may not be in the best interest of the Secretary. In addition, not requiring the information may encourage mortgagors to use deed-in-lieu methods as a means of disposing of troublesome mortgages/cases.

Agency form numbers, if applicable: None.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 10. The number of respondents is 223, the number of responses is 20, the frequency of response is once, and the burden hour per response is .50.

Status of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: November 18, 2008.

Ronald Y. Spraker,

Acting General Deputy Assistant Secretary for Housing—Deputy Federal Housing Commissioner.

[FR Doc. E8–28071 Filed 11–25–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5191–N–45]

Notice of Proposed Information Collection: Comment Request; Requisition for Disbursement of Sections 202 & 811 Capital Advance/ Loan Funds

AGENCY: Office of the Assistant Secretary for Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date: January 26, 2009.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048.

FOR FURTHER INFORMATION CONTACT: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–3000 (this is not a toll free

number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice olso lists the following informotion:

Title of Proposal: Requisition for Disbursement of Sections 202 & 811 Capital Advance/Loan Funds.

OMB Control Number, if applicable: 2502–0187.

Description of the need for the information ond proposed use: This information collection is used by Owner entities and submitted to HUD on a periodic basis (generally monthly) during the course of construction for the purpose of obtaining Section 202/811 capital advance/loan funds. The information will also be used to identify the Owner, the project, the type of disbursement being requested, the items to be covered by the disbursement, and the name of the depository holding the Owner's bank account, including the account number.

Agency form numbers, if applicable: HUD–92403–CA and HUD–92403–EH.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The estimated total number of hours needed to prepare the information collection is 1,230, the number of respondents is 266 generating approximately 2,460 annual responses, the frequency of response is monthly and on occasion, the estimated time needed to prepare the response is approximately 30 minutes.

Stotus of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: November 18, 2008.

Ronald Y. Spraker,

Acting General Deputy Assistont Secretory for Housing—Deputy Federol Housing Commissioner.

[FR Doc. E8–28072 Filed 11–25–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO35000.L14300000.ER0000.24–1A]

Revision of Approved Information Collection, OMB Control Number 1004–0189

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice and request for comments.

SUMMARY: The Bureau of Land Management (BLM) has submitted an information collection request (ICR) to extend a currently approved collection to collect the information listed below to the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). We use the information we collect to issue rights-of-way grants to use a specific piece of the public lands for certain projects, such as roads, pipelines, transmission lines, and communication sites. The BLM is seeking approval of the information collection on behalf of itself and the U.S. Fish and Wildlife Service, the National Park Service, the Bureau of Reclamation, and the U.S. Army Corps of Engineers.

DATES: OMB must respond to this request within 60 days but may respond after 30 days. For maximum consideration your comments and suggestions on the requirement should be made by December 26, 2008.

ADDRESSES: Send comments to the Office of Management and Budget, Interior Department Desk Officer (1004–0189), at OMB–OIRA via e-mail *OIRA_DOCKET@omb.eop.gov* or via facsimile at (202) 395–6566. Also please send a copy of your comments to BLM via Internet and include your name, address, and ATTN: 1004–0189 in your Internet message to *information_collection@blm.gov* or via mail to: U.S. Department of the Interior, Bureau of Land Management, Mail Stop 401LS, 1849 C Street, NW., ATTN: Bureau Information Collection Clearance Officer (WO–630), Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: You may contact Alzata L. Ransom, Division of Lands, Realty, and Cadastral Survey, at 202–452–7772. Persons who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) on 1–800–877–8330, 24 hours a day, seven days a week, to contact Ms. Ransom.

SUPPLEMENTARY INFORMATION: On March 21, 2008, the BLM published a notice in the **Federal Register** (73 FR 15192) requesting public comments on the proposed collection. The comment period ended on May 20, 2008. BLM received no comments. You may obtain copies of the collection of information and related forms and explanatory material by contacting the BLM Information Collection Clearance Officer at the telephone number listed below.

We specifically request your comments on the following:

1. Whether the collection of information is necessary for the proper functioning of the BLM, including whether the information will have practical utility;

2. The accuracy of BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;

3. The quality, utility and clarity of the information to be collected; and

4. How to minimize the burden of collecting the information on those who are to respond, including the use of appropriate automated electronic, mechanical, or other forms of information technology.

Title: Application for Transportation and Utility Systems and Facilities on Federal Lands, Standard Form 299.

OMB Control Number: 1004–0189.

Bureou Forın Number: SF–299.

Frequency: Once per respondent, on occasion.

Description of Respondents: Individuals, partnerships, corporations, associations or other business entity and any Federal, state, or local governmental entity, including municipal corporations, seeking to obtain rights-of-way grants.

Estimated Completion Time: The following tables show the estimated completion time for applications submitted on behalf of various kinds of applicants to the several Federal agencies.

Statement of questions	Burden
Bureau of Land Management	
(a) Total average annual applications for collection	4,677 applications.
(b) Average annual applications per industry:	
(1) Utility Industry	3,577 applications.
(2) Service Providing Industry	200 aplications.
(3) State and Local Government	400 applications.
(4) Federal Government	*500* applications.
	4,677
(b) Frequency of application (for each industry)	1 application.
(c) Response time per applicant:	
(1) Utility Industry	25 hours.
(2) Service Providing Industry	25 hours.
(3) State and Local Government	25 hours.
(4) Federal Government	25 hours.
(d) Annual response time for collection (25 hours × 4,677 annual responses)	116,925 hours.
(e) Annual response time per industry:	
(1) Utility Industry (3,577 × 25)	89,425 hours.
(2) Service Providing Industry (200 × 25)	5,000 hours.
(3) State and Local Government (400 × 25)	10,000 hours.
(4) Federal Government (500 × 25)	12,500 hours.
	116,925
Fish and Wildlife Service	
(a) Total average annual applications for collection	62 applications.
(b) Average annual applications per industry:	
(1) Utility Industry	31 applications.
(2) Service Providing Industry	9 applications.
(3) State and Local Government	22 applications.
(b) Frequency of application (for each industry)	1 application.
(c) Response time per applicant:	
(1) Utility Industry	25 hours.
(2) Service Providing Industry	25 hours.
(3) State and Local Government	25 hours.
(d) Annual response time for collection (25 hours × 4,677 annual responses)	1,550 hours.
(e) Annual response time per industry:	
(1) Utility Industry (31 × 25)	775 hours.
(2) Service Providing Industry (9 × 25)	225 hours.
(3) State and Local Government (22 × 25)	550 hours.
National Park Service	
(a) Total average annual applications for collection	15 applications.
(b) Average annual applications per industry:	
(1) Utility Industry	2 applications.
(2) Service Providing Industry	11 applications.
(3) State and Local Government	2 applications.
(b) Frequency of application (for each industry)	1 application.
(c) Response time per applicant:	
(1) Utility Industry	25 hours.
(2) Service Providing Industry	2 hours.
(3) State and Local Government	2 hours.
(d) Annual response time for collection	76 hours.
(e) Annual response time per industry:	
(1) Utility Industry (2 × 25)	50 hours.
(2) Service Providing Industry (11 × 2)	22 hours.
(3) State and Local Government Industry (2 × 2)	4 hours.

Statement of questions	Burden
Bureau of Reclamation	
(a) Total average annual applications for collection	1,000 applications.
(b) Average annual applications per industry:	
(1) Utility Industry	850 applications.
(2) Service Providing Industry	50 applications.
(3) State and Local Government	100 applications.
(b) Frequency of application (for each industry)	1 application.
(c) Response time per applicant:	
(1) Utility Industry	25 hours.
(2) Service Providing Industry	25 hours.
(3) State and Local Government	25 hours.
(d) Annual response time for collection	25,000 hours.
(e) Annual response time per industry:	
(1) Utility Industry (850 × 25)	21,250 hours.
(2) Service Providing Industry (50 × 25)	1,250 hours.
(3) State and Local Government (100 × 25)	2,500 hours.
U.S. Army Corps of Engineers	
(a) Total average annual applications for collection	32 applications.
(b) Average annual applications per industry:	
(1) Utility Industry	32 applications.
(b) Frequency of application (for each industry)	1 application.
(c) Response time per applicant:	
(1) Utility Industry	25 hours.
(d) Annual response time for collection	800 hours.
(e) Annual response time per industry:	
(1) Utility Industry (32 × 25)	800 hours.

Annual Responses: 5,786.
Annual Burden Hours: 144,351.
Total Annual Application and Cost Recovery Fees: $8,611,902.
Bureau Clearance Officer: Ted R. Hudson, 202–452–5042.

Dated: November 21, 2008.

Ted R. Hudson,

Acting Chief, Regulatory Affairs.

[FR Doc. E8–28101 Filed 11–25–08; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV030–08–1430–ER; 09–08807; TAS: 14X1109]

Notice of Intent To Prepare an Environmental Impact Statement for the New Comstock Wind Energy Project, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: The Bureau of Land Management (BLM) Carson City District Office intends to prepare an Environmental Impact Statement (EIS) for the Great Basin Wind New Comstock Wind Energy Project proposal in Carson City, Lyon, Storey, and Washoe counties. This notice announces the beginning of the scoping process and solicits input on the identification of issues.

DATES: The BLM will accept comments until December 26, 2008. A public scoping meeting will be held regarding the EIS on Wednesday, December 10, 2008, from 4 p.m. to 7 p.m. at the BLM's Carson City District Office, 5665 Morgan Mill Road, Carson City, Nevada.

ADDRESSES: Submit written comments to:

- BLM Carson City District Office, Attn: New Comstock Wind Energy Project EIS Project Manager, 5665 Morgan Mill Road, Carson City, NV 89701.
- Fax: (775) 885–6147.
- E-mail: *newcomstockwind@blm.gov.*

Documents pertinent to this proposal may be examined at the Carson City District Office.

FOR FURTHER INFORMATION CONTACT: For further information and to have your name added to the Comstock EIS mailing list, call Mark Struble (775) 885–6107; or e-mail *newcomstockwind@blm.gov.*

SUPPLEMENTARY INFORMATION: The EIS for the New Comstock Wind Energy Project (Project) will analyze the direct, indirect, and cumulative impacts resulting from construction and operation of a commercial wind turbine facility proposed in a right-of-way application submitted by Great Basin Wind, LLC. The proposed project includes the construction of approximately 69 wind turbines with the potential of producing 192 megawatts of electricity. The turbine towers would be 210 feet to 330 feet tall supporting a nacelle and three blades 115 feet to 170 feet in length. Turbine units would be connected to a proposed electric substation by approximately 20 miles of underground electrical distribution system. A proposed 120 kV overhead transmission line approximately 5 miles in length would connect the new substation to an

existing substation operated by NV Energy located near U.S. Highway 50 east of Carson City. A series of 15 feet to 40 feet wide access roads will be improved or constructed to facilitate site development. Other facilities will include several small outbuildings for storage of materials and temporary work areas and storage yards.

The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the EIS process. The EIS will address issues brought forth through scoping and will be evaluated by an interdisciplinary team of BLM and other agency specialists. A range of alternatives and mitigating measures will be considered to evaluate and minimize environmental impacts and to assure that the proposed actions do not result in undue or unnecessary degradation of public lands. Federal, State, and local agencies and other individuals and organizations that may be interested in or affected by the BLM decision on the New Comstock Wind Energy Project are urged to participate in the EIS process. It is important that those interested in the proposed activities participate in the scoping and commenting processes of the EIS.

Written comments may be provided to BLM at the public scoping meetings or may be submitted to the BLM using one of the methods listed in the Addresses section. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publically 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.

Authority: 43 CFR 2804.

Dated: November 14, 2008.

Linda J. Kelly,

Field Manager, Sierra Front Field Office.

[FR Doc. E8–28198 Filed 11–25–08; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

National Park Service

Draft General Management Plan and Environmental Impact Statement, Cedar Creek and Belle Grove National Historical Park, VA

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of availability.

SUMMARY: Pursuant to section 102 (2)(C) of the National Environmental Policy Act (NEPA) of 1969 (Pub. L. 91–190, as amended), the National Park Service (NPS) announces the availability of the Draft General Management Plan and Environmental Impact Statement (GMP/EIS) for Cedar Creek and Belle Grove National Historical Park, Virginia.

Consistent with National Park Service laws, regulations, policies, and the purposes of the National Historical Park, the Draft GMP/EIS describes and analyzes four alternatives (A–D) to guide the management of the park over the next 20 years. The alternatives incorporate various management prescriptions to addresss the following issues: protecting park resources and values, interpretation, visitor facilities and services, access and circulation, related resources, partnership collaboration, and technical assistance.

Alternative A is continuation of current management practices. Visitors would experience the park at sites owned and independently managed by the Key Partners. The NPS would provide technical assistance and bring national recognition and visibility to the park by virtue of being part of the national park system.

Under *Alternative B*, visitors would experience the park at sites owned by the Key Partners and through electronic media and NPS ranger led tours and programs. Visitors would access the park via auto-touring routes and a few non-motorized trails located on Key Partner properties. The primary NPS role would be to provide interpretive programs and technical assistance. The Key Partners would have the responsibility for land and resource protection. There would be increased collaboration among the NPS and the Key Partners, with the NPS serving as a coordinator for resource and planning issues.

Under *Alternative C*, visitors would experience the park at a NPS-developed and managed visitor center and at visitor focal areas owned and managed by the NPS and the Key Partners. The NPS and the Key Partners would coordinate interpretive programs at these sites. Visitors would access the park via auto-touring routes and a system of non-motorized trails that provides opportunities for interpretation. The NPS and the Key Partners would develop a coordinated land protection plan focused on protection of key historic sites that would become focal areas. The NPS and the Key Partners would develop formal agreements to undertake special projects and general park management.

Alternative D is the preferred alternative. Under this alternative, visitors would experience the park at a NPS-developed and managed visitor center and at visitor focal areas owned and managed by the NPS and the Key Partners. The NPS and the Key Partners would coordinate interpretive programs at these sites. Visitors would access the park via auto-touring routes and an extensive system of non-motorized trails that provides opportunities for interpretation and recreation, that connect focal areas, and that tie to communities and resources outside the park. The NPS and the Key Partners would develop a coordinated land protection plan focused on protection of cultural landscapes, sensitive natural resource areas, and lands providing connections between NPS and Key Partner properties. The NPS and the Key Partners would develop formal agreements that define responsibilities for special projects, programs, events, and specific park operations.

The Draft GMP/EIS evaluates the potential environmental consequences of implementing the alternatives. Impact topics include the cultural, natural, and socioeconomic environments. This notice also announces that public meetings will be held to solicit comments on the Draft GMP/EIS during the public review period. Dates, times, and locations will be announced on the agency's planning Web site *http://parkplanning.nps.gov/cebe*, in local papers, and can be obtained by calling the park office at (540) 868–9176.

Public Review: There are several ways to view the document:

- An electronic version of the document will be available for download, review, and comment on the agency's planning Web site *http://parkplanning.nps.gov/cebe.*
- CDs and a limited number of printed copies can be requested by contacting the park at (540) 868–9176 or by e-mailing park planner Christopher Stubbs at *chris_stubbs@nps.gov.*
- The document will be available for review at the park office at 7718½ Main St., Middletown, VA 22645.

The National Park Service will accept comments on the Draft GMP/EIS from the public for a period of 90 days following publication of the Environmental Protection Agency's Notice of Availability in the **Federal Register**. Interested persons may check the planning Web site at *http://parkplanning.nps.gov/cebe* for dates, times, and places of public meetings to be conducted by the NPS, or by calling (540) 868–9176.

If you wish to comment, you may do so by any one of several methods. The preferred method of comment is via the internet at *http://parkplanning.nps.gov/cebe.* You may mail your comments to Superintendent Diann Jacox, Cedar Creek and Belle Grove NHP, P.O. Box 700, Middletown, VA 22645. You may also hand deliver your comments to the National Park Service office at 7718½ Main St., Middletown, VA. If you include 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.

SUPPLEMENTARY INFORMATION: Cedar Creek and Belle Grove National Historical Park was created by Congress in December 2002 to help preserve, protect, and interpret a nationally significant Civil War landscape and antebellum plantation; to tell the rich story of Shenandoah Valley history; to preserve historic, natural, cultural, military, and scenic resources; and to serve as a focal point within the Shenandoah Valley Battlefields National Historic District. The park is located in Virginia's Shenandoah Valley, adjacent to the historic towns of Middletown and Strasburg, and is within the counties of Frederick, Shenandoah, and Warren. The park consists of approximately 3,712 acres that includes prehistoric resources, ecologically important areas, evidence of valley settlement and early European history of the region, examples of plantation life and culture, and significant Civil War resources. In the enabling legislation for the park, Congress established a Federal Advisory Commission to advise in the preparation of a GMP, and Key Partner organizations who may continue to own and manage properties within the park.

The Draft GMP/EIS sets forth alternative visions (management alternatives) for the development and operation of Cedar Creek and Belle Grove National Historical Park. This plan is the product of collaboration between the National Park Service, the Federal Advisory Commission, and the Key Partners to provide for the preservation and public enjoyment of the National Historical Park for the next 15 to 20 years.

FOR FURTHER INFORMATION CONTACT: Diann Jacox, Superintendent, Cedar Creek and Belle Grove National Historical Park, (540) 868–9176.

Dated: February 7, 2008.

Dennis R. Reidenbach,

Regional Director, Northeast Region, National Park Service.

Editorial Note: This document was received in the Office of the Federal Register on November 21, 2008.

[FR Doc. E8–28115 Filed 11–25–08; 8:45 am]

BILLING CODE 4310–AR–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent To Prepare a General Management Plan/ Environmental Impact Statement for Mount Rushmore National Memorial, SD

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of intent to prepare a General Management Plan/ Environmental Impact Statement for Mount Rushmore National Memorial, South Dakota.

SUMMARY: Pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), the National Park Service (NPS) is announcing its intent to prepare a General Management Plan/ Environmental Impact Statement (GMP/ EIS) for Mount Rushmore National Memorial (Memorial), South Dakota. This effort will update the 1980 GMP.

The GMP/EIS will establish the overall direction for the Memorial, setting broad management goals for managing the area over the next 15 to 20 years. The GMP/EIS will prescribe desired resource conditions and visitor experiences that are to be achieved and maintained throughout the Memorial based on such factors as the Memorial's purpose, significance, special mandates, the body of laws and policies directing Memorial management, resource analysis, and the range of public expectations and concerns. The GMP/ EIS also will outline the kinds of resource management activities, visitor activities, and developments that would be appropriate in the Memorial in the future.

A range of reasonable alternatives for managing the Memorial will be developed through this planning process and will include, at a minimum, a no-action and a preferred alternative. Major issues the GMP/EIS will address include changes in visitor use patterns and special events, adequacy and sustainability of existing facilities for visitor opportunities and activities and for Memorial operations, and partnership roles and opportunities. The need for new facilities such as maintenance, museum curation and storage, and interpretation will be examined. The GMP/EIS will evaluate the potential environmental effects of the alternative management approaches.

As the first phase of the planning process, the NPS is beginning to scope the issues to be addressed in the GMP/ EIS. All interested persons, organizations, Agencies, and Tribes are encouraged to submit comments and suggestions on issues and concerns that should be addressed in the GMP/EIS, and the range of appropriate alternatives that should be examined.

DATES: The NPS will begin public scoping soon. Public scoping meetings regarding the GMP, including specific dates, times, and locations, will be announced in the local media, at the Web site *http://parkplanning.nps.gov/*, or by contacting the Superintendent.

ADDRESSES: General park information requests or requests to be added to the project mailing list should be directed to: Gerard Baker, Superintendent, Mount Rushmore National Memorial, 13000 Highway 244, Building 31, Suite 1, Keystone, South Dakota 57751–0268; telephone: 605–574–2523; e-mail: *moru_gmp@nps.gov.*

If you wish to comment on any issues associated with the GMP/EIS, you may submit your comments by any one of several methods. You may mail comments to Mount Rushmore National Memorial, 13000 Highway 244, Building 31, Suite 1, Keystone, South Dakota 57751–0268. Once the public comment period commences, you may comment via the Internet at *http://www.planning.nps.gov/*; simply select Mount Rushmore National Memorial from the list of parks, and then select the GMP/EIS. Finally, you may hand-deliver comments to the Memorial at the address above.

Before including your address, telephone number, e-mail address, or other personal identifying information in your comments, 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 comments to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. We will make all submissions from organizations or businesses, from individuals identifying themselves as representatives or officials, or organizations or businesses available for public inspection in their entirety.

FOR FURTHER INFORMATION, CONTACT: Greg Jarvis, Project Manager, Planning Division, Denver Service Center, National Park Service, 12795 West Alameda Parkway, P.O. Box 25287, Denver, Colorado 80225–0287; telephone: 303–969–2263; or e-mail: *greg_jarvis@nps.gov*. General information about Mount Rushmore National Memorial is available on the Internet at *http://www.nps.gov/moru*.

Dated: November 4, 2008.

Ernest Quintana,

Regional Director, Midwest Region.

[FR Doc. E8–28232 Filed 11–25–08; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Weekly Listing of Historic Properties

Pursuant to (36CFR60.13(b,c)) and (36CFR63.5), this notice, through publication of the information included herein, is to appraise the public as well as governmental agencies, associations and all other organizations and individuals interested in historic preservation, of the properties added to, or determined eligible for listing in, the National Register of Historic Places from October 20 to October 24, 2008.

For further information, please contact Edson Beall via: United States Postal Service mail, at the National Register of Historic Places, 2280, National Park Service, 1849 C St. NW., Washington, DC 20240; in person (by appointment), 1201 Eye St., NW., 8th floor, Washington DC 20005; by fax, 202–371–2229; by phone, 202–354–2255; or by e-mail, *Edson_Beall@nps.gov*.

Dated: November 17, 2008.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

KEY: State, County, Property Name, Address/ Boundary, City, Vicinity, Reference Number, NHL, Action, Date, Multiple Name

ALABAMA

Elmore County

First Baptist Church of Wetumpka, 205 West Bridge St., Wetumpka, 06001101, LISTED, 10/24/08

ARKANSAS

Johnson County

Hill, Taylor, Hotel, 409 Alabama St., Coal Hill, 08001007, LISTED, 10/21/08

COLORADO

La Plata County

Denver and Rio Grande Western Railroad Locomotive No. 315, 479 Main Ave., Durango, 08001008, LISTED, 10/24/08

COLORADO

Rio Grande County

Spruce Lodge, 29431 W. U.S. Hwy. 160, South Fork, 08001009, LISTED, 10/21/08

MARYLAND

Washington County

Tolson's Chapel, 111 E. High St., Sharpsburg, 08001012, LISTED, 10/21/08

MARYLAND

Worcester County

St. Paul's by-the-sea Protestant Episcopal Church, 302 N. Baltimore St., Ocean City, 08001013, LISTED, 10/22/08

MISSOURI

Jasper County

Inter-State Grocer Company Building, 1027–1035 S. Main St., Joplin, 08001024, LISTED, 10/24/08 (Historic Resources of Joplin, Missouri)

MONTANA

Flathead County

Wheeler Camp (Boundary Increase and Additional Documentation), North end of Lake McDonald, Glacier National Park, Apgar vicinity, 08001015, LISTED, 10/24/08 (Glacier National Park MRA (AD))

NORTH CAROLINA

Wake County

Purefoy-Chappell House and Outbuildings, 1255 S. Main St., Wake Forest, 08001016, LISTED, 10/22/08 (Wake County MPS)

VIRGINIA

Arlington County

Aurora Highlands Historic District, Bounded by 16th St. S., S. Eads St., 26th St. S., and S. Joyce St., Arlington, 08001018, LISTED, 10/22/08 (Historic Residential Suburbs in the United States, 1830–1960 MPS)

[FR Doc. E8–28063 Filed 11–25–08; 8:45 am]

BILLING CODE 4310–70–P

LEGAL SERVICES CORPORATION

Notice of Availability of Calendar Year 2009 Competitive Grant Funds; Correction

AGENCY: Legal Services Corporation.

ACTION: Notice; correction. The dates for filing the Notice of Intent to Compete (NIC) and competitive grant applications for service areas in Wyoming have been revised. See the revised dates under **SUPPLEMENTARY INFORMATION.**

SUMMARY: The Legal Services Corporation (LSC) is the national organization charged with administering Federal funds provided for civil legal services to low-income people. LSC hereby announces the availability of competitive grant funds for the provision of a full range of civil legal services to eligible clients in Wyoming. Grants will be awarded in or around April 2009. The estimated annualized grant amounts for service areas in Wyoming are: $478,874 for the provision of civil legal services to the general low-income population throughout the state (i.e., service area WY–4); $12,054 for the provision of civil legal services to the migrant farmworker population throughout the state (i.e., service area MWY); and $167,794 for the provision of civil legal services to the Native American population throughout the state (i.e., service area NWY–1). The grant will be awarded in or around April 2009.

DATES: See **SUPPLEMENTARY INFORMATION** section for grants competition dates.

ADDRESSES: Legal Services Corporation—Competitive Grants, 3333 K Street, NW., Third Floor, Washington, DC 20007–3522.

FOR FURTHER INFORMATION CONTACT: Reginald Haley, Office of Program Performance, 202–295–1545.

SUPPLEMENTARY INFORMATION: The Request for Proposals (RFP) is available at *www.grants.lsc.gov*. Once at the Web site, click on *FY 2009 Request For Proposals Narrative Instruction* to access the RFP and other information pertaining to the LSC competitive grants process. Refer to the RFP for instructions on preparing the grant proposal; the regulations and guidelines governing LSC funding; the definition of a full range of legal services; and grant proposal submission requirements.

Applicants must file a NIC (RFP Form-H) to participate in the competitive grants process. The deadline for filing the NIC is March 2, 2009, 5 p.m. E.D.T. The deadline for filing grant proposals is April 13, 2009, 5 p.m. E.D.T. The dates shown in this notice for filing the NIC and the grant proposals supersede the dates in the RFP. All other instructions, regulations, guidelines, definitions, and grant proposal submission requirements remain in effect unless otherwise noted.

The following persons, groups, and entities are qualified applicants who may submit a Notice of Intent to Compete (NIC; RFP Form-H) and an application to participate in the competitive grants process: (1) Current recipients of LSC grants; (2) non-profit organizations that have as a purpose the

provision of legal assistance to eligible clients; (3) private attorneys, groups of attorneys or law firms; (4) state or local governments; and (5) sub-state regional planning and coordination agencies that are composed of sub-state areas and whose governing boards are controlled by locally elected officials.

LSC will not fax the RFP to interested parties. Interested parties are asked to visit *http://www.grants.lsc.gov* regularly for updates on the LSC competitive grants process.

Dated: November 20, 2008.

Victor M. Fortuno,

Vice President and General Counsel, Legal Services Corporation.

[FR Doc. E8–28186 Filed 11–25–08; 8:45 am]

BILLING CODE 7050–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2008–0607]

Commonwealth of Virginia: NRC Staff Assessment of a Proposed Agreement Between the Nuclear Regulatory Commission and the Commonwealth of Virginia

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of a proposed Agreement with the Commonwealth of Virginia.

SUMMARY: By letter dated June 12, 2008, Governor Timothy M. Kaine of Virginia requested that the U.S. Nuclear Regulatory Commission (NRC or Commission) enter into an Agreement with the Commonwealth of Virginia (Commonwealth or Virginia) as authorized by Section 274 of the Atomic Energy Act of 1954, as amended (Act).

Under the proposed Agreement, the Commission would relinquish, and the Commonwealth would assume, portions of the Commission's regulatory authority exercised within the Commonwealth. As required by the Act, the NRC is publishing the proposed Agreement for public comment. The NRC is also publishing the summary of an assessment by the NRC staff of the Commonwealth's regulatory program. Comments are requested on the proposed Agreement, especially its effect on public health and safety. Comments are also requested on the NRC staff assessment, the adequacy of the Commonwealth's program, and the Commonwealth's program staff, as discussed in this notice.

The proposed Agreement would release (exempt) persons who possess or use certain radioactive materials in the Commonwealth from portions of the Commission's regulatory authority. The Act requires that the NRC publish those exemptions. Notice is hereby given that the pertinent exemptions have been previously published in the **Federal Register** and are codified in the Commission's regulations as 10 CFR Part 150.

DATES: The comment period expires December 22, 2008. Comments received after this date will be considered if it is practical to do so, but the Commission cannot assure consideration of comments received after the expiration date.

ADDRESSES: Written comments may be submitted to Mr. Michael T. Lesar, Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, Washington, DC 20555–0001. Members of the public are invited and encouraged to submit comments electronically to *http://www.regulations.gov*. Search on Docket ID: [NRC–2008–0607] and follow the instructions for submitting comments.

The NRC maintains an Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at *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 NRC Public Document Room (PDR) reference staff at (800) 397–4209, or (301) 415–4737, or by e-mail to *pdr.resource@nrc.gov*.

Copies of comments received by NRC may be examined at the NRC Public Document Room, 11555 Rockville Pike, Public File Area O–1–F21, Rockville, Maryland. Copies of the request for an Agreement by the Governor of Virginia including all information and documentation submitted in support of the request, and copies of the full text of the NRC Draft Staff Assessment are also available for public inspection in the NRC's Public Document Room—ADAMS Accession Numbers: ML081720184, ML081760524, ML081760523, ML081760623, ML081760624, ML082470314, and ML083180102.

FOR FURTHER INFORMATION CONTACT: Ms. Monica L. Orendi, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Telephone (301) 415–3938 or e-mail to *monica.orendi@nrc.gov*.

SUPPLEMENTARY INFORMATION: Since Section 274 of the Act was added in 1959, the Commission has entered into Agreements with 35 States. The Agreement States currently regulate approximately 18,000 Agreement material licenses, while the NRC regulates approximately 4,000 licenses. Under the proposed Agreement, approximately 400 NRC licenses will transfer to the Commonwealth. The NRC periodically reviews the performance of the Agreement States to assure compliance with the provisions of Section 274.

Section 274e requires that the terms of the proposed Agreement be published in the **Federal Register** for public comment once each week for four consecutive weeks. This notice is being published in fulfillment of the requirement.

I. Background

(a) Section 274b of the Act provides the mechanism for a State to assume regulatory authority, from the NRC, over certain radioactive materials [1] and activities that involve use of the materials.

In a letter dated June 12, 2008, Governor Kaine certified that the Commonwealth of Virginia has a program for the control of radiation hazards that is adequate to protect public health and safety within Virginia for the materials and activities specified in the proposed Agreement, and that the Commonwealth desires to assume regulatory responsibility for these materials and activities. Included with the letter was the text of the proposed Agreement, which is shown in Appendix A to this notice.

The radioactive materials and activities (which together are usually referred to as the "categories of materials") that the Commonwealth requests authority over are:

(1) The possession and use of byproduct materials as defined in section 11e.(1) of the Act;

(2) The possession and use of byproduct materials as defined in section 11e.(3) of the Act;

(3) The possession and use of byproduct materials as defined in section 11e.(4) of the Act;

(4) The possession and use of source materials; and

[1] The radioactive materials, sometimes referred to as "Agreement materials," are: (a) Byproduct materials as defined in Section 11e.(1) of the Act; (b) byproduct materials as defined in Section 11e.(3) of the Act; (c) byproduct materials as defined in Section 11e.(4) of the Act; (d) source materials as defined in Section 11z. of the Act; and (e) special nuclear materials as defined in Section 11aa. of the Act, restricted to quantities not sufficient to form a critical mass.

(5) The possession and use of special nuclear materials in quantities not sufficient to form a critical mass.

The materials and activities the Commonwealth is not requesting authority over are:

(1) The regulation of extraction or concentration of source material from source material ore and the management and disposal of the resulting byproduct material;

(2) The regulation of land disposal of byproduct material or special nuclear material waste received from other persons; and

(3) The evaluation of radiation safety information on sealed sources or devices containing byproduct, source, or special nuclear materials and the registration of the sealed sources or devices for distribution.

(b) The proposed Agreement contains articles that:

(1) Specify the materials and activities over which authority is transferred;

(2) Specify the activities over which the Commission will retain regulatory authority;

(3) Continue the authority of the Commission to safeguard nuclear materials and restricted data;

(4) Commit the Commonwealth and NRC to exchange information as necessary to maintain coordinated and compatible programs;

(5) Provide for the reciprocal recognition of licenses;

(6) Provide for the suspension or termination of the Agreement; and

(7) Specify the effective date of the proposed Agreement.

The Commission reserves the option to modify the terms of the proposed Agreement in response to comments, to correct errors, and to make editorial changes. The final text of the Agreement, with the effective date, will be published after the Agreement is approved by the Commission and signed by the NRC Chairman and the Governor of Virginia.

(c) The regulatory program is authorized by law under the Code of Virginia (32.1–227—32.1–238). Section 32.1–235 provides the Governor with the authority to enter into an Agreement with the Commission. Virginia law contains provisions for the orderly transfer of regulatory authority over affected licensees from the NRC to the Commonwealth. After the effective date of the Agreement, licenses issued by NRC would continue in effect as Commonwealth licenses until the licenses expire or are replaced by Commonwealth issued licenses. NRC licenses transferred to the Commonwealth which contain requirements for decommissioning and express intent to terminate the license when decommissioning has been completed under a Commission approved decommissioning plan will continue as Commonwealth licenses and will be terminated by the Commonwealth when the Commission approved decommissioning plan has been completed.

The Commonwealth currently regulates the users of naturally-occurring and accelerator-produced radioactive materials. The Energy Policy Act of 2005 (EPAct) expanded the Commission's regulatory authority over byproduct materials as defined in Sections 11e.(3) and 11e.(4) of the Act, to include certain naturally-occurring and accelerator-produced radioactive materials. On August 31, 2005, the Commission issued a time-limited waiver (70 FR 51581) of the EPAct requirements. Under the proposed Agreement, the Commonwealth would assume regulatory authority for these radioactive materials. Therefore, if the proposed Agreement is approved, the Commission would terminate the time-limited waiver in the Commonwealth coincident with the effective date of the Agreement. Also, a notification of waiver termination would be provided in the **Federal Register** for the final Agreement.

(d) The NRC draft staff assessment finds that the Commonwealth's Division of Radiological Health, an organizational unit of the Virginia Department of Health (VDH), is adequate to protect public health and safety and is compatible with the NRC program for the regulation of Agreement materials.

II. Summary of the NRC Staff Assessment of the Commonwealth's Program for the Control of Agreement Materials

The NRC staff has examined the Commonwealth's request for an Agreement with respect to the ability of the radiation control program to regulate Agreement materials. The examination was based on the Commission's policy statement "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement," (46 FR 7540; January 23, 1981, as amended by Policy Statements published at 46 FR 36969; July 16, 1981 and at 48 FR 33376; July 21, 1983), and the Office of Federal and State Materials and Environmental Management Programs (FSME) Procedure SA–700, "Processing an Agreement."

(a) Organization and Personnel. The Agreement materials program will be located within the existing Division of Radiological Health (DRH) of the VDH. The DRH will be responsible for all regulatory activities related to the proposed Agreement.

The educational requirements for the DRH staff members are specified in the Commonwealth's personnel position descriptions, and meet the NRC criteria with respect to formal education or combined education and experience requirements. All current staff members hold at least bachelor's degrees in physical or life sciences, or have a combination of education and experience at least equivalent to a bachelor's degree. All have had additional training and work experience in radiation protection. Supervisory level staff has at least seven years working experience in radiation protection.

The DRH performed and the NRC staff reviewed an analysis of the expected workload under the proposed Agreement. Based on the NRC staff review of the DRH's staff analysis, the DRH has an adequate number of staff to regulate radioactive materials under the terms of the Agreement. The DRH will employ a staff with at least the equivalent of 6.0 full-time professional/technical and administrative employees for the Agreement materials program.

The Commonwealth has indicated that the DRH has an adequate number of trained and qualified staff in place. The Commonwealth has developed qualification procedures for license reviewers and inspectors which are similar to the NRC's procedures. The technical staff are working with NRC license reviewers in the NRC Region I Office and accompanying NRC staff on inspections of NRC licensees in Virginia. DRH staff is also actively supplementing their experience through direct meetings, discussions, and facility walk-downs with NRC licensees in the Commonwealth, and through self-study, in-house training, and formal training.

Overall, the NRC staff believes that the DRH technical staff identified by the Commonwealth to participate in the Agreement materials program has sufficient knowledge and experience in radiation protection, the use of radioactive materials, the standards for the evaluation of applications for licensing, and the techniques of inspecting licensed users of agreement materials.

(b) Legislation and Regulations. In conjunction with the rulemaking authority vested in the Virginia Board of Health by Section 32.1–229 of the Code of Virginia, the DRH has the requisite authority to promulgate regulations for protection against radiation. The law

provides DRH the authority to issue licenses and orders, conduct inspections, and to enforce compliance with regulations, license conditions, and orders. Licensees are required to provide access to inspectors.

The NRC staff verified that the Commonwealth adopted the relevant NRC regulations in 10 CFR Parts 19, 20, 30, 31, 32, 33, 34, 35, 36, 39, 40, 61, 70, 71, and 150 into Virginia Administrative Code Title 12, Section 5–481. The NRC staff also approved two license conditions to implement Increased Controls and Fingerprinting and Criminal History Records Check requirements for risk-significant radioactive materials for certain Commonwealth licensees under the proposed Agreement. These license conditions will replace the Orders that NRC issued (EA–05–090 and EA–07–305) to these licensees that will transfer to the Commonwealth. As a result of the restructuring of Virginia Regulations, the Commonwealth deleted financial assurance requirements equivalent to 10 CFR 40.36. The Commonwealth is proceeding with the necessary revisions to their regulations to ensure compatibility, and these revisions will be effective by January 1, 2009. Therefore, on the proposed effective date of the Agreement, the Commonwealth will have adopted an adequate and compatible set of radiation protection regulations that apply to byproduct, source, and special nuclear materials in quantities not sufficient to form a critical mass. The NRC staff also verified that the Commonwealth will not attempt to enforce regulatory matters reserved to the Commission.

(c) Storage and Disposal. The Commonwealth has adopted NRC compatible requirements for the handling and storage of radioactive material. The Commonwealth will not seek authority to regulate the land disposal of radioactive material as waste. The Commonwealth waste disposal requirements cover the preparation, classification, and manifesting of radioactive waste generated by Commonwealth licensees for transfer for disposal to an authorized waste disposal site or broker.

(d) Transportation of Radioactive Material. Virginia has adopted compatible regulations to the NRC regulations in 10 CFR Part 71. Part 71 contains the requirements licensees must follow when preparing packages containing radioactive material for transport. Part 71 also contains requirements related to the licensing of packaging for use in transporting radioactive materials. Virginia will not attempt to enforce portions of the regulations related to activities, such as approving packaging designs, which are reserved to NRC.

(e) Recordkeeping and Incident Reporting. The Commonwealth has adopted compatible regulations to the sections of the NRC regulations which specify requirements for licensees to keep records, and to report incidents or accidents involving materials.

(f) Evaluation of License Applications. The Commonwealth has adopted compatible regulations to the NRC regulations that specify the requirements a person must meet to get a license to possess or use radioactive materials. The Commonwealth has also developed a licensing procedures manual, along with the accompanying regulatory guides, which are adapted from similar NRC documents and contain guidance for the program staff when evaluating license applications.

(g) Inspections and Enforcement. The Commonwealth has adopted a schedule providing for the inspection of licensees as frequently as, or more frequently than, the inspection schedule used by the NRC. The program has adopted procedures for the conduct of inspections, reporting of inspection findings, and reporting inspection results to the licensees. The Commonwealth has also adopted procedures for the enforcement of regulatory requirements.

(h) Regulatory Administration. The Commonwealth is bound by requirements specified in Commonwealth law for rulemaking, issuing licenses, and taking enforcement actions. The program has also adopted administrative procedures to assure fair and impartial treatment of license applicants. Commonwealth law prescribes standards of ethical conduct for Commonwealth employees.

(i) Cooperation with Other Agencies. Commonwealth law deems the holder of an NRC license on the effective date of the proposed Agreement to possess a like license issued by the Commonwealth. The law provides that these former NRC licenses will expire either 90 days after receipt from the radiation control program of a notice of expiration of such license or on the date of expiration specified in the NRC license, whichever is later. In the case of NRC licenses that are terminated under restricted conditions required by 10 CFR 20.1403 prior to the effective date of the proposed Agreement, the Commonwealth deems the termination to be final despite any other provisions of Commonwealth law or rule. For NRC licenses that, on the effective date of the proposed Agreement, contain a license condition indicating intent to terminate the license upon completion of a Commission approved decommissioning plan, the transferred license will be terminated by the Commonwealth under the plan so long as the licensee conforms to the approved plan.

The Commonwealth also provides for "timely renewal." This provision affords the continuance of licenses for which an application for renewal has been filed more than 30 days prior to the date of expiration of the license. NRC licenses transferred while in timely renewal are included under the continuation provision. The Code of Virginia provides exemptions from the Commonwealth's requirements for licensing of sources of radiation for NRC and U.S. Department of Energy contractors or subcontractors. The proposed Agreement commits the Commonwealth to use its best efforts to cooperate with the NRC and the other Agreement States in the formulation of standards and regulatory programs for the protection against hazards of radiation, and to assure that the Commonwealth's program will continue to be compatible with the Commission's program for the regulation of Agreement materials. The proposed Agreement stipulates the desirability of reciprocal recognition of licenses, and commits the Commission and the Commonwealth to use their best efforts to accord such reciprocity.

III. Staff Conclusion

Section 274d of the Act provides that the Commission shall enter into an agreement under Section 274b with any State if:

(a) The Governor of the State certifies that the State has a program for the control of radiation hazards adequate to protect public health and safety with respect to the agreement materials within the State, and that the State desires to assume regulatory responsibility for the agreement materials; and

(b) The Commission finds that the State program is in accordance with the requirements of section 274o, and in all other respects compatible with the Commission's program for the regulation of materials, and that the State program is adequate to protect public health and safety with respect to the materials covered by the proposed Agreement.

The NRC staff has reviewed the proposed Agreement, the certification by the Commonwealth of Virginia in the application for an Agreement submitted by Governor Kaine on June 12, 2008, and the supporting information provided by the staff of the DRH of the

Virginia Department of Health, and concludes that the Commonwealth of Virginia satisfies the criteria in the Commission's policy statement "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement," and therefore, meets the requirements of Section 274 of the Act. The proposed Commonwealth of Virginia program to regulate Agreement materials, as comprised of statutes, regulations, and procedures, is compatible with the program of the Commission and is adequate to protect public health and safety with respect to the materials covered by the proposed Agreement.

Dated at Rockville, Maryland, this 17th day of November 2008.

For the Nuclear Regulatory Commission.

Robert J. Lewis,

Director, Division of Materials Safety and State Agreements, Office of Federal and State Materials and Environmental Management Programs.

Appendix A—An Agreement Between the United States Nuclear Regulatory Commission and the Commonwealth of Virginia for the Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the Commonwealth Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended

Whereas, The United States Nuclear Regulatory Commission (the Commission) is authorized under Section 274 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et seq.* (the Act), to enter into agreements with the Governor of any State/Commonwealth providing for discontinuance of the regulatory authority of the Commission within the Commonwealth under Chapters 6, 7, and 8, and Section 161 of the Act with respect to byproduct materials as defined in Sections 11e.(1), (3), and (4) of the Act, source materials, and special nuclear materials in quantities not sufficient to form a critical mass; and,

Whereas, The Governor of the Commonwealth of Virginia is authorized under the Code of Virginia Section 32.1–235, to enter into this Agreement with the Commission; and,

Whereas, The Governor of the Commonwealth of Virginia certified on June 12, 2008, that the Commonwealth of Virginia (the Commonwealth) has a program for the control of radiation hazards adequate to protect public health and safety with respect to the materials within the Commonwealth covered by this Agreement, and that the Commonwealth desires to assume regulatory responsibility for such materials; and,

Whereas, The Commission found on [date] that the program of the Commonwealth for the regulation of the materials covered by this Agreement is compatible with the Commission's program for the regulation of such materials and is adequate to protect public health and safety; and,

Whereas, The Commonwealth and the Commission recognize the desirability and importance of cooperation between the Commission and the Commonwealth in the formulation of standards for protection against hazards of radiation and in assuring that Commonwealth and Commission programs for protection against hazards of radiation will be coordinated and compatible; and,

Whereas, The Commission and the Commonwealth recognize the desirability of the reciprocal recognition of licenses, and of the granting of limited exemptions from licensing of those materials subject to this Agreement; and,

Whereas, This Agreement is entered into pursuant to the provisions of the Act;

Now, therefore, It is hereby agreed between the Commission and the Governor of the Commonwealth acting on behalf of the Commonwealth as follows:

Article I

Subject to the exceptions provided in Articles II, IV, and V, the Commission shall discontinue, as of the effective date of this Agreement, the regulatory authority of the Commission in the Commonwealth under Chapters 6, 7, and 8, and Section 161 of the Act with respect to the following materials:

1. Byproduct materials as defined in Section 11e.(1) of the Act;
2. Byproduct materials as defined in Section 11e.(3) of the Act;
3. Byproduct materials as defined in Section 11e.(4) of the Act;
4. Source materials; and
5. Special nuclear materials in quantities not sufficient to form a critical mass.

Article II

This Agreement does not provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to:

1. The regulation of the construction and operation of any production or utilization facility or any uranium enrichment facility;
2. The regulation of the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;
3. The regulation of the disposal into the ocean or sea of byproduct, source, or special nuclear materials waste as defined in the regulations or orders of the Commission;
4. The regulation of the disposal of such other byproduct, source, or special nuclear materials waste as the Commission from time to time determines by regulation or order should, because of the hazards or potential hazards thereof, not be disposed without a license from the Commission;
5. The evaluation of radiation safety information on sealed sources or devices containing byproduct, source, or special nuclear materials and the registration of the sealed sources or devices for distribution, as provided for in regulations or orders of the Commission;
6. The regulation of byproduct material as defined in Section 11e.(2) of the Act;
7. The regulation of the land disposal of byproduct, source, or special nuclear material waste received from other persons.

Article III

With the exception of those activities identified in Article II.1 through 4, this Agreement may be amended, upon application by the Commonwealth and approval by the Commission, to include one or more of the additional activities specified in Article II, whereby the Commonwealth may then exert regulatory authority and responsibility with respect to those activities.

Article IV

Notwithstanding this Agreement, the Commission may from time to time by rule, regulation, or order, require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of such product except pursuant to a license or an exemption from licensing issued by the Commission.

Article V

This Agreement shall not affect the authority of the Commission under Subsection 161b or 161i of the Act to issue rules, regulations, or orders to protect the common defense and security, to protect restricted data, or to guard against the loss or diversion of special nuclear material.

Article VI

The Commission will cooperate with the Commonwealth and other Agreement States in the formulation of standards and regulatory programs of the Commonwealth and the Commission for protection against hazards of radiation and to assure that Commission and Commonwealth programs for protection against hazards of radiation will be coordinated and compatible.

The Commonwealth agrees to cooperate with the Commission and other Agreement States in the formulation of standards and regulatory programs of the Commonwealth and the Commission for protection against hazards of radiation and to assure that the Commonwealth's program will continue to be compatible with the program of the Commission for the regulation of materials covered by this Agreement.

The Commonwealth and the Commission agree to keep each other informed of proposed changes in their respective rules and regulations, and to provide each other the opportunity for early and substantive contribution to the proposed changes.

The Commonwealth and the Commission agree to keep each other informed of events, accidents, and licensee performance that may have generic implication or otherwise be of regulatory interest.

Article VII

The Commission and the Commonwealth agree that it is desirable to provide reciprocal recognition of licenses for the materials listed in Article I licensed by the other party or by any other Agreement State.

Accordingly, the Commission and the Commonwealth agree to develop appropriate

rules, regulations, and procedures by which such reciprocity will be accorded.

Article VIII

The Commission, upon its own initiative after reasonable notice and opportunity for hearing to the Commonwealth, or upon request of the Governor of the Commonwealth, may terminate or suspend all or part of this agreement and reassert the licensing and regulatory authority vested in it under the Act if the Commission finds that (1) such termination or suspension is required to protect public health and safety, or (2) the Commonwealth has not complied with one or more of the requirements of Section 274 of the Act.

The Commission may also, pursuant to Section 274j of the Act, temporarily suspend all or part of this agreement if, in the judgment of the Commission, an emergency situation exists requiring immediate action to protect public health and safety and the Commonwealth has failed to take necessary steps. The Commission shall periodically review actions taken by the Commonwealth under this Agreement to ensure compliance with Section 274 of the Act which requires a Commonwealth program to be adequate to protect public health and safety with respect to the materials covered by this Agreement and to be compatible with the Commission's program.

Article IX

This Agreement shall become effective on [date], and shall remain in effect unless and until such time as it is terminated pursuant to Article VIII.

Done at [Richmond, Virginia] this [date] day of [month], [year].

For the United States Nuclear Regulatory Commission.

Dale E. Klein,

Chairman.

For the Commonwealth of Virginia.

Timothy M. Kaine,

Governor.

[FR Doc. E8–28132 Filed 11–25–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 030–03289]

Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment to Byproduct Materials License No. 44–10187–03, for Unrestricted Release of Fletcher Allen Health Care's Degoesbriand Laboratory in Burlington, VT

AGENCY: Nuclear Regulatory Commission.

ACTION: Issuance of Environmental Assessment and Finding of No Significant Impact for License Amendment.

FOR FURTHER INFORMATION CONTACT: Penny Lanzisera, Senior Health Physicist, Medical Branch, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania 19406; telephone (610) 337–5169; fax number (610) 337–5269; or by e-mail: *penny.lanzisera@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of a license amendment to Byproduct Materials License No. 44–10187–03. This license is held by Fletcher Allen Health Care (the Licensee), for, in part, its DeGoesbriand Laboratory (the Facility), located at One Prospect Street in Burlington, Vermont. Issuance of the amendment would authorize release of the Facility for unrestricted use. The Licensee requested this action in a letter dated April 25, 2008. The NRC has prepared an Environmental Assessment (EA) in support of this proposed action in accordance with the requirements of Title 10, Code of Federal Regulations (CFR), Part 51 (10 CFR Part 51). Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate with respect to the proposed action. The amendment will be issued to the Licensee following the publication of this FONSI and EA in the **Federal Register**.

II. Environmental Assessment

Identification of Proposed Action

The proposed action would approve the Licensee's April 25, 2008, license amendment request, resulting in release of the Facility for unrestricted use. License No. 44–10187–03 was issued on March 18, 1968, pursuant to 10 CFR Part 30, and has been amended periodically since that time. This license authorized the Licensee, in part, to use unsealed byproduct material for purposes of conducting research and development activities on laboratory bench tops and in hoods.

The Facility consists of laboratories located in a building of 234,000 square feet. The Facility is located in a commercial area. Within the Facility, use of licensed materials was confined to five rooms of approximately 2,000 square feet.

On May 27, 2004, the Licensee ceased licensed activities and initiated a survey and decontamination of the Facility. Based on the Licensee's historical knowledge of the site and the conditions of the Facility, the Licensee determined that only routine decontamination activities, in accordance with their NRC-approved, operating radiation safety procedures, were required. The Licensee was not required to submit a decommissioning plan to the NRC because worker cleanup activities and procedures are consistent with those approved for routine operations. The Licensee conducted surveys of the Facility and provided information to the NRC to demonstrate that it meets the criteria in Subpart E of 10 CFR Part 20 for unrestricted release.

Need for the Proposed Action

The Licensee has ceased conducting licensed activities at the Facility, and seeks the unrestricted use of its Facility.

Environmental Impacts of the Proposed Action

The historical review of licensed activities conducted at the Facility shows that such activities involved use of the following radionuclide with half-life greater than 120 days: hydrogen-3. Prior to performing the final status survey, the Licensee conducted decontamination activities, as necessary, in the areas of the Facility affected by this radionuclide.

The Licensee conducted a final status survey on May 28, 2004. This survey covered the five rooms used at the Facility. The final status survey report was attached to the Licensee's amendment request dated April 25, 2008. The Licensee elected to demonstrate compliance with the radiological criteria for unrestricted release as specified in 10 CFR 20.1402 by using the screening approach described in NUREG–1757, "Consolidated NMSS Decommissioning Guidance," Volume 2. The Licensee used the radionuclide-specific derived concentration guideline levels (DCGLs), developed there by the NRC, which comply with the dose criterion in 10 CFR 20.1402. These DCGLs define the maximum amount of residual radioactivity on building surfaces, equipment, and materials, and in soils, that will satisfy the NRC requirements in Subpart E of 10 CFR Part 20 for unrestricted release. The Licensee's final status survey results were below these DCGLs and are in compliance with the As Low As Reasonably Achievable (ALARA) requirement of 10 CFR 20.1402. The NRC thus finds that the Licensee's final status survey results are acceptable.

Based on its review, the staff has determined that the affected environment and any environmental impacts associated with the proposed action are bounded by the impacts evaluated by the "Generic Environmental Impact Statement in

Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Nuclear Facilities" (NUREG–1496) Volumes 1–3 (ML042310492, ML042320379, and ML042330385). The staff finds there were no significant environmental impacts from the use of radioactive material at the Facility. The NRC staff reviewed the docket file records and the final status survey report to identify any non-radiological hazards that may have impacted the environment surrounding the Facility. No such hazards or impacts to the environment were identified. The NRC has identified no other radiological or non-radiological activities in the area that could result in cumulative environmental impacts.

The NRC staff finds that the proposed release of the Facility for unrestricted use is in compliance with 10 CFR 20.1402. Based on its review, the staff considered the impact of the residual radioactivity at the Facility and concluded that the proposed action will not have a significant effect on the quality of the human environment.

Environmental Impacts of the Alternatives to the Proposed Action

Due to the largely administrative nature of the proposed action, its environmental impacts are small. Therefore, the only alternative the staff considered is the no-action alternative, under which the staff would leave things as they are by simply denying the amendment request. This no-action alternative is not feasible because it conflicts with 10 CFR 30.36(d), requiring that decommissioning of byproduct material facilities be completed and approved by the NRC after licensed activities cease. The NRC's analysis of the Licensee's final status survey data confirmed that the Facility meets the requirements of 10 CFR 20.1402 for unrestricted release. Additionally, denying the amendment request would result in no change in current environmental impacts. The environmental impacts of the proposed action and the no-action alternative are therefore similar, and the no-action alternative is accordingly not further considered.

Conclusion

The NRC staff has concluded that the proposed action is consistent with the NRC's unrestricted release criteria specified in 10 CFR 20.1402. Because the proposed action will not significantly impact the quality of the human environment, the NRC staff concludes that the proposed action is the preferred alternative.

Agencies and Persons Consulted

NRC provided a draft of this Environmental Assessment to the State of Vermont's Office of Radiological Health for review on September 16, 2008. On October 22, 2008, the State of Vermont's Office of Radiological Health responded by e-mail. The State agreed with the conclusions of the EA, and otherwise had no comments.

The NRC staff has determined that the proposed action is of a procedural nature, and will not affect listed species or critical habitat. Therefore, no further consultation is required under Section 7 of the Endangered Species Act. The NRC staff has also determined that the proposed action is not the type of activity that has the potential to cause effects on historic properties. Therefore, no further consultation is required under Section 106 of the National Historic Preservation Act.

III. Finding of No Significant Impact

The NRC staff has prepared this EA in support of the proposed action. On the basis of this EA, the NRC finds that there are no significant environmental impacts from the proposed action, and that preparation of an environmental impact statement is not warranted. Accordingly, the NRC has determined that a Finding of No Significant Impact is appropriate.

IV. Further Information

Documents related to this action, including the application for license amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The documents related to this action are listed below, along with their ADAMS accession numbers.

1. Letter dated April 25, 2008 requesting amendment (ML081270653);
2. Letter dated July 8, 2008 providing additional information (ML081980145);
3. NUREG–1757, "Consolidated NMSS Decommissioning Guidance";
4. Title 10 Code of Federal Regulations, Part 20, Subpart E, "Radiological Criteria for License Termination";
5. Title 10, Code of Federal Regulations, Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions"; and
6. NUREG–1496, "Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Nuclear Facilities:"

If you do not have access to ADAMS, or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov*. These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Region I, 475 Allendale Road, King of Prussia, PA this 19th day of November 2008.

For the Nuclear Regulatory Commission.

Pamela Henderson,

Chief, Medical Branch, Division of Nuclear Materials Safety, Region I.

[FR Doc. E8–28130 Filed 11–25–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–482]

Kansas Gas and Electric Company, Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., Wolf Creek Nuclear Operating Corporation, Wolf Creek Generating Station, Unit 1; Notice of Issuance of Renewed Facility Operating License No. NPF–42 for an Additional 20-Year Period Record of Decision

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission) has issued renewed facility operating license No. NPF–42 to Wolf Creek Nuclear Operating Corporation (WCNOC), the operator of the Wolf Creek Generating Station (WCGS). Renewed facility operating license No. NPF–42 authorizes operation of WCGS at reactor core power levels not in excess of 3565 megawatts thermal (1228 megawatts electric), in accordance with the provisions of the WCGS renewed license and its technical specifications.

The notice also serves as the record of decision for the renewal of facility operating license No. NPF–42 for WCGS, consistent with Title 10 of the *Code of Federal Regulations* Section 51.103 (10 CFR 51.103). As discussed in the Final Supplemental Environmental Impact Statement (FSEIS) for WCGS, dated May 2008, the Commission considered a range of reasonable alternatives that included generation from coal, natural gas, oil, wind, solar,

hydropower, geothermal, wood waste, municipal solid waste, other biomass-derived fuels, delayed retirement, utility-sponsored conservation, a combination of alternatives, and a no action alternative. The factors considered in the record decision can be found in the supplemental environmental impact statement (SEIS) for License Renewal, Supplement 32 regarding Wolf Creek Generating Station.

WCGS Unit 1 is a PWR located 3.5 miles northeast of the town of Burlington, in Coffey County, Kansas. The application for the renewed license complied with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations. As required by the Act and the Commission's regulations in 10 CFR Chapter I, the Commission has made appropriate findings, which are set forth in the license. Prior public notice of the action involving the proposed issuance of the renewed license and of an opportunity for a hearing regarding the proposed issuance of the renewed license was published in the **Federal Register** on November 30, 2006.

For further details with respect to this action, see: (1) WCNOC's license renewal application for WCGS dated September 27, 2006, as supplemented by letters dated through August 1, 2008; (2) the Commission's safety evaluation report (NUREG–1915), published in October 2008; (3) the updated safety analysis report; and (4) the Commission's final environmental impact statement (NUREG–1437, Supplement 32), for WCGS, published on May 8, 2008. These documents are available at the NRC's Public Document Room, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, and can be viewed from the NRC Public Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*.

Copies of Renewed Facility Operating License No. NPF–42, may be obtained by writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Director, Division of License Renewal. Copies of the WCGS safety evaluation report (NUREG–1915) and the final environmental impact statement (NUREG–1437, Supplement 32) may be purchased from the National Technical Information Service, U.S. Department of Commerce, Springfield, VA 22161 (*http://www.ntis.gov*), 703–605–6000, or Attention: Superintendent of Documents, U.S. Government Printing Office, P.O. Box 371954 Pittsburgh, PA 15250–7954 (*http://www.gpoaccess.gov*), 202–512–1800. All orders should clearly identify the NRC publication number and the requestor's Government Printing Office deposit account number or VISA or MasterCard number and expiration date.

Dated at Rockville, Maryland, this 20th day of November 2008.

For the Nuclear Regulatory Commission.

Brian E. Holian,

Director, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. E8–28131 Filed 11–25–08; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

48 CFR Part 9904

Cost Accounting Standards: Harmonization of Cost Accounting Standards 412 and 413 With the Pension Protection Act of 2006

AGENCY: Office of Management and Budget, Office of Federal Procurement Policy

ACTION: Notice of extension of public comment period.

SUMMARY: The Office of Federal Procurement Policy (OFPP), Cost Accounting Standards Board (Board), is today announcing an extension of time to submit public comments regarding the Advance Notice of Proposed Rulemaking (ANPRM) (73 FR 51261, September 2, 2008) on the harmonization of Cost Accounting Standards (CAS) 412 and 413 with the Pension Protection Act (PPA) of 2006 (Pub. L. 109–280, 120 Stat.780). Many of the public comments received as of November 3, 2008 noted that the ANPRM addressed complex and technical accounting issues. Some of the commenters noted that they were still actively performing actuarial modeling of the ANPRM and alternative approaches. These commenters asked that the Board consider promulgating a second ANPRM or accepting public comments submitted after the original due date of November 3, 2008. Because the Final Rule must be published within the statutory time requirements of Section 106 of the PPA, the Board is concerned that the promulgation of a second ANPRM might not be feasible. Therefore to permit fuller consideration of the continuing efforts by the public, and to mitigate the need for a second ANPRM, the Board is extending the comment period to the date specified below.

Public comments already received in response to the ANPRM are available in their entirety at *http://www.whitehouse.gov/omb/procurement/index_casb.htm* and at *http://www.regulations.gov*.

DATES: Comments must be in writing and must be received by December 15, 2008.

ADDRESSES: The full text of the Advance Notice of Proposed Rulemaking, including the Board's response to public comments on the Staff Discussion Paper and the draft proposed amendments to Cost Accounting Standards 412 and 413, is available at: *http://www.regulations.gov* and *http://www.whitehouse.gov/omb/procurement/index_casb.html*.

All comments to this Advance Notice of Proposed Rulemaking must be in writing. Due to delays in the receipt and processing of mail, respondents are strongly encouraged to submit comments electronically to ensure timely receipt. Electronic comments may be submitted in any one of three ways:

1. Comments may be directly sent via *http://www.regulations.gov*—a Federal E-Government Web site that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type "CAS Pension Harmonization ANPRM" (without quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments;

2. Comments may be included in an e-mail message sent to *casb2@omb.eop.gov*. The comments may be submitted in the text of the e-mail message or as an attachment; or

3. Comments may also be submitted via facsimile to (202) 395–5105.

Be sure to include your name, title, organization, postal address, telephone number, and e-mail address in the text of your public comment and reference "CAS Pension Harmonization ANPRM" in the subject line. Comments received by the date specified below will be included as part of the official record.

Please note that all public comments received will be available in their entirety at *http://www.whitehouse.gov/omb/procurement/index_casb.html* and *http://www.regulations.gov* shortly after their receipt.

FOR FURTHER INFORMATION CONTACT: Eric Shipley, Project Director, Cost Accounting Standards Board (telephone:

410–786–6381, e-mail: *Eric.Shipley@cms.hhs.gov*).

Lesley A. Field,

Acting Chairperson, Cost Accounting Standards Board.

[FR Doc. E8–28043 Filed 11–25–08; 8:45 am]

BILLING CODE 3110–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2009–9, CP2009–10 and CP2009–11]

Global Direct Negotiated Service Agreements

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add Global Direct Negotiated Service Agreements to the Competitive Product List. The Postal Service has also filed two related contracts. This notice addresses procedural steps associated with these filings.

DATES: Comments are due December 2, 2008.

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:

I. Background

On November 17, 2008, the Postal Service filed a formal request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to add Global Direct Negotiated Service Agreements to the Competitive Product List.[1] The Postal Service indicates that Governors' Decision No. 08–10, July 16, 2008, establishes prices and classifications not of general applicability for Global Direct contracts.[2] The Request has been assigned Docket No. MC2009–9.

The Postal Service contemporaneously filed notice that it had entered into two Global Direct contracts with customers. Request at 1. The contracts have been assigned Docket Nos. CP2009–10 and CP2009–11. The Postal Service represents that the contracts' terms fit within the proposed Mail Classification Schedule (MCS) language included as Attachment A–2 to Governors' Decision 08–10, filed in Docket No. MC2008–7. *Id.* at 2. It claims the contracts are functionally equivalent in that they share similar cost and market characteristics, encompass customers who send mail directly to foreign destinations and desire that their mail bear the indicia of the foreign country, and cover the same services to the same foreign destination. *Id.* at 5–6. The Postal Service requests that the Commission classify these contracts as one product on the Competitive Product List in the MCS. *Id.* at 2, 5.

Request. Global Direct services provides customers with a price for mail acceptance within the United States and transportation to a receiving country of mail that bears the receiving country's indicia and meets the preparation requirements for the particular type of mail established by the receiving country.

The Request, which seeks to incorporate Governors' Decision No. 08–10 and the record of proceedings in Docket No. MC2008–7, includes a statement of supporting justification as required by 39 CFR 3020.32,[3] certifications of compliance with 39 U.S.C. 3633(a),[4] and supporting material filed under seal.[5] Substantively, the Request seeks to add two Global Direct Negotiated Service Agreements contracts as a single product in the Competitive Product List. *Id.* at 1–2.

In the Statement of Supporting Justification, Frank Cebello, Executive Director, Global Business Management, asserts that each contract will cover its attributable costs, make a positive contribution to institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.*, Attachment 1, at 2. Thus, Mr. Cebello contends there will be no issue of subsidization of competitive products by market dominant products as a result of these contracts. *Id.*

Related contracts. Copies of the specific Global Direct contracts were filed under seal a day after the Request was filed. The Postal Service notes the contracts are set to begin within 30 days after regulatory approvals and are set to expire not later than January 31, 2010. The Postal Service represents that the contracts are consistent with 39 U.S.C. 3633(a). *See id.* Attachments 2 and 3.

The Postal Service filed much of the supporting materials, including Governors' Decision 08–10 (in Docket No. MC2008–7) and the financial analysis for these Global Direct contracts, under seal. In its Request, the Postal Service maintains that the contracts and related financial information, including the customers' names and the accompanying analyses that provide prices, terms, conditions, and financial projections, should remain under seal. *Id.* at 2–4.

II. Notice of Filings

The Commission establishes Docket Nos. MC2009–9, CP2009–10, and CP2009–11 for consideration of the Request pertaining to the proposed Global Direct Negotiated Service Agreements product and the related contracts, respectively. In keeping with practice, these dockets are addressed on a consolidated basis for purposes of this Order; however, future filings should be made in the specific docket in which issues being addressed pertain.[6]

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and 39 CFR 3020 subpart B. Comments are due no later than December 2, 2008. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Michael J. Ravnitzky to serve as Public Representative in these dockets.

It is Ordered:

1. The Commission establishes Docket Nos. MC2009–9, CP2009–10, and CP2009–11 for consideration of the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Michael J. Ravnitzky is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than December 2, 2008.

[1] Request of the United States Postal Service to Add Global Direct Negotiated Service Agreements to the Competitive Product List, and Notice of Filing (Under Seal) Two Functionally Equivalent Agreements, November 17, 2008 (Request).

[2] Governors' Decision No. 08–10, July 16, 2008, filed in Docket No. MC2008–7 establishes prices and classifications not of general applicability for Global Direct and Global Bulk Economy Contracts, as well as for Global Plus Contracts 2, which combines Global Direct and Global Bulk Economy services. In that proceeding, the Postal Service indicated that until it entered into contracts with customers for Global Direct, it would not ask the Commission to establish an individual classification for Global Direct services. *See id.* at 1, n. 1.

[3] *See* Attachment 1 to the Request.

[4] *See* Attachments 2 and 3 to the Request.

[5] The supporting materials were filed subsequent to the Request on November 18, 2008.

[6] Docket No. MC2009–9 is reserved for those filings related to the proposed product of Global Direct services and the requirements of 39 U.S.C. 3642, while Docket Nos. CP2009–10 and CP2009–11 are reserved for those filings specific to the contracts and the requirements of 39 U.S.C. 3633.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Steven W. Williams,

Secretary.

[FR Doc. E8–28104 Filed 11–25–08; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Reports of Evidence of Material Violations: SEC File No. 270–514, OMB Control No. 3235–0572.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Sections 3501 through 3520, the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

On February 6, 2003, the Commission published final rules, effective August 5, 2003, entitled "Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer" (17 CFR 205.1 through 205.7). The information collection embedded in the rules is necessary to implement the Standards of Professional Conduct for Attorneys prescribed by the rule and required by Section 307 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7245). The rules impose an "up-the-ladder" reporting requirement when attorneys appearing and practicing before the Commission become aware of evidence of a material violation by the issuer or any officer, director, employee, or agent of the issuer. An issuer may choose to establish a qualified legal compliance committee ("QLCC") as an alternative procedure for reporting evidence of a material violation. In the rare cases in which a majority of a QLCC has concluded that an issuer did not act appropriately, the information may be communicated to the Commission. The collection of information is, therefore, an important component of the Commission's program to discourage violations of the federal securities laws and promote ethical behavior of attorneys appearing and practicing before the Commission.

The respondents to this collection of information are attorneys who appear and practice before the Commission and, in certain cases, the issuer, and/or officers, directors and committees of the issuer. We believe that, in providing quality representation to issuers, attorneys report evidence of violations to others within the issuer, including the Chief Legal Officer, the Chief Executive Officer, and, where necessary, the directors. In addition, officers and directors investigate evidence of violations and report within the issuer the results of the investigation and the remedial steps they have taken or sanctions they have imposed. Except as discussed below, we therefore believe that the reporting requirements imposed by the rule are "usual and customary" activities that do not add to the burden that would be imposed by the collection of information.

Certain aspects of the collection of information, however, may impose a burden. For an issuer to establish a QLCC, the QLCC must adopt written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation. We estimate for purposes of the PRA that there are approximately 16,611 issuers that are subject to the rules.[1] Of these, we estimate that approximately five percent, or 831, have established or will establish a QLCC.[2] Establishing the written procedures required by the rule should not impose a significant burden. We assume that an issuer would incur a greater burden in the year that it first establishes the procedures than in subsequent years, in which the burden would be incurred in updating, reviewing, or modifying the procedures. For purposes of the PRA, we assume that an issuer would spend 6 hours every three-year period on the procedures. This would result in an average burden of 2 hours per year. Thus, we estimate for purposes of the PRA that the total annual burden imposed by the collection of information would be 1,662 hours. Assuming half of the burden hours will be incurred by outside counsel at a rate of $400 per hour would result in a cost of $332,400.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study. Compliance with the collection of information requirements is in some cases mandatory and in some cases voluntary depending on the circumstances. Responses to the collection may or may not be kept confidential.

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.

Written comments regarding the above information should be directed to the following person: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an e-mail to: *nfraser@omb.eop.gov*; and (ii) Lewis W. Walker, Acting Director/CIO, Office of Information Technology, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this publication.

Dated: November 19, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28111 Filed 11–25–08; 8:45 am]

BILLING CODE 8011–01–P

[1] This estimate is based, in part, on the total number of operating companies that filed annual reports on Form 10–K, Form 10–KSB, Form 20–F, or Form 40–F, during the 2008 fiscal year and an estimate of the average number of issuers that may have a registration statement filed under the Securities Act pending with the Commission at any time (12,939). In addition, we estimate that approximately 3,672 investment companies currently file periodic reports on Form N–SAR.

[2] Indications are that the 2005 estimate of the percentage of issuers that would establish QLCCs (10%) was high. Our adjusted estimate in the percentage of QLCCs (5%) results in a reduced burden estimate as compared to the previously-approved collection.

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold an Open Meeting on Wednesday, December 3, 2008 at 10 a.m., in the Auditorium, Room L–002.

The subject matter of the Open Meeting will be:

Item 1: The Commission will consider whether to adopt rule amendments that would impose additional requirements on nationally recognized statistical rating organizations in order to address concerns about the integrity of their credit rating procedures and methodologies. The Commission also

will consider whether to propose and re-propose certain proposed rules relating to transparency and competition concerning nationally recognized statistical rating organizations.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: November 21, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28127 Filed 11–25–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Sunday, November 23, 2008, at 12 p.m.

Commissioners and certain staff members who have an interest in the matter will attend the Closed Meeting.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions as set forth in 5 U.S.C. 552b(c)(8) and (9) and 17 CFR 200.402(a)(8).and (9), permit consideration of the scheduled matter at the Closed Meeting.

Commissioner Paredes, as duty officer, voted to consider the item listed for the closed meeting in closed session and determined that no earlier notice thereof was possible.

The subject matter of the Closed Meeting scheduled for Sunday, November 23, 2008, will be:

A matter related to a financial institution.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

Dated: November 23, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28239 Filed 11–25–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

American Custom Components, Inc., Creditgroup Com, Inc. (n/k/a Tradex Global Financial Services, Inc.), Frederick Brewing Co., and Infinicall Corp., Respondents; Order of Suspension of Trading

November 24, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of American Custom Components, Inc. because it has not filed any periodic reports since the period ended June 30, 1998.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Creditgroup Com, Inc. (n/k/a Tradex Global Financial Services, Inc.) because it has not filed any periodic reports since August 12, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Frederick Brewing Co. because it has not filed any periodic reports since the period ended September 30, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Infinicall Corp. because it has not filed any periodic reports since the period ended December 31, 2005.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on November 24, 2008, through 11:59 p.m. EST on December 8, 2008.

By the Commission.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E8–28253 Filed 11–24–08; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58978; File No. SR–CBOE–2008–116]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend CBOE Rules Relating to an Expansion of the SPX Trading Crowd

November 19, 2008.

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 November 19, 2008, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules relating to the physical expansion of a trading crowd. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal*), at the Exchange's Office of the Secretary and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

CBOE recently completed an expansion of the back area of the SPX options trading crowd, which will result in a number of new trading spaces opening up in the trading crowd. In anticipation of the expansion, CBOE is filing this proposed rule change to describe the objective processes that it may utilize to determine which individuals can use one of the new trading spaces that are available, provided the demand for trading spaces in the trading crowd exceeds the supply.

Historically, an order in time process has generally been applied to determine which individuals can use new trading spaces in a crowd located on the CBOE trading floor. Recently CBOE codified in its rules pursuant to Commission approval objective processes pertaining to the issuance of new Interim Trading Permits ("ITPs") through either a random lottery process or order in time process, in anticipation that the demand for the ITPs would exceed the supply.[5] In the event the demand for trading spaces in the back area of the SPX trading crowd exceeds the supply, CBOE is adopting similar processes to determine which individuals can use one of the new trading spaces. Specifically, CBOE may choose to utilize either a random lottery process or an order in time process, which are the two objective processes that CBOE recently codified for the issuance of ITPs. CBOE notes that when it adopted these two processes for the issuance of ITPs, the rule filing did not receive any negative comments from its members relating to these objective processes. Instead, CBOE believes that the issuance of ITPs using the random lottery process was a positive experience, and now seeks to apply one of these two processes in the context of the physical expansion of the SPX trading crowd.

Under either of the processes that it chooses to utilize, CBOE would announce a deadline by which an approved individual CBOE member who desires to use the trading space can submit an indication of interest for one of the available trading spaces in the back area of the SPX trading crowd. Only those individuals who are approved members of CBOE would be eligible to submit an indication of interest, and the individual who would be using the trading space must be an effective member under CBOE Rule 3.10 (*i.e.*, must be on a membership[6]), a temporary member, or ITP Holder at the time of the random lottery process or the order in time process. If an existing member of the SPX trading crowd submits an indication of interest, is "selected" through the random lottery process or the order in time process and chooses a new trading space in the back area of the SPX trading crowd, that member's prior trading space would be deemed vacant.

After the deadline for indications of interest has passed, the available trading spaces in the back area of the SPX trading crowd would be allocated through a random lottery process or an order in time process.[7] Each individual member who is "selected" through either the random lottery process (based on the lottery selection sequence) or the order in time process (based on time sequence) would choose the new trading space where he or she would like to stand.

CBOE believes that these processes would provide for the issuance of new trading spaces in an objective manner and consequently would provide for fair access to the Exchange.

2. Statutory Basis

The proposed rule change would permit the Exchange to allocate new trading spaces in the SPX trading crowd pursuant to one of two objective processes: a random lottery process or an order in time process. CBOE notes that both of these processes have been codified in connection with the issuance of ITPs in a prior filing that was approved by the Commission. As a result, the Exchange believes the proposed rule change is consistent with the Act and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) Act[9] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest. CBOE believes that these processes would provide for the issuance of new trading spaces in an objective manner and consequently would provide for fair access to the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[12] However, Rule 19b–4(f)(6)(iii)[13] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay because it has now completed the expansion of its SPX trading crowd and has recently come to believe that the demand for additional trading spaces may exceed the newly available supply. To respond to this possibility, CBOE would like the flexibility to utilize a

[5] See Securities Exchange Act Release No. 58178 (July 17, 2008), 73 FR 42634 (July 22, 2008), approving SR–CBOE–2008–40.

[6] Being "on a membership" means that the member has satisfied the applicable requirements to obtain a membership and a membership has been released to that member by the Exchange's Membership Department.

[7] A member who selects a trading space following the random lottery process or the order in time process does not obtain any ownership right in that particular trading space. In the event a space dispute should arise, the crowd space dispute resolution procedures in Rule 24.21 will continue to apply.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] *Id.*

[13] 17 CFR 240.19b–4(f)(6)(iii).

lottery process when it allocates the additional space in the next several days. CBOE notes that its proposed rule change is a copy of its current lottery process applicable to the allocation of ITPs, which the Commission previously approved, and would apply that methodology in the context of expanding its SPX trading crowd.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[14] In particular, the Commission believes that waiver of the operative delay will promote competition and efficiency by providing CBOE with the option to utilize its new lottery process to manage the expansion of the SPX trading crowd, which it anticipates allocating in the next several days. Waiving the operative delay will enable CBOE to use either this new process or the historically-utilized first in time process as it deems appropriate, and will enable CBOE to allocate the new space promptly through a fair and objective methodology. For these reasons, the Commission designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2008–116 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2008–116. 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 am and 3 pm. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–CBOE–2008–116 and should be submitted on or before December 17, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28045 Filed 11–25–08; 8:45 am]

BILLING CODE 8011–01–P

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's effect on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58980; File No. SR–CBOE–2008–61]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Clarify Exchange Rule 9.11 Relating to Confirmations to Customers

November 19, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 10, 2008, Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE"), filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange"), proposes to amend CBOE Rule 9.11—Confirmation to Customers to clarify that written confirmations relating to options transactions do not need to specify the exchange or exchanges on which an option contract is executed. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/Legal*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below and is set forth in sections (A), (B), and (C) below.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed amendment to Exchange Rule 9.11 clarifies that a member organization is not required to disclose the market on which an options transaction is executed on a written confirmation furnished to a customer of a member organization. The member organization will continue to furnish a written confirmation that contains a description of each transaction in the option contracts, the underlying security type, option expiration month, exercise price, number of option

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

contracts, premium, commissions, date of transaction and settlement date, and shall indicate whether the transaction is a purchase or sale and whether a principal or agency transaction. The confirmation shall also by appropriate symbols distinguish between Exchange transactions and other transactions in options contracts.

Prior to August 1999, an options class was typically listed on only one options exchange. In August 1999, the options exchanges began to multiply-list options classes that were previously listed on only one exchange. In October 1999, the Commission stated that it believed a linkage among options markets would benefit investors by increasing competition among markets (and market participants) to provide the best execution of customer orders.[5] Subsequently, the Commission directed the options exchanges to act jointly in discussing, developing, and submitting for Commission approval an intermarket linkage plan for multiply-traded options. On July 28, 2000, the Commission approved the Plan for the Purpose of Creating and Operating an Intermarket Options Market Linkage (the "Options Linkage Plan" or "Linkage Plan") submitted by the CBOE, the American Stock Exchange LLC ("Amex") and the International Securities Exchange, Inc.[6] The Philadelphia Stock Exchange, Inc., and the Pacific Stock Exchange agreed to participate in the Options Linkage Plan in November 2000.[7] As a result of the introduction of multiply listed options and the implementation of the Linkage Plan, the contracts in a customer options order could be executed on more than one options exchange and the significance of the options exchange or exchanges that execute a particular options transaction has diminished significantly.

Under the duty of best execution, CBOE members are required to exercise diligence to obtain the best price when routing customer options orders for execution. The Exchange, as well as the other members of the Options Self Regulatory Council (the "OSRC"),[8] believes that in light of the existing best execution and disclosure requirements, the usefulness of including on an options confirmation the name of the options exchange or exchanges on which an options transaction was effected does not outweigh the operational difficulties of capturing the information given the multiple trading of options and the application of the Options Linkage Plan industry-wide. Consequently, the proposal would amend Exchange Rule 9.11 to make clear that written confirmations relating to options transactions are not required to specify the options exchange or exchanges on which such options contracts were executed.

The Exchange has worked with the other members of the OSRC in developing these proposed rule changes. Also, the Commission has approved an Amex proposal to clarify that written confirmations relating to options transactions are not required to specify the options exchange or exchanges on which such options contracts are executed.[9] Each additional member of the OSRC is expected to similarly file rule proposals to either delete the requirement that the written options confirmation disclose the name of the options exchange or exchanges on which the options transaction was executed, or clarify that no such requirement exists.

The Exchange believes that with the expansion of multi-listing of options and the introduction of new options exchanges, it has become operationally inefficient to require the disclosure of the market center on which an order was executed on the confirmation. As an example, a customer may have a single option order containing numerous option contracts executed on multiple exchanges. Under these conditions, it would be inefficient for the member organization to be required to identify the exchange symbol for each contract executed on that customer's order.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Exchange Act[10] in general, and furthers the objectives of Section 6(b)(5)[11] of the Act in particular in that it is designed to promote just and equitable principles of trade, facilitate transactions in securities, remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest by clarifying the Exchange's options confirmation procedure rules to better reflect the realities of the modern options market.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the forgoing rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13]

A proposed rule change filed under 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[14] However, Rule 19b–4(f)(6)(iii)[15] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The proposed rule change is substantially similar to an Amex rule that provides that written confirmations relating to options transactions are not required to specify the options exchange or exchanges on which such options were executed.[16] The Exchange believes that this proposed rule change does not raise any new, unique or substantive issues from those raised in the approved Amex filing. The Exchange also believes that acceleration of the operative date is consistent with the protection of investors and the public interest.[17]

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[5] *See* Exchange Act Release No. 42029 (Oct. 19, 1999), 64 FR 57674 (Oct. 26, 1999).

[6] *See* Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (Aug. 4, 2000).

[7] *See* Exchange Act Release Nos. 43573 (Nov. 16, 2000), 65 FR 70850 (November 28, 2000) and 43574 (Nov. 16, 2000), 65 FR 70851 (Nov. 28, 2000) (approval order).

[8] The ORSC consists of the options exchanges and the Financial Industry Regulatory Authority, Inc. ("FINRA").

[9] *See* Exchange Act Release No. 58814 (Oct. 20, 2008), 73 FR 63527 (Oct. 24, 2008) (SR–Amex–2008–53).

[10] 15 U.S.C. 78f.

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] *Id.*

[16] *See supra* note 9, and related text.

[17] For purposes only of waiving the 30-day operative delay, the Commission has considered the impact of the proposed rule on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Lastly, the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five days prior to the date of the filing of the proposed rule change as required by Rule 19b–4(f)(6).

At any time within 60 days of the filing of such proposed rule change the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2008–61 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2008–61. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. 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–CBOE–2008–61 and should be submitted on or before December 17, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28140 Filed 11–25–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58974; File No. SR–NASDAQ–2008–087]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by The NASDAQ Stock Market LLC Regarding a Clerical Change to Nasdaq Rules

November 18, 2008.

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 November 12, 2008, The NASDAQ Stock Market LLC ("Nasdaq") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq proposes to make a clerical correction to the Nasdaq rulebook under Rule 19b–4(f)(3) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to make clerical corrections to the Nasdaq rulebook. Nasdaq proposes to implement the proposed rule change immediately.

The text of the proposed rule change is available on Nasdaq's Web site (*http://www.complinet.com/nasdaq*), at Nasdaq's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq proposes to make a clerical correction to the Nasdaq rulebook. Specifically, Nasdaq proposes to renumber Nasdaq Rule 7039 to Nasdaq Rule 7046, and also to renumber Nasdaq Rule 7050 to Nasdaq Rule 7045. Nasdaq is renumbering these rules because Nasdaq has filed other proposed rule changes that necessitate a renumbering. Nasdaq is making no changes to Rules 7039 and 7050, other than to change their numbers to 7046 and 7045.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Section 6(b)(5) of the Act,[5] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change makes a minor clerical change to renumber an existing Nasdaq rule.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 C.F.R. 240.19b–4(f)(3).

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(3) thereunder,[7] Nasdaq has designated this proposal as one that is concerned solely with the administration of the self-regulatory organization. Accordingly, Nasdaq believes that its proposal should become immediately effective.

IV. Solicitation of Comments

Inferested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2008–087 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2008–087. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2008–087 and should be submitted on or before December 17, 2008.

For the Commission, by the Division of Trading & Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28091 Filed 11–25–08; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 C.F.R. 240.19b–4(f)(3).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58979; File No. SR–NYSE–2008–116]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending Rule 411(b) Concerning Certain Odd-Lot Order Handling Requirements, Rescinding NYSE Information Memorandum 94–14 and Issuing a New Information Memo That Provides Comprehensive and Updated Interpretive Guidance on, and Application of, Current NYSE Odd-Lot Trading Practices and Rules

November 19, 2008.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 ("Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 6, 2008, New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to (i) amend Rule 411(b) concerning certain odd-lot order handling requirements, (ii) rescind NYSE Information Memorandum ("Information Memo") 94–14 to the extent it created a distinction in the regulatory treatment of odd-lot limit and odd-lot market orders, and (iii) issue a new Information Memo that provides comprehensive and updated interpretive guidance on, and application of, current NYSE odd-lot trading practices and Rules. This rule filing is available on the Exchange's Web site at *http://www.nyse.com*, at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This proposal is to (i) amend NYSE Rule 411(b) concerning certain odd-lot order handling requirements, (ii) rescind NYSE Information Memo 94–14 to the extent it created a distinction in the regulatory treatment of odd-lot limit and odd-lot market orders, and (iii) issue a new Information Memo that provides comprehensive and updated interpretive guidance on, and application of, current NYSE odd-lot trading practices and Rules.

Current Operation of the Odd-Lot Order System

The odd-lot order system is used for all orders for less than a unit of trading (a unit of trading is generally referred to as a "round-lot"), currently set at 100 shares for most NYSE-listed securities.[4] These orders, which are too small to be handled efficiently in the regular auction market on the Exchange, traditionally, have been used by retail investors to buy and sell small amounts of stock. More recently, market

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The vast majority of securities trade in round-lots of 100 shares; however, there are some securities that trade in round-lots of 10 or even 1 share.

professionals using certain trading strategies and programs have also accessed the odd-lot system.

NYSE Rule 124 prescribes certain rules governing the execution of odd-lot orders. Among other things, because odd-lot orders are executed outside the regular auction market, Rule 124(a) prescribes that the Designated Market Maker ("DMM") is the contra party for all odd-lot orders, thereby providing execution and price guarantees. Pursuant to NYSE Rule 124(c), odd-lot market orders and marketable limit orders are subject to automatic execution at the price of the next round-lot transaction in the subject security on the Exchange.

NYSE Rule 411(b) prescribes certain order-handling requirements for odd-lot orders. In particular, Rule 411(b)(1) provides that member organizations may not combine (or "bunch") multiple odd-lot orders from different customers without prior approval. The Rule also requires member organizations to aggregate odd-lot orders, where possible, into as many round lot orders as possible rather than process them separately. Although not expressly stated, Rule 411(b) also implicitly prohibits a customer or member organization from unbundling a round-lot order in order to avoid the round-lot market and take advantage of the odd-lot market.

Background

The odd-lot system was initially created to replace odd-lot dealers on the Exchange. Before the creation of the odd-lot system, odd-lot dealers made markets in odd-lots and either paired-off odd-lot orders against each other or traded with them as dealers. When the Exchange eliminated separate odd-lot dealers and adopted Rule 124, DMMs (at the time, specialists) were made the counter-party for each odd-lot order execution in their respective stocks.

Because the system forces DMMs to provide liquidity, the Exchange has always sought to limit the use of the odd-lot order system to only the types of trading it replaced (so-called "traditional" or "standard" odd-lot trading practices) in order to ensure the system's continued economic viability. In particular, the Exchange has long prohibited the specific use of the odd-lot order system as a professional trading platform, because it reduces the DMMs' willingness to provide cost effective and efficient liquidity for the odd-lot system as a whole. Accordingly, the Exchange has on many occasions issued guidance that any use of the odd-lot system in a manner that is inconsistent with traditional or standard odd-lot investment activity is strictly prohibited.

Distinction in Regulatory Treatment of Odd-Lot Limit and Odd-Lot Market Orders

Information Memo 94–14 provides that certain trading practices that rely specifically on odd-lot limit orders are flatly prohibited.[5] Under the terms of Information Memo 94–14, however, odd-lot market orders were not subject to the same restrictions.

This distinction in the regulatory treatment between odd-lot limit and odd-lot market orders noted in Information Memo 94–14 evolved from changes made to the odd-lot order system in and around 1991.[6] Before then, DMMs were permitted to charge a differential on (i) all odd-lot limit orders executed through the automated system, and (ii) any odd-lot order that required manual handling; all other odd-lot orders, including market orders, were executed without a differential.[7]

In February 1991, at the conclusion of a six month pilot program, the Exchange amended NYSE Rule 124 to eliminate price differentials on odd-lot orders executed on the Exchange and extended the "no commission policy" to cover floor brokerage charges on all systematized odd-lot orders. The Exchange stated that, by providing more economic pricing, the amendments would enhance the efficiency of odd-lot order executions compatible with the traditional odd-lot investing practices of smaller investors. Although there were concerns about possible adverse impacts to the odd-lot market, the data collected during the implementation of the pilot program reflected that the mix of odd-lot limit and market orders had remained at or near historical levels and there was no evidence of regulatory issues or trading abuses.[8]

In July 1991, after implementation of the amendments and further observation of the odd-lot market, the Exchange released Information Memo 91–29. In that Information Memo, the Exchange identified and precluded certain trading practices that had developed that were inconsistent with traditional or standard odd-lot trading practices and that undermined the economic benefits derived by the market from the elimination of differential pricing for odd-lot orders. These practices included the unbundling of round-lot orders for the purpose of entering odd-lot limit orders in comparable amounts, the failure to aggregate into round-lots odd-lot orders from the same account or accounts with a common monetary interest, and the entry of odd-lot limit orders on both sides of the market for a security in order to capture the "spread". The Exchange also emphasized more generally that any odd-lot order entry practices intended to circumvent the round-lot auction market were prohibited.[9]

To address these issues in part, in 1992 the Exchange amended NYSE Rule 411(b) to expand the requirement for aggregating odd-lot orders to include market participants who entered multiple orders on behalf of various accounts over which they had investment discretion.[10]

In Information Memo 94–14, the Exchange identified and precluded additional types of trading using odd-lot limit orders in particular, including index arbitrage, program trading and day trading, as inconsistent with traditional or standard odd-lot trading practices and that undermined the integrity of the odd-lot order system and its purpose. At that time, the Exchange noted that such trading practices using odd-lot market orders were not precluded.[11]

More recently, in Information Memo 07–60, the Exchange provided additional interpretive guidance concerning the odd-lot system, including an overview of various types of prohibited trading practices.[12]

Proposed Rule Changes

The rules and interpretive guidance (in the form of Information Memos and Enforcement Decisions) for the

[5] *See* Information Memo 94–14 (April 18, 1994). *See also* Securities Exchange Act Release No. 34–33678 (February 24, 1994), 59 FR 10192 (March 3, 1994) (SR–NYSE–92–13).

[6] In May 1992, because it made changes to existing NYSE Rule 124, the Exchange submitted to the Commission the interpretive guidance that would later become Information Memo 94–14, which was approved in February 1994 after several amendments. *See* Securities Exchange Act Release No. 34–33678 (February 24, 1994), 59 FR 10192 (March 3, 1994) (SR–NYSE–92–13) (formally adopting Information Memo 94–14). Information Memo 94–14 was subsequently distributed to all members and member organizations on April 18, 1994.

[7] *See* Securities Exchange Act Release No. 34–28837 (January 14 [sic], 1991), 56 FR 4660 (February 5, 1991) (SR–NYSE–91–03).

[8] *See* Securities Exchange Act Release No. 34–28837 (January 14 [sic], 1991), 56 FR 4660 (February 5, 1991) (SR–NYSE–91–03). *See also* Securities Exchange Act Release No. 34–33678 (February 24, 1994), 59 FR 10192 (March 3, 1994) (SR–NYSE–92–13).

[9] *See* Information Memo 91–29 (July 25, 1991).

[10] *See* Securities Exchange Act Release No. 34–31048 (August 18, 1992), 57 FR 38706 (August 26, 1992) (SR–NYSE–92–03).

[11] *See* Information Memo 94–14 (April 18, 1994). *See also* Securities Exchange Act Release No. 34–33678 (February 24, 1994), 59 FR 10192 (March 3, 1994) (SR–NYSE–92–13).

[12] *See* Information Memo 07–60 (June 29, 2007). This Information Memo was not filed with the SEC.

Exchange's odd-lot order system have evolved over the years in response to changes in the way market participants use the system. This has resulted in a set of rules and policies that, while comprehensive, is not readily accessible in one source. Moreover, some of the rules (i.e. Rule 411(b)) have not been updated to reflect the Exchange's most current interpretive guidance and application of odd-lot trading practices. As a result, and as described more fully below, the Exchange proposes the following changes in order to update Rule 411(b) and to provide a single source of interpretive guidance in accordance with the current odd-lot order system and trading practices.

2. Proposed Amendments to Rule 411(b)

The Exchange proposes to amend Rule 411(b) to update and clarify certain odd-lot trading practices described in the Rule.

First, the Exchange proposes to amend the first subparagraph of the Rule to clarify that a person, member or member organization shall not enter or accept multiple odd-lot orders in the same security where those orders can be aggregated into round-lots. Under the current Rule, members or member organizations must monitor and aggregate odd-lot orders received from their customers where appropriate. As amended, the Rule would also explicitly provide that members or member organizations must not submit un-aggregated orders.

In addition, the Exchange proposes to limit the requirement to aggregate odd-lot orders to regular trading hours from 9:30 a.m. to 4 p.m. The Exchange's member firms have differing systems and procedures that make it difficult to standardize their capability to aggregate odd-lot orders prior to the commencement of trading at 9:30 a.m. As a result, the Exchange believes that it is more equitable to limit the aggregation requirement to regular trading hours.

The Exchange also proposes to add a new subparagraph to the Rule to explicitly provide that no person, member or member organization shall unbundle market or limit round-lot orders for the purpose of entering multiple odd-lot orders that aggregate to an amount comparable to the amount of the original round-lot order(s).[13]

Finally, the Exchange proposes to make technical amendments to Rule 411(b) to reorder and renumber the subparagraphs in this section in accordance with these proposed amendments.

3.Proposed Rescission of Information Memo 94–14 and Issuance of New Information Memo

The Exchange is seeking approval from the SEC to rescind Information Memo 94–14 and to eliminate the regulatory distinction between odd-lot limit and odd-lot market orders.

The distinction in the regulatory treatment of odd-lot limit and odd-lot market orders as described in Information Memo 94–14 is no longer necessary or practical in today's market. In the past, as observed by the Exchange, odd-lot limit orders could be and were used by market participants to access the odd-lot order system in ways that were inconsistent with traditional or standard odd-lot trading and that undermined the integrity of the odd-lot order system. Since the filing and approval of Information Memo 94–14, however, the market has undergone significant changes, including the adoption of Regulation NMS and technological developments impacting order routing and execution. Today, volume is much greater and the speed of the market has increased such that most limit orders are effectively market orders when entered. In addition, there are numerous programs and algorithmic trading platforms that permit market participants to use trading strategies involving both limit and market orders. At the same time, the Exchange has better tools with which to conduct market surveillance and regulation.

In conjunction with these changes to the marketplace, NYSE Regulation has noted the increasing use of odd-lot market orders in trading practices that, were they implemented using odd-lot limit orders (even marketable limit orders), would be violations of the Exchange's current odd-lot rules and interpretive guidance. These trading practices are designed to circumvent the auction market and provide liquidity and pricing that is not otherwise available, or to create an unfair advantage over other market participants, and, as a result, threaten to undermine the economic viability of the odd-lot trading system and reduce the DMMs' willingness to provide cost-effective and efficient liquidity.

Given this trend, the Exchange believes that it is no longer proper, or consistent with the protection of investors, to maintain a regulatory distinction between odd-lot limit and odd-lot market orders in determining whether odd-lot activity is violative and that, moreover, continuation of this distinction impedes the appropriate regulation of abusive trading practices involving both odd-lot limit and odd-lot market orders.

In addition, in the interest of providing market participants with a single, comprehensive source of guidance, the Exchange proposes to issue a new Information Memo that would update and restate the Exchange's most current interpretive guidance and application of odd-lot trading practices and Rules. The proposed new Information Memo would retain the relevant portions of Information Memo 94–14 and prior Information Memos, as well as the more recent guidance issued in Information Memo 07–60.

4. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[14] which requires the rules of an exchange to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change also supports the principles of Section 11A(a)(1)[15] of the Act, in that it seeks to ensure economically efficient execution of securities transactions and fair competition among brokers and dealers and among exchange markets.

In particular, as noted above, the proposed rule filing would bring the Exchange's odd-lot Rules and interpretive guidance into line with the way the odd-lot system is currently used by market participants. The proposed filing also would eliminate a historical distinction in the regulatory treatment of odd-lot trading that is no longer relevant in today's market. The Exchange has observed patterns of abuse by market participants who have crafted schemes involving odd-lot market orders that, were they implemented using odd-lot limit orders, would be violations of the Exchange's current odd-lot rules and interpretive guidance. The Exchange believes that, in order to effectively regulate the use of the odd-lot system and protect investors, it is necessary to close this loophole. In addition, the proposed filing would provide market participants with a comprehensive source of the Exchange's most current interpretive guidance and

[13] E-mail from Jason Harman, Consultant, NYSE Regulation, to Nathan Saunders, Special Counsel, and Steve Varholik, Attorney, Division of Trading and Markets, Commission, on November 18, 2008 (clarifying discussion relating to proposed NYSE Rule 411(b)(3)).

[14] 15 U.S.C. 78f(b)(5).

[15] 15 U.S.C. 78k–1(a)(1).

application of odd-lot trading practices and Rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2008–116 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2008–116. 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–NYSE–2008–116 and should be submitted on or before December 17, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28042 Filed 11–25–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58977; File No. SR–OCC–2008–09]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Approval of a Proposed Rule Change Relating to Eligible Margin Assets

November 19, 2008.

I. Introduction

On May 15, 2008, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") proposed rule change SR–OCC–2008–09 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] Notice of the proposal was published in the **Federal Register** on August 19, 2008.[2] No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description

The primary purpose of this rule change is to eliminate, as eligible forms of margin assets, foreign currency and letters of credit denominated in a foreign currency.

Background

The Philadelphia Stock Exchange, Inc. ("Phlx") has delisted all physical delivery foreign currency and cross-rate foreign currency options (collectively, "currency options") and has advised OCC that it does not presently plan to list contracts requiring foreign currency delivery. To support premium and exercise settlement for such currency options, OCC has maintained in various countries bank accounts that also have been used from time to time to hold margin deposits in foreign currencies. With the delisting of physical delivery currency options, these accounts are no longer needed for operational reasons. Few clearing members have deposited foreign currencies as margin with OCC and only then in de minimis amounts, and no such deposits are currently held by OCC. In light of the limited and infrequent use of this margin asset class by clearing members, OCC has determined to close its foreign currency accounts for cost saving purposes. Closing these accounts means that OCC will no longer have the operational capability to accept foreign currency for margin purposes, and accordingly, OCC is modifying its rules to delete this asset class. Letters of credit denominated in a foreign currency have never been posted with OCC by clearing members, and their acceptance will be eliminated as well.

Rule Changes

To eliminate these forms of margin assets, OCC is amending Rule 604. Specifically, references to deposits of foreign currencies are being deleted from paragraph (a), which relates to cash margin deposits. References to letters of credit denominated in a foreign currency are being deleted from paragraph (c). Other technical, conforming changes will be made to paragraph (c) to reflect such deletion. Because amended paragraph (c) specifies that letters of credit are to be denominated in U.S. dollars, specific references to U.S. dollar denominated letters of credit are being removed from Interpretations and Policies .03 and .08 under Rule 604. Interpretation and Policy .09 is being deleted in its entirety as it solely relates to deposits of letters

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 58347 (August 12, 2008), 73 FR 48419.

of credit denominated in a foreign currency.

For rule transparency purposes, OCC is also inserting a notice at the beginning of the By-Law articles and Rule chapters that relate to physical delivery currency options (*i.e.*, Articles XV and XXI and Chapters XVI and XXII) to inform readers that such provisions are inoperative until further notice by OCC.

III. Discussion

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in its custody or control or for which it is responsible.[3] The Commission finds the proposed rule change to be consistent with this requirement because it eliminates a margin asset class that was seldom used by clearing members for margin deposits. In addition, having foreign currencies on deposit is no longer required operationally for OCC to support premium and exercise settlement due to the delisting of all physical delivery currency options. Accordingly, the proposed rule should not affect OCC's obligation to assure the safeguarding of securities and funds which are in its custody or control or for which it is responsible.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–OCC–2008–09) be and hereby is approved.[4]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[5]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28044 Filed 11–25–08; 8:45 am]

BILLING CODE 8011–01–P

[3] 15 U.S.C. 78q–1(b)(3)(F).

[4] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58988; File Nos. SR–OCC–2008–18 and SR–NSCC–2008–09]

Self-Regulatory Organizations; The Options Clearing Corporation and National Securities Clearing Corporation; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Changes Relating to Amendment No. 2 to the Third Amended and Restated Options Exercise Settlement Agreement

November 20, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on November 17, 2008, The Options Clearing Corporation ("OCC") and the National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule changes described in Items I and II, and III below, which items have been prepared primarily by OCC and NSCC. The Commission is publishing this notice and order to solicit comments from interested persons and to grant approval of the proposals.

I. Self-Regulatory Organizations' Statements of the Terms of Substance of the Proposed Rule Changes

The proposed rule changes would amend the Third Amended and Restated Options Exercise Settlement Agreement between OCC and NSCC as described herein.

II. Self-Regulatory Organizations' Statements of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

In their filings with the Commission, OCC and NSCC included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments they received on the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below. OCC and NSCC have prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[2]

(A) Self-Regulatory Organizations' Statements of the Purpose of, and Statutory Basis for the Proposed Rule Changes

The purpose of the proposed rule changes is to reduce the burden on clearing members of OCC that are also members of NSCC that results from duplicative margin requirements relating to option exercises and assignments and to allow clearing members to use stock deposited as margin with OCC to meet settlement obligations at NSCC.

OCC and NSCC are parties to a Third Amended and Restated Options Exercise Settlement Agreement dated as of February 16, 1995, as amended ("OCC/NSCC Accord"), which provides for a two-way guaranty between OCC and NSCC of the mark-to-market amounts for which NSCC has guaranteed settlement. Through these rule changes, OCC and NSCC seek approval for an Amendment No. 2 to the OCC/NSCC Accord ("Amendment") that would address the matters stated above.

Under the OCC/NSCC Accord currently in effect, OCC guarantees to NSCC the performance by NSCC members of settlement obligations resulting from exercise and assignment ("E&A") positions, with the amount guaranteed by OCC with respect to the performance of an NSCC member's settlement obligation equal to the smaller of the "Net Member Debit to NSCC" and the "Calculated Margin Requirement" with respect to the NSCC member. OCC can make this guarantee because it continues to margin E&A activity through the settlement date.[3] Similarly, NSCC guarantees to OCC the smaller of the "Net Member Debit to OCC" and the "Calculated Margin Credit." NSCC can make this guarantee because it collects risk-based margin on the member's entire portfolio of E&A activity.[4]

Both OCC and NSCC collect margin with respect to E&A positions through settlement, calculated utilizing risk-based margining methodologies which include volatility charges. OCC collects risk margin to cover (i) the risk that NSCC might decline to settle a defaulting member's pending E&A activity[5] thereby forcing OCC to guarantee buy-ins and sell-outs and (ii) the risk that the market might move against E&A positions accepted by NSCC for settlement thereby increasing OCC's potential liability to NSCC under the OCC/NSCC Accord. NSCC collects a

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified the text of the summaries prepared by OCC and NSCC.

[3] In the case of E&A activity resulting from exercises at expiration ("Expiration E&A Activity"), the settlement date is normally the Wednesday after expiration.

[4] Because OCC marks E&A activity to the market and guarantees that amount to NSCC, NSCC does not mark E&A positions to the market. However, it does collect VAR margin to cover potential losses in liquidating E&A positions.

[5] Under its rules, NSCC's guaranty does not attach until midnight on T+1. For exercises on expiration weekend, T+1 is normally the following Monday.

volatility charge because OCC's liability under the OCC/NSCC Accord is limited to the negative mark-to-market value of E&A positions as of the close on the day before the member was suspended. To a considerable degree, NSCC's VAR margin and OCC's risk margin overlap, covering the same risk.

This dual obligation to OCC and NSCC with respect to E&A positions may constitute a significant temporary financial burden on NSCC members and OCC clearing members, particularly during the three business days following options expiration each calendar month. This burden has significantly grown as recent market conditions have caused an increase in the volatility charges of both clearing corporations. The Amendment addresses this problem in two ways. First, it accelerates NSCC's guarantee of Expiration E&A Activity to the time on T+1 when the member meets its morning NSCC clearing fund requirement instead of midnight.

Second, it provides that in calculating OCC's obligations to NSCC, Expiration E&A Activity would be marked to the previous day's close only: (i) On T+1 (because even if the member failed to settle with OCC on T+1, OCC would be holding risk margin collected on T to cover that risk) and (ii) on T+2 and T+3 if, and only if, OCC had collected that morning's mark-to market payment. If the member failed before OCC collected that morning's mark, pending Expiration E&A Activity would be marked to the second previous day's close.[6]

The combined effect of these two changes is to enable OCC to stop collecting risk margin on Expiration E&A Activity after the morning of T+1. Once the member meets its morning clearing fund requirement at NSCC on T+1, NSCC would be responsible for settling those positions, and OCC could not be liable to NSCC under the Accord for more than the mark-to-market that OCC had already collected so there would be no risk to be margined. NSCC's risk in this regard would be covered by its collection of margin.

OCC estimates that if this arrangement had been in place during recent months, it would have reduced daily margins for OCC clearing members during the week after expiration by $2 billion in August (affecting 89 members), $3.7 billion in September (93 members), and $3 billion in October (95 members). The Amendment is intended to mitigate burdens on NSCC and OCC members while retaining adequate margin to protect both OCC and NSCC.

In order to further mitigate financial burden and facilitate the settlement, on any exercise settlement date, of the settlement obligations relating to assigned short positions, OCC and NSCC, together with DTC, have established a program to permit an NSCC member that has a security deliver obligation on an exercise settlement date with respect to an assigned short position to request OCC to release underlying securities pledged to OCC at DTC by the NSCC member to meet the NSCC member's OCC margin or cover requirement so that the NSCC member may fully or partially complete its continuous net settlement security deliver obligation at NSCC on such exercise settlement date. Some OCC members use stock held at DTC and pledged to OCC as a "specific deposit" to cover short positions. However, if the short position is assigned, the member has to obtain other stock to deliver to NSCC. OCC will release the specific deposit once the member settles with NSCC, but obtaining stock to deliver to NSCC can strain the member's liquidity. Until recently, clearing members expressed little or no interest in using systems designed to allow members to use deposited stock to meet settlement obligations at NSCC if covered positions were assigned. However, clearing members have expressed increased interest given current demands on member liquidity. For OCC to be able to activate these systems, the Amendment will exclude positions settled by the delivery of specific deposits from the calculation of OCC's guarantee exposure. OCC also needs to perform some minor coding and testing. In order to avoid the need for a separate amendment when that work is completed, the necessary amendment is included in Section 4 of the Amendment.[7] Section 4 will become effective when NSCC and OCC jointly announce that the systems are ready for use.

The Amendment recites that it will be in effect until November 1, 2009 unless further extended by mutual agreement. The reason for this "sunset" provision is that OCC and NSCC intend to restate the OCC/NSCC Accord in its entirety in order to address and clarify various issues.

OCC and NSCC believe that the proposed rule changes are consistent with the purposes and requirements of Section 17A of the Act because it is designed to promote the prompt and accurate clearance and settlement of options exercises and assignments, to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of such transactions, and, in general, to protect investors and the public interest. It accomplishes this purpose by eliminating duplicative margin requirements and providing more efficient stock settlement procedures where stock required to be delivered to NSCC is pledged to OCC.

(B) Self-Regulatory Organizations' Statements on Burden on Competition

OCC and NSCC do not believe that the proposed rule changes would impose any burden on competition.

(C) Self-Regulatory Organizations' Statements on Comments on the Proposed Rule Changes Received From Members, Participants, or Others

Written comments relating to the proposed rule changes have not been solicited or received.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible and to foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions.[8] While the Amendment should reduce duplicative margin holdings and enable increased efficiency in stock settlement procedures where stock required to be delivered to NSCC is pledged as margin collateral with OCC the Commission believes that the proposals have been designed in such a manner that they are consistent with OCC's and NSCC's obligations to assure the safeguarding of securities and funds in the custody or control of the clearing agency or for which they are responsible. Additionally, the proposed rule changes should foster cooperation and coordination between OCC and NSCC.

OCC and NSCC have requested that the Commission approve the proposed rules prior to the thirtieth day after publication of the notice of filing. The Commission finds good cause for approving the proposed rule changes prior to the thirtieth day after publication of notice because such

[6] *See* the example at the end of Section 3 of the Amendment. Copies of the Amendment are attached as Exhibit 5 to the proposed rule changes and is available at *http://www.theocc.com/publications/rules/proposed_changes/sr_occ_08_18.pdf* and *http://www.dtcc.com/downloads/legal/rule_filings/2008/nscc/2008-09.pdf*.

[7] *Supra*, note 6.

[8] 15 U.S.C. 78q–1(b)(3)(F).

approval will permit OCC and NSCC to implement the proposed rule changes prior to the November options expiration on November 22, 2008.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule changes are 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 Numbers SR–OCC–2008–18 and SR–NSCC–2008–09 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Numbers SR–OCC–2008–18 and SR–NSCC–2008–09. These file numbers 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 changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings also will be available for inspection and copying at the principal offices of OCC and NSCC and on OCC's and NSCC's Web sites at *http://www.theocc.com/publications/rules/proposed_changes/sr_occ_08_18.pdf* and *http://www.dtcc.com/downloads/legal/rule_filings/2008/nscc/2008–09.pdf*, respectively. 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 Numbers SR–OCC–2008–18 and SR–NSCC–2008–09 and should be submitted on or before December 17, 2008.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule changes are consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.[9]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule changes (File No. SR–OCC–2008–18 and SR–NSCC–2008–09) be and hereby are approved on an accelerated basis.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28095 Filed 11–25–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58973; File No. SR–OPRA–2008–04]

Options Price Reporting Authority; Notice of Filing and Immediate Effectiveness of Proposed Amendment to the Options Price Reporting Authority's Policies With Respect to Device-Based Fees

November 18, 2008.

Pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act")[1] and Rule 608 thereunder,[2] notice is hereby given that on November 12, 2008, the Options Price Reporting Authority ("OPRA") submitted to the Securities and Exchange Commission ("Commission") an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA Plan").[3] The proposed amendment would revise OPRA's "Policies with Respect to Device-Based Fees."[4] The Commission is publishing this notice to solicit comments from interested persons on the proposed OPRA Plan amendment.

I. Description and Purpose of the Plan Amendment

The primary purpose of this filing is to amend the language of the current version of OPRA's Policies with Respect to Device-Based Fees to confirm their application to third party payment arrangements. A secondary purpose of this filing is to make a few additional changes in the Policies.

Background

OPRA uses the term "device-based fees" to refer to fees that are determined by counting "devices" or "User IDs" that are enabled to receive OPRA data. If a person signs a Professional Subscriber Agreement with OPRA, OPRA collects device-based fees with respect to the receipt of the data by the Professional Subscriber.[5] OPRA's Policies with Respect to Device-Based Fees, as their title suggests, describe various policies with respect to OPRA's device-based fees.

OPRA invoices most Professional Subscribers that pay device-based fees directly, and the Professional Subscribers pay the device-based fees directly to OPRA. Some Professional Subscribers establish arrangements with third parties pursuant to which the third parties (each, a "third party payor") agree to pay OPRA's fees for the Professional Subscribers' use of OPRA data. This kind of payment arrangement is usually memorialized using an OPRA form agreement entitled "Third Party Billing Agreement."[6]

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[9] In approving the proposed rule changes, the Commission considered the proposals' impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78k–1.

[2] 17 CFR 242.608.

[3] The OPRA Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 608 thereunder (formerly Rule 11Aa3–2). *See* Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981). The full text of the OPRA Plan is available at *http://www.opradata.com*.

The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The seven participants to the OPRA Plan are the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Incorporated, the International Securities Exchange, LLC, NASDAQ OMX PHLX, Inc., NASDAQ Stock Market LLC, NYSE Alternext US LLC, and NYSE Arca, Inc.

[4] OPRA most recently amended its Policies with Respect to Device-Based Fees in File No. SR–OPRA–2007–02, Release No. 34–55455.

[5] A person may also become an OPRA Professional Subscriber by entering into a "Subscriber Agreement" with a "Vendor"—an entity that has entered into a Vendor Agreement with OPRA that authorizes the entity to redistribute OPRA Data to third persons. If a person becomes a Professional Subscriber by signing a Subscriber Agreement with a Vendor, the Vendor pays "usage-based fees" to OPRA. The Policies with Respect to Device-Based Fees are not relevant to usage-based fees.

[6] OPRA filed its current form of Third Party Billing Agreement in File No. SR–OPRA–2007–01, Release No. 34–55454.

Primary Purpose of Filing

The sections of the Policies entitled "Counting Devices and User IDs" and "Professional Subscriber's Responsibility to Verify Invoices" are applicable to device-based fees that a third party payor has agreed to pay, and OPRA is proposing to add an express statement to this effect to the Policies.

The section of the Policies entitled "Counting Devices and User IDs" states a longstanding OPRA policy that OPRA does not require a Professional Subscriber that pays device-based fees directly to OPRA to pay more than one fee with respect to any device or User ID that is enabled to receive OPRA information, even if the device or User ID is enabled to receive OPRA information from more than one source or "service." OPRA proposes to amend this section to state more explicitly that OPRA applies this policy on a "payor by payor" basis. For example, if a particular device is receiving data from one service that is being paid for by the Professional Subscriber and a second service that is being paid for by a third party payor, OPRA requires that the Professional Subscriber pay a device-based fee for the device and that the third party payor also pay a device-based fee for the device.

Secondary Purpose of Filing

OPRA is also proposing to amend a paragraph in the Policies that describes how a Professional Subscriber may count its devices and User IDs to state explicitly that the paragraph is relevant only to those Professional Subscribers that have been authorized to enable their own devices and User IDs to receive OPRA information. OPRA authorizes Professional Subscribers to enable their own devices and User IDs pursuant to OPRA's form "Indirect (Vendor Pass-Through) Circuit Connection Rider" or form "Direct Circuit Connection Rider." The "enablement" process is controlled, for all other Professional Subscribers, by the Vendors providing service to these Subscribers, and for these Subscribers, the Vendors report this information to OPRA and this paragraph in the Policies is not relevant. OPRA is also proposing to make a few additional self-explanatory changes in the language of the Policies.

The text of the proposed amendment to the OPRA Plan is available at OPRA, the Commission's Public Reference Room, and *http://opradata.com*.

II. Implementation of the OPRA Plan Amendment

Pursuant to paragraph to (b)(3)(iii) of Rule 608 under the Act,[7] OPRA designated this amendment as one involving solely technical or ministerial matters thereby qualifying the amendment for effectiveness upon filing. OPRA states that it will implement the revised form of the Policies upon filing with the Commission.

The Commission may summarily abrogate the amendment within sixty days of its filing and require refiling and approval of the amendment by Commission order pursuant to Rule 608(b)(2) under the Act[8] if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed OPRA Plan amendment is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–OPRA–2008–04 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–OPRA–2008–04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan amendment that are filed with the Commission, and all written communications relating to the proposed plan amendment between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of OPRA. 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–OPRA–2008–04 and should be submitted on or before December 17, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28090 Filed 11–25–08; 8:45 am]

BILLING CODE 8011–01–P

[7] 17 CFR 242.608(b)(3)(iii).

[8] 17 CFR 242.608(b)(2).

[9] 17 CFR 200.30–3(a)(29).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11540]

California Disaster #CA–00131 Declaration of Economic Injury

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Economic Injury Disaster Loan (EIDL) declaration for the State of California, dated 11/18/2008.

Incident: California Dry Lightning Wildfires.

Incident Period: 06/08/2008 through 08/20/2008.

Effective Date: 11/18/2008.

EIDL Loan Application Deadline Date: 08/18/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's EIDL declaration,

applications for economic injury disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties:
Mariposa, Mendocino, Santa Barbara, Shasta, Trinity.

Contiguous Counties: California
Glenn, Humboldt, Kern, Lake, Lassen, Madera, Merced, Modoc, Plumas, San Luis Obispo, Siskiyou, Sonoma, Stanislaus, Tehama, Tuolumne, Ventura.

The Interest Rate is: 4.000

The number assigned to this disaster for economic injury is 115400.

The State which received an EIDL Declaration # is California.

(Catalog of Federal Domestic Assistance Number 59002)

Sandy K. Baruah,

Acting Administrator.

[FR Doc. E8–28051 Filed 11–25–08; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11541 and #11542]

California Disaster #CA–00132

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of California (FEMA–1810–DR), dated 11/18/2008.

Incident: Wildfires.

Incident Period: 11/13/2008 and continuing.

Effective Date: 11/18/2008.

Physical Loan Application Deadline Date: 01/21/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 08/18/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 11/18/2008, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Los Angeles, Orange, Riverside, Santa Barbara.

Contiguous Counties (Economic Injury Loans Only): California: Imperial, Kern, San Bernardino, San Diego, San Luis Obispo, Ventura.

Arizona: La Paz.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	5.375
Homeowners Without Credit Available Elsewhere	2.687
Businesses With Credit Available Elsewhere	7.750
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	4.500
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000.

The number assigned to this disaster for physical damage is 115415 and for economic injury is 115420.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E8–28052 Filed 11–25–08; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11432 and #11433]

Louisiana Disaster Number LA–00021

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 3.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Louisiana (FEMA–1792–DR), dated 09/13/2008.

Incident: Hurricane Ike.

Incident Period: 09/11/2008 and continuing through 11/07/2008.

EFFECTIVE DATE: 11/07/2008.

Physical Loan Application Deadline Date: 12/11/2008.

EIDL Loan Application Deadline Date: 06/15/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of Louisiana, dated 09/13/2008 is hereby amended to establish the incident period for this disaster as beginning 09/11/2008 and continuing through 11/07/2008.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E8–28056 Filed 11–25–08; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law (Pub. L.) 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes a revision to an OMB-approved information collection.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, e-mail, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and the SSA Reports Clearance Officer to the addresses or fax numbers listed below.

(OMB) Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, E-mail address: *OIRA_Submission@omb.eop.gov.*

(SSA) Social Security Administration, DCBFM, Attn: Reports Clearance Officer, 1332 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400, E-mail address: *OPLM.RCO@ssa.gov.*

SSA has submitted the information collections listed below to OMB for

clearance. Your comments on the information collections would be most useful if received by OMB and SSA within 30 days from the date of this publication. You can obtain a copy of the OMB clearance packages by calling the SSA Reports Clearance Officer at 410–965–3758, or by writing to the above listed address.

Record of Supplemental Security Income Inquiry—20 CFR 416.345—0960–0140. SSA uses the information collected on Form SSA–3462, via telephone or personal interview, to determine potential eligibility for SSI payments and to establish the earliest date of inquiry. The respondents are individuals who inquire about SSI eligibility for themselves or others.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 500,000.

Frequency of Response: 1.

Average Burden per Response: 5 minutes.

Estimated Annual Burden: 41,667 hours.

Dated: November 21, 2008.

Liz Davidson,

Director, CRC/ODM/OPLM, Social Security Administration.

[FR Doc. E8–28176 Filed 11–25–08; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice: 6440]

60-Day Notice of Proposed Information Collection: DS 5507, Affidavit of Parentage, Physical Presence and Support, (New—OMB No. 1405–XXXX)

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* DS 5507, Affidavit of Parentage, Physical Presence and Support
- *OMB Control Number:* New—OMB No. 1405–XXXX
- *Type of Request:* New Collection
- *Originating Office:* Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS)
- *Form Number:* DS–5507
- *Respondents:* United States Citizens
- *Estimated Number of Respondents:* 15,026
- *Estimated Number of Responses:* 15,026
- *Average Hours per Response:* 30 minutes
- *Total Estimated Burden:* 7,513 hours
- *Frequency:* On Occasion
- *Obligation to Respond:* Voluntary

DATES: The Department will accept comments from the public up to 60 days from November 26, 2008.

ADDRESSES: You may submit comments by any of the following methods:

- *E-mail: ASKPRI@state.gov.*
- *Mail (paper, disk, or CD–ROM submissions):* U.S. Department of State, CA/OCS/PRI, SA–29, 4th Floor, Washington, DC 20520.
- *Fax:* 202–736–9111.
- *Hand Delivery or Courier:* U.S. Department of State, CA/OCS/PRI, 2100 Pennsylvania Avenue, 4th Floor, Washington, DC 20037.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Derek A. Rivers, Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS/PRI), U.S. Department of State, SA–29, 4th Floor, Washington, DC 20520, who may be reached on (202) 736–9028 or *ASKPRI@state.gov.*

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of proposed collection: The purpose of the information collection is to determine if U.S. citizen/national parent(s) possesses the requisite prior physical presence or residence in the United States prior to their child's birth to transmit U.S. citizenship (or U.S. non-citizen nationality) to the child; to establish parentage of the child, and to fulfill the requirements of 8 U.S.C. 1409(a) which requires a written statement of financial support to be provided by U.S. citizen fathers for children born out of wedlock.

Methodology: The information is collected in person, by fax, or via mail. The Bureau of Consular Affairs is currently exploring options to make this information collection available electronically.

Dated: November 17, 2008.

Mary Ellen Hickey,

Managing Director, Bureau of Consular Affairs, Department of State.

[FR Doc. E8–28195 Filed 11–25–08; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice: 6439]

Title: 60-Day Notice of Proposed Information Collection: DS–5506, Local American Citizen Skills/Resources Survey, New—OMB No. 1405–XXXX

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Local American Citizen Skills/ Resources Survey.
- *OMB Control Number:* New—OMB No. 1405–XXXX.
- *Type of Request:* New Collection.
- *Originating Office:* Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS).
- *Form Number:* DS–5506.
- *Respondents:* United States Citizens.
- *Estimated Number of Respondents:* 2,000.
- *Estimated Number of Responses:* 2,000.
- *Average Hours per Response:* 15 minutes.
- *Total Estimated Burden:* 500 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Voluntary.

DATE(S): The Department will accept comments from the public up to 60 days from November 26, 2008.

ADDRESSES: You may submit comments by any of the following methods:

- *E-mail: ASKPRI@state.gov.*
- *Mail (paper, disk, or CD-ROM submissions):* U.S. Department of State,

CA/OCS/PRI, SA–29, 4th Floor, Washington, DC 20520.

- *Fax:* 202–736–9111.
- *Hand Delivery or Courier:* U.S. Department of State, CA/OCS/PRI, 2100 Pennsylvania Avenue, 4th Floor, Washington, DC 20037.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Derek A. Rivers, Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS/PRI), U.S. Department of State, SA–29, 4th Floor, Washington, DC 20520, who may be reached on (202) 736–9028 or *ASKPRI@state.gov*.

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of proposed collection: The Local American Citizen Skills/Resources Survey is a systematic method of gathering information about skills and resources from U.S. citizens that will assist in improving the well-being of other U.S. citizens affected or potentially affected by a crisis.

Methodology: The information is collected in person, by fax, or via mail. The Bureau of Consular Affairs is currently exploring options to make this information collection available electronically.

Dated: November 17, 2008.

Mary Ellen Hickey,

Managing Director, Bureau of Consular Affairs, Department of State.

[FR Doc. E8–28194 Filed 11–25–08; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Public Notice for Waiver of Aeronautical Land-Use Assurance; James M. Cox Dayton International Airport, Dayton, OH

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of intent of waiver with respect to land.

SUMMARY: The Federal Aviation Administration (FAA) is considering a proposal to change a portion of the airport from aeronautical use to non-aeronautical use and to authorize the release of 382.9796 acres of airport property for future non-aeronautical development. The land consists of portions of 19 original airport acquired parcels. These parcels were acquired under grants 9–33–025–C511, 9–33–025–C813, 8–39–0029–01, 8–39–0029–03, 3–39–0029–03, and 3–39–0029–13 or without federal participation. There are no impacts to the airport by allowing the City of Dayton to sell or lease the property. The land is not needed for aeronautical use. Approval does not constitute a commitment by the FAA to financially assist in the sale or lease of the subject airport property nor a determination of eligibility for grant-in-aid funding from the FAA. The disposition of proceeds from the sale or lease of the airport property will be in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in the **Federal Register** on February 16, 1999. In accordance with section 47107(h) of title 49, United States Code, this notice is required to be published in the **Federal Register** 30 days before modifying the land-use assurance that requires the property to be used for an aeronautical purpose.

DATES: Comments must be received on or before December 26, 2008.

ADDRESSES: Written comments on the Sponsor's request must be delivered or mailed to: Irene R. Porter, Program Manager, Detroit Airports District Office, 11677 South Wayne Road, Suite 107, Romulus, MI 48174.

FOR FURTHER INFORMATION CONTACT: Irene R. Porter, Program Manager, Federal Aviation Administration, Great Lakes Region, Detroit Airports District Office, DET ADO–607, 11677 South Wayne Road, Suite 107, Romulus, Michigan 48174. Telephone Number (734–229–2915)/FAX Number (734–229–2950). Documents reflecting this FAA action may be reviewed at this same location or at James M. Cox Dayton International Airport, Dayton, Ohio.

SUPPLEMENTARY INFORMATION:

Southeast Area Legal Description

Situated in Section 9, Town 3, Range 6 East, in the City of Dayton, Montgomery County, Ohio, being part of a 311.24 acre (deed) tract (Parcel 1) conveyed to the City of Dayton as recorded in Deed Book 778, Page 91 (being part of Parcels 1 as shown on the James M. Cox Dayton International Airport Annexation Area as recorded in Plat Book 112, Page 26) (all references to Deed Books, Official Records, Microfiche numbers, Survey Records and Plats refer to the Montgomery County Recorder's Office, Montgomery County, Ohio) and being a tract of land more particularly described as follows: Beginning at the northwest corner of Lot 7 of Imperial Subdivision as recorded in Plat Book 80, Page 36, being on the south line of said Section 9, witness a concrete monument found on the south line of said Section 9, being 2.49 feet west of said lot corner, thence along the south line of said Section 9 North 89°50′05″ West, 1613.75 feet;

Thence North 15°23′35″ West, 377.11 feet;

Thence North 57°50′40″ East, 1248.32 feet to the southern corner of an existing 3.516 acre lease tract;

Thence along said lease parcel the following two (2) described courses;

North 57°50′40″ East, 310.69 feet;

South 00°26′02″ East, 72.87 feet to the western line of the existing General Aviation 2 Roadway;

Thence along the west line of said roadway South 00°26′02″ East, 118.10 feet;

Thence along the south line of said roadway North 89°23′07″ East, 965.76 feet to the west right-of-way line of North Dixie Road, also being the City of Dayton Corporation Line;

Thence along said right-of-way line of North Dixie Road South 01°59′46″ East, 293.39 feet to the north line of a 1.22 acre tract conveyed to The City of Vandalia as recorded in Microfiche #80–034 E07;

Thence along the lines of said 1.22 acre tract for the following three (3) described courses;

87°30′14″ West, 285.00 feet;

South 01°59′46″ East, 102.88 feet;

South 61°53′41″ East, 329.41 feet to the west right-of-way line of North Dixie Road, also being the City of Dayton Corporation Line;

Thence along said right-of-way line South 01°59′46″ East, 191.33 feet to the north line of a 1.002 acre tract conveyed to AKRG LLC as recorded in Microfiche #01–0170 B02;

Thence along the north line of said 1.002 acre tract North 89°52′31″ West, 193.29 feet to the northwest corner of said 1.002 acre tract;

Thence along the west line of said 1.002 acre tract and along the west line of a 0.5 acre tract of land conveyed to Paul Clinard as recorded in Microfiche #96–0735 A12, South 01°05′31″ East, 264.19 feet to the southwest corner of said 0.5 acre tract and being on the north line of Imperial Subdivision as recorded in Plat Book 80, Page 36, also being the south line of said Section 9;

Thence along the south line of said Section 9, also being the north line of said Imperial Subdivision North 89°50′05″ West, 411.23 feet to the Point of Beginning, containing 43.709 acres, subject however to all covenants, conditions, restrictions and easements contained in any instrument of record pertaining to the above described tract of land.

Southwest Area Legal Description

Parcel SW–1

Situated in Section 8, 17 and 18, Town 3, Range 6 East, in the City of Dayton, Montgomery County, Ohio, being part of a 165.938 acre (deed) tract (Parcel 26) conveyed to The City of Dayton, Ohio as recorded in Deed Book 1941, Page 262, part of a 130.027 acres (deed) tract (Parcel 58) conveyed to the City of Dayton, Ohio as recorded in Deed Book 2397, Page 74, part of 50.549 acre (deed) tract (Parcel 75) conveyed to The City of Dayton, Ohio as recorded in Deed Book 2367, Page 714 and part of a 2.00 acre tract (Parcel 114) conveyed to The City of Dayton, Ohio as recorded in Microfiche No. 86–205 C06 (being part of Parcels 26, 58, 75 and 114 as shown on the James M. Cox Dayton International Airport Annexation Area recorded in Plat Book 112, Page 26) (all references to Deed Books, Official Records, Microfiche numbers, Survey Records and Plats refer to the Montgomery County Recorder's Office, Montgomery County, Ohio) and being a tract of land more particularly described as follows:

Commencing from a ¾″ iron pin found in a monument box at P.O.T. Station 115+00 as shown on the Location Plan Airport Access Road, recorded in Plat Book 108, Page 25, thence along the centerline of said Access Road North 03°37′23″ East, 227.06 feet to the centerline of U.S. 40 (National Road);

Thence along the centerline of U.S. 40 (National Road) North 84°55′18″ East, 1008.86 feet to the southeast corner of a 50.549 acre tract (Parcel 75 per James M. Cox Dayton International Airport Annexation Area as recorded in Plat Book 112, Page 26) conveyed to The City of Dayton, Ohio as recorded in Deed Book 2367, Page 714;

Thence along the east line of said 50.549 acre tract North 01°49′50″ East, 1805.76 feet to the north Limited Access Right-of-Way Line for Terminal Drive;

Thence along said Limited Access Right-of-Way Line South 56°54′21″ West, 10.23 feet to the Point of Beginning of the following described tract of land;

Thence along said Limited Access Right-of-Way Line the following five (5) described courses;

South 56°54′21″ West, 490.49 feet;

With a curve to the left, with an arc length of 980.63 feet, a radius of 1502.41 feet, with a delta angle of 37°23′50″ and a chord bearing and distance of South 38°14′05″ West, 963.31 feet;

With a curve to the right, with an arc length of 351.32 feet, a radius of 697.20 feet, with a delta angle of 28°52′18″ and a chord bearing and distance of South 33°48′05″ West, 347.62 feet;

South 48°14′14″ West, 707.08 feet;

With a curve to the right, with an arc length of 328.22 feet, a radius of 554.54 feet, with a delta angle of 33°54′43″ and a chord bearing and distance of South 65°11′38″ West, 323.45 feet to the north right-of-way line of U.S. Route 40;

Thence along said right-of-way line the following five (5) described courses;

South 82°08′59″ West, 367.40 feet;

South 84°45′18″ West, 450.00 feet;

South 84°37′43″ West, 897.21 feet;

North 18°38′19″ West, 108.86 feet;

North 89°22′33″ West, 19.59 feet to the west line of said Parcel 26;

Thence along said west line North 01°11′31″ East, 795.60 feet;

Thence through Parcel 26, 75 and 58 the following four (4) described courses;

North 56°28′16″ East, 2170.92 feet;

South 33°23′20″ East, 679.47 feet;

North 56°27′16″ East, 1629.79 feet;

South 33°32′44″ East, 403.05 feet to the Point of Beginning, containing 96.435 acres (4,200,706 sq. ft.), subject however to all covenants, conditions, restrictions and easements contained in any instrument of record pertaining to the above described tract of land.

Parcel SW–2

Situated in Section 8, Town 3, Range 6 East, in the City of Dayton, Montgomery County, Ohio, being part of a 130.027 acres (deed) tract (Parcel 58) conveyed to the City of Dayton, Ohio as recorded in Deed Book 2397, Page 74 (being part of Parcel 58 per James M. Cox Dayton International Airport Annexation Area as recorded in Plat Book 112, Page 26) (all references to Deed Books, Official Records, Microfiche numbers, Survey Records and Plats refer to the Montgomery County Recorder's Office, Montgomery County, Ohio) and being a tract of land more particularly described as follows:

Commencing from a ¾″ iron pin found in a monument box at P.O.T. Station 115+00 as shown on the Location Plan Airport Access Road, recorded in Plat Book 108, Page 25, thence along the centerline of said Access Road North 03°37′23″ East, 227.06 feet to the centerline of U.S. 40 (National Road);

Thence along the centerline of U.S. 40 (National Road) North 84°55′18″ East, 1008.86 feet to the southeast corner of a 50.549 acre tract (Parcel 75 per James M. Cox Dayton International Airport Annexation Area as recorded in Plat Book 112, Page 26) conveyed to the City of Dayton, Ohio as recorded in Deed Book 2367, Page 714;

Thence along the east line of said 50.549 acre tract North 01°49′50″ East, 1805.76 feet to the north Limited Access Right-of-Way Line for Terminal Drive;

Thence along said Limited Access Right-of-Way Line North 56°54′21″ East, 85.90 feet to the end of said right-of-way line;

Thence along the northern right-of-way line for Terminal Drive North 57°22′49″ East, 226.58 feet;

Thence North 33°32′44″ West, 459.47 feet to the future northern right-of-way line of Cargo Road and being the Point of Beginning of the following described tract of land;

Thence North 33°32′44″ West, 600.91 feet to the future southern right-of-way line of Concorde Drive;

Thence along said right-of-way line North 56°28′16″ East, 1175.24 feet;

Thence South 33°36′15″ East, 600.18 feet to the dedicated right-of-way line of Cargo Road, as recorded in Plat Book 202, Page 12;

Thence along said dedicated right-of-way South 56°23′45″ West, 382.16 feet to the end of the dedicated right-of-way for Cargo Road;

Thence along the projection of the northern right-of-way line of Cargo Road South 56°27′16″ West, 793.70 feet to the Point of Beginning, containing 16.210 acres (706124 sq. ft.), subject however to all covenants, conditions, restrictions and easements contained in any instrument of record pertaining to the above described tract of land.

Parcel SW–3

Situated in Section 8, Town 3, Range 6 East, in the City of Dayton, Montgomery County, Ohio, being part of a 130.027 acres (deed) tract conveyed to the City of Dayton, Ohio as recorded in Deed Book 2397, Page 74 (being part of

Parcel 58 per James M. Cox Dayton International Airport Annexation Area as recorded in Plat Book 112, Page 26) (all references to Deed Books, Official Records, Microfiche numbers, Survey Records and Plats refer to the Montgomery County Recorder's Office, Montgomery County, Ohio) and being a tract of land more particularly described as follows:

Commencing from a ¾" iron pin found in a monument box at P.O.T. Station 115+00 as shown on the Location Plan Airport Access Road, recorded in Plat Book 108, Page 25, thence along the centerline of said Access Road North 03°37'23" East, 227.06 feet to the centerline of U.S. 40 (National Road);

Thence along the centerline of U.S. 40 (National Road) North 84°55'18" East, 1008.86 feet to the southeast corner of a 50.549 acre tract (Parcel 75 per James M. Cox Dayton International Airport Annexation Area as recorded in Plat Book 112, Page 26) conveyed to the City of Dayton, Ohio as recorded in Deed Book 2367, Page 714;

Thence along the east line of said 50.549 acre tract North 01°49'50" East, 1805.76 feet to the north Limited Access Right-of-Way Line for Terminal Drive;

Thence along said Limited Access Right-of-Way Line North 56°54'21" East, 85.90 feet to the end of said right-of-way line;

Thence along the northern right-of-way line for Terminal Drive North 57°22'49" East, 1011.19 feet to a southern corner of the dedicated right-of-way line of Cargo Road as shown on the Freight Drive, Cargo Road & Boeing Drive Dedication as recorded in Plat Book 202, Page 12;

Thence along the western end of the dedicated right-of-way for Boeing Drive the following two (2) described courses;

North 56°32'48" East, 161.09 feet;

North 33°27'11" West, 13.00 feet and being the Point of Beginning of the following described tract of land;

Thence continuing along said dedicated right-of-way the following six (6) described courses;

With a curve to the right, with an arc length of 54.40 feet, a radius of 35.00 feet, with a delta angle of 89°03'14" and a chord bearing and distance of North 78°55'34" West, 49.09 feet;

North 34°23'57" West, 68.66 feet;

South 55°36'03" West, 10.00 feet;

North 34°23'57" West, 264.00 feet;

With a curve to the right, with an arc length of 63.39 feet, a radius of 40.00 feet, with a delta angle of 90°47'58" and a chord bearing and distance of North 10°59'46" East, 56.96 feet;

North 56°23'45" East, 550.23 feet;

Thence through said Parcel 58 South 33°36'15" East, 282.21 feet to the east line of said Lot 58;

Thence along said east line South 02°01'14" West, 155.67 feet;

Thence South 56°32'48" West, 450.04 feet to the Point of Beginning, containing 5.340 acres (232628 sq. ft.), subject however to all covenants, conditions, restrictions and easements contained in any instrument of record pertaining to the above described tract of land.

Parcel SW–4

Situated in Section 8, Town 3, Range 6 East, in the City of Dayton, Montgomery County, Ohio, being part of a 130.027 acres (deed) tract (Parcel 58) conveyed to the City of Dayton, Ohio as recorded in Deed Book 2397, Page 74, part of a 8.00 acres (deed) tract (Parcel 74) conveyed to the City of Dayton, Ohio, as recorded in Deed Book 2432, Page 452 and part of a 2.147 acre (deed) tract (Parcel 87) as conveyed to the City of Dayton as recorded in Deed Book 2421, Page 03 (being part of Parcels 58, 74 and 87 per James M. Cox Dayton International Airport Annexation Area as recorded in Plat Book 112, Page 26) (all references to Deed Books, Official Records, Microfiche numbers, Survey Records and Plats refer to the Montgomery County Recorder's Office, Montgomery County, Ohio) and being a tract of land more particularly described as follows:

Commencing from a ¾" iron pin found in a monument box at P.O.T. Station 115+00 as shown on the Location Plan Airport Access Road, recorded in Plat Book 108, Page 25, thence along the centerline of said Access Road North 03°37'23" East, 227.06 feet to the centerline of U.S. 40 (National Road);

Thence along the centerline of U.S. 40 (National Road) North 84°55'18" East, 1008.86 feet to the southeast corner of a 50.549 acre tract (Parcel 75 per James M. Cox Dayton International Airport Annexation Area as recorded in Plat Book 112, Page 26) conveyed to the City of Dayton, Ohio as recorded in Deed Book 2367, Page 714;

Thence along the east line of said 50.549 acre tract North 01°49'50" East, 1805.76 feet to the north Limited Access Right-of-Way Line for Terminal Drive;

Thence along said Limited Access Right-of-Way Line North 56°54'21" East, 85.90 feet to the end of said right-of-way line;

Thence along the northern right-of-way line for Terminal Drive North 57°22'49" East, 226.58 feet to the Point of Beginning of the following described tract of land;

Thence North 33°32'44" West, 407.47 feet to the projected southern right-of-way line for Cargo Road;

Thence along said future right-of-way line North 56°27'16" East, 793.75 feet to the west end of the right-of-way line of Cargo Road as shown on the Freight Drive, Cargo Road & Boeing Drive Dedication as recorded in Plat Book 202, Page 12;

Thence along said dedicated right-of-way line the following six (6) described courses;

North 56°23'45" East, 4.99 feet;

With a curve to the right, with an arc length of 70.06 feet, a radius of 45.00 feet, with a delta angle of 89°12'11" and a chord bearing and distance of South 79°00'02" East, 63.20 feet;

South 34°23'57" East, 318.00 feet;

South 55°36'03" West, 4.00 feet;

With a curve to the right, with an arc length of 91.14 feet, a radius of 60.00 feet, with a delta angle of 87°02'10" and a chord bearing and distance of South 13°01'48" West, 82.63 feet;

South 33°27'11" East, 1.00 feet;

Thence along the northern right-of-way line of Terminal Drive South 57°22'49" West, 784.61 feet to the Point of Beginning, containing 8.014 acres (349075 sq. ft.), subject however to all covenants, conditions, restrictions and easements contained in any instrument of record pertaining to the above described tract of land.

Northwest Area Legal Description

Parcel 37

Situated in Sections 4 and 5, Town 3, Range 6 East, in the City of Dayton, Montgomery County, Ohio, being part of a 203.16 acre (deed) tract conveyed to the City of Dayton, Ohio as recorded in Deed Book 2297, Page 350 (being part of Parcel 37 as shown on the James M. Cox Dayton International Airport Annexation Area recorded in Plat Book 112, Page 26) (all references to Deed Books, Official Records, Microfiche numbers, Survey Records and Plats refer to the Montgomery County Recorder's Office, Montgomery County, Ohio) and being a tract of land more particularly described as follows:

Commencing from a 6" diameter concrete monument with a chiseled "X" found at the Northeast corner of said section 5 and being the Northwest corner of said Section 4, thence along the common line with said sections South 00°02'25" East, 70.00 feet to a ⅝" iron pin with a cap stamped "CESO INC" set on the south right-of-way line of Lightner Road and being on the common line with said Sections 4 and 5 and being the Point of Beginning of the following described tract of land;

Thence along said south right-of-way line North 89°59′16″ East, 66.90 feet;

Thence through said Parcel 37 the following two (2) described courses;

South 00°19′33″ West, 2612.46 feet;

South 88°52′35″ West, 50.21 feet to the common line with said Sections 4 and 5;

Thence along said common line North 00°02′25″ West, 1410.91 feet to the southeast corner of Parcel 1 of said City of Dayton deed and being the northeast corner of Parcel 149 of the Dayton International Airport parcel numbers;

Thence along the south and west lines of said Parcel 1 of said City of Dayton deed the following two (2) described courses;

North 89°51′15″ West, 407.88 feet;

North 00°04′12″ West, 1202.48 feet to the south right-of-way line of Lightner Road;

Thence along said south right-of-way line South 89°51′16″ East, 408.50 feet to the Point of Beginning, containing 14.780 acres (643818 sq. ft.), subject however to all covenants, conditions, restrictions and easements contained in any instrument of record pertaining to the above described tract of land.

Parcel 65 (except 6.03 acres previously released)

Situated in the Township of Butler, County of Montgomery, State of Ohio and in the Southeast quarter of Section 5, Town 3, Range 6 East and being a tract of land conveyed to Mary Davidson and Stanley E. Davidson in Deed Book 1242, Page 20, Deed Book 1977, Page 1 and Deed Book 2206, Page 387 of the deed records of Montgomery County, Ohio, and to Thomas H. Davidson, James L. Davidson and Harriet E. Davidson in Deed Book 1242, Page 20 and Deed Book 2206, Page 387 of the deed records of said County and being more particularly bounded and described as follows: Beginning at an iron pipe in the east line of Section 5, Town 3, Range 6 East and in the centerline of Old Springfield Road, said iron pipe being North 6°05′50″ West 1780.00 feet from the southeast corner of said Section 5;

Thence South 85°01′West 1331.54 feet along the centerline of Old Springfield Road to an iron pipe;

Thence North 6°14′10″ West 886.12 feet to a stone;

Thence North 84°17′50″ East 1333.46 feet to an iron pipe in the east line of said Section 5;

Thence South 6°05′50″ East 902.81 feet along the east line of said Section 5 to the place of beginning;

Containing 27.36 acres, more or less.

Excepting the following described property: Situated in the City of Dayton, County of Montgomery, being part of Lot numbered 81143 of the consecutive numbers of lots on the revised plat of said City of Dayton, being more particularly described as follows:

Beginning at the centerline intersection of Peters Pike and vacated Old Springfield Pike; thence with the centerline of Peters Pike North 00°15′59″ West 31.08 feet to a point;

Thence North 89°44′01″ East 30.00 feet to a point in the east right of way of said Peters Pike; thence along the future north right of way of Old Springfield Pike North 87°40′00″ East 1305.41 feet to a point; thence continuing with said right of way South 89°09′51″ East 239.21 feet to a point, said point being the POINT OF BEGINNING OF THE PARCEL herein described;

Thence leaving said Right of Way North 00°15′59″ West 747.08 feet to a point;

Thence North 89°44′02″ East 321.58 feet to a point;

Thence South 00°15′59″ East 747.08 feet to a point in the future North Right of Way of Old Springfield Pike;

Thence continuing with said Right of Way South 89°44′02″ West 321.58 feet to the true point of beginning, containing 5.515 acres more or less.

Excepting the following described property: Situated in the City of Dayton, County of Montgomery, State of Ohio, and being part of Lot 81143 of the consecutive lot numbers in the City of Dayton and being more particularly described as follows:

Beginning at the centerline intersection of Peters Pike and vacated Old Springfield Pike; thence with the centerline of Peters Pike North 00°15′59″ West 31.08 feet to a point;

Thence North 89°44′01″ East 30.00 feet to a point in the east right of way of said Peters Pike; thence along the future north right of way of Old Springfield Pike North 87°40′00″ East 1305.41 feet to a point; thence continuing with said right of way South 89°09′51″ East 239.21 feet to a point,

Thence North 89°44′02″ East a distance of 321.58 feet, said point being the true point of beginning of the leased parcel herein described;

Thence leaving said right of way North 00°15′59″ West 747.08 feet to a point;

Thence North 89°44′02″ East 30.00 feet to a point;

Thence South 00°15′59″ East 747.08 feet to a point;

Thence South 89°44′02″ West 30.00′ to the true point of beginning, containing 0.515 acres more or less, subject to all public roads and easements of record.

Parcel 101

SITUATED IN SECTION 5, TOWN 3, RANGE 6 EAST OF BUTLER TOWNSHIP, MONTGOMERY COUNTY, OHIO, AND BEING A PART OF THE 23.215 ACRE TRACT AS DESCRIBED IN THE DEED BOOK 1487, PAGE 194 OF THE MONTGOMERY COUNTY, OHIO DEED RECORDS AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE INTERSECTION OF THE CENTERLINE OF PETERS PIKE AND OLD SPRINGFIELD ROAD AND AT THE SOUTHEAST CORNER OF THE SAID 23.215 ACRE TRACT;

THENCE SOUTH 79°29′30″ WEST WITH THE CENTERLINE OF OLD SPRINGFIELD ROAD AND THE SOUTH LINE OF THE SAID 23.215 ACRE TRACT FOR A DISTANCE OF 702.20 FEET;

THENCE NORTH 0°05′30″ WEST FOR A DISTANCE OF 330.73 FEET;

THENCE NORTH 81°58′32″ EAST FOR A DISTANCE OF 697.30 FEET TO THE CENTERLINE OF PETERS PIKE AND TO THE EAST LINE OF THE SAID 23.215 ACRE TRACT;

THENCE SOUTH 0°05′30″ EAST WITH CENTERLINE OF PETERS PIKE AND WITH THE EAST LINE OF THE SAID 23.215 ACRE TRACT FOR A DISTANCE OF 300.00 FEET TO THE PLACE OF BEGINNING.

CONTAINING 5.000 ACRES MORE OR LESS.

Parcel 148

SITUATED IN THE TOWNSHIP OF BUTLER, COUNTY OF MONTGOMERY, STATE OF OHIO AND BEING PART OF THE WEST HALF OF THE SOUTHEAST QUARTER OF SECTION FIVE (5), TOWNSHIP THREE (3), RANGE SIX (6) EAST, BY BEGINNING AT A STONE IN THE CENTER OF THE ROAD ON THE HALF SECTION LINE; THENCE DUE EAST 1339.97 FEET TO A CORNER; THENCE DUE SOUTH 885.06 FEET TO THE CENTER OF THE ROAD; THENCE SOUTH 87 DEGREES 40 MINUTES WEST 1337.00 FEET TO A STONE IN THE CENTER OF ROAD CROSSING; THENCE NORTH ½ DEGREE WEST 941.49 FEET TO PLACE OF BEGINNING; CONTAINING 28.088 ACRES, MORE OR LESS.

Parcel 149

SITUATED IN THE CITY OF DAYTON, COUNTY OF MONTGOMERY AND IN THE STATE OF OHIO AND BEING 19 ACRES OUT OF THE SOUTHEAST CORNER OF THE NORTHEAST QUARTER OF SECTION 5, TOWN 3, RANGE 6 EAST

BEING PART OF LOT 81143 CITY OF DAYTON AND BOUNDED AND DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHEAST CORNER OF THE NORTHEAST QUARTER OF THE AFORESAID SECTION 5; THENCE WEST WITH THE SOUTH LINE OF SAID QUARTER SECTION, 1210.44 FEET TO THE EAST LINE OF A 13 ACRE TRACT LAND FORMERLY OWNED BY JOHN TENNEY; THENCE NORTH PARALLEL WITH THE EAST LINE OF SAID QUARTER SECTION, 1389.3 FEET TO TOWNSHIP ROAD; THENCE EAST WITH SAID ROAD 1210.44 FEET TO THE EAST LINE OF SAID QUARTER; THENCE SOUTH WITH SAID EAST LINE, 1410.42 FEET TO THE PLACE OF BEGINNING, EXCEPTING 20 ACRES OFF THE WEST PART OF SAID TRACT OF LAND CONVEYED TO WILLIAM ROUSER BY COLUMBUS OAKS AND WIFE WILLIAM TENNEY AND WIFE BY DEED BEARING DATE OF MAY 19, 1875, THE LAND HEREIN CONVEYED CONTAINING 19 ACRES, MORE OR LESS.

Parcel 150

SITUATED IN THE CITY OF DAYTON, COUNTY OF MONTGOMERY, STATE OF OHIO AND BEING IN SECTION FIVE (5), TOWNSHIP THREE (3), RANGE SIX (6) E. AND BEING ALL OF LOT 81143 CITY OF DAYTON, AND BEING ALL OF LAND CONVEYED TO RALPH E. ALEXANDER AND EVELYN ALEXANDER BY DEED RECORDED IN DEED BOOK 2089, PAGE 163, AND BEING MORE PARTICULARLY BOUNDED AND DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT IN THE CENTERLINE OF OLD SPRINGFIELD RD., AT THE SOUTHWEST CORNER OF LAND CONVEYED TO THE CITY OF DAYTON, BY DEED RECORDED IN DEED BOOK 2376, PAGE 572; THENCE NORTH 6°14′10″ WEST ALONG WEST LINE OF SAID CITY OF DAYTON LAND FOR A DISTANCE OF 886.12 FEET TO THE NORTHWEST CORNER OF SAID LAND; THENCE NORTH 84°17′50″ EAST ALONG THE NORTH LINE OF SAID CITY OF DAYTON LAND FOR A DISTANCE OF 123.02 FEET TO THE SOUTHEAST CORNER OF LAND CONVEYED TO ELMER J. AND JANET L PRIKKEL BY DEED RECORDED IN DEED BOOK 71–121–D06 SAID POINT BEING THE TRUE PLACE OF BEGINNING OF THE TRACT HEREIN CONVEYED, THENCE NORTH 6°05′50″ WEST ALONG THE EAST LINE OF SAID PRIKKEL LAND FOR A DISTANCE OF 1384.68 FEET TO A POINT IN THE CENTERLINE OF PRIVATE ROAD; THENCE NORTH 83°12′40″ E. ALONG THE CENTERLINE OF SAID ROAD FOR A DISTANCE OF 627.00 FEET TO A POINT IN THE NORTHWEST CORNER OF LAND CONVEYED TO JOHN M. AND MINNIE L. AVEY BY DEED RECORDED IN DEED BOOK 2215, PAGE 60; THENCE SOUTH 6°05′50″ EAST ALONG THE WEST LINE OF SAID AVEY LAND FOR A DISTANCE OF 1396.56 FEET TO A POINT IN THE NORTHLINE OF LAND CONVEYED TO THE CITY OF DAYTON, BY DEED RECORDED IN DEED BOOK 2374, PAGE 572; THENCE SOUTH 84°17′50″ WEST ALONG THE NORTH LINE OF SAID CITY OF DAYTON LAND FOR A DISTANCE OF 627.00 FEET TO THE TRUE PLACE OF BEGINNING, CONTAINING 20.016 ACRES, MORE OR LESS.

Parcel 152a

SITUATED IN THE TOWNSHIP OF BUTLER, IN THE COUNTY OF MONTGOMERY AND IN THE STATE OF OHIO AND LOCATED IN SECTION 5, TOWN 3, RANGE 6–E, BEING FURTHER BOUNDED AND DESCRIBED AS FOLLOWS:

BEGINNING AT AN IRON PIPE FOUND AT THE SOUTHWEST CORNER OF THE NORTHEAST QUARTER OF SECTION 5, THENCE NORTH 00°00′ EAST FOR 1172.20 FEET ALONG THE CENTERLINE OF PETERS PIKE TO A RAILROAD SPIKE SET MARKING THE PLACE OF BEGINNING OF THE TRACT HEREIN DESCRIBED;

THENCE CONTAINING NORTH 00°00′ EAST FOR 206.45 FEET ALONG SAID CENTERLINE TO AN IRON PIN FOUND ON THE CENTERLINE OF A PRIVATE DRIVE;

THENCE NORTH 89°49′05″ EAST FOR 1061.66 FEET ALONG THE CENTERLINE OF THE 30 FEET WIDE PRIVATE DRIVE TO AN IRON PIN FOUND; THENCE SOUTH 00°07′ WEST FOR 206.45 FEET TO AN IRON PIN SET; THENCE SOUTH 89°49′05″ WEST FOR 1061.24 FEET TO THE RAILROAD SPIKE MARKING THE TRUE PLACE OF BEGINNING OF THE ABOVE DESCRIBED TRACT.

CONTAINING A TOTAL OF 5.031 ACRES.

Parcel 153

SITUATED IN THE TOWNSHIP OF BUTLER, COUNTY OF MONTGOMERY, STATE OF OHIO AND BEING PART OF SECTION 5, TOWN 3, RANGE 6E, AS CONVEYED TO LILLIE E. YORK IN MICROFICHE 88–668D07 AND DEED BOOK 2004, PAGE 537, OF THE DEED RECORDS OF SAID COUNTY, AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT AN IRON PIN AT THE INTERSECTION OF THE CENTER LINES OF PETERS PIKE AND A PRIVATE ROAD, SAID POINT BEING 1272.48 FEET, MEASURED ALONG THE CENTER LINE OF PETERS PIKE, SOUTH OF THE NORTH LINE OF MONTGOMERY COUNTY, WHICH IS ALSO THE NORTH LINE OF SECTION 5;

THENCE NORTH ALONG THE CENTER LINE OF PETERS PIKE FOR A DISTANCE OF 444.23 FEET TO AN IRON PIN;

THENCE N. 89 DEGREES 29′30″ E. PARALLEL TO THE NORTH LINE OF SECTION 5 FOR A DISTANCE OF 549.12 FEET TO AN IRON PIN IN THE WEST LINE OF PARCEL ONE [PARCEL 156];

THENCE SOUTH ALONG SAID WEST LINE FOR A DISTANCE OF 444.23 FEET TO AN IRON PIN IN THE CENTER LINE OF PRIVATE ROAD;

THENCE S. 89 DEGREES 29′30″ W. ALONG THE CENTER LINE OF SAID PRIVATE ROAD FOR A DISTANCE OF 549.12 FEET TO THE POINT OF BEGINNING.

CONTAINING 5,60 ACRES MORE OR LESS.

Parcel 156

SITUATED IN THE TOWNSHIP OF BUTLER, COUNTY OF MONTGOMERY, STATE OF OHIO AND BEING A PART SECTION 5, TOWN 3, RANGE 6E AS CONVEYED TO LILLIE E. YORK IN MICROFICHE 88–668D07 AND DEED BOOK 2004, PAGE 537, OF THE DEED RECORDS OF SAID COUNTY, AND BEING MORE PARTICULARLY BOUNDED AND DESCRIBED AS FOLLOWS:

STARTING AT AN IRON PIN AT THE INTERSECTION OF THE CENTER LINE OF PETERS PIKE AND THE NORTH LINE OF MONTGOMERY COUNTY, WHICH IS ALSO THE NORTH LINE OF SECTION 5 AND THE NORTH LINE OF LIGHTNER ROAD;

THENCE N. 89 DEGREES 29′ 30″ E. ALONG THE NORTH LINE OF SECTION 5 FOR A DISTANCE OF 549.12 FEET TO AN IRON PIN;

THENCE SOUTH ACROSS LIGHTNER ROAD FOR A DISTANCE OF 70.00 FEET TO THE POINT OF BEGINNING IN THE SOUTH LINE OF LIGHTNER ROAD;

THENCE N. 89 DEGREES 29′ 30″ E. ALONG THE SOUTH LINE OF LIGHTNER ROAD FOR A DISTANCE OF 1316.70 FEET TO A POINT;

THENCE SOUTH FOR A DISTANCE OF 1202.48 FEET TO A POINT IN THE CENTER LINE OF A PRIVATE ROAD;

THENCE S. 89 DEGREES 29′ 30″ W. ALONG SAID CENTER LINE FOR A DISTANCE OF 991.70 FEET TO AN IRON PIN AT THE SOUTHEAST CORNER OF A TRACT DESCRIBED IN MICROFICHE 82–230B10;

THENCE NORTH ALONG THE EAST LINE OF SAID TRACT FOR A DISTANCE OF 268.07 FEET TO AN IRON PIN AT ITS NORTHEAST CORNER;

THENCE S. 89 DEGREES 29′ 30″ W. ALONG THE NORTH LINE OF SAID TRACT FOR A DISTANCE OF 325.00 FEET TO AN IRON PIN AT ITS NORTHWEST CORNER;

THENCE NORTH FOR A DISTANCE OF 934.41 FEET TO THE POINT OF BEGINNING.

CONTAINING 34.346 ACRES MORE OR LESS.

Parcel 157

SITUATED IN THE TOWNSHIP OF BUTLER, COUNTY OF MONTGOMERY AND STATE OF OHIO AND BEING ELEVEN AND ONE-HALF (11½) ACRES OFF THE NORTHEAST QUARTER OF SECTION FIVE (5), TOWN THREE (3), RANGE SIX (6), EAST, AND BEGINNING AT THE NORTHWEST CORNER OF NANCY TENNY'S LINE AND RUNNING SOUTH 1272.48 FEET TO THE ROAD AGREED UPON BY THE PARTIES; THENCE WEST 390.72 FEET TO ROSANNA TENNY'S ELEVEN AND ONE-HALF (11½) ACRE TRACT; THENCE NORTH 1272.48 FEET TO THE COUNTY LINE; THENCE EAST 390.72 FEET TO THE PLACE OF BEGINNING.

Parcel 615

SITUATED IN THE TOWNSHIP OF MONROE, COUNTY OF MIAMI AND STATE OF OHIO, BEING A PART OF THE SOUTHEAST QUARTER OF SECTION 32, TOWN 4, RANGE 6, AS SHOWN BY SURVEY FILED IN VOLUME NO. 34 ON PLAT NO. 189, OF THE MIAMI COUNTY ENGINEER'S RECORDS OF LAND SURVEYS, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS: COMMENCING AT A HINGE NAIL SET OVER A RAILROAD SPIKE FOUND AT THE NORTHEAST CORNER OF THE SOUTHEAST QUARTER OF SECTION 32, SAID HINGE NAIL BEING ON THE CENTERLINE OF FREDERICK-GINGHAMSBURG ROAD; THENCE WITH THE ONE HALF SECTION LINE AND THE CENTERLINE OF FREDERICK-GINGHAMSBURG ROAD, NORTH 88 DEGREES 22 MINUTES 40 SECONDS WEST, 332.43 FEET TO A P.K. NAIL OVER A RAILROAD SPIKE; THENCE SOUTH 1 DEGREE 40 MINUTES 00 SECONDS WEST, 250.00 FEET TO AN IRON PIPE FOUND AT THE PLACE OF BEGINNING OF THE TRACT OF LAND HEREIN DESCRIBED; THENCE CONTINUING SOUTH 1 DEGREE 40 MINUTES 00 SECONDS WEST, 1080.31 FEET TO AN IRON PIN FOUND;

THENCE NORTH 88 DEGREES 47 MINUTES 08 SECONDS WEST, 811.05 FEET TO AN IRON PIN SET; THENCE NORTH 1 DEGREE 14 MINUTES 00 SECONDS EAST 1081.50 FEET TO AN IRON PIN SET; THENCE SOUTH 88 DEGREES 42 MINUTES 00 SECONDS EAST, 505.33 FEET TO AN IRON PIN FOUND; THENCE NORTH 1 DEGREE 14 MINUTES 00 SECONDS EAST, 250.00 FEET TO A RAILROAD SPIKE SET ON THE CENTERLINE OF THE FREDERICK-GINGHAMSBURG ROAD AND THE ONE HALF SECTION LINE WITNESS AN IRON PIN SET 30.00 FEET DISTANT ALONG THE LINE LAST DESCRIBED; THENCE WITH SAID CENTERLINE AND ONE HALF SECTION LINE, SOUTH 88 DEGREES 42 MINUTES 00 SECONDS EAST, 50.00 FEET TO A RAILROAD SPIKE SET, WITNESS AN IRON PIN SET 30.00 FEET DISTANT ALONG THE LINE NEXT DESCRIBED;

THENCE SOUTH 1 DEGREE 14 MINUTES 00 SECONDS WEST, 250.00 FEET TO AN IRON PIN SET; THENCE SOUTH 88 DEGREES 42 MINUTES 00 SECONDS EAST, 263.90 FEET TO THE IRON PIPE FOUND AT THE PLACE OF BEGINNING, CONTAINING 20.514 ACRES, SUBJECT TO ALL LEGAL HIGHWAYS.

Parcel 616

Situated in the Township of Monroe, County of Miami and State of Ohio, being a part of the southeast quarter of Section 32, Town 4, Range 6 East, as shown by survey filed in Volume No. 27, on Plat No. 48, of the Miami County Engineer's Record of Land Surveys, and being more particularly described as follows:

Beginning at a railroad spike in the centerline of the Ginghamsburg-Frederick Road which marks the northeast corner of the southeast quarter of Section 32, said railroad spike being the place of beginning of the tract herein described; thence South 01 degrees 49 minutes 25 seconds West with the one half section line, 2667.07 feet to a concrete monument at the southeast corner of Section 32 (also the southwest corner of Section 33); thence North 88 degrees 37 minutes 40 seconds West with the south section line of Section 32, and said County line, 650.53 feet to an iron pin; thence North 1 degree 40 minutes 22 seconds East, 1333.14 feet to an iron pin; thence South 89 degrees 30 minutes 46 seconds East 325.32 feet to an iron pin; thence North 1 degree 40 minutes East 1330.31 feet to a railroad spike on the centerline of the Ginghamsburg-Frederick Road and the one half section line, said railroad spike being witnessed by an iron pin 30.00 feet distance on the line last described; thence south 88 degrees 22 minutes 40 seconds East with said centerline and said one half section line 332.43 feet to a railroad spike at the place of beginning, containing 30.111 acres, being subject to all legal highways, easements and restrictions of record. Said property being located at 1051 Lightner Boulevard, Tipp City, Ohio.

Excepting the following described property: Situate in the Township of Monroe, County of Miami and State of Ohio, being a part of the southeast quarter of Section 32, Town 4, Range 6 East, as shown by survey filed in Volume No. 35, on Plat No. 35, of the Miami County Engineer's Record of Land Surveys, being more particularly described as follows:

Commencing at a concrete monument found at the southeast corner of the southeast quarter of said Section 32, said monument being on the north line of Lightner Road and on the Miami-Montgomery County Line; thence with said county line and section line and the North right of way line of Lightner Road, North 88 degrees 37 minutes 40 seconds West, 410.53 feet to an iron pin set at the place of beginning of the tract of land herein described; thence continuing with the county line and section line and north right of way line of Lightner Road, North 88 degrees 37 minutes 40 seconds West 240.00 feet to an iron pin found; thence North 1 degree 40 minutes 22 seconds East, 360.00 feet to an iron pin set; thence South 88 degrees 37 minutes 40 seconds East, 240.00 feet to an iron pin set; thence South 1 degree 40 minutes 22 seconds West, 360.00 feet to an iron pin at the place of beginning, containing 1.9834 acres, more or less. Subject to all legal highways.

Issued in Romulus, Michigan on November 18, 2008.

Matthew J. Thys,

Manager, Detroit Airports District Office, FAA, Great Lakes Region.

[FR Doc. E8–28075 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Petition for Exemption From the Vehicle Theft Prevention Standard; Fuji Heavy Industries U.S.A., Inc.

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

ACTION: Grant of petition for exemption.

SUMMARY: This document grants in full the Fuji Heavy Industries U.S.A., Inc.'s (FUSA) petition for exemption of the Subaru Outback vehicle line in accordance with 49 CFR part 543, *Exemption from the Theft Prevention Standard*. This petition is granted because the agency has determined that the antitheft device to be placed on the line as standard equipment is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard (49 CFR part 541). FUSA requested confidential treatment for the information and attachments it submitted in support of its petition. The agency will address FUSA's request for confidential treatment by separate letter.

DATES: The exemption granted by this notice is effective beginning with model year (MY) 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Mazyck, International Policy, Fuel Economy and Consumer Programs, NHTSA, 1200 New Jersey Avenue, SE., Washington, DC 20590. Ms. Mazyck's phone number is (202) 366–0846. Her fax number is (202) 493–2990.

SUPPLEMENTARY INFORMATION: In a petition dated July 31, 2008, FUSA requested an exemption from the parts-marking requirements of the theft prevention standard (49 CFR part 541) for the Subaru Outback vehicle line, beginning with the 2010 model year. The petition has been filed pursuant to 49 CFR Part 543, *Exemption from Vehicle Theft Prevention Standard*, based on the installation of an antitheft device as standard equipment for an entire vehicle line.

Under § 543.5(a), a manufacturer may petition NHTSA to grant exemptions for one of its vehicle lines per model year. In its petition, FUSA provided a detailed description and diagram of the identity, design, and location of the components of the antitheft device for the Outback vehicle line. FUSA stated that all Subaru Outback vehicles will be equipped with a passive, transponder-based electronic immobilizer device as standard equipment. FUSA stated that the antitheft system and the immobilization features are designed and constructed within the vehicle's Controller Area Network electrical architecture. Major components of the antitheft device will include an electronic key, a passive immobilizer system, a key ring antenna and an engine control unit. System immobilization is automatically activated when the key is removed from the vehicle's ignition switch, or after 30 seconds if the ignition is simply moved to the off position and the key is not removed. The device will also have a visible and audible alarm, and panic mode feature. The alarm system will monitor door status and key identification. Unauthorized opening of a door will activate the alarm system causing sounding of the horn and flashing of the hazard lamps. FUSA's submission is considered a complete petition as required by 49 CFR 543.7 in that it meets the general requirements contained in 543.5 and the specific content requirements of 543.6.

FUSA also provided information on the reliability and durability of its proposed device, conducting tests based on its own specified standards. FUSA provided a list of the tests it conducted. FUSA believes that its device is reliable and durable because the device complied with its own specific requirements for each test. Additionally, FUSA stated that the immobilization features are designed and constructed within the vehicle's overall Controller Area Network Electrical Architecture. Therefore, the antitheft system cannot be separated and controlled.

FUSA stated that it believes that historically, NHTSA has seen a decreasing theft rate trend when electronic immobilization has been added to alarm systems. FUSA stated that it presently has immobilizer systems on all of its product lines (Forester, Tribeca, Impreza, Legacy, and Outback models) and it believes the data shows immobilization has had a demonstrable effect in lowering its theft rates. FUSA also noted that recent state-by-state theft results from the National Insurance Crime Bureau reported that in only 3 of the 48 states listed in its results, did any Subaru vehicle appear in the top 10 list of stolen cars. Review of the theft rates published by the agency through MY/CY also revealed that, while there is some variation, the theft rates for Subaru vehicles have on average, remained below the median theft rate of 3.5826.

FUSA also provided a comparative table showing how its device is similar to other manufacturer's devices that have already been granted an exemption by NHTSA. In its comparison, FUSA makes note of Federal Notices published by NHTSA in which manufacturers have stated that they have seen reductions in theft due to the immobilization systems being used. Specifically, FUSA notes claims by Ford Motor Company that its 1997 Mustangs with immobilizers saw a 70% reduction in theft compared to its 1995 Mustangs without immobilizers. FUSA also noted its reliance on theft rates published by the agency which showed that theft rates were lower for Jeep Grand Cherokee immobilizer-equipped vehicles (model year 1995 through 1998) compared to older parts-marked Jeep Grand Cherokee vehicles (model year 1990 and 1991). FUSA stated that it believes that these comparisons show that its device is no less effective than those installed on lines for which the agency has already granted full exemption from the parts-marking requirements. The agency agrees that the device is substantially similar to devices in other vehicles lines for which the agency has already granted exemptions.

Pursuant to 49 U.S.C. 33106 and 49 CFR 543.7(b), the agency grants a petition for an exemption from the parts-marking requirements of part 541 either in whole or in part, if it determines that, based upon substantial evidence, the standard equipment antitheft device is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of part 541. The agency finds that FUSA has provided adequate reasons for its belief that the antitheft device will reduce and deter theft. This conclusion is based on the information FUSA provided about its device.

The agency concludes that the device will provide the five types of performance listed in § 543.6(a)(3): promoting activation; attracting attention to the efforts of unauthorized persons to enter or operate a vehicle by means other than a key; preventing defeat or circumvention of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device.

For the foregoing reasons, the agency hereby grants in full FUSA's petition for exemption for the vehicle line from the parts-marking requirements of 49 CFR part 541. The agency notes that 49 CFR part 541, Appendix A–1, identifies those lines that are exempted from the Theft Prevention Standard for a given model year. 49 CFR part 543.7(f) contains publication requirements incident to the disposition of all Part

543 petitions. Advanced listing, including the release of future product nameplates, the beginning model year for which the petition is granted and a general description of the antitheft device is necessary in order to notify law enforcement agencies of new vehicle lines exempted from the parts-marking requirements of the Theft Prevention Standard.

If FUSA decides not to use the exemption for this line, it must formally notify the agency, and, thereafter, the line must be fully marked as required by 49 CFR parts 541.5 and 541.6 (marking of major component parts and replacement parts).

NHTSA notes that if FUSA wishes in the future to modify the device on which this exemption is based, the company may have to submit a petition to modify the exemption. Part 543.7(d) states that a Part 543 exemption applies only to vehicles that belong to a line exempted under this part and equipped with the anti-theft device on which the line's exemption is based. Further, § 543.9(c)(2) provides for the submission of petitions "to modify an exemption to permit the use of an antitheft device similar to but differing from the one specified in that exemption."

The agency wishes to minimize the administrative burden that Part 543.9(c)(2) could place on exempted vehicle manufacturers and itself. The agency did not intend Part 543 to require the submission of a modification petition for every change to the components or design of an antitheft device. The significance of many such changes could be *de minimis*. Therefore, NHTSA suggests that if the manufacturer contemplates making any changes the effects of which might be characterized as *de minimis*, it should consult the agency before preparing and submitting a petition to modify.

Authority: 49 U.S.C. 33106; delegation of authority at 49 CFR 1.50.

Issued on: November 20, 2008.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E8–28084 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2002–12479]

Dorel Juvenile Group [Cosco] (DJG); Notice of Appeal of Denials of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Request for comments on DJG appeal of denials of inconsequential noncompliance.

SUMMARY: This notice asks for public comments on DJG's appeal of NHTSA's denial of its petitions for two inconsequential noncompliances with the Federal safety standard for child restraint systems. This notice simply summarizes DJG's appeal—it does not represent NHTSA's judgment or findings on the appeal. All public comments will be considered along with the information in DJG's appeal and other relevant information as the agency makes its final decision on these petitions for inconsequential noncompliance.

DATES: Comments must be received by NHTSA on or before December 26, 2008.

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

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

Follow the online instructions for submitting comments.

- *Mail:* Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery or Courier:* U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Regardless of how you submit your comments, you should mention the docket number of this document.

SUPPLEMENTARY INFORMATION: Dorel Juvenile Group (DJG), of Columbus, Indiana, the parent company manufacturing Cosco brand child restraints, has appealed a decision by the National Highway Traffic Safety Administration that denied its two applications for a determination that its noncompliance with Federal Motor Vehicle Safety Standard (FMVSS) No. 213, "Child Restraint Systems" is inconsequential to motor vehicle safety. This notice of receipt of DJG's appeal is published in accordance with NHTSA's regulations (49 CFR 556.7 and 556.8) and does not represent any agency decision or other exercise of judgment concerning the merits of the appeal.

Notice of receipt of the petitions for inconsequential noncompliance was published on July 30, 2002 and December 3, 2002 in the **Federal Register** (67 FR 49387 and 67 FR 72025). On July 18, 2008, NHTSA published a notice in the **Federal Register** denying DJG's petitions (73 FR 41397), stating that the petitioner had not met its burden of persuasion that the noncompliance is inconsequential to motor vehicle safety.

Affected are a total of 3,957,826 child restraints representing 39 models produced from January 2000 through September 30, 2001 due to noncompliance with the post-abrasion tether webbing strength requirement and 54,400 child restraints representing 14 models produced from March 15, 2002 through August 1, 2002 due to noncompliance with the post-light exposure harness webbing strength requirement. The noncompliant tether webbing retained only 55 percent of its new webbing strength when subjected to the abrasion test and so failed to meet the 75 percent strength retention requirement of FMVSS No. 213. The noncompliant harness webbing retained only 37 percent of its new webbing strength when exposed to carbon arc light and so failed the 60 percent strength retention requirement in FMVSS No. 213.

Post-Abrasion Webbing Strength Petition, Denial, and Appeal Summary

In its original post-abrasion test strength retention petition, DJG asserted that the noncompliance is inconsequential to motor vehicle safety because its unabraded webbing strength as well as its post-abrasion webbing strength was sufficiently high and that its abraded strength was far higher than the anchorage strength requirement specified in FMVSS No. 225. In addition, DJG asserted that the abraded webbing strength test procedure was flawed because a minimum abraded breaking strength was not specified.

In its denial, NHTSA made the point that both the unabraded webbing strength and the degradation rate requirements are important from a safety perspective. NHTSA determined that the lack of sufficient breaking strength retention after abrasion signals the distinct probability that the webbing strength would be insufficient throughout a lifetime of use. The high

degradation rate of the DJG tether webbing could abrade to the point where the webbing strength is lower than the tether anchor strength, providing for an unsafe connection to the vehicle. In consideration of the foregoing, NHTSA decided that DJG did not meet its burden of persuasion that this noncompliance was inconsequential to motor vehicle safety.

In its appeal from NHTSA's denial, DJG stated that NHTSA did not respond to all the arguments and data in the denial decision and focused instead on the "high degradation rate" of the webbing and that it may not last the life of these child restraints. DJG states that according to NHTSA's own recommendation for the useful life of child restraints, the majority of the subject noncompliant child restraints are already beyond their useful life, given the passage of time between the filing of DJG's petition and the denial decision. DJG asserts that most of the child restraints at issue are now more than seven years old and beyond their useful life, yet there have been no complaints of tether webbing abrasion or tether webbing failure in crashes. DJG further states that the real world performance of these restraints contradicts NHTSA's assertion that there is a distinct probability that the tether webbing strength would be insufficient throughout a lifetime of use.

DJG also provided tether webbing strength test data of used child restraints from the affected population to demonstrate that the tether webbing is not being abraded in the real world to a strength level corresponding to the post-abrasion test strength of 10,903 N. DJG maintains that the tether webbing strength after 6 to 8 years of use ranges from 82.4 to 99.6 percent of initial breaking strength. DJG states that these test results also show that the tether webbing from compliant and noncompliant used child restraints performed comparably, and demonstrated no problematic degradation.

DJG argued in their appeal of NHTSA's denial that NHTSA had previously granted a petition for a determination of inconsequentiality with respect to tether webbing on certain Evenflo child restraints reasoning that the tensile strength of abraded Evenflo tethers were greater than the measured tensile loads in sled tests and that the Evenflo tether webbing would have complied with the agency's regulation in effect from 1971 to 1979 for both unabraded and abraded webbing for a Type 3 belt. DJG states that they had provided test data in the initial petition to demonstrate that the same two reasons for which NHTSA granted the application of inconsequential noncompliance applies to the subject noncompliant DJG child restraints and therefore, NHTSA should have also granted the DJG petition.

Finally, DJG cites docketed test results in connection with NHTSA's rulemaking on minimum breaking strength which demonstrates that DJG's tether webbing post-abrasion breaking strength was significantly higher than the new and post-abrasion breaking strength for at least one Britax model in the market at the time. DJG believes that since this Britax child restraint complied with the FMVSS No. 213 requirements, their subject child restraints with a post-abrasion tether breaking strength of more than two times that of the Britax child restraint poses no consequential safety risk.

Post Light Exposure Petition, Denial, and Appeal Summary

In its original post-light exposure test strength retention petition, DJG asserted that the noncompliance is inconsequential to motor vehicle safety because its light-exposed harness webbing breaking strength of 4,539 N far exceeded the corresponding tensile loads in 30 mph dynamic sled tests.

DJG argued that while the webbing (made of nylon fabric) was noncompliant when exposed to carbon arc light filtered by a Corex-D filter (tested according to the standard's specifications), the webbing was compliant when exposed to carbon arc light filtered by a soda-lime glass filter (specified by the standard for use only for polyester fabric). In addition, DJG asserted that carbon arc light does not have the same spectral characteristics as sunlight and delivers excessive relative photon energy to the test specimen in the ultraviolet and low visual spectrum compared to natural sunlight. DJG contends that light exposure testing using carbon arc light systems is obsolete since, in recent years, these systems have been replaced by Fluorescent UV or Xenon arc systems that resemble natural sunlight characteristics more closely than carbon arc systems. DJG stated that the harness webbing retained 93.5 percent of its initial breaking strength when it was exposed to a xenon arc lamp for 300 hours (3 times longer than that required by the standard).

In its denial, NHTSA noted that the test conditions in FMVSS No. 213 reflect the concern that child restraints will withstand even the most severe crashes which are well above 30 mph. Therefore, NHTSA did not find DJG's assertion that its light exposed harness webbing strength far exceeds forces in a 30 mph dynamic crash test to be persuasive evidence of the noncompliance being inconsequential to motor vehicle safety. NHTSA also pointed out that carbon arc light filtered by a soda-lime glass filter is not appropriate for webbing made of nylon and so the DJG compliant data was based on testing using an inappropriate filter, and not conducted according to FMVSS No. 213 requirements. NHTSA believes that the test results obtained by the carbon arc test method are an appropriate reflection of the strength capabilities of the DJG webbing and stated that the use of xenon arc lamp for weathering tests of glazing materials under FMVSS No. 205 does not mean that the carbon arc is not indicative of the sunlight spectral power distribution or that it produces invalid weathering results for webbing materials.

In its appeal of NHTSA's denial, DJG reiterated and emphasized the same points made in the original petition. DJG stated that NHTSA's assertion on the use of carbon arc source in light exposure testing was not substantiated and is contrary to the Agency's own conclusion in its recent rulemaking to amend FMVSS No. 205. In the final rule amending that standard, NHTSA concluded that a xenon arc light source had characteristics closer to natural sunlight than carbon arc light source. DJG noted that natural sunlight characteristics are the same for glazing material and harness webbing and so this implies that the xenon arc light source is more appropriate for use in the webbing light exposure tests.

DJG pointed out that NHTSA had previously relied on 30 mph crash test data to grant inconsequentiality petitions with respect to child restraints such as the Evenflo tether webbing described earlier that failed to meet the post-abrasion test requirements. DJG also presented docketed information of NHTSA's compliance test data which showed that the Safeline child restraints had post-light exposure strengths that were lower than that of the DJG webbing, yet the Safeline restraints complied with the standard and were deemed to provide an adequate level of safety because they had a very low initial breaking strength. DJG asserts that this Safeline data demonstrates that DJG's arguments are not theoretical and should not have been dismissed by NHTSA.

Lastly, DJG states that the real world experience of the noncompliant child restraints disproves NHTSA's assertion that the high degradation rate of the harness webbing signals a distinct probability that the webbing strength

would be insufficient throughout its use. DJG noted that though these restraints are now more than seven years old, and generally past their useful life, there have been no complaints regarding harness degradation in these restraints or any known failures of the harness webbing in crashes.

In conclusion, DJG states that real world experience of child restraints at issue in this proceeding has proven that the non-compliant webbing has performed satisfactorily for more than seven years in the field. In addition, DJG contends that recent testing of the breaking strength of the tether webbing in used child restraints confirms that the webbing is not degrading in use from abrasion, exposure to light or any other reason, and is retaining a very high percentage of its original strength. Therefore, DJG believes that NHTSA should grant DJG's appeal of the decision to deny its petitions for a determination that the noncompliance of its tether and harness webbing is inconsequential to safety.

Public Comments

Interested persons are invited to submit written data, views, and arguments on the petition appeal described above. The petition appeal, supporting materials, and all comments received before the close of business on the closing date indicated in the beginning of this notice will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition appeal is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30118(d) and 30120(h); delegations of authority at 49 CFR 1.50 and 49 CFR 501.8.

Issued on: November 20, 2008.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E8–28083 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35199]

Potlatch Land & Lumber, LLC—Change of Control Within Corporate Family Exemption

Potlatch Land & Lumber, LLC (PL&L), has filed a verified notice of exemption under 49 CFR 1180.2(d)(3) to undertake a change of control within its corporate family. PL&L, a newly organized subsidiary of Potlatch Corporation of Spokane, WA (Potlatch), seeks to acquire the stock of 3 short line railroads: St. Maries River Railroad Company (STMA), Warren & Saline River Railroad Company (WSR), and The Prescott and Northwestern Railroad Company (PNW). The stock of the railroads is currently held by Potlatch Forest Products Corporation, another subsidiary of Potlatch, which is being spun off and will be renamed Clearwater Paper Corporation.

The transaction is expected to be consummated on December 13, 2008 (30 days after the exemption was filed).

PL&L states that the transaction is designed to permit Potlatch, through PL&L, to retain indirect control of STMA, WSR, and PNW. PL&L adds that the transaction will not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(3).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here, because all the carriers involved are Class III rail carriers.

If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction. Petitions for stay will be due no later than December 5, 2008 (at least 7 days before the effective date of the exemption).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35199, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Fritz R. Kahn, 1920 N Street, NW., 8th Floor, Washington, DC 20036.

Board decisions and notices are available on our Web site at "*http://www.stb.dot.gov.*"

Decided: November 19, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. E8–27991 Filed 11–25–08; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. MC-F–21028]

Delivery Acquisition, Inc.—Purchase—Transportation Management Systems, LLC and East West Resort Transportation, LCC

AGENCY: Surface Transportation Board.

ACTION: Notice of Correction.

SUMMARY: This document contains a correction to a decision served and published in the **Federal Register** on July 18, 2008 (73 FR 41401–02). That decision tentatively approved the acquisition of control through purchase of Transportation Management Systems, LLC, f/k/a TMS, Inc. (TMS) and East West Resort Transportation, LLC (EWRT) by Delivery Acquisition, Inc. (Delivery), unless opposing comments were filed by September 2, 2008. No comments were subsequently filed with the Board and the Board's decision approving the proposed acquisition of control thus became effective on September 2, 2008. After the period for filing comments ended, the Board received notification from the applicants in this proceeding that references they had made in the application approved by the Board to operating rights issued by the former Interstate Commerce Commission (ICC) in Docket No. MC–169714 were incorrect, and that the correct number is MC–169174. Accordingly, the July 18 decision is being corrected to reflect the actual docket number of MC–169174, rather than MC–169714.

FOR FURTHER INFORMATION CONTACT: Julia Farr (202) 245–0359 [Federal Information Relay (FIRS) for the hearing impaired: 1–800–877–8339].

SUPPLEMENTARY INFORMATION: On September 2, 2008, the Board's approval of Delivery's acquisition of TMS and EWRT became effective. On November 13, 2008, the Board received notification from the applicants that their application misstated that certain of the operating rights held or leased by TMS, and EWRT had been issued by the former ICC in Docket No. MC–169714. The correct docket number is MC–169174.

A copy of this notice will be served on: (1) The U.S. Department of

Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 950 Pennsylvania Avenue, NW., Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of the General Counsel, 1200 New Jersey Avenue, SE., Washington, DC 20590.

Decided: November 20, 2008.

By the Board, Anne K. Quinlan, Acting Secretary.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. E8–28089 Filed 11–25–08; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Ex Parte 646 (Sub-No. 2)]

Simplified Standards for Rail Rate Cases—Taxes in Revenue Shortfall Allocation Method

AGENCY: Surface Transportation Board.

ACTION: Notice of final decision.

SUMMARY: The Board corrected an error created in *Simplified Standards For Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1) (STB served Sept. 5, 2007), by adjusting the revenue shortfall (or overage) to pre-tax dollars to conform with other elements of the Revenue Shortfall Allocation Method.

FOR FURTHER INFORMATION CONTACT: Timothy Strafford, (202) 245–0356. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: By a decision served on November 21, 2008, the Board found that there was a material error in the Revenue Shortfall Allocation Method (RSAM) formula described in *Simplified Standards For Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1) (STB served Sept. 5, 2007), in its failure to account for federal and state taxes. To correct this error, the Board revised the formula by adopting the use of the statutory federal tax rate, combined with a railroad-specific state tax rate, to best approximate the marginal taxes the carrier would pay on incremental revenue.

Additional information is contained in the Board's decision. A copy of the Board's decision is available for inspection or copying at the Board's Public Docket Room, Room 131, 395 E Street, SW., Washington, DC 20423–0001, and is posted on the Board's Web site, at *http://www.stb.dot.gov.*

Decided: November 20, 2008.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. E8–28112 Filed 11–25–08; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 20, 2008.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, and 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before December 26, 2008 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–1004.

Type of Review: Revision.

Title: U.S. Income Tax Return for Real Estate Investment Trusts.

Description: Form 1120–REIT is filed by a corporation, trust, or association electing to be taxed as a REIT in order to report its income, and deductions, and to compute its tax liability. IRS uses Form 1120–REIT to determine whether the REIT has correctly reported its income, deductions, and tax liability.

Respondents: Private sector.

Estimated Total Burden Hours: 142,203 hours.

OMB Number: 1545–1517.

Type of Review: Extension.

Title: Distributions From an Archer MSA or Medicare+Choice MSA.

Form: 1099–SA.

Description: This form is used to report distributions from a medical savings account as set forth in section 220(h).

Respondents: Private sector.

Estimated Total Burden Hours: 3,618 hours.

OMB Number: 1545–0126.

Type of Review: Extension.

Title: U.S. Income Tax Return of a Foreign Corporation.

Form: 1120–F.

Description: Form 1120–F is used by foreign corporations that have investments, or a business, or a branch in the U.S. The IRS uses Form 1120–F to determine if the foreign corporation has correctly reported its income, deductions, and tax, and to determine if it has paid the correct amount of tax.

Respondents: Private sector.

Estimated Total Burden Hours: 7,622,314 hours.

OMB Number: 1545–0941.

Type of Review: Extension.

Title: Report of a Sale or Exchange of Certain Partnership Interests.

Form: 8308.

Description: Form 8308 is an information return that gives the IRS the names of the parties involved in a section 751(a) exchange of a partnership interest. It is also used by the partnership as a statement to the transferor or transferee. It alerts the transferor that a portion of the gain on the sale of partnership interest may be ordinary income.

Respondents: Private sector.

Estimated Total Burden Hours: 1,460,000 hours.

Clearance Officer: Glenn P. Kirkland (202) 622–3428, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Nicholas A. Fraser (202) 395–5887, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Robert Dahl,

Treasury PRA Clearance Officer.

[FR Doc. E8–28081 Filed 11–25–08; 8:45 am]

BILLING CODE 4810–35–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 20, 2008.

The Department of Treasury will submit following public information collection request to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by contacting the Treasury clearance officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11020, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before December 26, 2008 to be assured of consideration.

OMB Number: 1505–0195.

Type of Review: Extension.

Title: Race and National Origin Identification.

Description: This form will be used to collect applicant race and national origin information through the online application system. The data will be used to help Treasury Bureaus and Departmental Offices identify barriers to selection and determine the demographics of the overall applicant pool.

Respondents: Individuals.

Estimated Total Reporting Burden: 8,000 hours.

Clearance Officer: Joann Sokol, Human Resources, 202–622–0814, 1750 Pennsylvania Avenue, Washington, DC 20220.

OMB Reviewer: Nick Fraser (202) 395–5887, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Robert Dahl,

Treasury PRA Clearance Officer.

[FR Doc. E8–28082 Filed 11–25–08; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 21, 2008.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, and 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

Dates: Written comments should be received on or before December 26, 2008, to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–1517.

Type of Review: Extension.

Form: 1099–SA.

Title: Distributions From an Archer MSA or Medicare+Choice MSA.

Description: This form is used to report distributions from a medical savings account as set forth in section 220(h).

Respondents: Private Sector.

Estimated Total Burden Hours: 3,618 hours.

OMB Number: 1545–1913.

Type of Review: Extension.

Form: 8892.

Title: Payment of Gift/GST Tax and/or Application for Extension of Time To File Form 709.

Description: Form 8892 was created to serve a dual purpose. First, the form enables taxpayers to request an extension of time to File 709, when they are not filing an individual income tax extension. Second, it serves as a payment voucher for taxpayers, who are filing an individual income tax extension (by Form 4868) and will have a gift tax balance due on Form 709.

Respondents: Individuals or Households.

Estimated Total Burden Hours: 7,200 hours.

OMB Number: 1545–1788.

Type of Review: Extension.

Form: 13013.

Title: Taxpayer Advocacy Panel (TAP) Membership Application Form.

Description: An application to volunteer to serve on the Taxpayer Advocacy Panel, and advisory panel to the IRS.

Respondents: Individuals or Households.

Estimated Total Burden Hours: 525 hours.

OMB Number: 1545–1414.

Type of Review: Extension.

Form: 8846.

Title: Credit for Employer Social Security and Medicare Taxes Paid on Certain Employee Tips.

Description: Employers in food or beverage establishments where tipping is customary can claim an income tax credit for the amount of social security and Medicare taxes paid (employer's share) on tips, other than tips used to meet the minimum wage requirement.

Respondents: Private Sector.

Estimated Total Burden Hours: 331,452 hours.

OMB Number: 1545–2108.

Type of Review: Extension.

Title: Notice 2008–66—Relief From Certain Low-Income Housing Credit Requirements Due to Severe Storms and Flooding in Missouri (NOT–130705–08).

Description: The Internal Revenue Service is suspending certain requirements under § 42 of the Internal Revenue Code for low-income housing credit projects in the United States to provide emergency housing relief needed as a result of the devastation caused by severe storms and flooding in Missouri beginning on June 1, 2008.

Respondents: Individuals or Households.

Estimated Total Burden Hours: 125 hours.

Clearance Officer: Glenn P. Kirkland (202) 622–3428, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Nicholas A. Fraser (202) 395–5887, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Celina Elphage,

Treasury PRA Clearance Officer.

[FR Doc. E8–28231 Filed 11–25–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0630]

Agency Information Collection (Regulation on Application for Fisher Houses and Other Temporary Lodging and VHA Fisher House Application) Activities Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Health Administration (VHA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 26, 2008.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0630" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, fax (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–0630."

SUPPLEMENTARY INFORMATION: Title: Regulation on Application for Fisher Houses and Other Temporary Lodging and VHA Fisher House Application, VA Forms 10–0408 and 10–0408a.

OMB Control Number: 2900–0630.

Type of Review: Extension of a currently approved collection.

Abstract: VA provides temporary lodging to veterans receiving VA medical care or Compensation and Pension examinations and to family members or other persons accompanying the veteran. Application for temporary lodging may be by letter, telephone, e-mail, facsimile or in person at the VA healthcare facility of jurisdiction. VA Forms 10–0408 and 10–0408a can be used to collect data during the application process to determine the claimant's eligibility for temporary lodging. Temporary lodging services are provided on a first come, first served basis.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 19, 2008, at page 54454.

Affected Public: Individuals or households.

Estimated Total Annual Burden: 83,333 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: Semi-annually.

Estimated Number of Respondents: 250,000.

Estimated Total Annual Responses: 500,000.

Dated: November 19, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–28170 Filed 11–25–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0669]

Proposed Information Collection (Claim for Credit of Annual Leave) Activity: Comment Request

AGENCY: Human Resources Management, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Human Resources Management (HRM), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to this notice. This notice solicits comments on information needed to process current and former employee's claims for restored annual leave charged on a non-workday while on military active duty.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 26, 2009.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov*; or to Katie McCullough-Bradshaw, Human Resources Management (058), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *Katie.McCullough-Bradshaw@mail.va.gov*. Please refer to "OMB Control No. 2900–0669]" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Katie McCullough-Bradshaw at (202) 461–7076 or Fax (202) 275–7607.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, HRM invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of HRM's functions, including whether the information will have practical utility; (2) the accuracy of HRM's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Claim for Credit of Annual Leave, VA Form 0862.

OMB Control Number: 2900–0669.

Abstract: Current and former employee's who were charged annual leave on a nonworkday while on active military duty complete VA Form 0862 to request restoration of annual leave. Those employees who separated or retired from VA will receive a lump sum payment for any reaccredited annual leave. The claimant must provide documentation supporting the period that he or she were on active military duty during the time for which they were charged annual leave on a non-workday.

Affected Public: Individuals or households and Federal Government.

Estimated Annual Burden: 3,375 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 13,501.

Dated: November 19, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–28191 Filed 11–25–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0688]

Proposed Information Collection (Procedures, and Security for Government Financing) Activity; Comment Request

AGENCY: Office of Management, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Office of Management (OM), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to reduce or suspend contract payments and to determine if the contractor has adequate security to warrant payment in advance.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 26, 2009.

ADDRESSES: Submit written comments on the collection of information through the Federal Docket Management System (FDMS) *www.Regulations.gov*; or to Arita Tillman, Acquisition Policy Division (049P1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; or e-mail: *arita.tillman@va.gov*. Please refer to "OMB Control No. 2900–0688" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Arita Tillman at (202) 461–6859, FAX 202–273–6229.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–21), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, (OM) invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of (OM)'s functions, including whether the information will have practical utility; (2) the accuracy of (OM)'s estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Titles:

a. Department of Veterans Affairs Acquisition Regulation (VAAR) 832.006–4, Procedures.

b. Department of Veterans Affairs Acquisition Regulation (VAAR) 832.202–4, Security for Government Financing.

OMB Control Number: 2900–0688.

Type of Review: Extension of a currently approved collection.

Abstract: Data collected under VAAR 832.006–4 will be used to assess a contractor's overall financial condition, and ability to continue contract performance if payments are reduced or suspended upon a finding of fraud. VA will use the data collected under VAAR 832.202–4 to determine whether or not a contractor has adequate security to warrant an advance payment.

Affected Public: Businesses or other for-profits.

Estimated Annual Burden:

a. VAAR 832.006–4, Procedures—50 hours.

b. VAAR 832.202–4, Security for Government Financing—10 hours.

Estimated Average Burden Per Respondent:

a. VAAR 832.006–4, Procedures—5 hours.

b. VAAR 832.202–4, Security for Government Financing—1 hour.

Frequency of Response: On occasion.

Estimated Number of Respondents:

a. VAAR 832.006–4, Procedures—10.

b. VAAR 832.202–4, Security for Government Financing—10.

Dated: November 19, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–28190 Filed 11–25–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0671]

Proposed Information Collection (Traumatic Injury Protection (TSGLI)) Activity; Comment Request; Withdrawal

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice; withdrawal of request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), the Department of Veterans Affairs (VA) published a collection of information notice in the **Federal Register** on October 23, 2008, at 73 FR 63229, announcing an opportunity for public comment on the proposed collection of certain information by the agency. The notice solicited comments on information needed to determine servicemembers' eligibility requirements for payment of traumatic injury protection benefits covered under Servicemembers' Group Life Insurance. With respect to the collection of information in that notice, we are withdrawing our request for comments because it was necessary to seek an immediate OMB approval on an emergency basis under 44 U.S.C. 3507(j). VA has submitted a copy of the amended TSGLI form (Servicemembers' Group Life Insurance Traumatic Injury Protection Application for TSGLI Benefits) to OMB for an emergency approval. This document withdraws the October 23, 2008 notice.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, at 202–461–7485.

Dated: November 19, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–28185 Filed 11–25–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974

AGENCY: Department of Veterans Affairs (VA).

ACTION: Notice of New System of Records.

SUMMARY: The Privacy Act of 1974 (5 U.S.C. 552(e)(4)) requires that all agencies publish in the **Federal Register** a notice of the existence and character of their systems of records. Notice is hereby given that the Department of Veterans Affairs (VA) is establishing a new system of records entitled "Administrative Data Repository—VA" (150VA19).

DATES: Comments on this new system of records must be received no later than December 26, 2008. If no public comment is received during the period allowed for comment or unless otherwise published in the **Federal Register** by VA, the new system will become effective December 26, 2008.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov;* by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS).

FOR FURTHER INFORMATION CONTACT: Stephania H. Putt, Veterans Health Administration (VHA) Privacy Officer, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (704) 245–2492.

SUPPLEMENTARY INFORMATION:

I. Description of Proposed Systems of Records

VHA Administrative Data Repository, ADR, is the enterprise data store for VHA persons. It includes identity, demographic and other administrative data for patients and non-patients, including employees, providers, IT users, etc.

The Administrative Data Repository (ADR) has been established to provide support for those cross-cutting administrative data elements relative to multiple categories of a person entity. Although, initially focused on the computing needs of VHA, the ADR is positioned to provide identity management and demographics support for all IT systems within the Department of Veterans Affairs. As the authoritative data store for cross cutting administrative person data, the ADR will establish and manage this data as a VHA corporate asset. State-of-the-art security methodology will be implemented to ensure the integrity and confidentiality of person data administered by the ADR.

II. Proposed Routine Use Disclosures of Data in the System

To the extent that records contained in the system include information protected by 38 U.S.C. 7332, i.e., medical treatment information related to drug abuse, alcoholism, or alcohol abuse, sickle cell anemia or infection with the human immunodeficiency virus, that information cannot be disclosed under a routine use unless there is also specific statutory authority permitting disclosure.

Data stored in ADR is used as the source of identity, demographic and other administrative data for VHA enterprise. The routine uses of records maintained in the system, including categories of users and the purposes of such uses are described below:

VHA is proposing the following routine use disclosures of information to be maintained in the system:

1. The record of an individual who is covered by a system of records may be disclosed to a Member of Congress, or a staff person acting for the Member, when the Member or staff person requests the record on behalf of and at the written request of the individual.

2. Disclosure may be made to National Archives and Records Administration (NARA) and the General Services Administration (GSA) in records management inspections conducted under authority of Title 44, Chapter 29, of the United States Code (U.S.C). NARA and GSA are responsible for management of old records no longer actively used, but which may be appropriate for preservation, and for the physical maintenance of the Federal government's records. VA must be able to provide the records to NARA and GSA in order to determine the proper disposition of such records.

3. Disclosure may be made to other Government agencies in support of data exchanges of electronic medical record information approved by the individual.

4. VA may disclose on its own initiative any information in this system, except the names and home addresses of veterans and their dependents, that is relevant to a suspected or reasonably imminent violation of law, whether civil, criminal or regulatory in nature and whether arising by general or program statute or by regulation, rule or order issued pursuant thereto, to a Federal, State, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule or order. VA may also disclose on its own initiative the names and addresses of veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, rule or order issued pursuant thereto.

5. VA may disclose information from this system of records to the Department of Justice (DoJ), either on VA's initiative or in response to DoJ's request for the information, after either VA or DoJ determines that such information is relevant to DoJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that release of the records to the DoJ is a use of the information contained in the records that is compatible with the purpose for which VA collected the records. VA, on its own initiative, may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

6. Disclosures of relevant information may be made to individuals, organizations, private or public agencies, or other entities with whom VA has a contract or agreement or where there is a subcontract to perform the services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor or subcontractor to perform the services of the contract or agreement. This routine use includes disclosures by the individual or entity performing the service for VA to any secondary entity or individual to perform an activity that is necessary for individuals, organizations, private or public agencies, or other entities or individuals with whom VA has a contract or agreement to provide the service to VA.

7. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

8. VA may disclose information to the Equal Employment Opportunity Commission when requested in connection with investigations of alleged or possible discriminatory practices, examination of Federal affirmative employment programs, or for other functions of the Commission as authorized by law or regulation. VA must be able to provide information to the Commission to assist it in fulfilling its duties to protect employee's rights, as required by statute and regulation.

9. VA may disclose to the Fair Labor Relations Authority (FLRA) (including its General Counsel) information related to the establishment of jurisdiction, the investigation and resolution of allegations of unfair labor practices, or information in connection with the resolution of exceptions to arbitration awards when a question of material fact is raised; to disclose information in matters properly before the Federal Services Impasse Panel, and to investigate representation petitions and conduct or supervise representation elections. VA must be able to provide information to FLRA to comply with the statutory mandate under which it operates.

10. VA may disclose information to officials of the Merit Systems Protection Board (MSPB), or the Office of Special Counsel, when requested in connection with appeals, special studies of the civil service and other merit systems, review of rules and regulations, investigation of alleged or possible prohibited personnel practices, and such other functions, promulgated in 5 U.S.C. 1205 and 1206, or as authorized by law.

11. VA may, on its own initiative, disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise,

there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems or programs (whether maintained by the Department or another agency or disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

III. Compatibility of the Proposed Routine Uses

The Privacy Act permits VA to disclose information about individuals without their consent for a routine use when the information will be used for a purpose that is compatible with the purpose for which VA collected the information. In all of the routine use disclosures described above, either the recipient of the information will use the information in connection with a matter relating to one of VA's programs, will use the information to provide a benefit to VA, or disclosure is required by law.

The notice of intent to publish and an advance copy of the system notice have been sent to the appropriate Congressional committees and to the Director of the Office of Management and Budget (OMB) as required by 5 U.S.C. 552a(r) (Privacy Act) and guidelines issued by OMB (65 FR 77677), December 12, 2000.

Approved: November 7, 2008.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

150VA19

SYSTEM NAME:

Administrative Data Repository—VA.

SYSTEM LOCATION:

Records are maintained in the Corporate Franchise Data Center. Address locations for VA AAC are 1615 Woodward Street, Austin, Texas 78772–001. In addition, information from these records or copies of records may be maintained at the Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC, VA Data Processing Centers, VA CIO Field Offices, Veterans Integrated Service Network Offices, and Employee Education Systems.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The records include information concerning current and former VHA patients, employees, providers, volunteers, trainees and contractors, as well as individuals working collaboratively with VHA.

CATEGORIES OF RECORDS IN THE SYSTEM:

The records may include information related to:

1. Administrative assignments or categorization of duties of certain VHA personnel;

2. The record may include identifying demographic information (*e.g.*, name, date of birth, gender, social security number, taxpayer identification number); and other demographic information such as address (*e.g.*, home and/or mailing address, home telephone number, emergency contact information such as name, address, telephone number, and relationship); education and continuing education (*e.g.*, name and address of schools and dates of attendance, courses attended and scheduled to attend, grades, type of degree, certificate, etc.); information related to military service and status; qualifications for employment (*e.g.*, license, degree, registration or certification, experience); veteran enrollment and eligibility information including financial assessments.

3. Electronic messages used for network communication between VHA systems; and

4. Health care providers' social security number and National Provider Identifier.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title 38, United States Code, Section 501.and Section 7304.

PURPOSE (S):

The main purpose of the Administrative Data Repository is to establish person identity throughout the VHA enterprise. The purpose of the system of records is to provide a repository for the administrative information that is used to accomplish the purposes described within this document including determining veteran benefits and eligibility. The records include information provided by patients, providers, employees, volunteers, trainees, contractors and others that receive IT access to our computer systems and information obtained in the course of routine work done including VHA patient care provided. Quality assurance information that is protected by 38 U.S.C. 7311 and 38 CFR 17.500–17.511 is not within the scope of the Privacy Act and, therefore, is not included in this system of records or filed in a manner in which the information may be retrieved by reference to an individual identifier.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

To the extent that records contained in the system include information protected by 38 U.S.C. 7332, i.e., medical treatment information related to drug abuse, alcoholism, or alcohol abuse, sickle cell anemia or infection with the human immunodeficiency virus, that information cannot be disclosed under a routine use unless there is also specific statutory authority permitting disclosure.

Data stored in ADR is used as the source of identity, demographic and other administrative data for VHA enterprise. The routine uses of records maintained in the system, including categories of users and the purposes of such uses are described below:

1. The record of an individual who is covered by a system of records may be disclosed to a Member of Congress, or a staff person acting for the Member, when the Member or staff person requests the record on behalf of and at the written request of the individual.

2. Disclosure may be made to National Archives and Records Administration (NARA) and the General Services Administration (GSA) in records management inspections conducted under authority of Title 44, Chapter 29, of the United States Code (U.S.C).

3. Disclosure may be made to other Government agencies in support of data exchanges of electronic medical record information approved by the individual.

4. VA may disclose on its own initiative any information in this system, except the names and home addresses of veterans and their dependents, that is relevant to a suspected or reasonably imminent violation of law, whether civil, criminal or regulatory in nature and whether arising by general or program statute or by regulation, rule or order issued pursuant thereto, to a Federal, State, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule or order. VA may also disclose on its own initiative the names and addresses of veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal or regulatory violations of law, or charged with enforcing or

implementing the statute, regulation, rule or order issued pursuant thereto.

5. VA may disclose information from this system of records to the Department of Justice (DoJ), either on VA's initiative or in response to DoJ's request for the information, after either VA or DoJ determines that such information is relevant to DoJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that release of the records to the DoJ is a use of the information contained in the records that is compatible with the purpose for which VA collected the records. VA, on its own initiative, may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

6. Disclosures of relevant information may be made to individuals, organizations, private or public agencies, or other entities with whom VA has a contract or agreement or where there is a subcontract to perform the services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor or subcontractor to perform the services of the contract or agreement.

7. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

8. VA may disclose information to the Equal Employment Opportunity Commission when requested in connection with investigations of alleged or possible discriminatory practices, examination of Federal affirmative employment programs, or for other functions of the Commission as authorized by law or regulation.

9. VA may disclose to the Fair Labor Relations Authority (FLRA) (including its General Counsel) information related to the establishment of jurisdiction, the investigation and resolution of allegations of unfair labor practices, or information in connection with the resolution of exceptions to arbitration awards when a question of material fact is raised; to disclose information in matters properly before the Federal Services Impasse Panel, and to investigate representation petitions and conduct or supervise representation elections.

10. VA may disclose information to officials of the Merit Systems Protection Board (MSPB), or the Office of Special Counsel, when requested in connection with appeals, special studies of the civil service and other merit systems, review of rules and regulations, investigation of alleged or possible prohibited personnel practices, and such other functions, promulgated in 5 U.S.C. 1205 and 1206, or as authorized by law.

11. VA may, on its own initiative, disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise, there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems or programs (whether maintained by the Department or another agency or disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained at the Corporate Franchise Data Center which is a VA operated facility. Information is stored on disk media.

RETRIEVABILITY:

Records are retrieved by person identifying traits such as name, social security number and other assigned unique identifiers of the individuals on whom they are maintained.

SAFEGUARDS:

1. Access to VA working and storage areas is restricted to VA employees on a "need-to-know" basis; strict control measures are enforced to ensure that disclosure to these individuals is also based on this same principle. Generally, VA file areas are locked after normal duty hours and the facilities are protected from outside access by the Federal Protective Service or other security personnel.

2. Access to file information is controlled at two levels; the systems recognize authorized employees by series of individually unique passwords/codes as a part of each data message, and the employees are limited to only that information in the file which is needed in the performance of their official duties. Information that is downloaded from ADR and maintained on personal computers is afforded similar storage and access protections as the data that is maintained in the original files. Access to information stored on automated storage media at other VA locations is controlled by individually unique passwords/codes.

3. Access to the Austin Automation Center is generally restricted to Center employees, custodial personnel, Federal Protective Service and other security personnel. Access to computer rooms is restricted to authorized operational personnel through electronic locking devices. All other persons gaining access to computer rooms are escorted. Information stored in the computer may be accessed by authorized VA employees at remote locations including VA health care facilities, Information Systems Centers, VA Central Office, and Veteran Integrated Service Networks. Access is controlled by individually unique passwords/codes which must be changed periodically by the employee.

RETENTION AND DISPOSAL:

The records must be disposed of in accordance with the records retention standards authorized by the National Archives and Records Administration General Records Schedule 14, item 6, and published in the Veterans Health Administration Records Control Schedule 10–1, Item XLV.

SYSTEM MANAGER(S) AND ADDRESS:

Official responsible for policies and procedures; Chief Information Officer (19), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Official maintaining this system of record: Director National Data Systems (19F–4), Corporate Franchise Center, 1615 Woodward Street, Austin, Texas 78772.

NOTIFICATION PROCEDURE:

Individuals who wish to determine whether this system of records contains information about them should contact the VA facility location at which they are or were employed or treated or made or have contact. Inquiries should include the person's full name, social security number, dates of treatment, dates of employment, date(s) of contact, and/or return address.

RECORD ACCESS PROCEDURE:

Individuals seeking information regarding access to and contesting of records in this system may write, call or visit the VA facility location where they are or were employed or treated or made contact.

CONTESTING RECORD PROCEDURES:

(See Record Access Procedures above.)

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by patients, employees, providers, IT users, and others that work collaboratively with VHA.

[FR Doc. E8–28183 Filed 11–25–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974

AGENCY: Department of Veteran Affairs.

ACTION: Notice of amendment to an existing system of records

SUMMARY: The Privacy Act of 1974 (5 U.S.C. 552(e)(4)) requires that all agencies publish in the **Federal Register** a notice of the existence and character of their systems of records. Notice is hereby given that the Department of Veterans Affairs (VA) is amending the system of records entitled "Individual Correspondence Records—VA" (05VA026) as set forth in the **Federal Register** on January 13, 1982 [47 FR 1462]. VA is amending the system by revising the routine uses of records maintained in the system, and adding seven new routine uses. VA is also making minor editorial changes to reflect the transition of Office of General Counsel from District Offices to Regional Offices, and to revise the list of those covered by the system of records to reflect current OGC correspondence. VA is republishing the system notice in its entirety.

DATES: Interested persons are invited to submit comments, suggestions, or objections regarding these changes. To assure consideration, written comments on this revised system of records must be postmarked no later than December 26, 2008, and written comments hand delivered to the Department and comments submitted electronically must be received as provided below, no later than 5 p.m. Eastern Time on December 26, 2008. If no public comment is received, the system will become effective December 26, 2008.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov;* by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS).

FOR FURTHER INFORMATION CONTACT: Susan Sokoll, Privacy Officer, (202) 461–7623, Office of the General Counsel (026C), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

SUPPLEMENTARY INFORMATION: The system of records, "Individual Correspondence Records—VA" (05VA026), was amended January 13, 1982, at 47 FR 1462.

I. Description of the System of Records

"Individual Correspondence Records—VA" contains letters written by veterans, beneficiaries of veterans, dependents of veterans, non-profit organizations, businesses, attorneys, and other individuals, to Office of General Counsel (OGC). These files contain the initial inquiry, subsequent information, all supporting documents from whatever source, and the response or opinion of the OGC attorney answering the inquiry.

II. Proposed Amendments to Routine Use Disclosures of Data in the System

VA is amending, deleting, rewriting and reorganizing the order of the routine uses in this system of records. Accordingly, the following changes are made to the current routine uses and are incorporated into the amended system of records notice.

The wording for current routine use 1 was revised.

Current routine uses 2 through 4 are being combined and revised into new routine use 4. This routine use is amended to more accurately reflect the conditions under which VA, on its own initiative, may disclose information from this system of records for law enforcement purposes.

New routine use number 2 is being added to authorize disclosure to the National Archives and Records Administration and General Services Administration for records management inspections conducted under authority of Title 44, Chapter 29, of the United States Code.

New routine use 3 is added to reflect VA's authorization to disclose individually-identifiable information to contractors or other entities that will provide services to VA for which the recipient needs that information in order to perform the services.

Current routine use number 5 is being renumbered as routine use number 10. New routine use 5 is added to state when VA may disclose information in legal proceedings, and when VA may disclose information to the Department of Justice. In determining whether to disclose records under this routine use, VA will comply with the guidance promulgated by the Office of Management and Budget (OMB) in a May 24, 1985, memorandum entitled "Privacy Act Guidance—Update" currently posted at *http://www.whitehouse.gov/omb/inforeg/guidance1985.pdf.*

VA is adding a new routine use 6 that authorizes the circumstances, and to whom, VA may disclose records in order to respond to, and minimize possible harm to, individuals as a result of a data breach. This routine use is promulgated in order to meet VA's statutory duties under 38 U.S.C. 5724 and the Privacy Act, 5 U.S.C. 552a, as amended.

VA is adding new routine use 7 to disclose information to the Merit Systems Protection Board or the Office of Special Counsel, where officials of those agencies determine, or VA determines the disclosure is necessary to perform duties imposed by 5 U.S.C. sections 1205 and 1206, or as may be authorized by law.

VA is adding new routine use 8 to disclose information to the Equal Employment Opportunity Commission when requested in connection with investigations of alleged or possible discriminatory practices, examination of Federal affirmative employment programs, or for other functions of the Commission as authorized by law or regulation.

VA is adding new routine use 9 to disclose information to the Federal Labor Relations Authority, where officials of those agencies determine, or VA determines the disclosure is necessary to perform duties imposed by the enabling statutes and legislation of that agency.

III. Compatibility of the Proposed Routine Uses

Release of information from these records, pursuant to routine uses, will be made only in accordance with the provisions of the Privacy Act of 1974.

The Privacy Act of 1974 permits agencies to disclose information about individuals, without their consent, for a routine use when the information will be used for a purpose for which the information was collected. VA has determined that the disclosure of information for the above purposes in the proposed amendment to routine uses is a proper and necessary use of the information collected by the Claimant Private Relief Legislative Files.

The report of intent to publish and an advance copy of the system notice have been sent to the appropriate Congressional committees and to the Director of the Office of Management and Budget (OMB) as required by 5 U.S.C. 552a(r) (Privacy Act) and guidelines issued by OMB (65 FR 77677), December 12, 2000.

Approved: November 7, 2008.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

SYSTEM NAME:

Individual Correspondence Records—VA (05VA026)

SYSTEM LOCATION:

This system of records is located in the Office of the General Counsel (OGC), Professional Staff Group VI (026), U.S. Department of Veterans Affairs (VA), 810 Vermont Avenue, NW., Washington, DC 20420, and at the Regional Counsel Offices. Addresses for Regional Counsel Offices may be obtained from the above-mentioned General Counsel Office address.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The following categories of individuals and business entities are covered by this system: (1) Veterans; (2) Beneficiaries of Veterans; (3) Dependents of Veterans; (4) Non-Veterans; (5) Employees; (6) Attorneys; (7) Businesses; and (8) Non-Profit Organizations. These persons and groups are those who write to Office of General Counsel with questions or requesting information.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in this system contain the original incoming letter, any attachments to the letter provided by the requestor, research and background material compiled by the OGC or Regional Counsel attorney as backup for the response to the inquiry, and the actual response or opinion. The incoming letter will contain the name and address of the requester, and may contain medical information, Social Security Number, VA Claim Number, financial information, or copies of personal papers.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title 38, United States Code, Section 311.

PURPOSE(S):

This system documents the response of Office of General Counsel and the Regional Counsel Offices to respond to inquiries from outside the government.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEMS, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

1. VA may disclose information to a congressional office in response to an inquiry from the congressional office on behalf of and at the request of that individual.

2. VA may disclose information to the National Archives and Records Administration (NARA) and the General Services Administration (GSA) as required to comply with statutory requirements to disclose information to NARA and GSA for them to perform their statutory records management activities and inspections under authority of title 44, Chapter 29, of the United States Code.

3. VA may disclose information to individuals, organizations, private or public agencies, other entities with whom VA has a contract or agreement to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor, subcontractor, public or private agency, or other entity or individuals with whom VA has contract or agreement. This routine use includes disclosures by the individual or entity performing the service for VA to any secondary entity or individual to perform an activity that is necessary for individuals, organizations, private or public agencies, or other entities or individuals with whom VA has a contract or agreement to provide the service to VA.

4. VA may disclose on its own initiative any information in this system, except the names, home addresses or other personally identifiable information of veterans and their dependents, which is relevant to a suspected or reasonably imminent violation of law, whether civil, criminal or regulatory in nature and whether arising by general or program statute or by regulation, rule or order issued pursuant thereto, to a Federal State, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule, or order. On its own initiative, VA may also disclose the names and addresses of veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, rule or order issued pursuant thereto.

5. VA may provide Department of Justice (DoJ) with information needed to represent the United States in litigation. VA may also disclose the information for this purpose in proceedings in which DoJ is not representing the Agency.

6. VA may, on its own initiative, disclose any information or records to appropriate agencies, entities, or persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of embarrassment or harm to the reputation of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems of programs (whether maintained by the Department or another agency or entity) that rely upon potentially compromised information; and (3) the disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by the Department to respond to a suspected or confirmed data breach, including the provision of credit protection services or any risk analysis services when necessary to respond to, and if necessary, mitigate damages that might arise from a data breach involving data covered by this system of records.

7. VA may disclose information to officials of the Merit Systems Protection Board or the Office of Special Counsel when requested in connection with appeals, special studies of the civil service and other merit systems, review of rules and regulations, investigation of alleged or possible prohibited personnel practices, and such other functions promulgated in 5 U.S.C. sections 1205 and 1206, or as may be authorized by law.

8. VA may disclose information to the Equal Employment Opportunity Commission when requested in connection with investigations of alleged or possible discriminatory practices, examination of Federal

affirmative employment programs, or for other functions of the Commission as authorized by law or regulation.

9. VA may disclose to the Federal Labor Relations Authority (including its General Counsel) information related to the establishment of jurisdiction, the investigation and resolution of allegations of unfair labor practices, or information in connection with the resolution of exceptions to arbitration awards when a question of material fact is raised; to disclose information in matters properly before the Federal Services Impasses Panel, and to investigate representation petitions and conduct or supervise representation elections.

10. Any information in this system from correspondence or inquiries sent to the VA may be disclosed to State or Federal agencies at the request of the correspondent or inquirer in order for those agencies to help the correspondent with his or her problem. The information disclosed may include the name and address of the correspondent or inquirer and details concerning the nature of the problem specified in the correspondence.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in individual file folders on shelves in the OGC law library or in the Regional Counsel Office.

RETRIEVABILITY:

Records filed by the last name of the individual(s) or organization(s) covered by the system of records.

SAFEGUARDS:

Records are maintained in a manned room during working hours. During nonworking hours, the file area is locked, and the building is protected by uniformed guards. Access to the records is only authorized to VA personnel on a "need to know" basis.

RETENTION AND DISPOSAL:

OGC correspondence records prior to 1975 relating to a veteran which result in a legal opinion have been placed on microfiche. The paper records are currently stored in the Washington National Records Center, and the microfiche is stored in the OGC Law Library. Records are maintained in the Office of General Counsel and the Regional Counsel Offices for a period of three years. After three years, general correspondence records are destroyed [Records Control Schedule N–15–06–2, Item 1].

SYSTEM MANAGER(S) AND ADDRESS(ES):

Assistant General Counsel, Professional Staff Group VI (026), Office of General Counsel, United States Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

NOTIFICATION PROCEDURE:

An individual who wishes to determine whether a record is being maintained in this system under his or her name or other personal identifier, or wants to determine the contents of such record, should submit a written request to the Assistant General Counsel, Professional Staff Group VI (026), Office of General Counsel, U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Such requests must contain a reasonable description of the records requested. All inquiries must reasonably identify the information involved and should include the individual's full name, return address, and telephone number.

RECORD ACCESS PROCEDURES:

Individuals seeking information regarding access to VA information maintained by the Office of General Counsel may send a request by mail to the Assistant General Counsel, Professional Staff Group VI (026), Office of the General Counsel, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, or may send a fax to the Assistant General Counsel, Professional Staff Group VI, 1–202–273–6645.

CONTESTING RECORD PROCEDURES:

Individuals seeking information regarding contesting or amending VA information maintained by the Office of General Counsel may send a request by mail to the Assistant General Counsel, Professional Staff Group VI (026), Office of the General Counsel, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, or may send a fax to the Assistant General Counsel, Professional Staff Group VI, 1–202–273–6645.

RECORDS SOURCE CATEGORIES:

Veterans, beneficiaries and dependents of veterans, employees, business, and non-profit organizations.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8–28197 Filed 11–25–08; 8:45 am]
BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; System of Records

AGENCY: Department of Veterans Affairs (VA).

ACTION: Notice of establishment of new system of records.

SUMMARY: The Privacy Act of 1974 (5 U.S.C. 552(e) (4)) requires that all agencies publish in the **Federal Register** a notice of the existence and character of their systems of records. Notice is hereby given that the Department of Veterans Affairs (VA) is establishing a new system of records entitled "Customer Relationship Management System (CRMS)–VA" 155VA16.

DATES: Comments on this new system of records must be received no later than December 26, 2008. If no public comment is received, the new system will become effective December 26, 2008.

ADDRESSES: Written comments concerning the proposed amended system of records may be submitted by: mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026; or e-mail to *VAregulations@mail.va.gov*. All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273–9515 for an appointment.

FOR FURTHER INFORMATION CONTACT: Veterans Health Administration (VHA) Privacy Officer, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; telephone (704) 245–2492.

SUPPLEMENTARY INFORMATION:

I. Description of Proposed Systems of Records

Electronic Service Records are maintained in a database at the Health Revenue Center (HRC), in Topeka, Kansas or at another Office of Information Technology (OI&T) approved location. These Service Records document telephone inquiries received from veterans, veteran's family members, members of the general public, VA customers, and VA employees.

The Service Records may contain such information as identifying information including name, address,

social security number, date of birth, telephone number, VA claims file number, etc.; family information including spouse and dependent(s) name(s), address(es), telephone number(s), etc.; veteran's financial information concerning co-payment billing of medical care and prescriptions; veteran's health insurance carrier name and address; veteran's health care provider, services provided, amounts claimed and paid; facility location(s) where treatment is provided; information about military service; *e.g.*, branch, combat service, military decorations, POW status, etc; information about veteran's eligibility and enrollment status for VA health care benefits; compensation, pension or education benefits; general public/job applicants' information, *e.g.*, name, address, and telephone number, etc.; and VA employee and benefits information, *e.g.*, name, address, social security number, date of birth, telephone number, and health insurance, life insurance coverage, retirement plan, etc. Overall, Service Records may be used to document all types of information resulting from communication with veterans, veteran's family members, members of the general public, VA customers, and VA employees during the course of conducting VA business.

The Service Records are maintained for historical reference, quality assurance and training, and statistical reporting purposes.

Magnetic media are also stored in a VA Office of Information and Technology (OI&T) approved location for contingency back-up purposes.

II. Proposed Routine Use Disclosures of Data in the System

We are proposing to establish the following Routine Use disclosures of information maintained in the system for the potential purpose of releasing information on a call handled such as, the caller's name, date and time of call, purpose of call, and information obtained and/or response provided.

1. The record of an individual who is covered by this system of records may be disclosed to a Member of Congress, or a staff person acting for the Member, when the Member or staff person requests the record on behalf of and at the written request of the individual.

VA must be able to provide information about individuals to adequately respond to inquiries from Members of Congress at the request of constituents who have sought their assistance.

2. Disclosure may be made to National Archives and Records Administration (NARA) and the General Services Administration (GSA) in records management inspections conducted under authority of Title 44, Chapter 29, of the United States Code (U.S.C.). NARA and GSA are responsible for management of old records no longer actively used, but which may be appropriate for preservation, and for the physical maintenance of the Federal government's records. VA must be able to provide the records to NARA and GSA in order to determine the proper disposition of such records.

3. VA may disclose information in this system of records to the Department of Justice (DOJ), either on VA's initiative or in response to DOJ's request for the information, after either VA or DOJ determines that such information is relevant to DOJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that release of the records to the DOJ is a use of the information contained in the records that is compatible with the purpose for which VA collected the records. VA, on its own initiative, may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

VA must be able to provide information to DOJ in litigation where the United States or any of its components is involved or has an interest. A determination would be made in each instance that under the circumstances involved, the purpose is compatible with the purpose for which VA collected the information. This routine use is distinct from the authority to disclose records in response to a court order under subsection (b)(11) of the Privacy Act, 5 U.S.C. 552(b)(11), or any other provision of subsection (b), in accordance with the court's analysis in *Doe* v. *DiGenova*, 779 F.2d 74, 78–84 (DC Cir. 1985) and *Doe* v. *Stephens*, 851 F.2d 1457, 1465–67 (DC Cir. 1988).

4. Disclosure of relevant information may be made to individuals, organizations, private or public agencies, or other entities or individuals with whom VA has a contract or agreement or where there is a subcontract to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor or subcontractor to perform the services of the contract or agreement. This routine use, which also applies to agreements that do not qualify as contracts defined by Federal procurement laws and regulations, is consistent with Office of Management and Budget (OMB) guidance in OMB Circular A–130, App. I, paragraph 5a(1)(b) that agencies promulgate routine uses to address disclosure of Privacy Act-protected information to contractors in order to perform the services contracts for the agency.

5. VA may disclose, on its own initiative, any information in this system, except the names and home addresses of veterans and their dependents, that is relevant to a suspected or reasonably imminent violation of law, whether civil, criminal, or regulatory in nature and whether arising by general or program statute or by regulation, rule or order issued pursuant thereto, to a Federal, State, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule or order. VA may also disclose, on its own initiative, the names and addresses of veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, or order issued pursuant thereto.

VA must be able to provide on its own initiative information that pertains to a violation of laws to law enforcement authorities in order for them to investigate and enforce those laws. Under 38 U.S.C. 5701(a) and (f), VA may only disclose the names and addresses of veterans and their dependents to Federal entities with law enforcement responsibilities. This is distinct from the authority to disclose records in response to a qualifying request from a law enforcement entity, as authorized by Privacy Act subsection 5 U.S.C. 552a(b)(7).

6. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs. This routine use permits disclosures by the Department to report a suspected incident of identity theft and provide information and/or documentation related to or in support of the reported incident.

7. VA may, on its own initiative, disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the

system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise, there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the potentially compromised information; and (3) the disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

8. Disclosure may be made to those officers and employees of the agency that maintains the record and who have a need for the record in the performance of their duties. This routine use permits disclosures by the Department to respond to Freedom of Information (FOIA)/Privacy Act requests and inquiries from officers and employees of Veteran Affairs organizations to aid in the services provided to veterans, veteran's family members, members of the general public, VA customers, and VA employees and to conduct general maintenance, trouble shooting and/or system upgrades.

9. To disclose the information listed in 5 U.S.C. 7114(b)(4) to officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions.

This routine use permits disclosures by the Department to respond to requests made by the American Federation of Government Employees (AFGE) Local 906 officials for information and/or documents associated with their duties of exclusive representation of covered Health Revenue Center (HRC) employees.

10. To disclose information to officials of the Merit Systems Protection Board (MSPB), or the Office of the Special Counsel, when requested in connection with appeals, special studies of the civil service and other merit systems, review of rules and regulations, investigation of alleged or possible prohibited personnel practices, and such other functions, promulgated in 5 U.S.C. 1205 and 1206, or as may be authorized by law. VA must be able to provide information to MSPB to assist it in fulfilling its duties as required by statute and regulation.

11. To disclose information from this system to the Equal Employment Opportunity Commission (EEOC) when requested in connection with investigations of alleged or possible discriminatory practices, examination of Federal affirmative employment programs, or other functions of the Commission as authorized by statute and regulation. VA must be able to provide information to EEOC to assist it in fulfilling its duties to protect employees' rights, as required by statute regulation.

12. To disclose to the Federal Labor Relations Authority (FLRA), including its General Counsel, information related to the establishment of jurisdiction, the investigation and resolution of allegations of unfair labor practices, or information in connection with the resolution of exceptions to arbitration awards when a question of material fact is raised; to disclose information in matters properly before the Federal Services Impasses Panel, and to investigate representation petitions and conduct or supervise representation elections. VA must be able to provide information to FLRA to comply with the statutory mandate under which it operates.

III. Compatibility of the Proposed Routine Uses

The Privacy Act permits VA to disclose information about individuals without their consent for a routine use when the information will be used for a purpose that is compatible with the purpose for which we collected the information. In all of the routine use disclosures described above, the recipient of the information will use the information in connection with a matter relating to one of VA's programs, will use the information to provide a benefit to VA, or disclosure is required by law.

The notice of intent to publish and an advance copy of the system notice have been sent to the appropriate Congressional committees and to the Director of OMB as required by 5 U.S.C. 552a(r) (Privacy Act) and guidelines issued by OMB (65 FR 77677), December 12, 2000.

Approved: November 7, 2008.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

155VA16

SYSTEM NAME:

Customer Relationship Management System (CRMS)–VA.

SYSTEM LOCATION:

Records and magnetic media are maintained at the Health Revenue Center (HRC), Topeka, Kansas facility or at another OI&T approved location. Magnetic media are also stored at an OI&T approved location for contingency back-up purposes.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The records include information concerning telephone inquiries from veterans, veteran's family members, members of the general public, VA customers, and VA employees.

CATEGORIES OF RECORDS IN THE SYSTEM:

The records may include information related to:

1. Veteran health benefits eligibility;
2. Veteran medical claims processing and payments;
3. Co-payments charged for medical care and prescriptions;
4. General human resources management; *e.g.*, employee benefits, recruitment/job applicants, etc.; and
5. Other information related to veterans, veteran's family members, members of the general public, VA customers, and VA employees.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title 38, United States Code, sections 501(a), 1705, 1710, 1722, 1722(a), 1781 and Title 5, United States Code, section 552(a).

PURPOSE(S):

The records and information may be used for historical reference, quality assurance, training, and statistical reporting.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

To the extent that records contained in the system include information protected by 45 CFR Parts 160 and 164, *i.e.*, individually identifiable health information, and 38 U.S.C. 7332, *i.e.*, medical treatment information related to drug abuse, alcoholism or alcohol abuse, sickle cell anemia or infection with the human immunodeficiency virus, that information cannot be disclosed under a routine use unless there is also specific statutory authority in 38 U.S.C. 7332 and regulatory authority in 45 CFR Parts 160 and 164 permitting disclosure.

VA may disclose protected information pursuant to the following routine uses where required by law, or required or permitted by 45 CFR Parts 160 and 164.

1. The record of an individual who is covered by this system of records may be disclosed to a Member of Congress, or a staff person acting for the Member, when the Member or staff person requests the record on behalf of and at the written request of the individual.

2. Disclosure may be made to National Archives and Records Administration (NARA) and the General Services Administration (GSA) in records management inspections conducted under authority of Title, Chapter 29, of the United States Code (44 U.S.C.).

3. VA may disclose information in this system of records to the Department of Justice (DOJ), either on VA's initiative or in response to DOJ's request for the information, after either VA or DOJ determines that such information is relevant to DOJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that release of the records to DOJ is a use of the information contained in the records that is compatible with the purpose for which VA collected the records. VA, on its own initiative, may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

4. Disclosure of relevant information may be made to individuals, organizations, private or public agencies, or other entities or individuals with whom VA has a contract or agreement or where there is a subcontract to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor or subcontractor to perform the services of the contract or agreement.

5. VA may disclose, on its own initiative, any information in this system, except the names and home addresses of veterans and their dependents, that is relevant to a suspected or reasonably imminent violation of law, whether civil, criminal or regulatory in nature and whether arising by general or program statute or by regulation, rule or order issued pursuant thereto, to a Federal, State, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule or order. VA may also disclose, on its own initiative, the names and addresses of veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, or order issued pursuant thereto.

6. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

7. VA may, on its own initiative, disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise, there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the potentially compromised information; and (3) the disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

8. Disclosure may be made to those officers and employees of the agency that maintains the record and who have a need for the record in the performance of their duties.

9. To disclose the information listed in 5 U.S.C. 7114(b)(4) to officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions.

10. To disclose information to officials of the Merit Systems Protection Board (MSPB), or the Office of the Special Counsel, when requested in connection with appeals, special studies of the civil service and other merit systems, review of rules and regulations, investigation of alleged or possible prohibited personnel practices, and such other functions, promulgated in 5 U.S.C. 1205 and 1206, or as may be authorized by law.

11. To disclose information from this system to the Equal Employment Opportunity Commission (EEOC) when requested in connection with investigations of alleged or possible discriminatory practices, examination of Federal affirmative employment programs, or other functions of the Commission as authorized by law or regulation.

12. To disclose to the Federal Labor Relations Authority (FLRA), including its General Counsel, information related to the establishment of jurisdiction, the investigation and resolution of allegations of unfair labor practices, or information in connection with the resolution of exceptions to arbitration awards when a question of material fact is raised; to disclose information in matters properly before the Federal Services Impasses Panel, and to investigate representation petitions and conduct or supervise representation elections.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored on electronic media in a VA OI&T approved location.

RETRIEVABILITY:

Records are retrieved by name, social security number, or other assigned identifiers of the individuals on whom they are maintained.

SAFEGUARDS:

1. All entrance doors to the HRC require an electronic pass card to gain entry. Hours of entry to the facility are controlled based on position held and special needs. Visitors to the HRC are required to sign in at a specified location and are either escorted the entire time they are in the building or they are issued a temporary visitors badge. At the end of the visit, visitors are required to turn in their badge. The building is equipped with an intrusion alarm system which is activated when any of the doors are forced open or held ajar for a specified length of time. During business hours, the security system is monitored by the VA police and HRC staff. After business hours, the security system is monitored by the VA telephone operator(s) and VA police. The VA police conduct visual security

checks of the outside perimeter of the building.

2. Access to the building is generally restricted to HRC staff and VA police, specified custodial personnel, engineering personnel, and canteen service personnel.

3. Access to computer rooms is restricted to authorized VA OI–T personnel and requires entry of a personal identification number (PIN) with the pass card swipe. PINs must be changed periodically. All other persons gaining access to computer rooms are escorted. Information stored in the computer may be accessed by authorized VA employees at remote locations including the Health Eligibility Center in Atlanta, GA; Health Administration Center in Denver, CO; Consolidated Patient Accounting Center in Ashville, NC; and VA health care facilities.

4. All new HRC employees receive initial information security and privacy policy training and sign a *Statement of Commitment and Understanding*: refresher training is provided to all employees on an annual basis. The HRC Information Security Officer performs an annual information security audit and periodic reviews to ensure security of the system.

5. For contingency purposes, database backups on magnetic media are stored off-site at an approved VA OI&T location.

RETENTION AND DISPOSAL:

Electronic Service Records are purged when they are no longer needed for current operation. Records are maintained and disposed of in accordance with records disposition authority approved by the Archivist of the United States, National Archives and Records Administration, and published in the VHA Records Control Schedule 10–1.

SYSTEM MANAGER(S) AND ADDRESS:

Official responsible for policies and procedures: Chief Business Officer (16), VA Central Office, 1722 I Street, NW., Washington, DC 20420. Official maintaining the system: Director, Health Revenue Center, 3401, SW., 21st Street, Bldg. 9, Topeka, Kansas 66604.

NOTIFICATION PROCEDURE:

Individuals who wish to determine whether this system of records contains information about them should contact the VA facility location at which they are or were employed or made or have contact. Inquiries should include the person's full name, social security number, dates of employment, date(s) of contact, and return address.

RECORD ACCESS PROCEDURE:

Individuals seeking information regarding access to and contesting of records in this system may write, call, or visit the VA facility location where they are or were employed or made contact.

CONTESTING RECORD PROCEDURES:

(See Record Access Procedures above.)

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by veterans, veteran's family members, members of the general public, VA customers, and VA employees.

[FR Doc. E8–28199 Filed 11–25–08; 8:45 am]
BILLING CODE 8320–01–P

Federal Register

Wednesday,
November 26, 2008

Part II

Department of Homeland Security

Transportation Security Administration

49 CFR Parts 1520 and 1580
Rail Transportation Security; Final Rule

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

49 CFR Parts 1520 and 1580

[Docket No. TSA–2006–26514; Amendment Nos. 1520–5, 1580–(New)]

RIN 1652–AA51

Rail Transportation Security

AGENCY: Transportation Security Administration, DHS.

ACTION: Final rule.

SUMMARY: The Transportation Security Administration (TSA) issues this final rule to enhance the security of our Nation's rail transportation system. This rule establishes security requirements for freight railroad carriers; intercity, commuter, and short-haul passenger train service providers; rail transit systems; and rail operations at certain, fixed-site facilities that ship or receive specified hazardous materials by rail. This rule codifies the scope of TSA's existing inspection program and requires regulated parties to allow TSA and Department of Homeland Security (DHS) officials to enter, inspect, and test property, facilities, conveyances, and records relevant to rail security. This rule also requires that regulated parties designate rail security coordinators and report significant security concerns.

This rule further requires that freight rail carriers and certain facilities handling specified hazardous materials be able to report location and shipping information to TSA upon request and implement chain of custody requirements to ensure a positive and secure exchange of specified hazardous materials. TSA also clarifies and amends the sensitive security information (SSI) protections to cover certain information associated with rail transportation.

DATES: This final rule is effective December 26, 2008.

FOR FURTHER INFORMATION CONTACT: *For questions related to freight rail security:* Scott Gorton, Transportation Sector Network Management, Freight Rail Security, TSA–28, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220; telephone (571) 227–1251; facsimile (571) 227–1923; e-mail *freightrailsecurity@dhs.gov.*

For questions related to passenger rail security: Morvarid Zolghadr, Mass Transit and Passenger Rail Security, TSA–28, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220; telephone (571) 227–2957; e-mail *passengerrailcomments@dhs.gov.*

For legal questions: David H. Kasminoff, Office of Chief Counsel, TSA–2, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220; telephone (571) 227–3583; facsimile (571) 227–1378; e-mail *david.kasminoff@dhs.gov.*

For questions related to SSI: Andrew E. Colsky, Office of the Special Counselor, SSI Office, TSA–31, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220; telephone (571) 227–3513; facsimile (571) 227–2945; e-mail *SSI@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Availability of Rulemaking Document

You can get an electronic copy of this rulemaking document by—

(1) Searching the Department of Transportation's electronic Docket Management System (DMS) Web page at *http://dms.dot.gov/search;*

(2) Visiting the Department of Transportation's Docket Operations facility located at 1200 New Jersey Avenue, SE., West Building, Ground Floor, Room W12–140, Washington, DC 20590. The facility is open from 9 a.m. to 5 p.m., Monday through Friday, excluding legal holidays. The Docket Operations telephone number is (202) 366–9826;

(3) Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/fr/index.html;* or

(4) Visiting TSA's Security Regulations Web page at *http://www.tsa.gov* and accessing the link for "Research Center" at the top of the page.

In addition, copies are available by writing or calling one of the individuals in the **FOR FURTHER INFORMATION CONTACT** section. When making such a request, please identify the docket number of this rulemaking.

Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires TSA to comply with small entity requests for information and advice about compliance with statutes and regulations within TSA's jurisdiction. Any small entity that has a question regarding this document may contact one of the persons listed in the **FOR FURTHER INFORMATION CONTACT** section. Persons can obtain further information regarding SBREFA on the Small Business Administration's (SBA) Web page at *http://www.sba.gov/advo/laws/law_lib.html.*

Abbreviations and Terms Used in This Document

AAR—Association of American Railroads
AEI—Automatic Equipment Identification
ASLRRA—American Short Line & Regional Railroad Association
Amtrak—National Railroad Passenger Corporation
CFATS—Chemical Facility Anti-Terrorism Standards
CVI—Chemical-terrorism Vulnerability Information
DOD—Department of Defense
DOE—Department of Energy
DOT—Department of Transportation
EPA—Environmental Protection Agency
FIPS201—Federal Information Processing Standards Publication 201
FRA—Federal Railroad Administration
FRFA—Final Regulatory Flexibility Analysis
FSO—Facility Security Officer
FTA—Federal Transit Administration
FTE—Full Time Equivalent
GPS—Global Positioning System
HMR—Hazardous Materials Regulations
HSPD—Homeland Security Presidential Directive
HTUA—High Threat Urban Area
IED—Improvised Explosive Device
MOU—Memorandum of Understanding
MTSA—Maritime Transportation Security Act
NAICS—North American Industry Classification System
NRC—Nuclear Regulatory Commission
OA—State Safety Oversight Agency
PCII—Protected Critical Infrastructure Information
PHMSA—Pipeline and Hazardous Materials Safety Administration
PIH—Poisonous by Inhalation or Poison Inhalation Hazard (materials) (PIH is another term for TIH)
RSC—Rail Security Coordinator
SBA—Small Business Administration
SD—Security Directive
SGI—Safeguards Information Program
SSI—Sensitive Security Information
STB—Surface Transportation Board
TIH—Toxic Inhalation Hazard (TIH is another term for PIH)

Outline of Final Rule Preamble

I. Background and Summary of This Final Rule

A. Summary of This Rule

TSA's final rule applies several general requirements to all freight and passenger railroad carriers, certain facilities that ship or receive specified hazardous materials by rail, and rail transit systems:

- *Rail Security Coordinator.* Covered entities must designate a rail security coordinator (RSC) and at least one alternate RSC to be available to TSA on a 24-hour, seven days per week basis to serve as the primary contact for receipt of intelligence information and other security-related activities.
- *Reporting.* Covered entities must immediately report incidents, potential threats, and significant security concerns to TSA.
- *TSA Inspection.* Covered entities must allow TSA inspectors, and DHS officials working with TSA, to enter and conduct inspections, copy records, perform tests, and conduct other activities necessary to carry out TSA's statutory responsibilities.
- *Sensitive Security Information (SSI).* This rule clarifies and extends the protection afforded to SSI in rail transportation and further identifies covered persons to include railroad carriers; certain facilities that ship or receive specified hazardous materials by rail; transit systems; and State, local, and tribal employees, contractors, and grantees.

The rule also applies additional requirements to freight railroad carriers and certain facilities that ship or receive specified hazardous materials by rail:

- *Location and Shipping Information.* Covered entities must provide to TSA, upon request, the location and shipping information of rail cars within their physical custody or control that contain a specified category and quantity of hazardous material. Class I freight railroad carriers must provide the information to TSA no later than five minutes (for one car) or 30 minutes (for two or more cars) after receiving the request. Other railroad operators and rail hazardous materials shipper and receiver facilities must provide the information for one or more cars within 30 minutes after receiving the request.
- *Chain of Custody and Control.* Covered entities must provide for a secure chain of custody and control of rail cars containing a specified quantity and type of hazardous material.

As TSA specified in its Notice of Proposed Rulemaking (NPRM) for this rulemaking (see 71 FR 76852, December 21, 2006), chain of custody and location requirements apply to specified quantities of three categories of hazardous materials based on the Department of Transportation's (DOT's) Hazardous Materials Regulations (HMR) (49 CFR parts 171–180):

(1) A rail car containing more than 2,268 kg (5,000 lbs) of a Division 1.1, 1.2, or 1.3 (explosive) material, as defined in 49 CFR 173.50;

(2) A tank car containing a material poisonous by inhalation (PIH) as defined in 49 CFR 171.8, including anhydrous ammonia, Division 2.3 gases poisonous by inhalation as set forth in 49 CFR 173.115(c), and Division 6.1 liquids meeting the defining criteria in 49 CFR 173.132(a)(1)(iii) and assigned to hazard zone A or hazard zone B in accordance with 49 CFR 173.133(a), excluding residue quantities of these materials; and

(3) A rail car containing a highway route-controlled quantity of a Class 7 (radioactive) material, as defined in 49 CFR 173.403.

Appendix B to part 1580 of Title 49 of the Code of Federal Regulations, reproduced as Table 1 below, presents a brief summary of the security measures required for the different categories of rail transportation entities that this final rule governs.

TABLE 1—TSA RAIL SECURITY FINAL RULE SUMMARY

Security measure and rule section	Freight railroad carriers NOT transporting specified hazardous materials	Freight railroad carriers transporting specified hazardous materials (§ 1580.100(b))	Rail operations at certain facilities that ship (*i.e.*, offer, prepare, or load for transportation) hazardous materials	Rail operations at certain facilities that receive or unload hazardous materials within an HTUA	Passenger railroad carriers and rail transit systems	Certain other rail operations (private, business/office, circus, tourist, historic, excursion)
Allow TSA to inspect (§ 1580.5)	X	X	X	X	X	X
Appoint rail security coordinator (§ 1580.101 freight; § 1580.201 passenger)	X	X	X	X	X	[1]
Report significant security concerns (§ 1580.105 freight; § 1580.203 passenger)	X	X	X	X	X	X
Provide location and shipping information for rail cars containing specified hazardous materials if requested (§ 1580.103)		X	X	X		
Chain of custody and control requirements for transport of specified hazardous materials that are or may be in an HTUA (§ 1580.107)		X	X	X		

[1] Only if notified in writing that a security threat exists.

B. Purpose of the Rule

In developing this rule, TSA identified and addressed threats to rail transportation. With respect to passenger rail, TSA recognizes that passenger railroad carriers, commuter operations, and subway systems are high consequence targets in terms of potential loss of life and economic disruption. They carry large numbers of people in a confined environment, offer the opportunity for specific populations to be targeted at particular destinations, and often have stations located below or adjacent to high profile government buildings, major office complexes, and iconic structures. Terrorist bombings since 1995 highlight the need for improved government access to, and monitoring of, transportation of passengers by rail. Terrorists have attacked the Tokyo subway system (1995); areas in and around the Moscow subway system (2000, 2001, and 2004); Madrid commuter trains (2004); the London Underground system (2005);

and the train system in Mumbai (formerly known as Bombay), India (2006).

TSA is also considering the threats that face freight rail transportation. Due to the open infrastructure of the rail transportation system, freight trains can be particularly vulnerable to attack. Currently, rail carriers and shippers lack positive chain of custody and control procedures for rail cars as they move through the transportation system (*e.g.*, as entities load the rail cars at originating facilities, as carriers transport the cars over the tracks, and as entities unload the cars at receiving facilities). This can present a significant vulnerability. Whenever entities stop rail cars in transit and interchange them without appropriate security measures, it creates security vulnerabilities. Freight trains transporting hazardous materials are of even more concern, because an attack on those trains (*e.g.*, through the placement of improvised explosive devices (IEDs) [1] or other forms of sabotage) could result in the release of hazardous materials.

TSA's NPRM proposed a number of measures to improve the security of freight rail and passenger rail, including rail transit. It also proposed security requirements for shippers and receivers of certain hazardous materials. This final rule adopts most of the provisions of the NPRM. TSA presented its rationale for each element of the NPRM in Section III of the preamble to the NPRM. 71 FR at 76861–76866. TSA describes the differences between the NPRM and this final rule in Section I.C of this preamble. TSA presents a summary of the public comments and responses in Section V of this preamble.

TSA's final rule adopts a risk-based approach by focusing on shipments of certain hazardous materials and establishing chain of custody and control procedures and other measures for rail cars that pose the greatest security vulnerabilities. While an IED attached to any rail car (such as a car transporting coal or household appliances) would obviously cause major damage to that car and its contents upon detonation, the more likely scenario is that terrorists would target a rail car containing highly toxic, explosive, or radioactive hazardous materials, which would cause the greatest loss of life and property and damage to the national economy.

[1] An IED is a device fabricated in an improvised manner that incorporates explosives or destructive, lethal, noxious, pyrotechnic, or incendiary chemicals into its design. It generally includes a power supply, a switch or timer, and a detonator or initiator.

To determine which hazardous materials to identify in the proposed regulation, TSA considered the hazardous materials for which security plans are required as specified in 49 CFR Part 172, Subpart I. (These requirements were included in a final rule adopted by the Pipeline and Hazardous Materials Safety Administration (PHMSA) under Docket Number HM–232.[2]) From the list of materials in 49 CFR 172.800(b), TSA identified three categories [3] of hazardous materials that pose the greatest transportation security risk—materials that are poisonous by inhalation (PIH),[4] explosive, and radioactive. In the NPRM, TSA proposed to apply specific requirements to certain carriers and facilities that handle these materials. This final rule focuses on the same materials.

Each of these three categories of hazardous materials presents serious security risks. The release of PIH materials in a densely populated urban area would have catastrophic consequences. Such a release would endanger significant numbers of people. The consequences of an accidental PIH release in a rural area were seen in the January 6, 2005 rail accident in Graniteville, South Carolina. A Norfolk Southern Railway Company (NS) freight train carrying chlorine was improperly diverted from the main track onto a rail spur. The train struck a standing train on the rail spur, derailing three locomotives and sixteen rail cars and rupturing a single tank car carrying chlorine. Even in this sparsely populated area, the collision resulted in fatal injuries to eight residents and one railroad employee, injuries to 630 people, and the evacuation of 5,400 local residents. The property damage, including damages to the rolling stock and track, exceeded $6.9 million. While the accident was not the result of a terrorist attack, it nonetheless illustrates the danger of transporting PIH materials and the damage that can result from a release.

Although the number of rail shipments carrying explosives and radioactive materials is relatively low, a release of these materials could cause serious and devastating harm. If terrorists detonated certain explosives [5] at critical points in the transportation cycle, they could cause significant loss of life and damage to infrastructure, and harm the national economy through the accompanying disruption to commerce. Likewise, if terrorists perpetrated an attack against a rail car transporting certain radioactive materials,[6] they could endanger a significant number of people as well as disrupt the supply chain as a result of contamination.

This final rule addresses the above-identified threats to rail transportation in several ways. This rule codifies the authority for TSA inspections, requires the designation of a rail security coordinator (RSC), and requires the reporting of significant security concerns by most entities to which the rule is applicable. These requirements will improve TSA's ability to inspect rail operations and communicate with railroads and rail facilities. Through these mechanisms, TSA and DHS will obtain better information and monitoring capabilities concerning potential transportation security incidents involving rail transportation and travel. Also, this final rule's requirements related to hazardous materials, such as additional monitoring and protection of certain rail cars and increased availability of location and shipping information for certain rail cars, will decrease the vulnerabilities of these hazardous materials shipments to attack.

TSA has legal authority to impose these requirements. Under the Aviation and Transportation Security Act (ATSA) [7] and delegated authority from the Secretary of Homeland Security, TSA has broad responsibility and authority for "security in all modes of transportation * * * including security responsibilities * * * over modes of transportation that are exercised by the Department of Transportation." [8] TSA

[2] *See* Section II.B of the preamble to the NPRM for a detailed discussion of the HM–232 rule. 71 FR at 76856.

[3] TSA also identified specified quantities of those hazardous materials. *See* Section I.B of this preamble or 49 CFR 1580.100(b) for a list of the quantities.

[4] PIH materials are gases or liquids that are known or presumed on the basis of tests to be so toxic to humans as to pose a hazard to health during transportation. *See* 69 FR 50988. *See also* 49 CFR 171.8, 173.115, and 173.132.

[5] Explosives in Class 1 are divided into six divisions. However, as discussed in Section III. A of this preamble, TSA proposes to apply subpart B to part 1580 only to rail cars containing more than 2,268 kg (5,000 lbs) of a Division 1.1, 1.2, or 1.3 explosive material.

[6] *See* 49 CFR 173, subpart H.

[7] Pub. L. 107–71, 115 Stat. 597 (November 19, 2001).

[8] *See* 49 U.S.C. 114(d). The TSA Assistant Secretary's current authorities under ATSA have been delegated to him by the Secretary of Homeland Security. Section 403(2) of the Homeland Security Act (HSA) of 2002, Pub. L. 107–296, 116 Stat. 2315 (2002), transferred all functions of TSA, including those of the Secretary of Transportation and the Under Secretary of Transportation for Security related to TSA, to the Secretary of Homeland Security. Pursuant to DHS Delegation Number 7060.2, the Secretary delegated to the Assistant Secretary (then referred to as the Administrator of TSA), subject to the Secretary's guidance and control, the authority vested in the Secretary with

has authorities in addition to those transferred from DOT.[9] TSA is empowered to develop policies, strategies, plans, and regulations for dealing with threats to all modes of transportation. As part of its security mission, TSA is responsible for assessing intelligence and other information to identify individuals who pose a threat to transportation security and to coordinate countermeasures with other Federal agencies to address such threats.[10] TSA enforces security-related regulations and requirements,[11] ensures the adequacy of security measures for the transportation of cargo,[12] oversees the implementation and ensures the adequacy of security measures at transportation facilities,[13] and carries out other appropriate duties relating to transportation security.[14] TSA has broad regulatory authority to achieve ATSA's objectives, and may issue, rescind, and revise such regulations as are necessary to carry out TSA functions.[15] TSA is also charged with serving as the primary liaison for transportation security to the intelligence and law enforcement communities.[16]

TSA's authority with respect to transportation security is comprehensive and supported with specific powers related to the development and enforcement of regulations, security directives (SDs), security plans, and other requirements. Accordingly, under this authority, TSA may assess a security risk for any mode of transportation, develop security measures for dealing with that risk, and enforce compliance with those measures.

The Federal hazardous materials transportation law (Federal hazmat law, 49 U.S.C. 5101 *et seq.*), authorizes the Secretary of DOT to "prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce." The Secretary of DOT has delegated this authority to PHMSA. Under the mandate in § 5103(b), PHMSA promulgated the HMR (49 CFR parts 171–180), which govern safety aspects, including security, of the transportation of hazardous material the Secretary of DOT considers appropriate. In accordance with its security authority, in March 2003, PHMSA adopted new transportation security requirements for offerors and transporters of certain classes and quantities of hazardous materials and new security training requirements for hazardous materials employees. The security regulations require offerors and carriers to develop and implement security plans and to train their employees to recognize and respond to possible security threats.

On August 9, 2006, DOT/PHMSA and DHS/TSA signed an annex to the September 28, 2004, "Memorandum of Understanding Between the Department of Homeland Security and the Department of Transportation on Roles and Responsibilities" (DHS–DOT MOU).[17] The purpose of the annex is to delineate clear lines of authority and responsibility, promote communication and efficiency, and avoid duplication of effort through cooperation and collaboration in the area of hazardous materials transportation security based on existing legal authorities and core competencies. The annex acknowledges that DHS has lead authority and primary responsibility for security activities in all modes of transportation and notes that TSA is the lead Federal entity for transportation security.

Similarly, on September 28, 2006, DOT's Federal Railroad Administration (FRA) and TSA signed an annex to the DHS–DOT MOU to address each agency's roles and responsibilities for rail transportation security. The FRA–TSA annex recognizes that TSA is the lead Federal entity for transportation security in general and rail security in particular. Concerning safety, the FRA–TSA annex recognizes that FRA has authority over every area of railroad safety (including security) and that FRA enforces PHMSA's HMR. The FRA–TSA annex includes procedures for coordinating: (1) Planning, inspection, training, and enforcement activities; (2) criticality and vulnerability assessments and security reviews; (3) communication with affected stakeholders; and (4) the use of personnel and resources. Copies of the two annexes are available for review in the public docket for this rulemaking. Consistent with the principles outlined in the PHMSA–TSA and FRA–TSA annexes, PHMSA and FRA collaborated with TSA to develop this final rule.

On April 16, 2008, PHMSA published an interim final rule in the **Federal Register** to revise the current requirements in the HMR applicable to the safe and secure transportation of hazardous materials transported in commerce by rail. 73 FR 20752. Specifically, PHMSA adopted the following:

- Rail carriers transporting certain explosives, PIH material, and radioactive materials must compile information and data on the commodities transported, including the transportation routes over which they transport these commodities.
- Rail carriers transporting the specified hazardous materials must use the data they compile on commodities they transport to analyze the safety and security risks for the transportation routes used and all practicable alternative routes to the one used. Rail carriers must utilize these analyses to make transportation decisions that result in the transportation of these materials over the safest and most secure commercially practicable routes posing the least overall safety and security risks.
- Rail carriers must specifically address the security risks associated with shipments delayed in transit or temporarily stored in transit as part of their security plans.
- Rail carriers transporting covered hazardous materials must notify consignees if there is a significant unplanned delay affecting the delivery of the hazardous material.
- Rail carriers must work with shippers and consignees to minimize the time a rail car containing one of the specified hazardous materials is placed on track awaiting pick-up or delivery or transfer from one carrier to another.
- Rail carriers must conduct visual security inspections at ground level of rail cars containing hazardous materials to inspect for signs of tampering or the introduction of an IED.

C. Changes From the NPRM

This section summarizes the regulatory text changes that TSA has made to the NPRM in this final rule. In addition to the summary contained in this section, in many cases TSA has provided a more extensive discussion of the change, and the reason for the change, in the response to comments below. *See* Section IV "Public Comments on the NPRM and TSA Responses on Regulatory Provisions." Finally, to the extent TSA has made technical corrections or corrected typographical errors, we do not specifically discuss them.

respect to TSA, including that in section 403(2) of the HSA.

[9] 49 U.S.C. 114(f).

[10] 49 U.S.C. 114(f)(1)–(5); (h)(1)–(4).

[11] 49 U.S.C. 114(f)(7).

[12] 49 U.S.C. 114(f)(10).

[13] 49 U.S.C. 114(f)(11).

[14] 49 U.S.C. 114(f)(15).

[15] 49 U.S.C. 114(l)(1).

[16] 49 U.S.C. 114(f)(1) and (5).

[17] The annex is entitled "Annex to the Memorandum of Understanding Between the Department of Homeland Security and the Department of Transportation Concerning Transportation Security Administration and Pipeline and Hazardous Materials Safety Administration Cooperation on Pipeline and Hazardous Materials Transportation Security."

1. Sensitive Security Information

TSA has revised paragraph (b)(15) of 49 CFR 1520.5 to add rail to the categories of research and development information related to transportation security activities that is protected as SSI. TSA has revised paragraph (b) of 49 CFR 1520.11 to add State, local, and tribal government employees, contractors, and grantees to the list of persons with a potential need to know SSI. TSA made this change to be consistent with DHS policy on information sharing and allow States, localities and tribal governments, and their contractors and grantees, to have access to SSI if the information is needed for the performance of official duties, such as the prevention or mitigation of security incidents, contracts, or grants.

2. Rail Security-Sensitive Materials

This final rule defines the term "rail security-sensitive materials" to mean one or more of the categories and quantities of the materials set forth in the new § 1580.100(b), the transportation of which requires the operators to carry out the security measures in this rule. TSA has introduced this term to comply with §§ 1501(13) and 1551 of the "Implementing the Recommendations of the 9/11 Commission Act of 2007" (9/11 Commission Act).[18] Section 1501(13) defines "security-sensitive material" to mean a material or group of materials, in a particular quantity and form that the Secretary of Homeland Security, in consultation with the Secretary of Transportation, determines through rulemaking with opportunity for public comment, poses a significant risk to national security while being transported in commerce. Section 1551 directs the Secretary of Transportation, in consultation with the Secretary of Homeland Security, to publish a final rule based on the PHMSA NPRM published on December 21, 2006.[19] That section directs the Secretary of Transportation to ensure that the PHMSA final rule requires railroad carriers of "security-sensitive materials" to "select the safest and most secure route to be used in transporting" those materials and to select such route based on the railroad carrier's analysis of the safety and security risks on primary and alternate transportation routes over which the carrier has authority to operate.

Through this Rail Transportation Security rulemaking, TSA has provided the public with an opportunity to comment on its identification of security-sensitive materials in the rail sector. *See* Section III of this preamble. TSA has added the term "rail security-sensitive material" to 49 CFR 1580.3 to denote that the Secretary of Homeland Security has determined that the categories and quantities of hazardous materials set forth in 49 CFR 1580.100(b) pose a significant risk to national security while being transported in commerce by rail due to the potential use of one or more of these materials in an act of terrorism. TSA has therefore concluded that these categories and quantities of hazardous materials constitute "security-sensitive material" for purposes of triggering the railroad routing requirements in § 1551 of the 9/11 Commission Act.

3. Inspection Authority

In response to commenters who expressed concerns about verifying the identity and credentials of TSA inspectors, TSA has added a new paragraph (d) to 49 CFR 1580.5. It provides that TSA inspectors, and DHS officials working with TSA, will present their credentials for examination, at the request of the entity being inspected, with the understanding that the credentials may not be reproduced. Any regulated party wishing to authenticate the identity of an individual purporting to represent TSA may contact the Freedom Center at 703–563–3240 or 1–877–456–8722.[20]

4. Reporting Significant Security Concerns

In the NPRM, TSA stated that reports of potential threats and significant security concerns to DHS would be required "in a manner prescribed by TSA." *See* 49 CFR 1580.105(b) and 1580.203(b). In this final rule, TSA has revised paragraph (b) of each section to indicate that the regulated parties must make the required reports by telephoning the Freedom Center at 703–563–3240 or 1–877–456–8722.

5. Chain of Custody and Control Requirements

Some commenters asked TSA to explain the concept of "attending a rail car" in the context of complying with the requirement in paragraphs (c) and (d) of 49 CFR 1580.107 "to ensure that the rail car is not left unattended at any time during the physical transfer of custody." One commenter asked if "maintain[ing] positive control of the rail car" for purposes of 49 CFR 1580.107(f)(1) was merely synonymous with a prohibition against unattended pick up and delivery. In response, TSA has added a new paragraph (k) to 49 CFR 1580.107 to explain the terms "attended" and "maintains positive control." As used in § 1580.107, a rail car is "attended" if an employee or authorized representative of the freight railroad carrier: (1) Is physically located on site in reasonable proximity to the rail car; (2) is capable of promptly responding to unauthorized access or activity at or near the rail car, including immediately contacting law enforcement or other authorities, and (3) immediately responds to any unauthorized access or activity at or near the rail car either personally or by contacting law enforcement or other authorities. Electronic monitoring is permitted so long as the responsible party is located on site and can accomplish an equivalent level of surveillance, response, and notification. Attending a rail car is a component part of maintaining positive control. As used in § 1580.107, when the rail hazardous materials receiver and freight railroad carrier communicate and cooperate with each other to ensure the security of the rail car during the physical transfer of custody, they are "maintaining positive control" of the car.

TSA has also included an explanation in paragraph (k) of the term "document the transfer." As used in § 1580.107, a transfer of physical custody of a rail car is properly documented, either in writing or electronically, when the documentation contains, at a minimum: (1) The car's initial (also known as the reporting mark) and number; (2) the names or employee numbers of the individuals who attended the transfer; (3) the location where the transfer took place; and (4) the date and time the transfer was completed.

[18] Pub. L. 110–53; 121 Stat. 266; August 3, 2007.

[19] The PHMSA NPRM proposed to require railroad carriers to compile annual data on specified shipments of hazardous materials, use the data to analyze safety and security risks along rail transportation routes where those materials are transported, assess alternative routing options, and make routing decisions based on those assessments. PHMSA also proposed clarifications of the current security plan requirements to address en route storage, delays in transit, delivery notification, and additional security inspection requirements for hazardous materials shipments. *See* 71 FR 76834 (December 21, 2006).

[20] The Freedom Center is a facility dedicated solely to transportation-security operations. Until June 21, 2007, the Freedom Center was known as the Transportation Security Operations Center, or TSOC. With state-of-the-art equipment and systems, the Freedom Center integrates all available capabilities to gather intelligence and conduct analysis related to transportation security. The Freedom Center correlates and fuses real-time intelligence and operational information across all modes of transportation, and coordinates with all homeland security agencies and with appropriate law enforcement agencies and stakeholders to gather additional information or to assist in the prevention of, and response to, transportation security-related incidents.

6. Location and Shipping Information for Certain Rail Cars

In the NPRM, TSA proposed a one-hour timeframe for freight railroad carriers, rail hazardous materials shippers, and rail hazardous materials receivers to report the location and shipping information to TSA or other DHS officials for a specified rail car(s). However, in recognition of the fact that such information is critical to addressing specific security threats or incidents, TSA sought comment on the feasibility of a shorter timeframe, such as five minutes or thirty minutes. Based upon comments received and TSA's understanding of the technological capabilities of the regulated parties, we have changed the reporting timeframe in 49 CFR 1580.103 by revising paragraph (d) and adding a new paragraph (e). Paragraph (d) requires all Class I freight railroad carriers subject to § 1580.103 to provide location and shipping information to TSA within five minutes if the request concerns only one car and within thirty minutes if the request concerns two or more rail cars. Paragraph (e) requires all other entities subject to § 1580.103 to provide the information to TSA within thirty minutes, regardless of how many rail cars the request concerns. TSA has also added a new paragraph (h) to § 1580.103 to indicate that TSA has adopted the same definition of "Class I carrier" as used by the Surface Transportation Board (STB). *See* 49 CFR part 1201, General Instructions 1–1.

The NPRM would have required each regulated party to develop procedures for determining location and shipping information, if requested by TSA, for covered rail cars under their physical custody and control, but the NPRM did not propose to require the regulated party to provide TSA with a contact telephone number to use when requesting this information. TSA has added a new paragraph (g) to § 1580.103, requiring each regulated party to provide TSA with a telephone number that is monitored by a live person on a 24-hours a day, seven days a week basis. This will assure a prompt response on those occasions when TSA needs information.

7. Harmonization of Federal Regulation of Nuclear Facilities

TSA recognizes that its statutory authorities and obligations may extend to facilities involved in the production and utilization of nuclear materials or weapons already subject to safety, security, and inspection requirements imposed by the Nuclear Regulatory Commission (NRC) and the Department of Energy (DOE). To ensure that regulated entities are not subject to duplicative or conflicting regulatory or inspection requirements, TSA has included section 1580.111 of the regulations, which states that TSA will coordinate activities under this subpart with the NRC and DOE with respect to regulation of rail hazardous materials shippers and receivers that are also licensed or regulated by the NRC or DOE under the Atomic Energy Act of 1954, as amended, to maintain consistency with the requirements imposed by the NRC and DOE. TSA will enter into appropriate agency-to-agency agreements with the NRC and DOE to carry out section 1580.111.

II. Overlap Between TSA's Rule and Other DHS Regulations

This Rail Transportation Security final rule affects entities that also may be subject to the requirements of other DHS rules—e.g., the DHS Chemical Facility Anti-Terrorism Standards (CFATS) regulation[21] and the Coast Guard's Maritime Transportation Security Act (MTSA)[22] regulations. This section describes the interrelationships of this rule with the CFATS and MTSA regulations.

Pursuant to § 550 of the Department of Homeland Security Appropriations Act of 2007 (2007 DHS Appropriations Act) (Pub. L. 109-295), which provides DHS with the authority to regulate the security of certain high-risk chemical facilities in the United States, DHS issued an interim final rule on Chemical Facility Anti-Terrorism Standards. *See* 72 FR 17688 (April 9, 2007). The CFATS rule establishes risk-based performance standards for the security of our Nation's high-risk chemical facilities. It requires facilities that possess specified chemicals at or above specified amounts to provide information to DHS. From this information, DHS will initially determine which facilities are high-risk and preliminarily place high-risk chemical facilities[23] in risk-based tiers. Such facilities must then prepare Security Vulnerability Assessments, which identify facility security vulnerabilities, and develop and implement Site Security Plans, which include measures that satisfy the DHS-identified risk-based performance standards. The CFATS rule contains associated provisions addressing inspections and audits, recordkeeping, and protection of information that constitutes Chemical-terrorism Vulnerability Information (CVI).

In the CFATS interim final rule (IFR), DHS recognized that with respect to chemical security, certain aspects of § 550 and TSA's authorities are concurrent and overlapping. In the preamble to the CFATS IFR, DHS stated that it does not presently plan to screen railroad facilities for inclusion in the § 550 program (although DHS reserves the right to reevaluate their possible coverage at a future date). *See* 72 FR 17698–17699. Nevertheless, it is possible that some chemical facilities will be subject to both CFATS and this TSA final rule. Specifically, it is possible that some facilities, which are rail hazardous materials shippers or receivers as defined in this final rule, may be subject to the CFATS screening requirements and may become covered facilities (i.e., high-risk facilities) under the CFATS rule. In such situations, the facilities will have to comply with the requirements of both regulatory programs (including requirements to provide information under both programs). TSA and DHS, however, will work closely together to ensure that the efforts directed at these facilities are coordinated and consistent.

MTSA requires the Secretary of Homeland Security to issue regulations to strengthen the security of American ports and waterways and the ships that use them. This authority, in addition to other grants of authority, serves as the basis for a comprehensive maritime security regime. Under these authorities, the Coast Guard issued regulations to ensure the security of vessels, facilities, and other elements of the maritime transportation system. Part 105 of Title 33 of the Code of Federal Regulations imposed requirements on a range of maritime facilities, including hazardous material and petroleum facilities and those fleeting facilities that receive barges carrying, in bulk, cargoes regulated by Subchapters D and O of Chapter I, Title 46, Code of Federal Regulations or Certain Dangerous Cargoes.

Pursuant to these maritime security regulations, the Coast Guard requires these facilities to perform security assessments and then, based on these assessments, develop security plans, and implement security measures and procedures in order to reduce the risk of, and to mitigate the results of, any security incident that threatens the facility, its personnel, the public, the environment, and the economy.

[21] 6 CFR Part 27.

[22] Pub. L. 107–295; Nov. 25, 2002, as codified in 46 U.S.C. chapter 701.

[23] Pursuant to 6 CFR 27.105, a "covered facility" or "covered chemical facility" is a "chemical facility determined by the Assistant Secretary to present high levels of security risk, or a facility that the Assistant Secretary has determined is presumptively high risk under § 27.200."

A few commenters requested that TSA not apply certain provisions of this final rule to facilities that comply with 33 CFR part 105 of the MTSA regulations. Specifically, commenters requested that TSA exempt these facilities from the Rail Transportation Security rule's requirements for appointing RSCs, for reporting of significant security concerns, and for chain of custody and controls. TSA addresses those specific comments in Section V of this preamble. Generally, however, TSA has decided not to exempt MTSA-regulated facilities from these requirements.

Regulating rail security at maritime facilities is a complex issue, and TSA recognizes that certain aspects of the Coast Guard's maritime security regulations and TSA's authorities are concurrent and overlapping. In some respects, compliance with the Coast Guard regulations and with these regulations can be achieved through the same operational practices. For example, the Facility Security Officer (FSO) can serve as the RSC. Also, the rail secure area required by this rule can be the same area as the restricted area designated in the facility security assessment required by 33 CFR 105.305, so long as the regulated party employs physical security measures to ensure that no unauthorized person gains access to the area. However, to the extent that the two sets of requirements are different to account for mode-specific differences in the security issues being addressed by the Coast Guard and TSA, the facility would have to satisfy both sets of regulatory requirements. TSA and the Coast Guard will work closely together to make sure that the requirements of the two programs are complementary, not inconsistent, with each other.

III. Rail Security-Sensitive Material

As discussed in section I.C.3 of this preamble, § 1501(13) of the 9/11 Commission Act defines the term "security-sensitive material" to mean "a material, or a group or class of material, in a particular amount and form that the Secretary [of Homeland Security], in consultation with the Secretary of Transportation, determines, through a rulemaking with the opportunity for public comment, poses a significant risk to national security while being transported in commerce due to the potential use of the material in an act of terrorism." In making such a determination, the Secretary of Homeland Security is directed to consider at least the following: (1) Class 7 radioactive materials; (2) Division 1.1, 1.2, and 1.3 explosives; (3) materials poisonous or toxic by inhalation, including Division 2.3 gases and Division 6.1 materials; and (4) a select agent or toxin regulated by the Centers for Disease Control and Prevention (CDC) under 42 CFR part 73.

As discussed in section IV.B of this preamble, DHS and DOT assessed the security vulnerabilities associated with the transportation of different types and classes of hazardous materials before proposing to apply enhanced security requirements for the categories and quantities of explosive, PIH, and radioactive materials specified in proposed § 1580.100(b). TSA sought comment on whether to apply the requirements in this final rule to fewer or additional hazardous materials or to extend the requirements to include tank cars containing residue. TSA also sought comment on whether there are other hazardous materials that could cause significant loss of life, transportation system disruption, or economic disruption and whether TSA should apply the requirements in this final rule to those other materials.

TSA did not propose to include select agents or toxins regulated by the CDC under 42 CFR part 73, because railroads transport few, if any, shipments of these types of materials. Generally, shipments of infectious substances, including select agents and toxins, must be transported quickly from point of origin to destination to prevent degradation of samples that can occur over time and to ensure swift diagnosis and treatment of infectious diseases. For these reasons, highway (for short distances) and air (for longer distances) are the preferred modes of transportation for these materials.

TSA provided notice and invited public comment in the NPRM on the list of materials that the Secretary of Homeland Security is required to consider under § 1501(13) of the 9/11 Commission Act when defining "security-sensitive material." The hazardous materials set forth in § 1580.100(b) of this final rule constitute the Secretary of Homeland Security's list of "security-sensitive materials" for purposes of rail transportation. *See* § 1551 of the 9/11 Commission Act. Accordingly, the Secretary of Homeland Security, in consultation with the Secretary of Transportation, has satisfied the requirements of § 1551 with respect to the rail mode of transportation and has determined that "rail security-sensitive materials" are: (1) More than 2,268 kg (5,000 lbs) in a single carload of a Division 1.1, 1.2, or 1.3 explosive; (2) a tank car containing a material poisonous by inhalation, as defined in 49 CFR 171.8, including anhydrous ammonia but excluding residue quantities of these materials; and (3) a highway route-controlled quantity of a Class 7 (radioactive) material, as defined in 49 CFR 173.403.

The list of "rail security-sensitive materials" represents the materials that TSA has determined are appropriate at this time for purposes of this final rule and the PHMSA interim final rule. DHS, in consultation with DOT, will continue to evaluate the transportation security risks posed by all types of hazardous materials and may regulate the transportation by rail of other materials at a later time. TSA notes that although PHMSA must require railroad carriers transporting the categories and quantities of materials identified on the DHS list of "rail security-sensitive materials" to comply with the routing requirements in the PHMSA interim final rule, DOT is not precluded by § 1551 of the 9/11 Commission Act from regulating the railroad routing of additional materials or quantities of materials, such as rail cars transporting residue amounts of hazardous materials.

IV. Public Comments on the NPRM and TSA Responses on Regulatory Provisions

A. Summary

To gain additional commenter input on the proposed rail security requirements, TSA held a public meeting on February 2, 2007 in Arlington, Virginia. Sixty-one persons attended the meeting. The oral presentations given by stakeholders mirrored their written comments. Transcripts from the public meeting are available for review in the public docket for this rulemaking. The public comment period for the NPRM closed on February 20, 2007. TSA received approximately 73 public comments on the NPRM. Comments were submitted by trade associations, individual companies, labor unions, States and localities, and private individuals.

Below is a summary of the public comments and TSA's responses, organized as follows: Section A describes the overall organization of this section of the preamble, and Section B includes comments and responses related to the specification of hazardous materials. Sections C, D, and E include comments and responses on issues that apply to passenger rail (including rail transit), freight rail, and hazardous materials facilities that ship or receive materials by rail. These issues relate to the appointment of an RSC, TSA's inspection authority, and the requirement to report suspicious incidents or activities. Section F

includes comments and responses on SSI issues. Sections G and H include comments and responses on issues that relate to freight railroad carriers and hazardous materials facilities that ship or receive materials by rail. Section I includes comments and responses on whistleblower protection. Section J includes comments and responses on preemption. Section K includes comments and responses on the regulatory impact assessment. Section L concerns comments that are beyond the scope of this rulemaking.

B. Specification of Hazardous Materials

As explained in the NPRM, TSA, PHMSA, and FRA have assessed the security vulnerabilities associated with the transportation of different types and classes of hazardous materials. TSA applied enhanced security requirements for certain categories and quantities of hazardous materials (*i.e.*, as specified in proposed § 1580.100(b)) based upon specific railroad transportation scenarios depicting how individuals could deliberately use hazardous materials to cause significant casualties and property damage. 71 FR at 76861. The materials specified in the NPRM present a significant rail transportation security risk and an attractive target for terrorists because of the potential for these materials to be used as weapons of mass effect. The proposed rule excluded tank cars containing only residue quantities of the hazardous material, because TSA concluded that, from a security perspective, the consequences of the release of a residue quantity of a PIH material would be significantly less than the consequences involving a loaded tank car. 71 FR at 76861. TSA sought comment on whether to apply the requirements in the final rule to fewer or additional hazardous materials or to extend the requirements to include tank cars containing residue quantities. TSA also sought comment on whether there are other hazardous materials that could cause significant loss of life, transportation system disruption, or economic disruption and whether TSA should apply the requirements in the final rule to those other materials.

Comments: An association commented that this final rule should not apply to Division 1.3 explosives, which consist of materials such as fireworks, smokeless powder, and rocket motors. The commenter noted that while TSA characterizes Division 1.3 explosives as commodities presenting "a fire hazard and either a minor blast hazard or a minor projection hazard or both, but not a mass explosion hazard" (71 FR at 76861), many commodities present a fire hazard that are not included in the commodities identified by TSA as warranting special security protection.

TSA Response: TSA is retaining Division 1.3 explosives in § 1580.100(b) of the final rule, because these explosive materials in the quantities covered in this rule present a significant security risk in transportation. Although a Division 1.3 explosive presents a minor blast and/or projection hazard, this material is extremely flammable and could be used as a weapon of mass effect. If compromised in transit by detonation or as a secondary explosion to an IED, Division 1.3 explosives could result in substantial damage to people, public and private property, and rail infrastructure.

Comments: A labor union recommended that TSA reduce the 5,000 pound applicability trigger for explosives in § 1580.100(b) to 100 pounds.

TSA Response: TSA has not adopted this recommendation. A low threshold quantity of 100 pounds of explosives, even if compromised or detonated in transit, is unlikely to have the potential to turn the rail shipment into a weapon of mass effect.

Comments: Several commenters expressed some concern that the TSA and PHMSA rail security NPRMs are not consistent in terms of their application to shipments of PIH materials. The PHMSA NPRM applies to bulk quantities of PIH materials. A "bulk quantity" as used in the HMR means a quantity that exceeds 450 L (119 gallons) for liquids, a net mass greater than 400 kg (882 pounds) for solids, or a water capacity greater than 454 kg (1,000 pounds) as a receptacle for gas. *See* 49 CFR 171.8. Thus, the provisions of the PHMSA NPRM would apply to PIH shipments transported in tank cars, including residue amounts exceeding 119 gallons, and portable tanks and other bulk containers. In contrast, the TSA NPRM would apply to tank cars containing PIH materials but exclude residues. Commenters suggested that the two rules should be applied consistently. They recommended that both final rules adopt the TSA tank-car threshold and exclude residue shipments, because they represent a low security threat.

TSA Response: We believe that there are important distinctions between the quantities of concern from a security perspective and the quantities of concern from a safety perspective. These distinctions account for the differences between the two rules. The amount of residue remaining in a tank car varies, but in most instances, tank car residues will total approximately 1–2 percent of the original amount of material in the tank, or 1,800–3,600 pounds. There are legitimate safety concerns relating to residue quantities even though the target attractiveness from a security standpoint is diminished. PHMSA explains those safety concerns in its rule. With respect to security, the potential consequences of the release of a residue quantity of al PIH material would be significantly less than the consequences of an incident involving a loaded tank car. Therefore, in this final rule, TSA is requiring enhanced security measures for the classes and quantities of PIH materials as proposed in the NPRM (*i.e.*, not tank cars containing residual PIH materials). TSA has determined that residue quantities of PIH materials in bulk packaging shipments do not carry sufficient amounts of security-sensitive materials to warrant the enhanced security measures required by this rulemaking.

Comments: Some commenters were confused as to whether TSA intended anhydrous ammonia to be included as a PIH material for which enhanced security measures are required.

TSA Response: The answer is yes. To ensure that this confusion does not persist, we are specifically adding anhydrous ammonia as an example in § 1580.100(b) of a material covered by the security requirements in this final rule. Commenters are correct that, under the HMR, anhydrous ammonia is classed as a Division 2.2 compressed gas for domestic transportation. However, anhydrous ammonia meets the definition of a material that is poisonous by inhalation under 49 CFR 171.8 of the HMR. That definition includes any material identified as an inhalation hazard by a special provision in column 7 of the 49 CFR 172.10 Hazardous Materials Table. The entry for anhydrous ammonia in the Hazardous Materials Table includes Special Provision 13, which requires the words "Inhalation Hazard" to be entered on shipping papers and marked on packages.

Comments: Some commenters believed that the hazardous materials listed in 49 CFR 1580.100(b) should include other flammable gases and liquids, since those materials could be weaponized, as well as include other materials that could cause serious damage if released into rivers and lakes. One commenter recommended that TSA extend the applicability of this final rule to cover commodities that convert to poisonous gases when they come into contact with water, fire, or acids; this commenter referenced a train derailment that occurred near Superior,

Wisconsin on June 30, 1992 in which 73 persons were injured when the contents of one rail car reacted with water and formed a vast vapor cloud.

TSA Response: While TSA agrees that other types of hazardous materials pose certain security risks in rail transportation, the risks are not as great as those posed by the explosive, radioactive, and PIH materials specified in this final rule, and at this time we are not persuaded that they warrant the additional precautions required by this final rule. TSA, in consultation with PHMSA and FRA, will continue to evaluate the rail transportation security risks posed by all types of hazardous materials and the effectiveness of existing Federal regulations in addressing those risks and will consider specific requirements as necessary.

Comments: One commenter requested that TSA revise the applicability language in 49 CFR 1580.100(b)(3) by replacing the threshold limit of "a highway route-controlled quantity of a Class 7 (radioactive) material" with the NRC's published list of Import and Export Threshold Limits for Category 1 and 2 Radioactive Materials. *See* Appendix P to 20 CFR part 110.

TSA Response: TSA has retained the threshold limits for radioactive materials as proposed in the NPRM. From a security perspective, it appears that the consequences from a release of a radioactive material subject to the lower threshold limits set forth by the NRC would be significantly less than the consequences of an incident using a highway route-controlled quantity of a Class 7 radioactive material.

C. Rail Security Coordinators

Section 1580.101 of the NPRM proposed that freight railroad carriers, rail hazardous materials shippers, and rail hazardous materials receivers within a High Threat Urban Area (HTUA) appoint an RSC, designated at the corporate level, to serve as the primary contact for intelligence information and security-related activities and communications with TSA, and coordinate security practices and procedures with law enforcement and emergency response agencies. Section 1580.201 of the NPRM proposed that passenger railroad carriers and rail transit systems appoint RSCs who would perform the same functions. TSA received numerous comments on the RSC provisions of the NPRM. TSA summarizes those comments and its responses below.

1. The RSC Role Must Be Performed by a Designated Individual

Comments: Several commenters, representing railroad carriers and explosives manufacturers, remarked that many companies already have emergency response and communications systems in place, with some of them following PHMSA's emergency response information requirements.[24] Some of these commenters urged TSA to allow the use of an emergency contact center number or a 24-hour corporate security number, instead of appointing an RSC.[25] The commenters stressed that an emergency call center could connect the TSA caller to the appropriate security or response personnel as needed. Further, other commenters thought that having TSA maintain telephone lists of specific individuals named as RSCs does not appear to add value to the regulation.

TSA Response: TSA believes that there is great security value in requiring the appointment of RSCs and in requiring regulated entities to provide contact information for these individuals. The RSC or alternate must serve as the security liaison between the regulated party and TSA. The RSC or alternate provides a primary single point of contact at the corporate level for receiving communications and inquiries from TSA concerning threat information or security procedures and coordinating responses with appropriate law enforcement and emergency response agencies. If TSA needs to convey extremely time-sensitive security information to a regulated party, particularly in situations requiring frequent information updates, it is important for the sake of continuity that TSA be able to interact with a specific individual. The RSC must be in a position to understand security problems, raise issues with corporate leadership, and recognize when emergency response action is appropriate.

TSA has decided not to allow the use of emergency call centers or 24-hour generic contact numbers to substitute for the requirement to designate named individuals to serve as RSCs and alternate RSCs. However, using call centers, in conjunction with appointed RSCs, may be an appropriate way to satisfy the requirements of 49 CFR 1580.101(e)(2) and 1580.201(e)(2). To meet these requirements, the call center or emergency hotline would need to be staffed 24-hours a day, 7 days a week, and must be able to immediately locate and communicate with the RSC.

2. Scope of Section 1580.101

Comments: Several commenters suggested that certain operations do not need RSCs or that individuals performing similar functions for other purposes, such as individuals responsible for security under DHS's CFATS rule, should be able to serve as RSCs.

Some commenters argued that proposed § 1580.101 should not apply to marine terminals because those facilities are regulated under the Coast Guard security requirements. They believed that TSA should exclude "on-dock" rail facilities from the requirement.

Several trade associations stated that § 1580.101 should not apply to a rail hazardous material shipper or receiver that only ships or receives the specified hazardous materials on an occasional basis. One of these commenters noted that many of its members are relatively small operations that may ship or receive tank cars of anhydrous ammonia only once or twice a year. Another association recommended exempting entities that ship or receive less than three rail cars per month.

Two trade associations objected to requiring occasional rail hazardous materials shippers or receivers to have an RSC available 24-hours a day, 7 days a week, 365 days a year, even if the facility has no rail cars in its custody or in transit. Similarly, several commenters argued that TSA should not require the RSC to be available 24-hours a day, 7 days a week for short line railroads that only operate 40 hours per week or for railroads that do not transport hazardous materials.

TSA Response: TSA requires a point of contact for all carriers, regardless of whether they transport hazardous

[24] PHMSA requires any person offering a hazardous material for transportation to provide an emergency response telephone number for use in the event of an emergency involving the hazardous material. See 49 CFR 172.604(a). The regulation requires that the telephone number be monitored at all times by "a person who is either knowledgeable of the hazardous material being shipped and has comprehensive emergency response and incident mitigation information for that material, or has immediate access to a person who possesses such knowledge and information," but permits the offeror to meet this requirement by providing the telephone number of an agency or organization. See 49 CFR 172.604(a) and (b).

[25] In 1971, the chemical industry established CHEMTREC as a public service hotline for fire fighters, law enforcement, and other emergency responders to obtain information and assistance for emergency incidents involving chemicals and hazardous materials. Additionally, for a fee, CHEMTREC helps shippers of hazardous materials comply with the PHMSA regulatory requirement to provide an emergency telephone number on shipping documents that can be called in the event of an emergency involving the hazardous material that is being shipped. CHEMTREC also provides emergency responders with the information they need in the event of an incident.

materials, because security concerns may arise that are unrelated to hazardous materials. TSA must be able to communicate as soon as possible with the RSC for all affected freight railroad carriers and rail hazardous materials facilities if TSA needs to convey extremely time-sensitive threat information or security procedures or seek information relating to threats or potential threats.

TSA has also carefully considered the comments concerning freight railroad carriers who rarely transport, and shippers and receivers who rarely ship or receive, rail cars containing the categories and quantities of hazardous materials covered by part 1580. However, TSA has decided not to exempt these entities from the RSC requirements. With respect to infrequent shipments of hazardous materials, the consequences can be significant even if a railroad carrier only transports a single carload or a rail hazardous materials facility only ships or receives a single carload. The January 6, 2005 rail accident in Graniteville, South Carolina resulted in the puncture of a single tank car of chlorine, but the consequences of that accident were substantial.

In the case of rail hazardous materials facilities that are also subject to the maritime security regime required by MTSA, the individual who serves as the FSO may also fulfill the duties of the RSC, provided that the person understands the responsibilities of an RSC as provided in 49 CFR 1580.101. *See* 33 CFR parts 101–106. However, compliance with MTSA does not itself satisfy the TSA requirement

3. Scope of Section 1580.201

Comments: Some commenters representing passenger railroads suggested that proposed § 1580.201 should not apply to tourist, scenic, historic, and excursion railroad operations. One commenter recommended that TSA exempt the systems unless they operate in an HTUA, while another commenter believed that the requirements would pose an undue burden.

TSA Response: TSA is promulgating the final RSC requirement as proposed. TSA only requires a tourist, scenic, historic, or excursion passenger rail operation, whether on or off the general railroad system of transportation, to designate and use an RSC if TSA informs it in writing that it must do so because of a general or specific threat concerning that operation. An exemption is not appropriate because many tourist, scenic, historic, and excursion operations, though not necessarily operating in areas of high risk, do carry large numbers of people and may become potential terrorist targets.

If the need arises, TSA will inform the carrier of the need for an RSC. In determining whether one or more of these passenger railroad carriers must designate and use an RSC, TSA will consider all available information, including location, populations served, and any intelligence, law enforcement, and reported suspicious activity.

4. Responsibilities of the RSC

Comments: A few commenters asked whether a corporate RSC could serve multiple regulated facilities or operations and whether the individual serving as the RSC may perform other functions. One State agency commenter recommended that the primary and alternate RSCs appointed by passenger railroad operators or mass transit operators should be identified within the existing State Safety Oversight Agency (OA), formed under 49 CFR part 659.

TSA Response: A single RSC or alternate may have responsibility for multiple covered rail facilities that are owned and operated by one corporation, provided that the individual has the information necessary to perform the RSC's duties.

This final rule allows different people to be on call at different times throughout the day, provided that at least one RSC or alternate is available to TSA on a 24-hour, 7 days a week basis. This final rule allows a passenger rail operator to select a qualified individual who also performs job duties for the OA to serve as the RSC.

5. Rail Security Coordinators Identified Previously

Comments: One mass transit agency asked whether a list of security coordinators previously sent to TSA to comply with the rail SDs would satisfy § 1580.201's requirement to appoint an RSC.[26]

TSA Response: Yes, passenger railroad carriers and rail transit systems that have already provided the required information on their primary and alternate RSCs to TSA have complied with the requirements of § 1580.201. They do not have to take further action unless any of the contact information changes. However, all covered parties, including those passenger railroad carriers and rail transit systems that have already provided the required information, must report all changes to the names, titles, telephone numbers, and e-mail addresses of the RSCs and alternate RSCs to TSA within seven calendar days.

6. Rail Security Coordinator Coordination With State and Local Governments

Comments: Several commenters representing State and local agencies stated that contact information for RSCs should be made available to local governments where hazardous material rail cars may be staged. Another commenter requested that TSA make RSC information available to local emergency planning committees and/or the sheriff's department at all locations where the railroad maintains a switching yard where rail cars containing hazardous materials subject to this final rule may be staged for more than four hours.

TSA Response: When it is necessary and appropriate, TSA will make RSC information available to State and local government agencies for official business purposes, including emergency responders.

7. Rail Security Coordinator Training

In the NPRM, TSA noted that the RSC proposal was crafted as a performance standard, and TSA anticipated that each of the regulated parties would provide its RSC with the information necessary to perform his or her job duties. 71 FR at 76863. However, TSA sought comment on whether to add a training requirement for RSCs in the final rule or via another rulemaking, and requested information on potential training methods.

Comments: TSA received comments both supporting and opposing the inclusion of training standards. Commenters supporting training requirements recommended TSA include standards that were consistent with those that the Coast Guard requires for FSOs under 33 CFR 105.205. Other commenters believed training programs were necessary to ensure a common knowledge base across the industry. For example, The Tri-State Oversight Committee for Maryland, Virginia, and the District of Columbia encouraged TSA to create a national level training program for RSCs and suggested that TSA establish a single training academy where RSCs could network and share best practices, similar to the Federal Transit Administration's (FTA's) workshops for State Safety Oversight

[26] On May 24, 2004, TSA issued SD-RAILPAX-04-01 and SD-RAILPAX-04-02, which require passenger rail systems to implement certain security measures to address the terrorist threat and establish a consistent baseline of protective measures applicable to all passenger rail operators. One of the protective measures required each regulated party to designate a primary and alternate Security Coordinator and provide these names to TSA.

personnel. Other commenters stated that training was unnecessary, because railroad personnel already perform similar functions and have been trained to perform them.

TSA Response: TSA has determined not to provide RSC training at this time or to provide specific training standards. To comply with the RSC requirement, the regulated party must ensure that individuals performing RSC duties are available to TSA on a 24-hours a day basis, capable of serving as the primary point of contact with TSA on security matters, and able to coordinate security practices and procedures with appropriate law enforcement and emergency response agencies. To meet the performance standard established for RSCs, TSA expects entities subject to this requirement to provide any necessary training, which may be specific to each entity.

D. Inspection Authority

TSA received numerous comments on many aspects of the inspection provisions of the NPRM. TSA considered all the comments and has decided to make only one minor change to the inspection provisions. Specifically, TSA has added a new paragraph (d) to 49 CFR 1580.5 to state that upon request, TSA inspectors and DHS officials working with TSA will present their credentials for examination, but with the proviso that the credentials may not be photocopied or otherwise reproduced (so as to mitigate the possibility that an inspector's credentials will be duplicated for fraudulent purposes). TSA added this paragraph in response to commenter requests for an authentication process to verify the identity of an individual purporting to represent TSA.

1. Unannounced Inspections

Comments: Section 1580.5(c) of the NPRM codified TSA's authority to "enter, without advance notice * * * any area or within any conveyance * * * in order to inspect or test compliance, or perform other such duties as TSA may direct." Many commenters objected to this provision, raising the following comments and concerns:

- Unannounced inspections will disrupt ongoing business activities.
- TSA should pre-arrange inspections when practical.
- Employees of railroads and facilities who find TSA inspectors on their premises might view them as a threat and respond by calling law enforcement or security guards.
- The presence of TSA inspectors on rail lines and in operating facilities would be dangerous to TSA employees, rail system or facility employees, and customers. Inspectors should be escorted, qualified, and/or trained to, ensure safety. Some commenters recommended specific types of safety training.
- Railroad operators and facility owner/operators may incur liability if TSA inspectors or others are injured.
- TSA inspectors should be required to obtain facility identification media and/or TSA should provide a mechanism through which they can verify the identity of TSA inspectors.
- The rule language is inconsistent with Security Directive RAILPAX-04-01.
- TSA should limit the scope of potential unannounced visits to hazardous materials shipper, railroad carrier, and hazardous materials receiver locations where rail cars containing PIH, explosive, and radioactive materials. are handled

TSA Response:

a. *Need to Conduct Unannounced Inspections*

TSA has retained the language that it used in the NPRM with respect to conducting inspections within any area or conveyance of a regulated party without providing advance notice. TSA anticipates that in most cases it will notify railroad carriers, rail transit systems, and rail hazardous materials facilities of scheduled inspections. This notice gives the parties to be inspected the opportunity to gather evidence of compliance and to arrange to have the appropriate personnel available to assist TSA. However, inspections related to a particular incident, and inspections that are made without notice, are necessary. Some inspections can only be effective if they are unannounced, so as to determine whether the regulated party is in compliance when it is unaware that TSA may be inspecting. TSA must have the flexibility to respond to information, operations, and specific circumstances whenever they exist or develop. TSA must be able to assess the security of covered parties during all times of the day or night and under all operational situations. Consequently, TSA may have to conduct inspections in the evenings, at night, on weekends, or on holidays. Security concerns are different at different times of the day and on different days of the week, and terrorists may seek to take advantage of vulnerabilities whenever they occur. TSA must be able to assess potential threats and an entity's security measures at any time.

The nature of any given TSA inspection will depend on the specific circumstances surrounding a particular railroad carrier, rail transit system, or rail hazardous materials shipper or receiver's operations at a given point in time and will be considered in conjunction with available threat information. While TSA may choose to notify regulated entities, local emergency responders, or other agencies on a case-by-case basis, TSA is not including a mandatory requirement to notify the regulated party.

We note, too, that many of the locations that TSA may inspect do not have access controls, such as fences or gates. Indeed, in some locations, the general public has easy access to the property. Unannounced TSA inspections of these areas will not require access to controlled areas. Further, TSA's inspection may test the regulated party's ability to detect and respond to the presence of unauthorized individuals.

b. *Contacts with Law Enforcement Officials*

In response to the commenters who believe that unannounced TSA inspections would create new safety and security risks for TSA inspectors and to other individuals on rail property, TSA recognizes that the presence of a seemingly unauthorized individual on the property of a railroad carrier, rail transit system, or rail hazardous materials facility may result in law enforcement officials being contacted. In the case of announced or planned inspections, TSA has trained its inspectors to identify themselves when they reach the facility to be inspected in order to avoid unnecessary notification of local law enforcement officials. In the case of unannounced inspections where the inspector has not notified any representative of the inspected facility, TSA has trained its inspectors to provide identification upon demand to a representative of the facility.

c. *Danger*

In response to commenter concerns about their liability in connection with TSA personnel who may be injured on rail property while performing unannounced inspections, we note that we have trained our inspectors on specific safety and security protocols to follow while inspecting the equipment and facilities of a regulated party. In the event that a TSA inspector is either injured or alleged to have caused an injury while on a regulated party's property, we will address the situation in accordance with applicable laws and regulations. By way of example, as a general rule, a TSA employee who sustains injuries while performing official duties is compensated by the Federal Employees Compensation Act

(FECA), 5 U.S.C. 8101–8193.[27] Persons who believe they have a tort claim against the United States may pursue their rights under the Federal Torts Claim Act (FTCA).[28] *See* 26 U.S.C. 2671–2680.

d. *Relationship to Inspection Authority Pursuant to Security Directives*

The American Public Transportation Association (APTA) commented that conducting unannounced inspections is inconsistent with the requirement in SD RAILPAX–04–01 that TSA coordinate inspections with the rail property's designated security coordinator. In response, TSA acknowledges that it is expanding the requirements in the rail SDs. In most cases, TSA inspectors will notify the rail property in advance to schedule an inspection and, to the extent practicable, work in close partnership during the visit with the RSC designated under § 1580.201 or other appropriate official(s) designated by the railroad carrier or rail transit system. However, TSA must be able to make unannounced inspections to check for compliance. To the extent there is ambiguity as to whether TSA inspections, evaluations, and tests to ensure compliance with the rail SDs can only be performed if they are announced and coordinated in advance with the regulated party, TSA notes that the inspection authority set forth in 49 CFR 1580.5 supersedes the provisions in TSA's rail SDs that compliance visits will be coordinated with the Security Coordinator.

e. *Training of TSA Inspectors*

TSA appreciates that inspectors must be properly trained to avoid danger to themselves, to workers on the inspected property, to travelers, and to the inspected property. TSA intends to use only properly trained personnel to conduct inspections. TSA puts its inspectors through a rigorous training program, incorporating classroom and field training, so that inspectors are knowledgeable on all aspects related to this regulatory program as well as on safety issues. TSA inspectors receive training on specific safety procedures to use while inspecting the equipment and facilities of freight and passenger railroad carriers, transit system owners and operators, and rail hazardous materials facilities, including the Transportation Safety Institute's Transportation of Hazardous Materials course covering 49 CFR parts 100–185. Many of TSA's inspectors have backgrounds in law enforcement and physical security and are subject matter experts in the field of railroad transportation, including the transportation of hazardous materials. In addition, all DHS officials conducting inspections with TSA will receive training, including training on applicable FRA requirements and the safety procedures to follow while aboard a conveyance or inside a terminal or facility. If a rail hazardous materials facility requests that an inspector receive facility-specific safety briefings or training, TSA will work with the facility to accommodate those requests, provided that the timing is acceptable and that additional safety training is reasonable given the nature of the expected inspection.

2. Use of Identification Media and Verification of Identity of TSA Inspectors

Comments: Section 1580.5(c) provides that TSA is authorized to "enter, without advance notice * * * any area or within any conveyance without access media or identification media * * * in order to inspect or test compliance, or perform other such duties as TSA may direct." Many commenters expressed concerns and comments about verifying the identity and credentials of inspectors. For example, APTA expressed the view that allowing TSA personnel to conduct inspections without identification media issued by the rail property would create unnecessary delays and disruption until their identities can be properly verified. APTA recommended that TSA inspectors use local identification media in addition to their TSA credentials to reduce the possibility that an individual posing as a TSA inspector could gain access to a property and compromise security.

Several commenters asked TSA to include a clearly stated authentication process, including a 24/7 telephone number, in the text of this final rule. Other commenters recommended that TSA officials be required to present government credentials and other identification (including photo identification) before being allowed on site, be badged at the facility to be inspected, or be escorted by a company representative.

One commenter stated that TSA inspections at NRC-licensed facilities without presentation of access or identification media issued or approved by the NRC licensees would place the licensees in direct violation of NRC regulations and security orders concerning access authorization.

TSA Response: TSA inspectors will carry Federal government credentials identifying themselves as having official authority to inspect. In addition, any railroad carrier, rail transit system, or rail hazardous materials facility wishing to authenticate the identity of an individual purporting to represent TSA may contact the Freedom Center at 703–563–3240 or 1–877–456–8722. In addition, TSA has provided some additional regulatory text on the issue of inspector credentials. Upon the request of an entity being inspected by TSA (and, as applicable, DHS officials working with TSA) the TSA or DHS official will present their credentials for examination, provided that the credentials may not be photocopied or otherwise reproduced. *See* 49 CFR 1580.5(d).

TSA notes that Homeland Security Presidential Directive 12 (HSPD–12) requires Federal agencies to improve secure identification processes for Federal employees and contractors.[29] The U.S. Department of Commerce has published guidance on the standards and methods by which Agencies could reach compliance with HSPD–12.[30]

As the capability becomes available and implementation of HSPD–12 continues, all Federal employees will have Federally-issued HSPD-12 compliant cards. TSA will establish procedures for regulated parties that elect to electronically validate Federal officials' credentials using FIPS 201 real-time credential authentication capability. In compliance with § 1512 of the 9/11 Commission Act, TSA is developing requirements for security programs in the rail sector. As TSA develops these requirements, TSA will consider procedures and protocols pertaining to verification of Federal HSPD–12 cards.

TSA has decided that it will not require an official of the inspected

[27] FECA is a law administered by the Office of Workers' Compensation Programs (OWCP) of the U.S. Department of Labor. It provides compensation benefits to civilian employees of the United States for disability due to personal injury sustained while in the performance of duty or to employment-related disease. These benefits include payment of medical expenses and compensation for wage loss. FECA also provides for the payment of benefits to dependents of employees if the injury or disease causes the employee's death.

[28] The FTCA specifies how the Federal government can be sued in tort, and for what torts it can be sued.

[29] The objectives of HSPD–12 are to ensure that the credentialing processes are administered by accredited providers; are based on sound criteria for verifying an individual's identity; include a credential that is resistant to fraud, tampering, counterfeiting and terrorist exploitation, and can be authenticated quickly and electronically.

[30] On February 25, 2005, the Department of Commerce issued the Federal Information Processing Standards Publication 201 (FIPS 201), Personal Identification Verification of Federal Employees and Contractors in response to HSPD–12.

entity to accompany a TSA inspector during inspections. Although, in many cases, such an escort may very well be helpful, in other cases, it may hinder an inspection's timing or scope. TSA's inspectors often will request an escort, but they must be able to perform unescorted inspections at times to check compliance. With the exception of NRC-licensed facilities (as discussed below), TSA also is not requiring that inspectors receive identification media from the facility to be inspected. These media will not be necessary once the inspectors show their TSA or DHS credentials.

In the case of inspections conducted at NRC-licensed facilities, TSA inspectors who have not been granted unescorted access to the facility in accordance with NRC regulations will perform their unannounced inspections while escorted by an NRC or licensee employee who has been granted unescorted access. NRC inspectors inspecting for compliance with NRC requirements will notify TSA about any rail security concerns. As noted earlier, TSA intends that the specifics of these arrangements be outlined in an agreement between TSA and the NRC.

3. Warrantless Inspections

a. Legal Authority To Conduct Warrantless Inspections

Comments: One commenter questioned the legal grounds for the seizure of copies of documents without a warrant.

TSA Response: TSA is mandated by ATSA to develop policies, strategies, and plans for dealing with threats to all modes of transportation,[31] including rail, and has authority to conduct inspections to ensure compliance with those policies and plans.[32] The inspection authority provision in § 1580.5 of this final rule requires that freight and passenger railroad carriers, rail transit systems, and rail hazardous materials facilities allow TSA officials and DHS officials working with TSA to enter and be present within any area or within any conveyance to conduct inspections, tests, or to perform such other duties at any time or place to carry out TSA's statutory duties.

These inspections may be conducted without a warrant. By publication of this final regulation, owners and operators of rail operations and hazardous materials facilities are on notice as to the statutory and regulatory authority for the inspections. The regulation also identifies that TSA and other authorized DHS officials are the persons authorized to conduct the inspections. In addition, TSA has explained that the inspections may occur at any time, but will occur in a reasonable manner. Finally, the regulation identifies the locations subject to inspection and delineates the scope of the inspection, in that the inspection will encompass the property, facilities, equipment, operations, conveyances, and records that are necessary to carry out TSA's security-related responsibilities.

The entities covered by this final rule are part of a closely regulated industry due to existing oversight and the heightened government interests in regulating these businesses. Most rail carriers and facilities identified in the regulation are already subject to regulation from other Federal entities such as DOT and EPA. There is also no doubt that TSA has a substantial interest in regulating the railroad carriers, rail transit systems, and rail hazardous materials facilities covered by this final rule. The preamble to the NPRM set forth several examples of the devastating consequences of an attack on rail transportation and clearly explained TSA's interest in regulating rail transportation to protect persons and property. 71 FR at 76854. The NPRM also described what measures must be taken by rail interests to detect and deter these threats.

The warrantless administrative inspections contemplated by the rule are also necessary to further the regulatory scheme. TSA's rail inspection program is directed at a mobile industry that transports persons and potentially dangerous materials, and if inspection is to be effective and serve as a credible deterrent, unannounced inspections are essential.

b. Criminal Evidence Found During an Inspection

Comments: A State DOT stated that TSA may not use its regulatory oversight powers as a means to gather and seize criminal evidence against a rail carrier without a search warrant. The commenter said while there are allowable exceptions to warrant searches (such as the exigent circumstances surrounding the hot pursuit of a criminal suspect), none of those circumstances would typically exist during an oversight inspection.

TSA Response: TSA is aware of the legal requirements for conducting a criminal investigation, including requirements for obtaining a search warrant in certain circumstances. Transportation Security Inspectors (Surface) are not criminal investigators, and they will be trained accordingly. As appropriate, the inspectors will refer matters to the appropriate law enforcement authorities.

4. Enforcement Guidance for Inspectors

Comments: One chemical manufacturer stated that TSA must ensure the fairness of guidance documents that TSA may issue to inspectors, that TSA must issue any guidance in accordance with Executive Order (E.O.) 13422, amending E.O. 12866, which addresses Regulatory Planning and Review and the Office of Management & Budget's (OMB's) Bulletin for Agency Good Guidance Practices, and that TSA should give the regulated community the opportunity to submit comments regarding any draft guidance.

TSA Response: TSA will evaluate any guidance materials issued to our inspectors to determine the appropriate procedure for issuing them.

5. Review Process for Enforcement Decisions

Comments: National Railroad Passenger Corporation (Amtrak) asked if there would be a review process if the rail carrier does not agree with the decision of the rail inspector.

TSA Response: If any covered party disagrees with a rail inspector's decision with respect to compliance or possible corrective action, the party may request that the decision be reviewed at a higher level at TSA. The regulated entity may request that the issue be resolved by TSA management. Management will raise unresolved issues to TSA's Office of Chief Counsel and senior management for final resolution.

6. Use of Third-Party Contractors for Inspections

Comments: One commenter raised a number of questions about the use of contractors or officials of other agencies to conduct inspections under this rule.

TSA Response: TSA does not intend to employ contractors to carry out TSA's inspection responsibilities. DHS officials may inspect rail operations and rail hazardous materials facilities in coordination with TSA.[33]

[31] 49 U.S.C. 114(f)(3).

[32] 49 U.S.C. 114(f)(9).

[33] TSA also works closely with DOT by consulting and coordinating on security-related transportation requirements to ensure they are consistent with the overall security policy goals and objectives established by DHS so that the regulated industry is not confronted with inconsistent security guidance or requirements promulgated by multiple agencies. While inspectors from both departments may sometimes perform joint inspections and share compliance information, each agency enforces its own regulatory requirements.

7. Other Comments on TSA Inspection Authority

Comments: A passenger railroad operator asked if TSA would provide any guidelines to rail inspectors regarding their actions while on a conveyance. For example, the commenter asked if the inspectors would occupy revenue seats of rail cars and transit vehicles and if they would be able to use their credentials to travel to and from their residence or place of work.

TSA Response: As stated above in the discussion of inspector training, TSA intends to use only properly trained personnel to conduct inspections. TSA inspectors will display credentials upon request and occupy revenue seats on passenger railroad cars and rail transit system conveyances only while performing official duties. If a TSA inspector is commuting to or from his or her residence or place of work, he or she will pay the same full fare as a member of the traveling public. Also, an on-duty TSA inspector may travel as a paying passenger when conducting unannounced inspections to evaluate the regulated party's security measures.

Comments: Proposed 49 CFR 1580.5(b)(7) states that TSA's inspection authority includes the right to "carry out such other duties, and exercise such other powers, relating to transportation security as the Assistant Secretary of Homeland Security for the TSA considers appropriate, to the extent authorized by law." One chemical manufacturer commented that this proposed language is vague and undefined, and subjects the regulated community to unknown inspection criteria.

TSA Response: TSA has retained the language that it used in the NPRM. TSA has the primary Federal role in enhancing security for all modes of transportation. Under ATSA, TSA's authority with respect to transportation security is comprehensive and supported with specific powers related to the development and enforcement of security-related regulations, SDs, security plans, and other requirements, including ensuring the adequacy of security measures for the transportation of cargo [34] and overseeing the implementation of and ensuring the adequacy of security measures at transportation facilities.[35] In addition to its other responsibilities under ATSA, TSA is charged with carrying out other appropriate duties relating to transportation security.[36] The regulatory language in 49 CFR 1580.5(b)(7) notifies the regulated community of TSA's broad statutory authority to inspect and codifies the scope of TSA's existing inspection program as it relates to rail security.

As explained in the NPRM, TSA is authorized to conduct general security assessments in addition to inspecting for compliance with specific regulations. TSA has specific powers to assess threats to transportation security; monitor the state of awareness and readiness throughout the rail sector; determine the adequacy of an owner or operator's transportation-related security measures; and identify security gaps.

Comments: Two associations expressed concern that the proposed rule extends beyond just the rail operations and shipping and receiving areas of a regulated facility and, therefore, exceeds TSA's authority. These commenters requested that TSA revise the inspection provision in the rule to limit its scope to those operations directly related to or impacting a facility's rail operations.

TSA Response: TSA's authority to inspect under this rule does not extend to areas of the facility that are unrelated to transportation security, which may include (for example) areas dedicated exclusively to manufacturing or engineering. However, TSA notes that its inspection authority is broad. TSA has the discretion to inspect those areas of a rail hazardous materials shipper or receiver facility that are related to the security of the transportation system, such as the rail secure area and control rooms or offices where security activities are initiated or monitored. Under the authority of ATSA, TSA is directed to ensure the adequacy of security measures for the transportation of cargo,[37] which includes ensuring the adequacy of security measures at the transportation-related areas of rail hazardous materials shipper and receiver facilities. The rail cars offered, prepared, loaded, received, or unloaded from or at these facilities may travel anywhere in the general railroad system of transportation, including in and near high population areas, critical infrastructure, and other vital areas. Sometimes loaded rail cars will remain for some time at the shipper's facility awaiting pickup from the freight railroad carrier. Whether being loaded at facilities or awaiting pickup at facilities, these rail cars could endanger surrounding areas. Accordingly, TSA's broad authority under ATSA includes authority to inspect those areas of the facilities used for transportation security activities.

E. Reporting Significant Security Concerns

1. General Comments

a. Value of Proposed Requirement To Report Significant Security Concerns

TSA received a number of comments supporting the proposed requirement to report significant security concerns. Two chemical companies and a major trade association supported the reporting of significant security concerns to TSA as proposed in § 1580.105. Other commenters expressed concerns about the requirements.

Comments: The Chairman and four members of the U.S. House Committee on Homeland Security expressed the view that the proposed reporting requirements would not improve rail security. They commented that the reporting requirements would not make the industry proactive in deterring terrorists and that, instead of collecting data for study after incidents have occurred, TSA should provide the industry with mandatory, standardized security practices and mandated training programs.

TSA Response: TSA believes that the requirements to report significant security concerns have great value in the overall approach to enhancing rail security. That approach includes other mandatory requirements, such as the chain of custody measures, location and shipping information, and the designation of RSCs, that will enhance security. TSA agrees with the House Committee members that it is important to focus on deterring activities that might compromise transportation security. TSA believes that reports of significant security concerns from rail transit operations, freight and passenger railroad carriers, and rail hazardous materials shippers and receivers enhance security, because they help TSA to evaluate if there are geographic or other patterns to the activities that are reported. If so, TSA may be able to interrupt similar events at other locations. In addition, TSA can determine if it should intensify inspections that focus on particular areas or activities.

b. Scope of the Reporting Requirements

Comments: The National Industrial Transportation League questioned the extent to which the reporting requirements would apply to a rail hazardous material shipper or receiver with a very large facility. The League asked if TSA intends to require a

[34] 49 U.S.C. 114(f)(10).
[35] 49 U.S.C. 114(f)(11).
[36] 49 U.S.C. 114(f)(15).
[37] 49 U.S.C. 114(f)(10).

regulated entity to report any of the enumerated incidents anywhere in its facility, even if the incident has no relationship to or impact on the facility's rail operations.

TSA Response: TSA does not expect shipping or receiving facilities in an HTUA to report incidents that bear no relationship to areas of the facility that are related to the designated rail secure area, rail shipments, or receipt of the hazardous materials covered by this regulation. However, TSA expects that facility owners will report suspicious incidents outside the scope of this rule to other Federal, State, or local authorities, as appropriate or required by those other authorities.

2. Time and Method of Reporting

a. When must reports be made?

Comments: TSA received many comments about the proposed requirement to report significant security concerns "immediately," particularly in the context of 911 notifications. Commenters asked TSA to define "immediately." Several commenters requested that TSA clarify that the new reporting requirement does not take precedence over "first calls" to local authorities (that is, 911) for events requiring police, fire, or emergency medical support. A chemical company said that, for practical purposes, "immediate" notification of TSA would follow notification of local first responders via 911. A trade association said that the rule should emphasize that local authorities are to be notified simultaneously because local authorities near the plant site are in the best position to act quickly to mitigate and reduce the consequences of a real threat.

Similarly, one transit authority said that the requirement for "immediate" reporting would burden the RSC and other supervisory security personnel during the resolution of incidents. At such a crucial time, the RSC and other security personnel should focus on safe and secure resolution of the incident. A transit authority suggested that TSA change the reporting timeframe from "immediately" to monthly or bi-weekly reporting.

Two State DOTs said that the proposed rule fails to establish a timeframe for reporting potential threats and significant security concerns or specifically identify the role of the State oversight agency in the reporting process.

Several commenters offered suggested definitions of the term "immediately." A trade association requested that TSA allow enough time to determine whether a notification is warranted. The association pointed out that the current DOT/PHMSA regulation (49 CFR 171.15) defines immediate notice to mean as soon as practical, but no later than 12 hours, and suggested that TSA incorporate similar language into the final rule. Another trade association noted that PHMSA's incident reporting requirements use the phrase "at the earliest practicable moment" to describe "immediate" and recommended that TSA use the same terminology. *See* 49 CFR 171.15 (which requires notice "as soon as practical but no later than 12 hours after the occurrence of [the] incident.").

TSA Response: TSA plays a crucial role in coordinating the Federal response to threats to transportation security. The immediate reporting of a potential threat, a security incident, or a significant security concern is integral to TSA's ability to carry out this function successfully. Prompt notification enables TSA to help coordinate the Federal response, including actions to be taken at the State and local levels, and provides TSA with the situational awareness needed to make the appropriate assessments on the National and local levels.

TSA recognizes that, in some cases, notifying the local first responders to address a threat or consequences in the immediate aftermath of an incident takes precedence over notifying TSA because of the need to protect lives or property. In these cases, regulated entities should notify TSA simultaneously or as soon as possible after notifying 911 or other first responders.

TSA decided not to provide a definition of "immediately" in this final rule. TSA considered the DOT/PHMSA definition but decided that allowing up to twelve hours to report an incident may not allow sufficient time for TSA or other agencies to take necessary action to address a security concern. As noted above, TSA recognizes that, in some cases, reporting to TSA may take place after the reporting entity alerts law enforcement and first responders to ensure public safety and mitigate damage to property.

b. Content and Method of Reporting

Comments: Many commenters asked questions with respect to what information they should include in the reports and how and to whom they should report the information. A technology vendor said that its "off-the-shelf" product could be configured with sensors to detect and report tampering with rail cars and assist in reporting significant safety concerns.

TSA Response: With respect to content, the reports should include all the information required in § 1580.105(d) and § 1580.203(d). Passenger railroad carriers and rail transit systems should refer to § 1580.203, and freight railroad carriers and facilities that ship or receive hazardous materials covered by the rule should refer to § 1580.105. With respect to the method of identifying the information to report, the rule does not require the use of specific products or methodologies. To help identify significant security concerns in a manner that meets this rule's performance standards, the covered entities may elect to use any variety of technological products.

3. Coordination With Other Reporting Requirements

Comments: TSA received numerous comments about the interrelationship between the reporting requirements of this rule and the reporting that occurs in response to other regulatory programs or other procedures. Commenters urged TSA to increase coordination and eliminate unnecessary duplication. For example, one trade association said that certain facilities are currently reporting significant security concerns to the FBI, local authorities, and the Coast Guard. The association said that TSA should use these existing reports to gather information rather than to create an additional reporting requirement. The association suggested that if TSA maintains this reporting requirement in the final rule, it should only apply to the certain hazardous materials determined to pose a higher security risk (such as PIH, explosives, and radioactive materials).

Several commenters wrote about the relationship between the proposed reporting requirement and FTA's reporting requirement in 49 CFR 659.33, asking TSA to clarify the role of State oversight agencies in the reporting process. Some State DOTs said that the proposed reporting would partially duplicate the reporting requirements of the State oversight program, which would force rail systems to develop multiple sets of procedures and processes.

Commenters suggested the following options for coordinating or merging the proposed reporting requirement with similar existing requirements:

- Create a centralized or "one stop" reporting process for stakeholders.
- Avoid any "excessive" duplication between the safety oversight and rail security programs.

- Minimize redundant reporting and ensure there is coordination of FRA, NTSB, and TSA reporting requirements.
- Make the proposed reporting requirement parallel to the existing requirements (or vice versa).
- Allow the reporting to other jurisdictional law enforcement agencies to meet the requirement of reporting to TSA.
- Allow reporting to the State oversight agency to fulfill TSA's requirement.
- Make the proposed reporting requirement more consistent with posting to the public transportation portion of the Homeland Security Information Network (HSIN).
- Modify the reporting requirements for the National Transit Database to support TSA's needs.
- Require that covered entities send reports to the National Response Center as the primary and sole reporting center for the purposes of this section and develop a mechanism for TSA to receive reports of significant security concerns from the National Response Center.
- Include language in the final rule to help regulated entities prioritize all of the notifications that they are required to make.

TSA Response: TSA needs information immediately on potential threats, suspicious activities, and security incidents for the purposes of comprehensive intelligence analysis, threat assessment, and allocation of security resources. Covered entities must report security concerns to the Freedom Center. The Freedom Center maintains communications networks with other Federal operations centers, such as DOT's Crisis Management Center, to convey reported security concerns to interested entities throughout the Federal government.

The reports submitted to State oversight agencies under 49 CFR 659.33 will not satisfy the requirements of this rule. Reports to the oversight agencies meet a more general need for situational awareness, particularly pertaining to safety conditions. The required reporting under this final rule and the reporting under 49 CFR 659.33 do not overlap extensively. Where they do overlap, TSA would expect that passenger railroad carriers and rail transit systems would follow procedures for reporting to TSA as well as to the State agencies.

TSA recognizes that entities regulated by both the Coast Guard and TSA may be required to report the same security concern to the National Response Center and the Freedom Center. However, in this final rule, TSA is requiring reporting to the Freedom Center for all rail-related security issues to facilitate the continued development of a centralized surface transportation security operations center and the development of rail specific intelligence. Moreover, obtaining reports indirectly from the National Response Center, the States, or other third parties might delay a needed response or may not contain adequate information for TSA's purposes.

4. Reportable Events

Comments: Many commenters said that TSA's definition of reportable events is too broad and should be more narrowly focused. Several comments from transit authorities said that the proposed reporting requirements would impose a substantial burden on transit systems and even on TSA itself and that the scope of the requirement should be narrowed. They also asserted that the proposed requirements would result in an overload of information that would divert attention from truly significant threats and dilute the effectiveness of the reporting system. Other commenters asked for a more specific description of "suspicious" activities or a list of examples that would, or would not, be considered "suspicious." A commenter identified "youth vandalism" as an incident that should not be reportable.

Several commenters offered specific suggestions for which activities or incidents should be considered reportable. Some commenters suggested that the requirement focus on activities that pose a security threat to rail cars carrying covered hazardous materials or the materials covered by this regulation.

An industry association noted that the events that must be reported to DOT are very specific (such as a person being killed or requiring hospitalization) and suggested that TSA's reportable events be more specific and similar to DOT's. One commenter suggested that TSA only require reporting of certain specific crimes. Another commenter made specific suggestions regarding the categories of events that should be reported to TSA.

TSA Response: TSA is aware that the proposed reporting requirements are broad and, in some respects—such as the requirement to report "suspicious" activities—are not as specific as the regulated community would like. However, TSA has not changed the reporting requirements in this final rule for the reasons described below.

The reporting requirements are intended to mitigate the risk to rail transportation systems. These requirements will provide information to the appropriate authorities, allowing their timely intervention to an attack or its preparation. Detecting activities that may compromise transportation security entails piecing together seemingly unrelated incidents or observations and conducting analysis in context with information from other sources. However, as the threat environment is dynamic and indicators of incident planning and preparation can change, TSA cannot provide a threshold for reportable events or a specific definition.

TSA has decided not to accept commenters' suggestions to limit the scope of the reporting requirement. Limiting the scope to the DOT reporting requirements, which are intended to identify safety concerns, would reduce the data that TSA could use for trend analysis to anticipate and prevent an attack. Limiting incident reporting to only PIH materials, explosives in Classes 1.1, 1.2, and 1.3, or highway route-controlled quantities of radioactive materials would also limit TSA's domain awareness.

Comments: A State DOT expressed the concern that transit agencies may respond to the proposed requirement by understating or omitting the annual crime statistics they provide to the State DOT to avoid the proposed reporting requirement. Two State DOTs asked what would happen to a rail transit agency that failed to notice or report a potential threat.

TSA Response: TSA does not believe that transit agencies or others within the scope of TSA's reporting requirements would fail to report crimes in order to avoid the reporting requirements of this final rule. If a covered entity failed to report a potential threat in accordance with this rule, TSA would consider taking enforcement action. TSA would exercise enforcement discretion and would consider factors such as the type of threat and its significance, the procedures the covered party had in place to identify and report such threats, and other factors as appropriate.

5. Training

Comments: Several commenters requested that TSA develop training programs to assist employees in recognizing events that could raise security concerns and should be reported. One State DOT commented that, for the reporting system to work successfully there needs to be a comprehensive and ongoing training program for employees of passenger railroad carriers and rail transit systems. The agency requested that TSA provide a rail-specific training package for reporting potential threats and significant rail security concerns. Similarly, a labor union asserted that

front-line workers will be in the best position to identify many of the potential threats or significant security concerns listed in the proposed rule. The union said that reporting will simply not be as robust or as complete as envisioned by TSA without mandatory security training for rail employees.

A chemical company noted that the proposed rule makes several references to IEDs. The company said that if these devices are a realistic threat to U.S. facilities, then the regulated community could benefit from specialized training, provided by TSA or other government agencies, on recognizing IEDs.

Some commenters requested that TSA provide training to RSCs on what constitutes a reportable event for purposes of reporting significant security concerns.

TSA Response: TSA recognizes that well-trained employees will enhance security. In the passenger rail/rail transit context, TSA has undertaken an effort to elevate the level of training generally, bring greater consistency, and assist transit agencies in arranging and implementing training programs by developing and disseminating a voluntary Mass Transit Security Training Program; this training program is available on TSA's Web site.[38] The program identifies specific types of training at basic and follow-on levels for particular categories of transit employees. Basic categories for front-line employees include security awareness, behavior recognition, and immediate emergency response. The training program presents the information in a readily understandable matrix, and provides effective guidance to passenger rail and transit agency officials on how to build and implement training programs for employees working in their systems. The Transit Security Grant Program, administered by DHS and TSA to advance security enhancement efforts in passenger rail and mass transit systems, affords the agencies the option of this pre-packaged training program with grant funding. Agencies taking advantage of this program have their grant applications expedited for review and approval. This initiative aims to expand significantly the volume and quality of training for passenger rail and mass transit employees. Information on this initiative is available on TSA's Web site.[39]

[38] *See http://www.tsa.gov/assets/xls/FY2007_TSGP_Training_Cost_Matrix.xls.*

[39] *See http://www.tsa.gov/assets/pdf/TSGP_Training_IB243.pdf.*

At this time, the rule does not mandate specific training for the reporting of significant security concerns. It specifies the type of incidents that covered entities must report. TSA will work with covered parties to comply with this final rule. In addition, TSA notes that current DOT regulations will aid in providing an adequate basis to identify suspicious incidents. Current DOT regulations require employers to provide security awareness training for most hazardous materials employees. *See* 49 CFR 172.704. The security awareness training must provide employees with an awareness of security risks associated with hazardous materials transportation and methods to enhance transportation security. This training must also include a component on how to recognize and respond to possible security threats. TSA recognizes that not all reporting will be accomplished by hazardous materials employees, however. TSA also recognizes that almost all employers provide their operational employees with some security awareness training. This training will enhance the quality of the information that covered entities report to TSA and will improve reporting levels. Additionally, TSA is developing a CD that will instruct workers on the appearance of an IED and how to locate an IED on a rail car. The CD will also include a training module on security awareness. TSA will provide the CD to covered parties prior to the effective date of this final rule via a mass mailing and will also post a request form on TSA's Web site.

We note that some commenters made reference to TSA providing training for RSCs. This final rule (49 CFR 1580.105 and 1580.203) does not assign the reporting task to the RSC, and TSA does not expect all reports of significant security concerns to come from the RSC. Reports may be made by individuals who are not employed at the corporate level of the regulated party.

6. Sharing of Information Received

Comments: A commenter asked whether TSA intends to share incident and trend analysis with anyone. Several governmental authorities requested that TSA transmit reports of significant security concerns to states and localities, including first responders, in a timely manner.

TSA Response: TSA may share reports of security concerns with Federal, State, or local law enforcement or other officials, for further analysis or for action consistent with those agencies' authorities.

7. Other Comments on Reporting Significant Security Concerns

Comments: One commenter asked how TSA will respond to and investigate reportable events.

TSA Response: If a determination is made that a reported event warrants a response or further investigation, TSA will work with the RSC, the local Transportation Security Inspectors (Surface), and other Federal, State, and local authorities, if warranted, to take appropriate action.

Comment: A commenter asked whether the information reported would receive SSI protection.

TSA Response: Under 49 CFR 1520.5(b)(7) (threat information), reports of significant security concerns would be considered SSI once TSA receives them.

F. Sensitive Security Information

1. Extent of Protection of Information as SSI

Comments: Several commenters suggested that the final rule should extend SSI protection to information that covered entities must submit to TSA under this rule, including location and shipping information for certain rail cars submitted in accordance with § 1580.103 and reports of significant security concerns submitted in accordance with § 1580.105 or § 1580.203.

TSA Response: The location and shipping information, which carriers are required to maintain and submit, would not be considered SSI. However, once DHS or DOT receives the location and shipping information from the railroad carrier and includes it as part of a broader analysis of the location of rail cars subject to the location reporting requirement, the compilation, not the raw data, will constitute SSI under revised § 1520.5(b)(12). Such compilations require greater protection than the information maintained by the railroad carrier for its business purposes, because the release of a compilation of location and shipping information to the public would increase the risk that the compiled information could be used to identify vulnerabilities or to plan an attack on critical rail assets. In the NPRM, TSA proposed to revise § 1520.5(b)(12), relating to information concerning infrastructure assets, to include rail transportation systems. TSA has included this provision in the final rule. Consistent with the provision, TSA considers lists of critical infrastructure assets prepared by DHS or DOT, including lists of rail cars containing covered materials, to be SSI.

With respect to reports of significant security concerns submitted under § 1580.105 or § 1580.203, such reports would constitute SSI under existing § 1520.5(b)(7) (threat information) once the Federal government receives them.

2. Access to Sensitive Security Information for State Oversight Agency or Designated Local or Tribal Officials

Comments: Many commenters expressed concern with the proposed amendment to 49 CFR part 1520 to protect information related to rail transit systems and to require rail transit systems to restrict the distribution, disclosure, and availability of SSI. Some said that the proposed rule needs to ensure that State oversight agencies responsible for establishing standards for rail safety and security programs for a State's rail fixed-guideway systems under 49 CFR part 659 will have access to SSI. Some were concerned about limitations on the availability of information, because they felt that State and local law enforcement and emergency response personnel need SSI for emergency planning. One commenter requested that TSA specify the rights of State and local governments to access SSI.

TSA Response: TSA agrees that State, local, and tribal governments, including State oversight agencies, should have access to SSI generated under this regulation for which they have a need to know. SSI may not be publicly disclosed pursuant to any State, local, or tribal law. This is consistent with DHS policy and will allow States, localities, and tribal employees, contractors, and grantees to have access to SSI if the information is needed for the performance of official duties on behalf of or in defense of the interests of Federal, State, local, or tribal government, or for performance of the contract or grant. Accordingly, TSA is adding State, local, and tribal agencies, which would include State oversight agencies, to the list of persons with a "need to know" under § 1520.11. This amendment does not authorize a State, local, or tribal agency to access SSI as a general matter. The agency must have a "need to know" specific pieces of SSI. SSI may not be publicly disclosed pursuant to any State, local, or tribal law.

3. Security Clearance

Comments: One commenter noted that most program administrators at the State oversight agencies do not have official "security clearance" authorizations and may therefore not have access to information needed to carry out security-related responsibilities.

TSA Response: TSA has revised § 1520.11 to allow access to SSI by State oversight agency employees with a need to know without requiring them to have security clearances. Under the SSI regulation, the Federal government does not ordinarily clear covered persons for receipt of classified national security information in order to receive access to SSI. TSA notes that security clearances would be required for access to information that is classified pursuant to Executive Order (E.O.) 13292 of March 25, 2003 (68 FR 15315. March 28, 2003); however, SSI does not fall within the scope of the E.O.

4. Inspection Information

Comments: One commenter requested that TSA protect information gathered by TSA inspectors as SSI.

TSA Response: This final rule will protect pertinent inspection-related security information as SSI under § 1520.5(b)(6), as amended by this rulemaking.

5. Simplified Marking

Comments: Another commenter suggested that TSA simplify the SSI marking requirements, so that documents need not be marked on every page.

TSA Response: This issue is beyond the scope of the Rail Transportation Security NPRM. TSA will consider revising the marking requirements of the SSI regulation in a future rulemaking.

6. Broadening the Scope of Sensitive Security Information

Comments: Many commenters supported the provisions protecting the disclosure of SSI in rail transportation. Others opposed expanding the scope of SSI, concerned that use of an SSI designation could withhold too much information from the public. They expressed concern that the proposed rule contained no restrictions on who may declare information SSI, or what information may be included in reports automatically accepted as SSI, and that there were no time limits on how long information protected as SSI remains SSI. These commenters believed that TSA should amend the SSI regulation to make it clear that records relating to the general safety of the rail and transit networks, as well as the terminals and other facilities, and records of their maintenance are not SSI. Other commenters suggested that TSA balance any need to protect route information against the need to disclose to States, cities, counties, Congress, and the public general information about the quantities and types of materials that are being shipped through an area. Other commenters urged that the definition of SSI be as narrow as possible.

TSA Response: TSA is fully committed to disclosing information to the public where appropriate unless such disclosure is prohibited from disclosure under law or would compromise transportation security. TSA does not intend to protect information as SSI that would not be detrimental to transportation security if publicly disclosed. SSI should not be released to individuals who do not have a need to know. Records relating to the general safety of railroad and transit systems, as well as related yards, terminals and other facilities, and records of their maintenance, are not SSI unless they overlap with or are inextricably commingled with security information that falls within the specific categories of SSI information in the SSI regulation. This consists of information that terrorists or others could use to the detriment of transportation or national security. Section 1520.15(b) allows for the public release of all information that is not SSI within records that contain both SSI and non-SSI information.

The SSI regulation defines what is considered SSI and imposes certain SSI handling requirements on a "covered person" with a need to know; only "covered persons" must mark information as SSI under the regulation.

7. Protection of SSI in Civil Litigation

Comments: Several commenters suggested that the SSI provisions should include the protections afforded CVI under DHS's CFATS rule, in light of recent Congressional requirements on the disclosure or sharing of SSI in civil litigation and the protection for SSI that is over three years old.

TSA Response: Last year, DHS issued the CFATS interim final rule on chemical facility security. Pursuant to its statutory mandate, the CFATS rule includes provisions for protecting CVI. Most rail SSI would not also qualify as CVI. Without statutory direction to do so, TSA is not authorized to expand the SSI regulation to include the protections afforded CVI.

The commenter is correct that Congress recently enacted legislation regarding SSI in civil litigation, but the new statute is narrow in scope. Section 525(d) of the 2007 DHS Appropriations Act grants civil litigants or their counsel who do not have a need to know under 49 CFR part 1520 access to specific SSI in Federal civil district court proceedings if certain requirements are met. This provision requires the controlled sharing in civil litigation in

Federal district courts of relevant SSI for which a litigant demonstrates a substantial need after successful completion of a security threat assessment, and under a protective order entered by the court that protects the SSI from unauthorized or unnecessary disclosure and specifies the terms and conditions of access.

8. Coordination With Other Information Protection Programs

Comments: Several commenters were concerned that the recent DHS rule governing CVI means that regulated entities may soon manage three categories of protected homeland security information: SSI, Protected Critical Infrastructure Information (PCII) in 6 CFR part 29, and CVI in 6 CFR part 27. Each has unique elements and regulatory requirements. Commenters suggested that TSA consider adopting regulations that would harmonize and clarify information protection procedures for government and the private sector.

Similarly, the NRC has pointed out that some information that would be SSI under this rule would also fall within the scope of their Safeguards Information (SGI) program under § 147 of the Atomic Energy Act of 1954, as amended. SGI must be protected in accordance with the requirements in 10 CFR part 73.

TSA Response: The requirements of each of these information-management programs are specific to each respective program and relate to particular statutory and regulatory provisions. It is beyond the scope of this rulemaking and of TSA's authorities to amend the regulations governing Federal programs other than SSI or to make changes to the SSI regulation that exceed the scope of the Rail Transportation Security NPRM. With respect to information that is both SSI and CVI, PCII, or SGI, such information must be marked and protected in accordance with all applicable regulations. TSA will work closely with DHS and other government agencies to make sure that the requirements of the CVI, PCII, SGI, and SSI programs are complementary, not inconsistent, with each other.

9. Protection for Personal Information

Comments: One commenter recommended that TSA extend SSI protection to the personal information of rail transportation workers and employees of rail hazardous materials shippers and receivers, including RSCs appointed pursuant to this rule.

TSA Response: TSA will not normally share the personal information of RSCs provided to TSA under this rule with organizations external to DHS. However, if appropriate, TSA may share the information with other Federal, State, local, or tribal government agencies, including DOT, in accordance with applicable requirements, such as the Privacy Act and the Freedom of Information Act. To the extent that TSA shares the information with non-Federal entities, such as State, local, or tribal agencies, TSA expects that information will be safeguarded in accordance with procedures designed to protect such information. Accordingly, TSA has decided that it is not necessary to expand the protections afforded to personal information by further amending the SSI regulation at this time. TSA notes that lists of individuals with unescorted access to rail secure areas, if maintained, will be considered SSI under § 1520.5(b)(11)(i)(A). This final rule adopts the proposed amendment of that provision to include lists of individuals with unescorted access to rail secure areas.

10. Expansion of Sensitive Security Information to Other Modes of Transportation Besides Rail

Comments: One commenter believed that the paragraphs in § 1520.5(b) should include motor carriers, motor carrier freight terminals, and motor carrier infrastructure assets.

TSA Response: The changes to the SSI regulation in this final rule are focused on rail transportation rather than on other modes of transportation. Any changes concerning other modes of transportation would be outside the scope of this rulemaking. In the future, TSA may consider changes in the SSI regulation relating to motor carriers.

G. Chain of Custody and Control

1. Applicability

Comments: A municipality supported the chain of custody provision and recommended that TSA extend it to the carriage of all hazardous materials. Another commenter suggested that the rule is vague and does not address certain kinds of terrorist attacks (such as placing an explosive device under rail tracks or under elevated rail in a major city) and does not mandate any protective distances.

TSA Response: TSA is not expanding the proposed list of hazardous materials to which the requirements of part 1580 apply. While we recognize that all substances defined by DOT as "hazardous materials" are "capable of posing an unreasonable risk to health, safety, and property when transported in commerce" (*see* 49 CFR 171.8), not all hazardous materials are subject to the same potential for terrorists to exploit them to cause significant loss of life, transportation system disruption, or economic disruption. At this time, TSA has decided not to expand the list of materials to which this rule applies.

Comments: A commenter asked why TSA did not propose to apply the chain of custody requirements to transfers occurring between train crews employed by the same carrier.

TSA Response: TSA applied a risk-based approach in crafting the requirements of this final rule, and the greatest risk to rail cars today is when they are standing still unattended in an HTUA or prior to entering an HTUA. While TSA acknowledges that there is a security vulnerability any time a railroad carrier leaves rail cars (and sometimes entire trains) unattended, cars and trains are much more frequently left unattended when awaiting interchange to another carrier or at the point of initial shipment and delivery. TSA may consider applying the chain of custody requirements to intra-carrier transfers in a later rulemaking.

Comments: Two commenters opposed the exclusion of facilities owned or operated by the Federal government from the definitions for receivers and shippers, due to possible dangers of explosives and nuclear materials.

TSA Response: Although facilities owned or operated by the Federal government, such as any facility owned or operated by the Department of Defense (DOD) or the Department of Energy, are not subject to the requirements of this final rule, these facilities are the responsibility of other Federal agencies. In general, a Federal agency that ships or receives the materials described in § 1580.100 would be a secure facility operating under policies or regulations that provide a level of security comparable to the requirements of this final rule. For example, DOD shipments of explosives are frequently contracted as "rail surveillance" shipments, meaning that railroad police or their agents attend, inspect, and monitor these shipments while they are in transportation. Similarly, Federal agents track and monitor shipments of high-level nuclear materials while in transportation.

Comments: If operations of two or more companies are co-located, would only companies that ship designated materials be subject to § 1580.107?

TSA Response: If a company is co-located at the same facility as shippers or receivers covered by the chain of custody requirements but does not engage in the transportation by rail of the materials described in § 1580.100,

that company does not have to comply with the chain of custody and control procedures in § 1580.107.

2. Attendance Requirement

Comments: Several commenters raised questions about compliance with the attendance requirement. Some commenters asked for clarification on the number of rail cars that one individual can attend. One commenter asked if a representative of the first railroad carrier must fully observe the transfer of physical custody of the rail car before turning it over to the second carrier, or if unmanned secure enclosures may be used.

TSA Response: Although the preamble to the NPRM stated that "not left unattended" meant that the employee or authorized representative must have "an unobstructed view of the rail car prior to the delivering carrier leaving the interchange point" (71 FR at 76873), TSA has reconsidered this interpretation. For purposes of paragraphs (c) and (d) of 49 CFR 1580.107, the requirement "to ensure that the rail car is not left unattended at any time during the physical transfer of custody" means that the regulated party has an employee or authorized representative physically located on site, in reasonable proximity to the rail car, who can reasonably detect unauthorized access or unlawful activity near the rail car and is capable of promptly responding to such unauthorized access or unlawful activity (such as by immediately contacting law enforcement or other authorities to investigate), and immediately responds to unauthorized access or activity at or near the rail car either personally or by contacting law enforcement or other authorities. *See* 49 CFR 1580.107(k)(1).

In the case of rail cars that have been decoupled from locomotive power and are therefore not in a train, reasonable proximity is best understood to mean that an employee or designee of the responsible party has either the rail car or the area surrounding the rail car, including paths of access to the rail car, within his or her field of vision. For rail cars that are in a train, the concept of reasonable proximity means that the train crewmembers are located on or near the train; although the train crewmembers may be located at the front of the train and physically unable to visually observe every rail car, the security risk is mitigated by the fact that the train is subject to unpredictable movement at any time. Determining what is a reasonable proximity is not calculated by measuring a precise distance or designating a particular location, but rather by achieving a reasonable expectation that any unlawful interference with the rail car will be promptly detected. As long as the individual performing the monitoring, whether on the ground or located in an on-site control room watching via a surveillance system, can satisfy this performance standard, there is no limit on the number of cars that he or she can attend. Accordingly, TSA does not expect the first railroad carrier to assign someone to literally observe each car 100 percent of the time during the physical transfer of custody.

TSA also does not want an employee or authorized representative of the regulated party to place his or her safety or life in jeopardy. TSA recognizes that a reasonable response to unauthorized access or unlawful activity may be to immediately contact law enforcement rather than approach an individual directly.

Comments: A municipality commented that TSA should provide clarification on whether rail switching yards must be converted into secure areas. As an example, it referenced a yard where trains are broken up into cars or blocks of cars and built into new trains.

TSA Response: Although the commenter uses the words "secure areas" in the context of asking whether rail yards fall under the "secure location" requirement in the definition of "rail secure area," the commenter's question appears to concern the carrier to carrier transfer requirements in 49 CFR 1580.107(c) and (d).[40] Under 49 CFR 1580.107, TSA requires attendance of the rail car during carrier to carrier physical transfers of custody. The attendance requirement only applies in a rail switching yard when one carrier interchanges a covered rail car with another carrier in such a yard. TSA anticipates this happening most often when cars enter and leave the yard, not while they are within the yard being switched. Movements within a yard (including many classification yards) that are transfers solely between the same railroad carrier are not covered by 49 CFR 1580.107.

Comments: An association representing short line and regional railroads commented that TSA should provide clarification on when the transfer is complete under the chain of custody and control requirements and recommended that TSA consider the transfer complete once the rail car is uncoupled from the delivering railroad carrier.

TSA Response: TSA agrees that the transfer is complete when the car is uncoupled from the train, and all documentation requirements are met either in writing or electronically.

Comments: Some commenters suggested that TSA amend paragraph (f)(1) of 49 CFR 1580.107 to prohibit unattended pick up and delivery rather than using the term "positive control."

TSA Response: The language in this final rule remains unchanged from the NPRM. However, TSA has added a new paragraph (k)(2) to 49 CFR 1580.107 to explain the term "maintains positive control."

By requiring that either the rail hazardous materials receiver in an HTUA or railroad carrier "maintains positive control" of the rail car during the physical transfer of custody of the rail car, TSA intends that the receiver communicate with the railroad carrier and work in close cooperation to ensure the security of the rail car during the transfer process. Since "attending the car" is only one component of the overall process of "controlling the car" during the transfer, the regulatory text requires one or both parties to be responsible for positive control.

Comments: A railroad carrier commenter indicated that a rail car is attended if a train crewmember is present. Several rail labor unions urged TSA to specify that a railroad carrier may not assign a train crewmember for purposes of compliance with the attendance requirements because of the high risk of injury or death in the event of a terrorist incident. One commenter stressed that train conductors already have numerous safety and other responsibilities, and are not trained as security personnel. Another commenter noted that 49 CFR 1580.107 does not have a training requirement, and requested that TSA add a provision to specifically address the skill set and qualifications necessary for conducting inspections required under 49 CFR 1580.107(a)(1), (b), (c), and (d).

TSA Response: As noted in the NPRM (71 FR at 76873), TSA intends that railroad carriers have maximum flexibility in adopting and implementing procedures to meet the car attendance performance standard. Accordingly, a railroad carrier's option to use any category of individuals, including train crewmembers, to carry out the job function of attending rail cars remains unchanged from the proposed rule. In crafting its

[40] As defined in 49 CFR 1580.3, a "rail secure area" is a secure location designated by a rail hazardous materials shipper or rail hazardous materials receiver where security-related pre-transportation or transportation functions are performed or rail cars containing the covered hazardous materials are prepared, loaded, stored, and/or unloaded.

procedures, TSA expects a railroad carrier to consider personal safety and security issues and competing job responsibilities of the potential individuals who will serve as attendants, as well as compliance with all other applicable laws, regulations, and contracts.

TSA is not prescribing a specific training requirement for attendant functions in this final rule, nor is it establishing minimum qualification standards for the employees who must attend the rail cars. However, in order to comply, the railroad carrier must ensure that persons who carry out this rule know what they must do. TSA will soon issue a DVD training video to freight railroad carriers and rail hazardous materials facilities on identifying IEDs and signs of rail car tampering and on security awareness.

TSA is mindful of employee concerns about personal safety. We do not expect that railroad employees will necessarily confront suspicious persons directly. For instance, an employee may summon law enforcement personnel to confront a suspicious individual or respond to a report of a possible IED.

Comments: Some commenters were concerned that the chain of custody provisions would be burdensome on small hazardous materials shippers and receivers in high threat urban areas that did not operate 24 hours a day, 7 days a week. Consequently, these facilities might not have staff to comply with the chain of custody provisions of this final rule when a carrier arrived to transfer a rail car.

TSA Response: TSA recognizes that a rail hazardous materials receiver located in an HTUA that is not open for business 24-hours a day, seven days a week, may incur some additional cost to meet the requirements in this final rule. TSA has accounted for this cost in the Regulatory Impact Assessment (RIA). Some regulated parties may satisfy the attendance requirement by employing someone only as long as necessary to transfer the car from the delivering railroad carrier, to document the transfer of custody, and to ensure that it is moved into a rail secure area. Once the rail car is placed in a rail secure area at the receiving facility, the rail car no longer needs to be attended.

3. Electronic Monitoring of Rail Cars

Comments: One group of commenters asked how technology can be used to comply with 49 CFR 1580.107. Several comments supported the use of technology to satisfy the chain of custody and control requirements, noting that electronic devices may offer better security benefits through their enhanced methods to track and control products while in transit. A trade association representing chlor-alkali producers worldwide (as well as packagers, distributors, users, and suppliers) asked TSA to clarify that "positive control" can be achieved through electronic communication.

TSA Response: TSA supports the use of technology to the extent that covered entities can use it to achieve the security standards of 49 CFR 1580.107. TSA recognizes that as existing and future technologies become commercially available, they could provide equal, or possibly superior, monitoring capability of rail cars. As noted, the attendance standard is that of a regulated party's reasonable expectation that it has the ability to detect unlawful interference with the rail car and properly respond to a security situation. See 49 CFR 1580.107(k)(1). As part of "maintaining positive control" of the rail car, attendance must occur until the receiving party has accepted physical custody. In this final rule, covered entities may use visual monitoring technology to comply with the attendance and transfer of physical custody requirements, but only if the person attending the car(s) or train is physically present on-site at the facility where the attendance is required.[41]

The technology selected may include, but is not limited to, intelligent video, passive intrusion detection, perimeter alarms, or advanced video surveillance systems.[42] Whatever system or method is selected, the regulated party is responsible for ensuring that the process employed provides an operationally effective means to meet the regulatory requirement. Automatic Equipment Identification (AEI) readers cannot be used to meet the provisions of 49 CFR 1580.107, because they cannot be used to monitor or control access to a car.

4. Rail Hazardous Materials Receivers

Comments: Some commenters requested that TSA assist facilities in determining whether they are within an HTUA and therefore subject to certain chain of custody and control provisions.

TSA Response: Before the effective date of this final rule, TSA will provide on its website maps of each of the 46 HTUAs that TSA will use to inspect for compliance with the applicable sections of this regulation. It is important to note that TSA will provide these maps for general guidance purposes only. TSA encourages any regulated party with questions concerning the applicability of this final rule to its operations to contact TSA directly.

Comments: A trade association commented that TSA should grant an exception to the chain of custody and control provisions for receivers located in an HTUA that receive less than one tank car per month.

TSA Response: This final rule does not contain an automatic exemption from the chain of custody requirements for rail hazardous materials receivers located within an HTUA, regardless of whether they receive very few cars in a given timeframe. The security risk posed by receipt of shipments of Division 1.1, 1.2, and 1.3 explosives, non-residue quantities of PIH materials, and highway route controlled quantities of radioactive materials is significant even if a rail hazardous materials facility only receives a single carload each month. While it is true that the security risks for the rail transportation system as a whole increases as the total number of shipments increase, it is also true that there is a risk associated with each carload received. An exemption from 49 CFR 1580.107 for the specified hazardous materials in amounts below a given threshold is not warranted given the security risks posed by these materials. However, any receiver located in an HTUA may request an exemption[43] from some or all of the chain of custody requirements of this final rule if it believes, based upon the operational characteristics and geographical location of its facility, that the potential security risk of its facility is insufficient to warrant application of the chain of custody requirements in 49 CFR 1580.107.

Comments: One commenter asked TSA to clarify that receivers located outside an HTUA are not required to satisfy the chain of custody and control provisions, including attending the physical hand-off from a railroad carrier.

TSA Response: Rail hazardous materials receivers *not* located within an HTUA are not subject to any of the requirements in this final rule.

Comments: A municipality stated that it is opposed to allowing shippers to request an exemption under 49 CFR 1580.107(j) if they determine that a

[41] Accordingly, a regulated party that has an on-site employee (or authorized representative) who can use electronic monitoring to (for example) promptly notify law enforcement personnel to investigate the presence of a trespasser near a rail car would be in full compliance with the attendance requirement.

[42] TSA recognizes that the development of systems and technologies to enhance the physical security of assets and infrastructure is an evolving process. TSA does not wish to preclude the use of advanced technologies that would provide the regulated parties with additional options for meeting the requirements of 49 CFR 1580.107.

[43] For information on the exemption, see 49 CFR 1580.107(j).

terrorist attack is unlikely at the area where they forward or receive hazardous materials. The commenter stated that such requests for exemption are likely to be based on cost considerations, and not necessarily on objective and knowing assessments that an area is less vulnerable to terrorist activity. In addition, once these locations become and remain unguarded, they are likely to attract persons who could take advantage of the fact that the area is unsecured.

TSA Response: In the case of shippers of the covered hazardous materials, TSA agrees with the commenter. As the first link in the supply chain, and the first opportunity for unlawful interference with a rail car, shippers are not allowed to request an exemption from this regulation. However, under 49 CFR 1580.107(j), a rail hazardous materials receiver located within an HTUA can receive an exemption from the chain of custody and control requirements if it shows TSA that the potential risk from its activities is insufficient to warrant compliance. TSA will only grant such an exemption if, after analyzing the factors relevant to the potential security risk, it concludes that doing so is in the public interest and consistent with transportation security. The factors include: (1) The quantities and types of all hazardous materials that the rail hazardous materials receiver typically receives or unloads; (2) the receiver's geographical location in relationship to populated areas, which includes both daytime office building populations and populations in residential neighborhoods; (3) the receiver facility's immediate proximity to sensitive populated areas, such as other businesses (including other hazardous materials facilities), residential homes and apartment buildings, elementary schools, and hospitals; (4) any information regarding threats to the facility; and (5) any other circumstances relevant to that receiver's activities that would demonstrate that these activities present a low security risk.

5. Document Requirement

Comments: Several commenters requested that TSA clarify whether electronic data interchange (EDI) may be used to satisfy the documentation requirements of this final rule. One trade association asked whether an AEI system with readers at agreed interchange points would satisfy the documentation requirements. An association representing Class I railroads requested clarification on whether notification on a "switch list" (date and time of delivery), which is then entered into the carrier's electronic database, meets the documentation requirement.[44]

TSA Response: The requirement to document the transfer of custody ensures that all parties involved in the transfer know who is responsible at any given time; this allows TSA to verify that freight railroad carriers and rail hazardous materials facilities are not engaged in practices that leave certain hazardous materials rail cars unattended, and therefore vulnerable to someone attaching an IED or otherwise sabotaging the car. The documentation requirement also assists in locating rail cars, especially after delivery to the receiving facility in an HTUA. This final rule does not specify that a carrier or facility must use a particular document to meet this requirement, but does prescribe certain mandatory information that carriers and facilities must include. In this regard, TSA recognizes the unique operating practices and considerations of each regulated party, and anticipates that each party will meet the performance standard by adapting existing documents and/or technology. Regardless of which method the regulated party uses to comply, TSA requires that the documentation must contain information that uniquely identifies that the rail car was attended during the transfer of custody. This information must include the car's initial (reporting mark) and number, identifying data that allows TSA to determine who in fact attended the rail car (such as the names or uniquely identifying employee numbers of the train crewmembers or rail hazardous materials facility employees), location of the transfer (such as the milepost number, name of the rail yard, or siding designation), and the date and time when the transfer was completed. *See* new 49 CFR 1580.107(k)(3).

EDI and switch lists may be used to satisfy the requirement and serve as a technical representation of a business conversation between two regulated parties if they are adapted to sufficiently document the transfer of physical custody from one regulated party to the other and allow TSA to determine who participated in the transfer and when and where the transfer took place. TSA is retaining in the final rule the language from the proposed rule requiring that both participants in the transfer create documentation. Passive AEI readers do not meet the documentation requirements of this final rule because while the passage of a rail car past an AEI reader would establish the car's geographical location at the time of the reading, it would not generate the required documentation.

6. Other Issues Concerning Chain of Custody and Control

Comments: Several members of Congress questioned the effectiveness of the proposed rule given the fact that so few TSA inspectors are available.

TSA Response: TSA has deployed the 100 inspectors provided for by Congress in the Department of Homeland Security Appropriations Act for fiscal year 2005 (Pub. L. 108–90). Assigned to 19 field offices throughout the United States, the inspectors cover the key rail and mass transit facilities in their regions. The program has focused on nationwide outreach and liaison activities with the rail industry and initiatives aimed at enhancing security in rail and mass transit systems. Inspections for compliance with this regulation, such as the chain of custody and control provision targeting of high risk interchanges, will focus our inspection priorities. Other provisions in this final rule, such as the appointment of a RSC and the requirement to provide certain location and shipping information, may be primarily monitored by headquarters staff. TSA is confident that this rule will be effectively implemented.

Comments: One municipality believed that re-routing of hazardous materials was a better strategy.

TSA Response: TSA's NPRM did not address this issue. DOT/PHMSA has addressed routing issues in its rule. As noted earlier in this preamble, DOT/PHMSA published an interim final rule in the **Federal Register** on April 16, 2008. The PHMSA rule revises the current requirements in the HMR applicable to the safe and secure transportation of hazardous materials transported in commerce by rail. In pertinent part, PHMSA is requiring

[44] For purposes of accounting and reporting, the Surface Transportation Board (STB) groups freight railroad carriers into the following three classes:

Class I: Carriers having annual carrier operating revenues of $250 million or more after applying the railroad revenue deflator formula.

Class II: Carriers having annual carrier operating revenues of less than $250 million but in excess of $20 million after applying the railroad revenue deflator formula.

Class III: Carriers having annual carrier operating revenues of $20 million or less after applying the railroad revenue deflator formula.

See 49 CFR 1201; General Instructions 1–1. The railroad revenue deflator formula is based on the Railroad Freight Price Index developed by the Bureau of Labor Statistics. The formula is as follows:

Current Year's Revenues × (1991 Average Index/Current Year's Average Index)

The STB is an economic regulatory agency that Congress charged with the fundamental missions of resolving railroad rate and service disputes and reviewing proposed railroad mergers. *See* ICC Termination Act of 1995, Pub. L. 104–88, 109 Stat. 803 (December 31, 1995).

freight railroad carriers to compile annual data on certain shipments of explosive, toxic inhalation, and radioactive materials, use the data to analyze safety and security risks along rail transportation routes where those materials are transported, assess alternative routing options, and make routing decisions based on those assessments.

Comments: Two commenters recommended that TSA adopt the DOT definition of offeror instead of "shipper" and that all requirements placed on the shipper should be assigned to the "offeror."[45]

One of the commenters stated that the definition in the proposed rule of "rail hazardous materials shipper" is more restrictive than the DOT definition of "person who offers" or "offeror" in 49 CFR 171.8. The commenter noted that the proposed rule appears to assume that all hazardous materials shipment origination activities occur at the physical facility where a covered hazardous material shipment originates, and indicated that this is not necessarily the case. The commenter recommended that TSA revise the proposed rule to distinguish between requirements applicable to the originating facility and requirements applicable to the person or organization performing the functions of "offeror," as described in 49 CFR 171.8.

Another commenter stated that since rail hazardous materials shippers and receivers are fixed-site facilities, not persons, they cannot be tasked to perform "offeror" functions. The commenter also recommended that TSA adjust the definition of "receiver" to make it consistent with 49 CFR 171.8.

TSA Response: TSA is revising the definitions of "rail hazardous materials shipper" and "rail hazardous materials receiver" in 49 CFR 1580.3 to clarify that this rule applies to the operator of the fixed-site facility. TSA is retaining the term "rail hazardous materials shipper" to establish that responsibility for compliance with the requirements in parts 1520 and 1580 rests with the operator of the fixed-site facility that has a physical connection to the general railroad system of transportation and offers, prepares, or loads any of the covered hazardous materials for transportation by rail. Although the facility operator may elect to assign responsibility for performing pre-transportation functions to an agent or contractor, the facility operator remains responsible under the rule for compliance with all applicable provisions of this final rule. In the event of noncompliance, TSA may hold the shipper/facility's operator responsible for the violation and subject to enforcement action. Further, TSA notes that a fixed-site facility operator is a "person" for purposes of being able to ship/offer or receive hazardous materials covered by the rule. *See* 49 CFR 1580.3.

TSA is also retaining the term "rail hazardous materials receiver" in this final rule rather than using the DOT term "consignee."[46] A fixed-site receiving facility is not merely a delivery location, but also the legal entity responsible for compliance with this final rule in its role as a receiver or unloader of the covered hazardous materials. While DOT regulations no longer apply after the delivering railroad carrier departs a rail hazardous materials receiver facility (*see* 49 CFR 171.1(c)(3) and 171.8), TSA's final rule extends beyond that time and covers the transportation-related areas of these facilities that receive or unload covered rail cars.

Comments: A chemical manufacturer observed that TSA's definition of "offeror" includes the words "Any person who * * * [t]enders or makes the hazardous material available * * *" (49 CFR 1580.3). That manufacturer noted that the term "tenders" has a precise legal meaning, often used in satisfaction of a debt or obligation. The commenter recommended that TSA revise the definition of "offeror" by replacing the word "tenders" with "provides."

TSA Response: For the sake of consistency with DOT's HMR, TSA based its definition of "offers" or "offeror" (49 CFR 1580.3) on the DOT definition of "person who offers" or "offeror" (49 CFR 171.8). In pertinent part, DOT defines a "person who offers or offeror" as "any person who * * * [t]enders or makes the hazardous material available * * *" In the context of TSA's definition of "offers" or "offeror," the legal meaning of "tenders" is clear.

Comments: A chemical manufacturer commented that TSA should align the applicability of its rail transportation security rule with DHS's CFATS regulation and clearly define jurisdictions and authority so that entities covered by both regulations have a clear understanding of their obligations under the law.

TSA Response: It is not practicable for TSA to align the applicability section of the two rulemakings. Section 1580.107 of the freight rail provisions of TSA's regulation focuses on the pickup, delivery, and interchange of rail cars containing certain hazardous materials, whereas DHS's CFATS rule establishes requirements for the security of entire high-risk chemical facilities. Given the disparity in focus and the differences in addressing risk between the transportation and chemical sectors, it is neither practicable nor necessary to completely align the applicability sections of the two rules. Due to the nature of the supply chain, there is some inherent overlap between transportation and chemical facilities. This is reflected in the TSA regulation. In order to secure the transportation system, in § 1580.107 we are regulating facilities that are connected to the general railroad system of transportation and ship, or receive in an HTUA, one or more of the specified categories and quantities of the hazardous materials listed in § 1580.100(b). However, we believe that the responsibilities of those facilities that are potentially subject, to some degree, to both this rule and to CFATS are sufficiently clear and that those responsibilities will not conflict with each other.[47]

Comments: A commenter expressed concern that the attendance requirements of 49 CFR 1580.107 might lead to non-compliance with the hours of service laws,[48] cause worker fatigue issues, and have an impact on transit times and delivery schedules.

TSA Response: TSA recognizes that the attendance requirement may require certain operational changes by the freight railroad carriers required "to ensure that the rail car is not left unattended during the physical transfer of custody." This final rule allows freight railroad carriers the maximum degree of flexibility to adopt and implement procedures to meet the car

[45] In pertinent part, in 49 CFR 171.8, DOT defines a "person who offers" or "offeror" as:

(1) Any person who does either or both of the following:

(i) Performs, or is responsible for performing, any pre-transportation function required under [Subchapter C] for transportation of the hazardous material in commerce.

(ii) Tenders or makes the hazardous material available to a carrier for transportation in commerce.

* * * * *

[46] In 49 CFR 171.8, DOT defines a "consignee" as "the person or place shown on a shipping document, package marking, or other media as the location to which a carrier is directed to transport a hazardous material."

[47] Note that the preamble to the CFATS IFR stated that DHS may re-evaluate the coverage of railroads under that regulation, and if so would conduct a new rulemaking for that purpose. *See* 72 FR 17699 (April 9, 2007).

[48] TSA presumes that the commenter is referring to the Federal hours of service laws (49 U.S.C. 21101–21108), which includes requirements concerning maximum on-duty and minimum off-duty periods for individuals engaged in or connected with the movement of a train. *See* 49 U.S.C. 21101 and 21103.

attendance performance standard. In this regard, 49 CFR 1580.107 does not specify a maximum number of rail cars that a carrier employee or authorized representative may attend, nor does it require the attendant to be within a certain designated distance from the rail car. TSA expects the affected freight railroad carriers to adopt and carry out implementing procedures that meet the performance standard of this rule without compromising railroad safety or violating any other Federal requirements.

Comments: Several commenters asked whether the chain of custody provisions apply to imports and exports from Mexico and Canada.

TSA Response: The chain of custody requirements do not apply at any shipper facilities located outside the United States, but begin at the first carrier interchange point inside the United States that triggers the provisions of § 1580.107, and apply to all subsequent covered carrier interchanges. The requirements also apply to a rail hazardous materials receiver located in an HTUA, regardless of whether the rail car originated at a domestic or foreign location. Accordingly, for shipments originating in Canada or Mexico, there will be no evidence of a secure shipment from the initial rail hazardous materials shipper, and for shipments destined for Canada or Mexico, there is no requirement for a secure hand off to the receiver.

Comments: One commenter requested clarification of responsibilities where a passenger railroad has contractual agreements regarding the use of their respective rail tracks for the transportation of hazardous materials by private freight railroad carriers.

TSA Response: The requirements in § 1580.107 do not apply to passenger railroad carriers that lease or have contractual agreements regarding the use of their track by freight railroad carriers to haul hazardous materials. Only the railroad carrier transporting the covered hazardous materials, not the owner of the track, is covered by § 1580.107.

Comments: The Small Railroad Business Owners of America commented on the potential danger of grouping hazardous materials rail cars together in secure areas rather then leaving them individually on tracks in various rail yards. The commenter stated that the best solution is to employ security systems that are monitored, such as television cameras and employees who work in the area who are told to immediately report any unauthorized persons.

TSA Response: TSA recognizes that rail hazardous materials facilities may have to comply with 49 CFR 1580.107 by storing covered rail cars in close proximity to each other. However, this final rule does not outline any specific requirements for the storage of covered cars, other than that the cars must be kept in a rail secure area with physical security measures while awaiting pickup at a rail hazardous material shipper by a railroad carrier or awaiting unloading at a rail hazardous materials receiver in an HTUA. The rule also does not specify the size of the secure area; a facility may establish multiple secure areas. TSA believes that placing covered cars only in secure areas with physical security measures in place provides an added security benefit, since it is easier for the facility to monitor the cars in concentrated locations rather than stored individually on multiple tracks.

H. Location and Shipping Information for Certain Rail Cars

1. Applicability

Comments: An association suggested that TSA exempt Class III railroads from providing routing information for cars on other carriers' portions of a rail car trip (i.e., the time that the rail car spends in transportation being hauled by another railroad carrier). The commenter stated that the shipping documents that small railroad carriers receive from connecting carriers typically do not indicate the routing that the larger railroads will use. They asserted that, in practice, this information is available from Class I railroad carriers who have multiple routing options and will know which route other carriers will use to the final delivery destination point.

TSA Response: When TSA needs to know the location of a specific rail car, the agency may query a number of carriers about the routing and shipping information; however, TSA recognizes that the entity in possession of the rail car generally has the best available information. In the context of TSA requesting the information, since this final rule only requires railroad carriers to report information for cars under their physical custody and control, TSA will not ask a carrier to submit information that is beyond its range of knowledge and that would require it to make inquiries of other carriers. *See* 49 CFR 1580.103(b).

Concerning routing information, TSA understands the differing capabilities between Class I railroads and short line and regional railroads, and has taken this into consideration in this final rule by allowing freight railroads, other than Class I carriers, more time to provide the required information. *See* 49 CFR 1580.103(e). TSA understands that routes sometimes change and expects that all regulated parties will provide the best available current routing information. TSA anticipates that in cases of heightened threat or during a security incident, all regulated parties would go beyond the minimum regulatory requirements and provide TSA with as much information as possible, including available information on rail cars that a railroad carrier had on its system before transferring it to another carrier or to a rail hazardous materials receiver.

Comments: One association commented that the only location and shipping information that rail hazardous materials shippers and receivers should have to provide to TSA, when requested, is the fact that the facility is in possession of the car.

TSA Response: This final rule provides that all covered freight railroad carriers and rail hazardous materials facilities must develop procedures to determine the location and shipping information specified by 49 CFR 1580.103 for rail cars under their physical custody and control containing the specified hazardous materials. A rail hazardous materials facility meets the requirements of 49 CFR 1580.103 if it informs TSA that it currently has a specific car(s) in its possession, identifies which rail cars contain a specified hazardous material, and provides TSA with the name and address of the facility where the car(s) or train is located. TSA is aware that some rail shipper and receiver facilities are very large, but there may be times when it is imperative that DHS know an exact car location inside a facility. In these cases, DHS and TSA will work with the affected facility to locate the precise position of the car to ensure appropriate intervention.

Comments: One commenter recommended that TSA extend applicability of the car location and shipping information reporting requirement to covered entities handling all DOT-classified hazardous materials.

TSA Response: As discussed in Section V.G.1 of this preamble, TSA is not revising the list of hazardous materials to which the requirements of 49 CFR 1580.103 apply. While TSA acknowledges that all hazardous materials present certain security risks in transportation, we selected the explosive, PIH, and radioactive materials as an initial step, because of the significant risk posed by these materials. In the case of an emergency

involving explosives, PIH, or radioactive materials, such as a specific threat against a particular train or a general threat involving the metropolitan area through which the train is operating, it may be critical for TSA to have location and shipping information rapidly to address threats to persons and property.

2. Timeframe for Reporting Information

Comments: Many commenters supported the requirement to provide location and shipping information to TSA upon request within one hour, as proposed in the NPRM. TSA also requested comment on whether TSA could and should shorten the response time to five minutes for providing information on a specific car and 30 minutes for providing information on more than one car under the regulated party's physical custody and control.

Several commenters opposed shortening the response time. These commenters varied in their reasons for opposing the change, including arguments that it would pose an unreasonable cost, was too difficult, or was impossible to implement with current technology. A few commenters supported the shortened five minute/30 minute reporting timeframe. One commenter suggested that commercial off-the-shelf technology existed that could meet TSA's proposed requirement. Two others suggested that the threat was severe enough that TSA must be able to obtain location and shipping information on cars carrying security-sensitive materials in the shortest possible timeframe, regardless of whether the private sector funds the technology or the government establishes a national system.

TSA Response: TSA requires all Class I freight railroad carriers subject to 49 CFR 1580.103 to provide the location and shipping information to TSA within five minutes if the request concerns only one rail car and within thirty minutes if the request concerns two or more rail cars. *See* 49 CFR 1580.103(d). All other regulated parties subject to 49 CFR 1580.103 must provide the information to TSA within thirty minutes, regardless of how many rail cars the request concerns. *See* 49 CFR 1580.103(e). TSA has concluded that regulated parties can comply with these timeframes. The technological capability to locate the rail cars currently exists. While compliance with this final rule may require procedural changes to the carrier or facility's operations, it will not entail significant or costly technological changes.

Freight railroad carriers, both small and large, maintain systems to track and locate rail cars for both operational and revenue accounting purposes. Depending on the size and operational needs of the railroad, the sophistication of these systems will vary, but all perform the same basic functions. Railroad carriers trace the location of rail cars from the time that they are accepted for transportation at the point of origin until they are placed at the receiver's designated location. While in transit between the points of origin and destination, the progress of a rail car is tracked using a variety of methods including AEI, global positioning systems (GPSs), train dispatching systems, and train crew reporting. Railroad carriers then use computer-based systems to capture data on the location and progress of their rail cars. Carriers can use these types of systems to meet the reporting requirements of 49 CFR 1580.103.

TSA notes that railroad carriers transporting rail cars containing explosives, radioactive, or PIH materials have programs or procedures in place to quickly locate a single tank car on their property if they are provided with the car's reporting marks (initial & number). For purposes of complying with 49 CFR 1580.103, TSA anticipates that the vast majority of railroad carriers will determine the number and types of rail cars on their property containing PIH or other specified materials by utilizing car trace and yard management software that sorts car contents according to Standard Commodity Codes (STCC). In addition, TSA recognizes that railroad carriers can, and tend to, send car location messages to a central databank (Railinc [49]), which allows the shipper, carrier(s), and receiver of the rail car to track the approximate location and trip progress of a particular rail car.

In 2006, TSA conducted audits of freight railroad carriers and their employees to determine the level of implementation of certain voluntary guidance.[50] One of these standards concerned the ability of railroad carrier employees to locate cars containing PIH materials in a specific yard. TSA determined that all of the Class I railroads and over 80 percent of the Short Line and Terminal railroads had systems in place to locate cars containing PIH or other specified materials. In this regard, the majority of the railroad carriers have developed car tracing programs that allow them to identify those trains operating on their systems that have PIH or other specified material cars in the train.

As part of the process of analyzing the security threat to the freight railroad system, TSA has reviewed the ability of Class I, II, and III railroad carriers to respond to car location and shipping information requests. In all instances, when asked about rail cars containing the covered materials that were under their physical custody and control, Class I carriers were able to respond in five minutes or less when the request concerned one rail car and in 30 minutes or less when the request involved multiple rail cars. The Class I carriers used their existing programs and/or procedures to locate a single rail car on their property once TSA provided the car's reporting mark and serial number (car initial and number). These carriers also used car tracing programs to identify those trains operating on their systems that had hazardous material cars in the train.

In the case of Class II and III carriers, TSA is aware of at least one program that the industry developed for the purpose of locating hazardous materials rail cars being hauled on Short Line and Terminal railroads. TSA and FRA have funded a program known as FreightScope.[51] The Federal government in conjunction with the American Short Line & Regional Railroad Association (ASLRRA), has tested the functional capability of this program. Representatives of the ASLRRA, acting as agents for their member railroads, maintained a means of accessing the information in the FreightScope program, as well as a means of transmitting the information to the Federal government upon request. In the tests performed, the ASLRRA representatives were able to provide the requested car location and reporting information in approximately 20 minutes. In one instance, the ASLRRA representative provided a verbal accounting of the information in less than five minutes.

Larger and medium size rail hazardous materials shippers and rail

[49] Railinc is a leading provider of information technology and related business services to the North American railroad industry. The company hosts a variety of rail industry revenue, equipment, and operations management applications.

[50] On June 23, 2006, DHS and DOT issued 24 recommended security action items for the rail transportation of materials poisonous by inhalation, commonly referred to as TIH materials. The security action items are divided into three categories: (1) System security; (2) access control; and (3) en-route security. On November 21, 2006, the two Departments issued three additional recommended security action items. The security action items are available on TSA's public Web site.

[51] Railinc, a subsidiary of the AAR, developed FreightScope from ASLRRA specifications and with sponsorship and funding from FRA. It provides a Web-based interactive dashboard of near-real-time rail shipment location information for North America. Users can quickly determine the last reported location of hazardous materials shipments that are in the control of Short Line railroads.

hazardous materials receivers of rail cars covered by this regulation have existing systems in place to record cars that enter or leave their facilities by rail. Railroad carriers notify shippers prior to dropping off residue cars and picking up loaded cars, and notify receivers when delivering a loaded car or picking up a residue car. Shippers are aware of the location and status of rail cars covered by this final rule as the cars pass through the facility, both while going through the loading process and while in temporary storage waiting to be shipped. Shippers also follow very specific company and DOT-required procedures for pre- and post-load inspections and necessary rail car maintenance and repair. While there is a constant movement of rail cars into, through, and out of a facility between these processes, plant personnel monitor the tank cars at each stage of the process, including loading and unloading operations and railroad carrier drop offs and pickups. Large and medium size receivers in HTUAs also follow very specific procedures and processes from the time a covered rail car enters the facility until the covered hazardous material is unloaded, including inspections prior to unloading. In addition, they perform pre-release checks before the residue cars are picked up by the railroad carrier.

Smaller rail hazardous materials shippers and smaller rail hazardous materials receivers in an HTUA have smaller inventories of rail cars and consequently a smaller turnover of cars. TSA anticipates that the facilities will comply with this final rule by maintaining a written list of rail cars with the relevant information, and perform a visual check for the requested cars. The location and shipping information requirement will not result in operational changes to the systems at these smaller facilities.

As noted in the preamble to the NPRM, TSA sought comment on an alternative to the proposed one-hour reporting timeframe, because in an emergency, "information concerning the location of certain hazardous materials * * * [is] critical to decisions concerning possible rerouting, stopping, or otherwise protecting shipments and populations to address specific security threats or incidents." 71 FR at 65864 and 76871. TSA specifically asked for comment on how a shorter timeframe could be accomplished and at what financial cost. Based upon comments received and our understanding of the technological capabilities of freight railroad carriers and rail hazardous materials facilities, in this final rule, TSA has revised the timeframe for a regulated party to report location and shipping information. Each Class I railroad carrier must provide the requested information to TSA no later than five minutes after receiving the request if the request involves only one rail car and no later than 30 minutes if the request concerns two or more rail cars. All freight railroad carriers not otherwise identified as Class I carriers by the STB are permitted up to 30 minutes to provide the requested information, regardless of the number of rail cars involved. All rail hazardous materials shippers and all rail hazardous materials receivers in an HTUA are permitted up to 30 minutes to provide the requested information, regardless of the number of rail cars involved.

TSA has also added a new paragraph (g) to 49 CFR 1580.103, requiring each regulated party to provide a telephone number for TSA to use when requesting location and shipping information. In contrast to the RSC provision, which requires the regulated party to designate a named individual as TSA's contact person because of the potential need to convey extremely time-sensitive threat information or security procedures at any time of the day or night, paragraph (f) merely requires that the designated telephone number be monitored at all times by a live person. As long as the individual who answers TSA's telephone call can provide accurate information within the specified timeframe, paragraph (f) permits the regulated party to use a designated third party or agent to meet this performance standard, rather than exclusively a company employee. Since this provision allows the regulated party flexibility to determine how best to meet the reporting requirement, smaller railroad carriers and rail hazardous materials facilities that do not operate around the clock or maintain 24/7 operations centers can comply with minimal operational changes.

TSA is also deleting the words "in writing" from paragraph (f)(6) in this final rule (which was designated as paragraph (e)(6) in the NPRM), to allow regulated entities, on a case-by-case basis, to request an alternate reporting format and for TSA to immediately approve that request by telephone, without the need for a written response. TSA anticipates that a railroad carrier or rail hazardous materials facility may use this provision when they receive a request for information on only one rail car and can provide the answer easily by telephone. However, TSA does not anticipate approving the use of verbal communication if the requested information concerns numerous rail cars located at many different locations.

3. Technology for Reporting Information

Comments: Several commenters stressed that TSA should allow them to use existing resources to comply with the location and shipping information requirement. A commenter indicated that existing AEI readers and supporting two-way communications systems are fully capable of producing the location and shipping information requested by TSA. The commenter stated that GPS by itself does not add substantial benefits and has significant limitations, such as requiring a direct line of sight to the satellite and an independent power source, which will need replacement. Additionally, the frequency of transmission causes immediacy of location reports to vary.

TSA Response: TSA believes that the technology currently employed by freight railroad carriers and rail hazardous materials facilities is sufficient to comply with 49 CFR 1580.103. This final rule establishes a performance standard that requires the regulated entities to be able to provide the requested information in the timeframe specified, without mandating a particular technology or system protocol for obtaining it. Accordingly, while certain larger freight railroad carriers will meet the requirement by using AEI tags, smaller carriers that rarely haul rail cars containing the specified hazardous materials may elect to obtain the requested location and shipping information merely by calling the train crew on a two-way radio or cellular telephone. Depending on the number of rail cars present that contain one or more of the listed hazardous materials, rail hazardous materials facilities may choose to employ a sophisticated computer program (as appropriate) or simply assign an employee to physically count the rail cars containing the product and gather the requested information for each rail car. If the carrier, shipper, or receiver provides the location and shipping information to TSA within the specified timeframe and does so using one of the approved methods, the carrier or facility would be in full compliance with this final rule.

Comments: A few commenters supported enhancing the current AEI system with GPS-based tracking and monitoring systems. These commenters noted that GPS-based technologies can provide timely and accurate tracking information. They suggested that the current AEI-based system cannot meet the requirements of this rulemaking or provide the efficiency benefits. One

commenter noted that in addition to location data, GPS-based systems can provide security information such as a notification if certain equipment becomes compromised in transit.

Other commenters opposed the use of a GPS-based system and supported the continued use of the current AEI system to meet the proposed requirements.

TSA Response: TSA appreciates the comments on AEI systems and GPS technology. TSA is not mandating any specific technology to meet the requirements of this final rule at this time. In order to better understand the security costs, benefits, and drawbacks of GPS, TSA has commissioned a comparative study between GPS and the current AEI-based system. Additionally, the study will provide the Federal government with an assessment of the AEI system and additional technologies that could be used to enhance the current system's fidelity.

4. TSA's Use of the Information

Comments: Several members of Congress requested information on how TSA intends to use the information gathered pursuant to the location and shipping information provisions of the regulation.

TSA Response: TSA intends to use the information obtained under § 1580.103 to prevent or mitigate a terrorist attack. TSA anticipates requesting information in cases of heightened threat or prior to or during an attack. In cases where TSA/DHS has threat information about a specific rail car, commodity, or area, or other relevant fact relating to the transportation of covered materials being shipped by rail, it is imperative that TSA be able to focus upon the affected entity or population as quickly as possible. Currently, the Federal government does not have in place a permanent system to locate rail cars or target hazardous materials in transportation and must partner with the private sector. By finalizing this provision of the rule and including a new requirement that each covered party must supply TSA with a 24-hour contact telephone number, TSA/DHS has a new tool to enable the Federal government to focus on potential or actual targets and take appropriate action when time is of the essence.

I. Whistleblower Protection for Employees

Comments: Two labor unions requested that the rule include whistleblower protection for employees of covered entities who report significant security concerns. The commenters indicated that absent such whistleblower protection, rail employees will remain subject to discipline and dismissal for reporting security concerns. One commenter provided regulatory language that would establish an appropriate level of whistleblower protection for employees who report security lapses to the relevant Federal entities. A third labor union asserted that the final rule must include mechanisms to ensure that employees are permitted to participate fully in reporting security concerns without harassment by employers. The union said that TSA inspectors and other agency officials should have the ability to talk directly with front-line workers about security concerns and any employer harassment they face. In addition, the union urged TSA to adopt regulations specifically prohibiting any type of employee harassment or intimidation with fines and penalties sufficient to discourage this conduct.

TSA Response: The topic of whistleblower protection is outside the scope of the NPRM, and therefore TSA has not addressed it in this final rule. TSA notes, however, that two provisions of the 9/11 Commission Act provide protections from retaliation for public transportation employees and railroad employees who, in good faith, provide information, or otherwise directly assist an investigation, about conduct that the employees reasonably believe is a violation of a Federal law, rule, or regulation related to railroad safety or security or gross fraud, waste, or abuse of Federal grants or other public funds.[52] *See* §§ 1413 (Public Transportation Employee Protections) and 1521 (Railroad Employee Protections) of the 9/11 Commission Act; *see also* 49 U.S.C. 20109. Each provision includes protections for employees who refuse to violate or help in the violation of any Federal law, rule, or regulation relating to safety or security; file a complaint, or directly cause to be brought a proceeding related to the enforcement of certain laws and regulations; or furnish information to DOT, DHS, NTSB, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with (as applicable) public transportation or railroad transportation. The whistleblower protections are enforced through the filing of a complaint with the Department of Labor. *See* § 1413(c) of the 9/11 Commission Act and 49 U.S.C. 20109(c) (as amended by § 1521 of the 9/11 Commission Act).

J. Preemption

Comments: Section 1580.109 of the NPRM proposed to preempt any State laws, rules, regulations, orders or common law requirements covering the same subject matter as § 1580.107. TSA sought comment on the scope of the subject matter that the final rule should or should not preempt under 49 U.S.C. 20106. Commenters were sharply divided on the issue of the proposed rule's preemptive effect, with industry commenters in favor of preemption and State and local governments opposed.

Several chemical manufacturers expressed support for the proposed rule's preemption provision, because it would implement national uniformity and increase the effectiveness of compliance efforts. Several trade associations urged TSA to expand to provisions beyond those for chain of custody and control requirements.

One commenter asserted that TSA's statement in the preamble of the NPRM that it "does not intend to preempt inspection activities conducted in furtherance of State and local laws or preempt requirements to appoint an RSC, or report significant security concerns" (71 FR 76875) is inconsistent with the language in 49 U.S.C. 20106. In this regard, the commenter stated that § 20106 provides that the States cannot regulate a subject when DOT or DHS has regulated that subject. The commenter asserted, therefore, that TSA lacks discretion to allow States to enforce their own requirements relating to RSCs or the reporting of security concerns. Further, the commenter stated that State requirements could result in railroads being subjected to differing requirements for security coordinators and a duty to report different types of occurrences in every State, leading to compliance difficulties without enhancing security.

Other industry representatives also emphasized the importance of uniform national standards and supported broad preemption.

State commenters raised objections to preemption and urged TSA to explain its plans for coordination and information sharing with States. A State requested assurance that a State's right to inspect and regulate will not be abrogated. A municipality, citing 49 U.S.C. 20106, urged TSA to include language in the final rule text recognizing the right of a political subdivision to enact more stringent law

[52] The investigation stemming from the information must be conducted by: A Federal, State, or local regulatory or law enforcement agency; a Member or committee of Congress or the General Accounting Office; or a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct.

when "necessary to eliminate or reduce an essentially local safety or security hazard" if it "is not incompatible" with a Federal regulation and "does not unreasonably burden interstate commerce."

Another State objected to TSA's proposed "subject matter" preemption of chain of custody and control requirements, stating that it would prevent a necessary partnership among Federal, State, local, and tribal governments. The commenter preferred use of the "substantially the same" form of Federal preemption language contained in the Federal hazardous materials transportation laws, which would preserve State laws that do not act as an "obstacle" to compliance or accomplishment of the Federal requirements. *See* 49 U.S.C. 5125. Another commenter urged TSA to adopt a "conflict" preemption standard in lieu of its proposed "field" or "subject matter" standard.

An individual commenter opposed preemption of State and local requirements, and gave the example of cities that want to place restrictions on where rail cars storing Toxic Inhalation Hazard (TIH) materials can be located. The commenter supported State and local efforts to mandate what the commenter characterized as the most basic terrorism prevention measures: Routing and storing the most dangerous cargoes away from vulnerable target areas. Other commenters objected to preemption, because they believed that Federal regulations alone cannot effectively ensure that the public is protected from dangers associated with the shipment of potentially hazardous materials via rail.

TSA Response: TSA has fully considered the sharply divided comments on the issue of this final rule's preemptive effect. TSA has decided to retain the same language it proposed in the NPRM. In addition, after further consideration of the governing statutory provision, TSA has added a sentence to § 1580.109 that tracks the language of that governing statutory provision—i.e., 49 U.S.C. 20106. The new sentence conveys Congress' intent as to the standard for preemption in the area of rail security (and safety).

While in the past TSA's regulations have not included regulatory text about preemptive effect, the absence of such text does not necessarily indicate that TSA's regulations do not have preemptive effect. TSA has included such a provision here to make clear its finding about one aspect of this rulemaking.

Congress has clearly legislated the standard for preemption in rail security (and safety) legislation. 49 U.S.C. 20106 provides that all regulations prescribed by the Secretary of Homeland Security relating to railroad security preempt any State law, regulation, or order covering the same subject matter, except a provision that: (1) is necessary to eliminate or reduce an essentially local security hazard, (2) is not incompatible with a Federal law, regulation, or order, and (3) does not unreasonably burden interstate commerce. Unless a state law, regulation, or order meets all three of these conditions, § 20106 expresses Congress's intent that it will be preempted. With the exception of a provision directed at an essentially local security hazard that is not inconsistent with a Federal law, regulation, or order, and that does not unreasonably burden interstate commerce, § 20106 will preempt any State or local law or regulatory agency rule covering the same subject matter as § 1580.107.[53]

In the context of railroad safety, the Supreme Court has consistently interpreted § 20106 to confer on the Secretary of Transportation the power to issue regulations that would preempt not only State statutes, but common law as well. *See CSX Transp.* v. *Easterwood,* 507 U.S. 658, 664 (1993) ("[L]egal duties imposed on railroads by the common law fall within the scope of [the] broad phrases" of § 20106). *See also Norfolk Southern Ry. Co.* v. *Shanklin,* 529 U.S. 344 (2000). The Court has further held that Federal regulations under the Federal railroad safety laws will preempt common law where the regulations "substantially subsume" the subject matter of the relevant State law. *Easterwood,* 507 U.S. at 664.

As provided in the regulatory text at § 1580.109, the preemptive effect of this rule extends to the rule's provisions regarding chain of custody and control, both within and outside of HTUAs, of rail cars containing hazardous materials. TSA finds that, consistent with § 20106, these provisions preempt State, local, and tribal requirements covering the same subject matter, including any such requirements prescribing or restricting security measures during the physical transfer of custody and control of rail cars containing the categories and quantities of hazardous materials set forth in § 1580.100(b), as well as any requirements that might attempt to impose a duty on freight railroad carriers or rail hazardous materials shippers, or rail hazardous materials receivers pertaining to the physical transfer of custody and control chain of rail cars containing hazardous materials that is not specifically set forth in § 1580.107. For example, TSA's rule would preempt any State law or common law theory of liability that would require a freight railroad carrier to hire armed security guards to attend the rail car during the physical transfer of custody; a rail hazardous materials shipper or receiver to use specifically-designated physical security measures to ensure that no unauthorized person gains access to the rail secure area; or additional physical inspections of the rail car by the carrier or facility than that specified in § 1580.107.

It would be impractical and burdensome to the secure chain of physical custody and control process to require regulated parties to develop multiple sets of procedures to comply with varying State and local requirements. TSA is aware that, if this final rule did not preempt State or local regulations regarding the chain of custody requirements in § 1580.107, a freight railroad carrier or rail hazardous materials facility may need to comply with different requirements in different jurisdictions. Clearly, § 20106 was intended to prevent this outcome. Any other result would require a substantial resource commitment, because it would require carriers and facilities to instruct individuals who carry out chain of custody requirements to do so according to a multitude of different operating rules and practices. This, in turn, could raise significant safety and security concerns. This also might require carriers to vary the size and training qualifications of the train crew based upon the varying laws in each jurisdiction. Because rail transportation of hazardous materials frequently involves transportation across jurisdictions and because of the resources necessary to comply with potentially varying chain of custody requirements, TSA believes that subjecting carriers to additional State regulations in this area would likely place an unreasonable burden on interstate commerce. TSA seeks to avoid this result. For these reasons, the chain of custody and control security measures must be subject to uniform national standards.

Whether the other provisions of this final rule preempt any such State, local, or tribal law, or types of laws, depends on an analysis of the specific State, local, or tribal law, or types of law, in the context of 49 U.S.C. 20106. At this

[53] Although § 1528 of the 9/11 Commission Act restructured the preemption provision in 49 U.S.C. 20106, Congress did so for "for clarification purposes" without intending "any substantive change in the meaning of the provision." *See* 9/11 Commission Act, Conference Report to accompany H.R. 1, page 351 (July 25, 2007).

time, TSA makes no finding as to whether those other provisions of this final rule preempt State, local, or tribal law.

Finally, TSA is not including language delegating inspection authority to the States, as requested by the New Jersey Office of Homeland Security & Preparedness. TSA does note, however, that if, in the course of performing an inspection, TSA identifies evidence of noncompliance with a State requirement, TSA will (as appropriate) provide the information to the appropriate State agency for action. In this regard, TSA would not directly enforce State security rules and would initiate a Federal inspection only when a security nexus exists. If TSA were to reconsider its position in the future, it would do so through the issuance of notice to the public.

K. Comments on the Regulatory Impact Assessment

To evaluate the impact of the proposed rule, TSA prepared a Regulatory Impact Assessment (RIA) and posted it to the public docket in December of 2006. We received a number of public comments that addressed many aspects of the assessment. The majority of commenters discussed what they perceive to be deficiencies or inaccuracies in our assessment. Several commenters, including individuals, businesses, and trade associations, questioned some of the analytical assumptions used to estimate the costs of the NPRM. Others pointed out instances where they believe that we failed to account for a compliance cost. TSA considered all comments on the original RIA and has summarized and responded to them below.

1. Whether the Benefits of the Rule Justify the Costs

Comments: Although we received multiple comments that supported the security objectives of the proposed rule, one commenter, a large Class I railroad, stated that the costs of the proposed regulatory action far outweigh the benefits. In its comprehensive public comments, the railroad implied that the costs of the proposed rule—both direct and indirect—could not be justified by the increase in security afforded by the regulation, and that the rule would only negligibly reduce risk in the rail transportation mode. The commenter asserted that it is impossible to completely secure the U.S. rail network. The commenter also asserted that the rule fails to strike the proper balance between compliance costs (both direct and indirect) and the probability of the occurrence of a transportation security incident in the rail mode.

The same commenter stated that the rule would not substantially increase the level of security in the rail transportation mode. The railroad noted that the U.S. rail network is an inherently open system, making it difficult to secure. Further, the railroad stated that while the proposed rule attempts to address the risk posed by hazardous materials, the very nature of the U.S. rail network would prevent a shipment of hazardous materials from ever being fully secured. It observed that the rail system will always be susceptible to attack and other incidents.

The commenter stated that the proposed rule would inflict significant direct and indirect costs on the rail transportation mode. In particular, the railroad singled out the chain of custody and control requirements as being potentially costly for freight railroad operators. The railroad noted that the requirement would force companies to make investments in security in lieu of investments aimed at increasing rail system capacity, an acute need in light of the continuing growth in freight rail shipments. The railroad implied that the rule, by curtailing the expansion of the rail network and slowing the movement of freight, would exact large costs on railroads, shippers, and ultimately the U.S. economy.

The commenter stated that TSA did not adequately estimate the costs in the RIA and that TSA did not satisfactorily weigh them against the benefits of the proposed regulation. The commenter also criticized TSA for failing to calculate the probability of the occurrence of a transportation security incident in the rail transportation mode, a step it believes is necessary in justifying the costs of the proposed rule. In the commenter's view, the agency examined the potential consequences of a security incident, without acknowledging the low probability of such an event. Consequently, the railroad did not agree with TSA's assessment that the costs of the proposed rule—and in particular that the financial impact of the chain of custody and control requirement—could be justified by security improvements.

TSA Response: TSA recognizes that the rule will have an economic impact on railroads, and we appreciate that the compliance costs of the regulation represent an investment in security for many in the industry. As part of the economic analysis required by E.O. 12866, we have made every attempt to include all known and quantifiable costs in the RIA.

The agency disagrees, however, with the assertion that the rule will impose costs on industry disproportionate to its benefits. Although the agency concurs with the portrayal of the U.S. rail system as an open, difficult-to-secure network, TSA believes that the provisions of the rule, including those not addressed by the comment, will improve security in the rail mode.

First, this final rule will protect the dissemination of sensitive rail security information by designating it as SSI. This provision of this final rule will impose no costs on covered individuals and businesses but will provide an additional measure of protection against possible threats. Information that could potentially be detrimental to security if publicly disclosed will be less likely to be distributed and misused under the SSI designation.

Second, this final rule will codify the authority of TSA, or DHS officials working with TSA, to enter and inspect covered entities at any time, including inspecting and testing property, facilities, equipment, and operations, and viewing, inspecting, and copying records. These inspections will assist TSA in carrying out its statutory authority, which includes the assessment of threats to transportation; enforcement of security-related regulations and requirements; inspection, maintenance, and testing of security facilities, equipment, and systems; and ensuring the adequacy of security measures for the transportation of freight and cargo. *See* 49 U.S.C. 114.

Third, this final rule will require freight and passenger railroad carriers, rail transit systems, and rail hazardous materials facilities to designate and use RSCs. This provision will prove beneficial, because it will result in more efficient communication between TSA and companies operating in the rail mode, particularly in the event of an emergency.

Fourth, this final rule will require freight and passenger railroad carriers, rail transit systems, and rail hazardous materials facilities to immediately report potential threats and significant security concerns to TSA. This requirement will help TSA "connect the dots," pulling together seemingly disconnected or disparate reports of suspicious or unusual activities. These reports may provide the insight necessary to prevent a transportation security incident, if they can be analyzed quickly in the context of broader information derived from the intelligence community.

Fifth, this rulemaking will require freight railroad carriers transporting certain categories and quantities of

hazardous materials, and rail hazardous materials facilities subject to the rule, to provide information to TSA on the location of certain rail cars. This requirement will increase security by providing information critical to re-routing or stopping shipments to address specific security threats or incidents. This information could amplify the ability of TSA, law enforcement, and emergency response agencies to respond to any potential threats or attacks involving rail cars transporting hazardous materials and to protect the populations that might otherwise be harmed.

Sixth, this final rule will require freight railroad carriers and rail hazardous materials facilities to eliminate practices that leave certain hazardous materials unattended before or during shipment, and after shipment until unloading of the rail car occurs. This requirement will apply: (1) To the rail hazardous materials shipper and freight railroad carrier until the freight railroad carrier takes physical custody of the rail car, (2) when two freight railroad carriers interchange a rail car within an HTUA, (3) when two freight railroad carriers interchange a rail car that may enter an HTUA after the interchange, (4) to the freight railroad carrier delivering a rail car to a rail hazardous materials receiver within an HTUA, and (5) to the rail hazardous materials receiver within an HTUA until the rail car is unloaded. Although these requirements will impose costs to industry, as highlighted by the commenter, TSA believes these provisions will significantly increase security in the rail mode. The agency believes strongly that the requirement will appreciably reduce the risk of a rail car being used in a transportation security incident inside a major U.S. metropolitan area.

Finally, while the commenter may view risk in the rail mode as low, risk is in fact dynamic, constantly evolving and shifting over time. Transportation modes once considered at low risk for a security incident may experience an increase in risk due to changes in the underlying threat, vulnerability, and consequence calculus—the three factors of which risk is a function.

For example, risk to the rail mode may rise due to the threat shifting behavior on the part of adversaries. Or, changes in standard industry practices may increase the vulnerability of the mode, causing an increase in overall risk. Conversely, natural developments, such as population growth in certain rail-centric locations across the country, may cause the consequences from a particular incident in the industry to rise, yielding an increase in the risk profile of the mode. For these reasons, the agency did not attempt to quantify benefits or risk reduction to the mode.

TSA's authority under ATSA with respect to transportation security is comprehensive and supported with specific powers related to the development and enforcement of security-related regulations and requirements. With its broad authority, the agency may assess a security risk for any mode of transportation, develop security measures for dealing with that risk, and enforce compliance with those measures. TSA strongly believes that the benefits enumerated above more than justify the potential compliance costs of this final rule. In fact, the agency is confident that the regulation will appreciably increase security in the rail mode.

2. Overestimated Compliance Costs

Comments: One information technology firm specializing in GPSs opined that TSA's estimate in the NPRM for the economic impact of the rule was too high. In its comment, the company estimated that there are approximately 50,000 affected rail tank cars in service, and that the affected firms could outfit all of them with GPS technology for less than $42 million, which represents a fraction of the economic impact TSA estimated in the RIA.

TSA Response: The rule does not require railroads or other covered entities to purchase and maintain GPS technologies. To comply with related provisions of the rulemaking, namely the location and shipping information requirement, a firm may choose to utilize GPS; however, that is the prerogative of the firm and not mandated by the regulation. The location and shipping information requirement is a performance standard, and TSA has not dictated the use of any specific technology to meet this standard.

Additionally, there are several other provisions of the rulemaking that the technology firm failed to account for when it estimated that the regulation would cost industry less than $42 million. For example, the company did not comment on the cost of RSCs, the reporting of significant security concerns, or the chain of custody and control requirements—all major provision of the rule. For these reasons, TSA did not adjust its analysis of the economic impact of the rule based on the information submitted by the commenter.

3. Underestimated Compliance Costs

A number of commenters indicated that some of the compliance costs estimated in the RIA for the NPRM were understated. Many companies, individuals, and trade associations that commented on compliance cost estimates focused on the chain of custody and control requirement, but others raised different concerns. TSA has summarized those comments by topic and responded to them below.

i. General

Comments: One individual commenter stated that the cost of this final rule will be twice as high as TSA estimated in the RIA. Without providing any details, this individual opined that the average annual cost of the rule, estimated by TSA at $15 million to the railroad industry and its shippers and receivers, was simply too low.

TSA Response: Without more detailed information on why the rule will cost industry twice the amount estimated by TSA in the RIA, we did not adjust the estimates.

ii. Chain of Custody and Control

Comments: Other commenters asserted that the proposed chain of custody provision might lead to economic issues resulting from the possible disruption of the continuous supply to chemical companies of raw materials. The commenters relayed concerns that certain Class I railroad carriers have informed some rail hazardous materials facilities that their railroads will no longer store chlorine. Instead, under the new rule, the commenters stated that receivers will have to accept product shipments on delivery.

TSA Response: TSA understands that the chain of custody and control requirements of the final rule will likely change the way that railroad carriers and rail hazardous materials facilities interact with each other with respect to the shipment of certain classes of hazardous materials. The agency agrees with the commenters that the changes spurred by the final rule will have real economic consequences. However, TSA disagrees that the chain of custody provisions will adversely affect the economy or result in supply chain disruptions of the hazardous materials to which this final rule applies.

In attempting to estimate the economic impact of the chain of custody and control provision, the agency assumed that rail hazardous materials facilities will need to modify their existing business procedures to ensure that someone is able to accept a

hazardous materials shipment covered by the rule. As stated above, TSA accounted for the costs of these economic impacts in the RIA to the best of its abilities, estimating that the regulatory provision will not impose an insignificant cost on all rail hazardous materials facilities. TSA hopes that freight railroad carriers, rail hazardous materials shippers, and rail hazardous materials receivers will work together to minimize the costs of this regulation by working to speed the covered materials through the supply chain and better schedule deliveries to receivers. As the agency could not find any information to improve its RIA, the cost estimates for this provision remain unchanged.

Comments: A trade association representing the explosives industry stated that the attendance requirement, also known as the chain of custody and control provisions of the rule, could be very costly. The association also noted, however, that it could not provide any insight into the scope or level of costs that regulated parties will likely incur for this provision of the rule.

TSA Response: TSA acknowledges that there will be costs for entities in the railroad industry and others to comply with the chain of custody and control requirement. However, without more detailed information from the commenter, we decided not to change the cost estimates for this provision.

Comments: A large, Class I railroad commented that the RIA for the NPRM underestimated the direct costs for railroads and other firms to comply with the chain of custody and control requirement of the rulemaking. It stated that TSA's methodology for calculating the compliance costs of this provision was inadequate.

In particular, the railroad remarked that one of the key assumptions used in the calculation—that railroads and other firms will use a single security guard to monitor rail cars and interchanges affected by this requirement—was flawed. The carrier pointed out that a single individual supervising multiple cars in a classification yard, in many instances, will not be sufficient to comply with the rule. The company went on to state that many of its classification yards are large or constructed on a curve, making it difficult for a single person to maintain supervision of multiple cars if they are not all located adjacent to each other in a small area. In many situations, routine yard activities will also make it difficult for an individual to monitor affected cars. This flawed analytical assumption caused the agency to underestimate the cost of this requirement of the proposed rule.

TSA Response: The carrier presented several logical points in explaining how TSA failed to calculate the costs of the chain of custody provision in an accurate manner. We agree with some of the arguments put forth by the railroad, particularly the observation that a single individual, in many instances, will be unable to monitor multiple rail cars in a large area. TSA acknowledges that operational realities may make it difficult for an individual to have an "unobstructed view of the rail car prior to the delivering railroad carrier leaving the interchange point," as we proposed in the NPRM.

For this reason, TSA has amended the language of the proposal to allow railroad carriers more flexibility in complying with the chain of custody and control provision. The final rule will not require affected entities to have an "unobstructed view of the rail car" when complying with this requirement. This change should assuage some of the concerns expressed by the railroad. It should also make it likelier that railroad carriers will be able to meet the requirement using the method described in the RIA.

TSA would also like to note that the chain of custody and control requirement is a performance standard. Different entities, using whatever means practicable, may meet the standard using different methods. So, while TSA appreciates the input from the particular railroad, its concerns may not be reflective of the broader industry. Moreover, TSA was unable to improve its estimate with the information given by the commenter. Furthermore, the agency could not find any credible data that would cause it to alter its original estimate.

Because of the rule change, and because of the lack of new, detailed information, we did not adjust our cost estimate for this provision of the final rule.

Comments: The same commenter also stated that TSA ignored the indirect costs of the chain of custody and control requirement when it estimated costs for the original RIA. In detailing the potentially significant indirect costs of the requirement, the railroad noted that the provision may force railroad firms to make sub-optimal changes to their operations, resulting in high costs to the industry.

The commenter claimed that the chain of custody and control requirement would slow the movement of freight on the national rail network. This would have serious consequences for railroad companies and their customers.

For railroad companies, constraining commodity flows could increase operating costs. For example, if the chain of custody and control requirement impedes the speed at which railroad companies currently deliver covered hazardous materials to locations in HTUAs, then companies may be forced to use multiple crews and multiple shifts for what presently takes only one crew and one shift. This would have obvious financial implications.

Likewise, the commenter stated that if shipments are slowed due to the new requirement, customers of the rail mode could also experience adverse effects, particularly to operations that are dependent on timely deliveries. In concluding this portion of its comment, the railroad stressed that anything it would have to do above and beyond current operations that would consume capacity would cost the company, and potentially its customers, money.

TSA Response: TSA agrees that the security improvements required by the final rule, particularly the chain of custody and control provision, will have cost impacts on the rail mode. We believe, however, that the provisions of the rule are essential to reducing risk in the industry and increasing the overall level of security and that the provisions need not be obstacles to efficient operations. TSA agrees that there will be changes but has considered both security and impact in finalizing the requirements.

While the carrier asserted that the rule may impact the flow of freight movements over the national rail network, the carrier failed to provide TSA with a clear, detailed exposition of how the rule will increase transit times of shipments and cause the railroads to increase staffing levels. As previously noted, railroads may well find several ways to comply with this provision. In fact, TSA contends that some railroads will be able to comply with the provision without adversely affecting rail operations. Without any new, detailed information, we could not reliably modify our original costs estimates for the final rule.

Comments: The same commenter also asserted that the RIA did not account for the fact that the number of HTUAs may expand in the future, which would increase the cost of complying with the chain of custody and control requirement of the rule. Chasing a potentially moving target, NS pointed out, would make it hard for firms to plan their operations and make long-term investments. This uncertainty would impose additional costs on the affected firms.

TSA Response: In estimating costs for the RIA, TSA did not forecast an expansion in the number of HTUAs over time, because TSA has finalized the list of HTUAs through this rulemaking. If TSA decides to make any changes to the list of applicable HTUAs, it will do so through further rulemaking. Thus, railroads and other entities affected by the rule will not need to plan for sudden changes in the list of HTUAs. Consequently, we did not adjust the RIA for potential changes to the number of HTUAs.

iii. Opportunity Cost of Foregone Investments in Rail Capacity

Comments: Maintaining and expanding railroad infrastructure to accommodate the continuing growth of freight shipments requires significant levels of investment, one commenter asserted. Money that is spent complying with Federal rules represents resources that railroad companies cannot use to expand rail capacity, something that is needed to meet the transportation needs of the nation. The commenter implied that investments in security improvements represent opportunity costs to the rail mode, and that TSA failed to account for these types of costs in the RIA.

TSA Response: For any given firm, part of the cost of every investment decision is the value of the benefits forgone from choices not taken. The issue is no different for investments in security improvements. To adequately evaluate the claims included in the comment, TSA would need data reflecting current rail capacity relative to future demand identifying projected capacity shortfalls. TSA could then compare the total cost of the chain of custody and control requirement to the total cost of industry investments in capacity. Without such data, which was not provided by the commenter, TSA could not credibly change its analysis. The agency was also unable to obtain this type of data from a public source.

4. Incidence of Compliance Costs

Comments: One commenter—a large Class I railroad—expressed concern that the private sector is expected to shoulder the costs of the final rule. It opined that shippers will pay for the cost of security regulations issued by TSA absent any government funding. An individual, echoing the comments made by the railroad, also predicted that the railroad companies would pass along compliance costs to customers in the form of rate increases.

TSA Response: Nothing in this final rule would prevent a freight railroad carrier or a rail hazardous materials facility or even a rail transit system from attempting to pass on its costs of compliance to its customers. That is a decision for each regulated party to make, one that falls outside the scope of the final rule.

Although TSA acknowledges that some firms might pass on their compliance costs, we were unable to conclusively determine if this would be a direct result of the final rule. Without further information from industry, TSA did not attempt to ascertain who would ultimately pay for the costs of the regulation other than the parties directly regulated by the rule.

5. Unintended Economic Consequence of Regulation

Comments: The cost of complying with the regulation will ultimately fall on consumers in the form of shipment rate increases, one individual stated. Increased rates for freight shipments will cause consumers to move shipments of hazardous materials from railroads to commercial motor carriers, making them more susceptible to attacks at truck stops within HTUAs. The commenter noted that it is widely accepted in risk analysis circles that chemicals are generally safer when transported by rail than by highway.

TSA Response: While some consumers may engage in intermodal substitution, the analysis put forth by the commenter is incomplete. To fully evaluate the substitution effect between rail and trucking services would require several additional pieces of information: How will the increase in railroad operating cost be reflected in the fee railroads charge to customers? Is there tank truck capacity to absorb the shifted volume such that current operating costs and fees of the trucking industry would be unaffected? Would delivery by tank truck rather than rail car require additional time in transportation? What additional capital costs would consumers be required to assume in order to accommodate a shift from rail to trucking? What additional costs would be incurred by consumers as a result of changes in plant operations to accommodate a shift from rail to trucking? How elastic or inelastic is the demand for rail transport of hazardous material? Absent these data, TSA decided it could not credibly change the cost estimates in the RIA in response to this comment.

6. Insufficient Calculation of Benefits

Comments: One individual stated that TSA failed to provide information on the approximate percentage of total risk that would be eliminated by the rule. He also noted that the re-routing of certain freight around various metropolitan areas would likely be more effective in mitigating risk to the public.

TSA Response: As previously noted, risk is dynamic—the risk of a transportation incident occurring in one mode of transportation may shift over time. In the rail mode, like all other modes, factors such as threat, vulnerability, and consequence are constantly evolving, making it difficult to quantitatively measure risk. For this reason, TSA did not attempt to quantify benefits or risk reduction to the rail industry. TSA has concluded, however, that investment in the security measures required by this rule remains a prudent course of action.

While we appreciate the individual's comments regarding the re-routing of certain types of freight around metropolitan areas, we have not evaluated that alternative at this time, although we suspect the costs of such a requirement could be significant. Further, it is illustrative that no railroads suggested this as a viable alternative to the rule. Moreover, this issue is outside the scope of this final rule, but PHMSA addressed it in its interim final rule published in the **Federal Register** on April 16, 2008.[54]

Comments: Echoing the comment summarized above, a railroad carrier remarked that TSA did not weigh the costs of the regulation against the probability of a transportation security incident in the rail mode. The railroad implied that the agency, while only examining the potential consequences of an event, failed to acknowledge the relatively low probability of an attack on a rail car, and therefore did not complete a comprehensive analysis of the rule.

TSA Response: As stated several times above, risk is not a static concept. The ever-shifting, always evolving nature of risks to the transportation sector makes it very difficult for TSA to calculate the probability of an event in any particular mode. For this reason, we did not attempt to quantitatively gauge the level of risk to the rail transportation industry.

Moreover, TSA does not concede that the probability of an incident involving a rail car is relatively low. The commenter provided no facts or evidence to support its claim, and the agency strongly believes that security improvements in the industry are merited. Even if the probability of an incident in the rail mode were low, the potential consequences of such an incident could be very significant. If

[54] *See* Section IV.G "Chain of Custody and Control."

potential consequences are high, it is worth taking steps to deter an incident.

7. Impact on Small Entities

Comments: Some commenters expressed concern that the requirement for rail hazardous materials facilities to attend rail car exchanges during a physical transfer of custody might impose an economic burden on the industry. These commenters were particularly concerned about the economic effect on small companies that may not be open for business at the time of transfer.

TSA Response: TSA recognizes that a rail hazardous materials receiver located in an HTUA that is not open for business 24 hours a day, seven days a week, may incur some additional cost to meet the requirements of the final rule. To the best of its ability, TSA accounted for this economic impact in the RIA, estimating that rail hazardous materials facilities will collectively incur costs of over $70 million, discounted at 7 percent, over the 10-year period of analysis. To date, TSA has not received any information that would allow it to improve its estimate and therefore has not changed it for the final rule.

Comments: An industry trade association representing short line and regional railroads expressed reservations about how the chain of custody and control requirement will affect small railroad carriers. Explaining how the rule may fundamentally change the way small railroads operate, the trade association asserted that the requirement may impose a severe financial impact on the industry.

In its comment, the trade association stated that small railroad companies, unlike the large Class I railroads, generally operate less than 24 hours a day. In fact, many companies may also only operate two to three days a week, meaning that they are not always open for business when another railroad drops off a car for interchange. Furthermore, small railroads find it difficult to predict when a rail car will be dropped off for interchange, given the way many Class I railroads operate around the clock.

The commenter stated that the operational realities of the industry will make it difficult for small railroads to comply with the chain of custody and control requirement without making significant changes to their practices. The trade association contended that small railroad carriers will need to evolve from scheduled, weekday businesses into firms operating 24 hours a day, seven days a week, in order to adequately follow the chain of custody and control provision, which will require firms to document the transfer of custody of a rail car. With no new source of revenues to offset the increased operating costs, the commenter argued that the effects of this change will be financially devastating for small railroads.

TSA Response: TSA appreciates the special needs of the smaller railroads represented by the commenter and has no doubt that the unique characteristics of the industry pose special issues. The chain of custody and control requirement is a paramount feature of this rule and represents a new business process for the industry in general. We realize the provision will impact firms financially.

We do not agree, however, with some of the assertions made by a trade association. First, the rule does not require small Class II and Class III railroads to change their hours of operation. While it is true that the chain of custody and control requirement will impact current industry practices, small railroads are free to meet the requirement, which is a performance standard, in almost any way practicable. Because it is also incumbent upon Class I railroads to meet the performance standard, TSA anticipates railroads may need to increase their level of coordination with respect to interchanges of covered hazardous materials. The agency believes that this can occur without substantial changes to small railroads' hours of operations or staffing levels.

Furthermore, lacking detailed information on the types of costs likely to be incurred by smaller railroads, TSA could not credibly modify its cost estimates for this provision of the rule. In its comment, the trade association did not specifically lay out how affected small entities would meet the requirement, and how the small entities' actions would impose high financial costs. The trade association did not direct TSA to more information that would allow it to more fully understand the operational and financial impacts of the provision.

Despite all the comments on this provision, TSA strongly believes that the security benefits of improved chains of custody and control are critical for securing the nation's rail network. During the public comment period, TSA did not receive any recommendations for less-costly alternatives that would attain the security goal of this provision of the rule. For this reason, TSA sees no reason to exclude the chain of custody provision that TSA proposed in the NPRM.

Comments: With respect to rail hazardous materials facilities, an individual questioned whether TSA had any further information on the number of small facilities likely to incur costs to secure their property. This individual noted that, in the RIA provided with the NPRM, TSA estimated that between two and 14 small facilities will need to install security fencing to comply with the rule.

TSA Response: We have not adjusted the original estimate of the number of small facilities likely to incur cost as a result of the rule. During the comment period, the agency did not receive any new information that would cause it to modify its initial estimate, nor could it find any new information to belie its original claim. The estimate, therefore, of two to 14 small facilities remains the same for the RIA for the final rule.

8. Impact on International Trade

Comments: Another individual asserted that the RIA for the NPRM failed to adequately examine whether the rule will adversely impact international trade. Specifically, he stated that TSA did not sufficiently analyze whether the rule will interfere with international boundary crossing inspection procedures of tank cars.

TSA Response: The chain of custody requirements do not apply at any shipper facilities located outside the United States. Rather, for international shipments to the United States, the requirements begin at the first railroad carrier interchange point and apply to all subsequent carrier interchanges that are otherwise subject to this final rule. The requirements also apply at a rail hazardous materials receiver located in an HTUA, regardless of whether the rail car originated at a foreign or domestic location. Accordingly, this final rule does not affect any existing requirements applicable to inspections of tank cars entering the United States from a foreign location.

L. Comments Beyond the Scope of the Rule

Comments: Two commenters supported the rerouting of hazardous materials around cities. The Government of the District of Columbia (District) commented on the feasibility of using technologies that incorporate chemical sensors and open hatch detection into GPS tracking systems to immediately notify local officials and first responders of potential tank car leaks, in order to meet the proposed location and shipping information requirements in § 1580.103. The District asserted that because of the unique risks that the city faces, such security measures could not substitute for

rerouting all hazardous materials around the District.

TSA Response: The topic of rerouting of hazardous materials around cities is outside the scope of the NPRM, and therefore TSA is not addressing it in this final rule. However, TSA notes that on December 21, 2006, PHMSA published an NPRM in the **Federal Register**, proposing to revise the current requirements in the HMR applicable to the safe and secure transportation of hazardous materials transported in commerce by rail. 71 FR 76852. Section I.B. "Purpose of the Rule" contains a discussion of PHMSA's proposed requirements. PHMSA published its interim final rule in the **Federal Register** on April 16, 2008.

V. Rulemaking Analyses and Notices

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 (E.O. 12866), Regulatory Planning and Review (58 FR 51735, October 4, 1993), directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996), requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. Fourth, the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation). The OMB A–4 Accounting Statement is located in the full Regulatory Impact Assessment, which is located in the docket.

In conducting these analyses, TSA determined:

(1) This rulemaking does not constitute an economically "significant regulatory action" as defined in E.O. 12866.

(2) This rulemaking is unlikely to have a significant economic impact on a substantial number of small entities under § 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). To make this determination, we conducted a Final Regulatory Flexibility Analysis (FRFA), which is available below.

(3) This rulemaking does not constitute a barrier to international trade.

(4) This rulemaking does not impose an unfunded mandate on State, local, or tribal governments, or on the private sector.

TSA summarizes the E.O 12866 analysis, international trade analysis, and the unfunded mandates analysis, though provides the FRFA in its entirety.

A. Executive Order 12866 Assessment (Regulatory Planning and Review) Impact Summary

The rule addresses threats and vulnerabilities in the rail transportation sector. This summary provides a synopsis of the costs and benefits of the final rule.

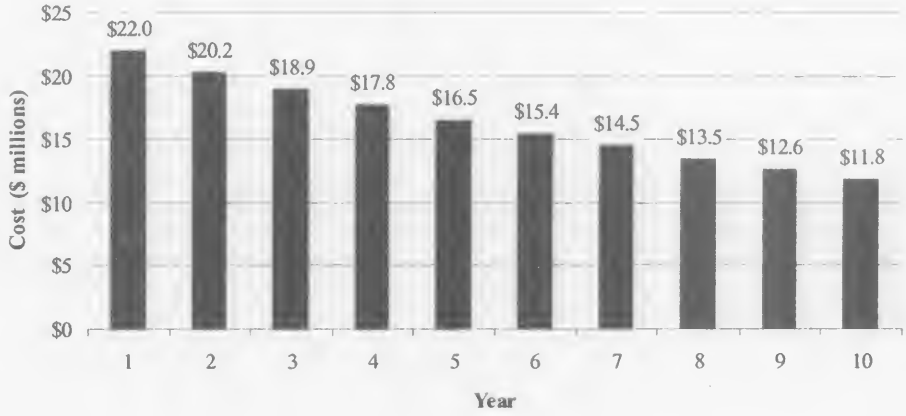
Benefits of the Final Rule

The final rule enhances the security of rail transportation by: (1) Requiring the protection of SSI in the rail transportation sector; (2) clarifying TSA and DHS authority to conduct inspections in order to assess and mitigate threats to security; (3) providing TSA and DHS with a regulatory mechanism to locate rail cars containing certain hazardous materials; (4) mandating that rail hazardous materials facilities that ship or receive these materials conduct routine inspections of shipments; (5) creating a secure chain of custody requirement for the transfer of rail cars containing these materials; and (6) requiring certain rail hazardous materials shipper and receiver facilities to store rail cars containing these hazardous materials in areas with physical security controls.

Costs of the Final Rule

The costs of the final rule result primarily from the requirements for: (1) Freight railroad carriers and rail hazardous materials shippers and receivers to establish secure chains of custody for hazardous materials covered by the rule; and (2) railroad carriers, rail hazardous materials shippers, and rail hazardous materials receivers to provide TSA and DHS with various pieces of information. TSA concluded that the present value total cost (7 percent discount rate) of the rule will range from $152.8 million to $173.9 million. *See* Figure 1 for the primary 10-year cost estimate, which equals $163.3. TSA has provided a detailed discussion in the docket of how TSA calculated this estimate and the range of estimates discussed above.

Figure 1: Primary 10 Year Cost of the Final Rule, Discounted 7 Percent



B. Regulatory Flexibility Act Assessment

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612), TSA prepared this Final Regulatory Flexibility Analysis (FRFA) that examines the impacts of the final rule on small entities. A small entity may be: (1) A small business, defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act; (2) a small not-for-profit organization; or (3) a small governmental jurisdiction (locality with fewer than 50,000 people).

This FRFA addresses the following:

1. The objectives of and legal basis for the final rule;
2. The reason the agency is considering this action;
3. Significant issues raised during the public comment period;
4. The number and types of small entities to which the rule applies;
5. Projected reporting, recordkeeping, and other compliance requirements of the final rule, including the classes of small entities that will be subject to the requirements and the type of professional skills necessary for preparation of the reports and records; and
6. Flexibility in the final rule.

Background and Legal Authority

TSA has the responsibility for enhancing security in all modes of transportation. Under ATSA, and delegated authority from the Secretary of Homeland Security, TSA has broad responsibility and authority for "security in all modes of transportation * * * including security responsibilities * * * over modes of transportation that are exercised by the Department of Transportation."[55] TSA has authorities in addition to those transferred from DOT. TSA is specifically empowered to develop policies, strategies, plans and regulations for dealing with threats to all modes of transportation, including mass transit.[56] As part of its security mission, TSA is responsible for assessing intelligence and other information to identify individuals who pose a threat to transportation security and to coordinate countermeasures with other Federal agencies to address such threats.[57] TSA also is empowered to enforce security-related regulations and requirements,[58] ensure the adequacy of security measures for the transportation of cargo,[59] oversee the implementation, and ensure the adequacy, of security measures at transportation facilities,[60] and carry out other appropriate duties relating to transportation security.[61] TSA has broad regulatory authority to achieve ATSA's objectives, and may issue, rescind, and revise such regulations as are necessary to carry out TSA functions,[62] and may issue regulations and security directives without notice or comment or prior approval of the Secretary of DHS.[63] TSA is also charged with serving as the primary liaison for transportation security to the intelligence and law enforcement communities.[64]

TSA's authority with respect to transportation security is comprehensive and supported with specific powers related to the development and enforcement of regulations, security directives, security plans, and other requirements. Accordingly, under this authority, TSA may assess a security risk for any mode of transportation, develop security measures for dealing with that risk, and enforce compliance with those measures.

TSA's legal authority is supported by National policy. On December 17, 2003, the President issued Homeland Security Presidential Directive 7 (HSPD–7, Critical Infrastructure Identification, Prioritization, and Protection), which "establishes a national policy for Federal departments and agencies to identify and prioritize United States critical infrastructure and key resources and to protect them from terrorist attacks."[65] In recognition of the lead role assigned to DHS for transportation security, and consistent with the powers granted to TSA by ATSA, the directive provides that the roles and responsibilities of the Secretary of DHS include coordinating protection activities for "transportation systems, including mass transit, aviation, maritime, ground/surface, and rail and pipeline systems."[66] In furtherance of this coordination process, HSPD–7 provides that DHS and DOT will "collaborate on all matters relating to transportation security and transportation infrastructure protection."[67] (HSPD–7, Paragraph 22(h).)

In accordance with the September 2004 Memorandum of Understanding (MOU) between DHS and DOT, the two departments consult and coordinate on security-related rail and hazardous materials transportation issues to ensure they are consistent with overall DHS security policy goals and objectives and the regulated industry is not confronted with inconsistent security guidance or requirements promulgated by multiple agencies.

Statement of Need for the Regulatory Action

TSA developed the final rule to mitigate threats and vulnerabilities in the rail transportation network. In the United States, the freight rail transportation system transports hundreds of millions of dollars worth of freight and employs hundreds of thousands of individuals annually.[68] Passenger systems, including passenger railroad carriers as well as rail mass transit systems, carry millions of people daily throughout the country.

Rail transportation networks—both passenger and freight—are vulnerable to a variety of transportation security incidents. In the past, terrorists have targeted passenger and mass transit rail transportation systems to inflict mass casualties (e.g., Tokyo 1995; Moscow 2000, 2001, and 2004; Madrid 2004; London 2005; and Mumbai 2006). Freight rail systems also represent potential terrorist targets. Although not the result of a deliberate attack, the incident involving a ruptured chlorine tank car in Graniteville, South Carolina, killed nine people and injured hundreds more. These incidents highlight the fact that hazardous materials in rail transportation and rail passenger systems are possible targets of terrorism intended to inflict hundreds or even thousands of fatalities, with direct and indirect costs from transportation system disruption that could total billions of dollars.

The final rule attempts to reduce the probability that such an event will occur by: (1) Requiring the protection of sensitive security information in the rail sector; (2) clarifying TSA's authority to

[55] *See*, 49 U.S.C. 114(d). The TSA Assistant Secretary's current authorities under ATSA have been delegated to him by the Secretary of Homeland Security. Under Section 403(2) of the Homeland Security Act (HSA) of 2002, Pub. L. 107–296, 116 Stat. 2315 (2002), all functions of TSA, including those of the Secretary of Transportation and the Undersecretary of Transportation of Security related to TSA, transferred to the Secretary of Homeland Security. Pursuant to DHS Delegation Number 7060.2, the Secretary's guidance and control, the authority vested in the Secretary with respect to TSA, including that in Section 403(2) of the HSA.

[56] 49 U.S.C. 114(f)(3).

[57] 49 U.S.C. 114(f)(1)–(5); (h)(1)–(4).

[58] 49 U.S.C. 114(f)(7).

[59] 49 U.S.C. 114(f)(10).

[60] 49 U.S.C. 114(f)(11).

[61] 49 U.S.C. 114(f)(15).

[62] 49 U.S.C. 114(l)(1).

[63] 49 U.S.C. 114(l)(2).

[64] 49 U.S.C. 114(f)(1) and (5).

[65] HSPD–7, Paragraph 1.

[66] HSPD–7, Paragraph 15.

[67] HSPD–7, Paragraph 22(h).

[68] U.S. Department of Transportation, Research and Innovative Technology Administration, Bureau of Transportation Statistics, *Pocket Guide to Transportation 2006* (Washington, D.C.: Bureau of Transportation Statistics, 2006).

conduct inspections of rail security operations; (3) requiring the designation of an RSC and an alternate; (4) requiring covered entities to have the ability to report on rail car locations and shipping information for cars under their physical custody and control; (5) requiring covered entities to report significant security concerns to TSA; and (6) requiring covered entities to establish chain of custody and control standards for certain hazardous shipments.

Issues Raised in Public Comments

TSA received public comments on the Initial Regulatory Flexibility Analysis that was issued in support of the NPRM during the public comment period. All comments are available for the public to view at the Federal Docket Management System: *l:ttp://www.regulations.gov/search/index.jsp*.

As part of this rulemaking effort, TSA has summarized and responded to all public comments relating to the Initial Regulatory Flexibility Analysis issued with the NPRM. Comment summaries and responses are located in the preamble to the final rule, which is also available at *http://www.regulations.gov/search/index.jsp* and in the **Federal Register**.

Description and Estimated Number of Small Entities

The regulated entities are divided into railroad carriers, transit systems, and rail hazardous materials facilities. Rail hazardous materials facilities are primarily chemical manufacturers, although some wholesalers may also ship chemicals. Additionally, some ammonia producers classify themselves as support activities for agriculture or agricultural wholesalers. Figure 1 provides the North American Industry Classification System (NAICS) codes and SBA standards for defining small entities for the sectors expected to be affected by the rule.

FIGURE 1—FIRM SIZE STANDARDS

Industry	NAICS	Small business standard
Line Haul railroads	482111	1,500 FTEs.
Short line railroads	482112	500 FTEs.
Transit Systems	485	$6.5 million.
Petrochemical manufacturing	32511	1,000 FTEs.
Alkalis and chlorine manufacturing	325181	1,000 FTEs.
All other basic inorganics	325188	1,000 FTEs.
All other basic organics	325199	1,000 FTEs.
Plastic and resin manufacturing	32511	750 FTEs.
Nitrogen fertilizer manufacturing	325311	1,000 FTEs.
Other chemical manufacturing	325	500–1,000 FTEs.
Support activities for rail	48821	$6.5 million.
Petroleum refineries	32411	1,500 FTEs.
Pulp and paper mills	3221	750 FTEs.
Support activities for agriculture	1151	$6.5 million.
Chemical wholesalers	42469	100 FTEs.
Agricultural wholesalers	42491	100 FTEs.
Electric utilities	2111	<4 m megawatt hours/year.
Water and sewage systems, private	2213	$6.5 million.
Water and sewage systems, public	92	<50,000 people serviced.

Source: Small Business Administration.

Overall, of all the regulated parties, TSA identified 651 entities that may meet the SBA definition of a small entity. These entities reflect the following makeup:

FIGURE 2—TYPES OF SMALL ENTITIES

Type	Count
Railroads	549
Transit, Other	86

FIGURE 2—TYPES OF SMALL ENTITIES—Continued

Type	Count
Small Rail Hazardous Materials Facilities	16
Total	651

The number of small railroad carriers potentially affected by the rule is difficult to estimate accurately, because most local railroad carriers are privately owned. Based on the Association of American Railroads (AAR) data on employment and revenues, TSA assumed that all railroad carriers, except the seven Class I railroads, are small entities. This assumption may be conservative, because some private companies own a number of local railroads and may exceed the 500 full-time equivalent (FTE) size limits. Figure 3 presents the AAR data on the number of railroads, average revenues, and average number of FTEs.

FIGURE 3—RAILROAD TYPES BY AVERAGE REVENUE AND NUMBER OF EMPLOYEES

Type	Number	Average freight revenue	Average number of FTEs
Class I	7	$5,590,000,000	21,100
Regional	31	45,483,871	239
Local	314	3,121,019	17
Switching and Terminal	204	3,137,255	32

Source: American Association of Railroads.

The Bureau of Transportation Statistics (BTS) lists 152 transit systems (21 commuter rail systems, 45 rail transit systems, and 86 other rail transit systems).[69] Of these 86 listed as "other," the systems include cable car, inclined plane, monorail, and automated guideway.[70] As shown in Figure 4, only the systems in the "other" category have average passenger revenues of less than $6.5 million, which is the SBA standard for small transit entities. The other transit systems not only have average passenger revenues that exceed the standard, but are also generally operated by governmental entities that receive financial support from the Federal and State governments. TSA did not identify any systems that qualified as small. It is unlikely that local governments that meet the SBA standard for small governments (50,000 people served) operate rail transit systems. Consequently, TSA has included only the "other" entities as potentially affected small entities.

FIGURE 4—TRANSIT SYSTEMS BY AVERAGE REVENUES

Type	Number	Average annual passenger revenue
Heavy Rail	14	$189,590,000
Light Rail	27	8,490,000
Commuter Rail	21	73,910,000
Other	86	590,000

Source: BTS.

Of the 241 rail hazardous materials facilities identified from the Risk Management Program (RMP) data, there are 29 facilities that at first review appeared to be small entities based upon the facility employee count. However, within these 29, research on corporate relationships revealed that, at most, 16 facilities are potentially small. As explained in Section 5.6.1 of the separate full evaluation, only facilities with less than 21 employees are expected to incur incremental costs related to creating secure storage areas, while all will incur costs for the other requirements. Based upon this threshold of 20 or less employees, at most eight facilities could have costs. Three of these facilities have revenue data that suggests a large firm. Additionally, descriptions of operating locations and business lines on the World Wide Web suggest that these three facilities have a higher number of employees than small entities and that they are parts of much larger firms. Although TSA is using eight as the number of facilities for purposes of the analysis below, this may overstate the number of firms.

Figure 5 presents the data distribution by FTE for hazardous materials facilities that may be SBA-defined small entities. Of the total facilities assumed to be small, 14 have less than 100 employees while only two have 100 or more.[71]

FIGURE 5—AFFECTED SMALL RAIL HAZARDOUS MATERIALS FACILITIES

Number of FTEs	Rail hazardous materials facilities
100+	2
50–99	3
21–49	5
10–20	5
1–9	1
Potential Small Entities	16

Source: TSA Calculations.

Description of Compliance Requirements

Railroads will have to submit the name(s) of and engage in training of the RSC, document chain of custody transfers, and file incident reports and car location reports as needed. TSA assumed that regional and local railroad carriers handled hazardous materials shipments in proportion to their percentage of total freight carried. Again, this assumption may be conservative because it is likely that Class I carriers move most chemicals. Figure 6 presents the costs for an average regional, local, and shortline and terminal (S&T) rail carrier to comply with the requirements.

FIGURE 6—AVERAGE COSTS TO RAILROADS BY SIZE

Requirement	Unit cost	Number Activities/year	Regional	Local	S & T
RSC	$91.00	2	$182	$182	$182
Incident Report	63.00	2	126	126	126
Chain of Custody	4,969,723	Weighted by % of Revenue	5,362	368	370
Location	91.00	1	91	91	91
Total			5,761	767	769

Source: TSA Calculations.

As discussed above, only the 86 transit systems in the "other" category in Figure 4 are expected to be small

[69] Bureau of Transportation Statistics, National Transportation Statistics, Modal Profile Transit Systems. Updated April 2005. Note, however, that four of the 152 transit systems listed by BTS are classified as trolley bus and would not be covered by this final rule. This is represented in Figure 4, which only shows 41 transit systems (14 heavy rail and 27 light rail).

[70] The estimate for "Other Rail Transit Systems" impacted by this final rule shown in Figure 4 is conservative because it includes conveyances such as vanpools and aerial tramways, which will not be affected by this rule.

[71] The number of facilities that actually are part of firms that meet the small entity definitions may be lower. TSA excluded only those facilities that could be clearly identified as belonging to corporations or municipalities that exceed the SBA standards.

entities according to SBA standards.[72] These small transit systems will only incur unit costs for submission of RSC information and incident reporting. Both the RSC and incident reporting costs are expected to be incurred on average just once per year per small transit system, resulting in average costs per system of just $245, as shown in Figure 7.

FIGURE 7—AVERAGE COSTS FOR SMALL TRANSIT SYSTEMS

Requirement	Unit cost	Number of activities/ year	Regional
	A	B	A × B
RSC	$91.00	2	$182
Incident Report	63.00	1	63
Total			245

Source: TSA Calculations.

As explained above, the cost for hazardous materials facilities includes the cost of adding fencing, training, and inspections, plus the types of cost incurred by railroads. TSA assumed that each facility will train an average of 10 workers and the number of inspections per small facility is based on the assumption that the number of inspections is proportional to the quantity of chemical held. The 16 small rail hazardous materials facilities represent about 2.7 percent of the covered hazardous materials affected chemicals; therefore 2.7 percent of the inspections were divided among the 16 firms to estimate 191 inspections a year. Figure 8 presents the average costs for a hazardous materials facility with 20 or fewer employees. Because fencing is a capital cost, Figure 8 and Figure 9 also present the cost based on amortizing the fencing cost over 10 years at 7% discount rate.[73]

FIGURE 8—AVERAGE COSTS FOR SMALL RAIL HAZARDOUS MATERIALS FACILITIES (<21 EMPLOYEES)

Requirement	Unit cost	Number	First-year cost	Annual after 1st year
	A	B	A × B	
Secure Storage Area	$16,150	1	$16,150	$2,299
RSC	91	1	91	91
Training	63	10	630	630
Inspections	11	191	2,006	2,006
Incident Report	63	1	63	63
Chain of Custody	42,481	1	42,481	42,481
Location Reporting	91	1	91	91
Total			61,512	47,661

Source: TSA Calculations.

FIGURE 9—AVERAGE COSTS FOR SMALL RAIL HAZARDOUS MATERIALS FACILITIES (>=21 EMPLOYEES)

Requirement	Unit cost	Number	First-year cost	Annual after 1st year
	A	B	A × B	
RSC	$91	1	$91	$91
Training	63	10	630	630
Inspections	11	191	2,006	2,006
Incident Report	63	1	63	63
Location Reporting	0	0	0	0
Total			2,790	2,790

Source: TSA Calculations.

To examine the overall impact on small firms, a traditional method is to compare costs as a percentage of revenue. TSA was unable to find revenue information on six of the 16 small rail hazardous materials facilities. One approximation method is to use known average revenues per employee as a proxy. For those firms in this group of small facilities with revenue information available, the average revenue per employee is approximately $685,000. There is, however, one firm with revenue as low as $50,000 per employee. This wide range suggests an alternative value must also be considered. For the compliance impacts in Figure 10, TSA used the smallest revenue per employee number to create a proxy for the missing revenue values as the "Low End" estimate. For the

[72] Again, it is important to note that the estimate of 86 "Other Rail Transit Systems" impacted by the rule is in all likelihood conservative.

[73] Note that calculations in Figures 8 and 9 may be off due to rounding.

"Average" estimate, TSA substituted the average $685,000 as the revenue per employee. For each identified rail hazardous materials facility that may be a small entity, a letter identification label is used to avoid listing specific business names. For the railroads, averages appeared to be representative and only one estimate for each rail or transit type is presented. Figure 10 presents the average costs as a percent of average revenues with the missing data replacement described above. As can be seen, most instances have a relatively low cost/revenue relationship. However, five instances in the "low-end" case and two in the "average" case could have much higher impact if the unknown firm revenues are reflected by the estimation technique.

FIGURE 10—AVERAGE FIRST-YEAR COMPLIANCE COSTS AS A PERCENT OF REVENUE

(A) ID	(B) Revenue: low end estimate	(C) Revenue: average estimate	(D) Cost impact	(E = D/B) Cost ÷ revenue (low end) (percent)	(F = D/C) Cost ÷ revenue (average) (percent)
Rail and Transit					
Regional		$45,483,871	$16,624		0.0
Local		3,121,019	1,465		0.0
S & T		3,137,255	2,411		0.1
Small Transit		590,000	154		0.0
Small Rail Hazardous Materials Facilities					
A	$300,000	4,108,192	61,512	20.5	1.5
B	600,000	8,216,383	61,512	10.3	0.7
C	650,000	8,901,082	61,512	9.5	0.7
D	24,400,000	24,400,000	61,512	0.3	0.3
E	850,000	11,639,876	61,512	7.2	0.5
F	1,000,000	1,000,000	61,512	6.2	6.2
G	4,600,000	4,600,000	2,790	0.1	0.1
H	1,100,000	1,100,000	2,790	0.3	0.3
I	12,000,000	12,000,000	2,790	0.0	0.0
J	10,000,000	10,000,000	2,790	0.0	0.0
K	27,000,000	27,000,000	2,790	0.0	0.0
L	24,400,000	24,400,000	2,790	0.0	0.0
M	2,500,000	34,234,930	2,790	0.1	0.0
N	19,600,000	19,600,000	2,790	0.0	0.0
O	190,000,000	190,000,000	2,790	0.0	0.0
P	130,000,000	130,000,000	2,790	0.0	0.0

Flexibility in the Final Rule

Four parts of the final rule provide small entities with regulatory flexibility, helping them to minimize their compliance costs.

First, the final rule will not require some railroad carriers, including certain tourist and scenic railroads, to maintain RSCs unless otherwise notified by TSA. This should provide some flexibility to certain smaller railroads not hauling freight.

Second, the provision that requires freight railroad carriers and rail hazardous materials facilities to provide TSA with the location and shipping information of certain rail cars has been modified to allow smaller companies more flexibility. Upon request by TSA, each Class I railroad must provide information to TSA no later than five minutes if the request concerns only one rail car and no later than 30 minutes if the request concerns more than one rail car. Conversely, the rule will require rail hazardous materials facilities and freight railroads other than the Class I carriers, upon request by TSA, to provide the agency with location and shipping information of rail cars within 30 minutes, regardless of the number of rail cars covered by the request. Moreover, the rule will also allow carriers to use a designated third party or agent to provide the car location and shipping information so long as the designated third party can provide accurate information within the specified timeframe. These policies should provide smaller railroads and rail hazardous materials facilities with some regulatory relief.

Third, with respect to the chain of custody provision of the final rule, TSA added a new definition for what constitutes an "attended" rail car during an exchange of custody. The new definition, which TSA created after receiving many comments from industry, allows railroad carriers and rail hazardous materials facilities greater flexibility by stating that a representative of a railroad or rail hazardous materials facility does not have to maintain a line of sight with all rail cars during an exchange of custody. Railroads and rail hazardous materials facilities will now only need to ensure that an employee or representative is in reasonable proximity to the rail car(s), monitoring an exchange of custody in a manner that would allow them to properly detect unauthorized activity. This flexibility should allow firms to comply with the provisions using less costly methods than would have been otherwise possible.

Fourth, the final rule will allow rail hazardous materials facilities that receive covered shipments located in HTUAs to request an exemption from the chain of custody and control section if they believe, based on operational and geographic characteristics, that the potential security threat to the facility does not warrant the application of the security measure.

These measures should allow affected firms—both large and small—some flexibility in complying with the rule.

Identification of Duplication, Overlap, and Conflict With Other Rules

This rail transportation security rule affects entities that are also subject to the requirements of other DHS rules—the DHS Chemical Facility Anti-Terrorism Standards (CFATS) regulation

and the Coast Guard's Maritime Transportation Security Act (MTSA) regulations. TSA has provided a more detailed discussion in Section II of this preamble.

Conclusion

While approximately 70% of the total affected entities were identified as small entities, the estimated compliance costs associated with this rulemaking are low on a per entity basis except for the identified five ("low end case") and two ("average case") facilities. Rail hazardous materials facilities are allowed great flexibility in selecting the physical security measures needed to ensure no unauthorized persons gain access to the rail secure area, and may select lighting, video surveillance, or other appropriate methods besides fencing to meet the performance standard. Certain rail hazardous materials facilities may receive an exemption from some or all of the chain of custody and control requirements. TSA notes that these cases with the significant impact are costed using the most expensive compliance method (fencing). These businesses may in fact have much lower impacts based upon the performance standard compliance alternatives or exemption. Based on this analysis, TSA believes that this FRFA shows that an estimated impact of the two cost scenarios with impact of over 6% on either five out of 651 firms (0.8 percent) or 2 out of 651 firms (0.3 percent) is unlikely to constitute a substantial number under section 605(b) of the RFA (5 U.S.C. 601 *et seq.*).

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that TSA consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of § 3507(d), obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations.

This final rule contains new information collection activities subject to the PRA. Accordingly, TSA has submitted the following information requirements to OMB for its review.

This final rule will require: (1) Freight and passenger railroad carriers, rail transit systems, certain rail hazardous materials shipper and receiver facilities, tourist, scenic, historic, and excursion rail operations (whether operating on or off the general railroad system of transportation), and private rail car operations (on or connected to the general railroad system of transportation) to allow TSA and DHS officials working with TSA to enter and be present within any area or within any conveyance to conduct inspections, tests, or to perform such other duties as TSA directs, including copying of records; (2) freight railroad carriers, certain rail hazardous materials shipper and receiver facilities, passenger railroad carriers, and rail mass transit systems to designate and submit contact information for an RSC and at least one alternate RSC to be available to TSA on a 24-hours, 7 days a week basis to serve as the primary contact for receipt of intelligence information and other security-related activities and coordinator of security practices and procedures with appropriate law enforcement and emergency response agencies; (3) freight and passenger railroad carriers, certain rail hazardous materials shippers and receivers, passenger railroad carriers, rail mass transit systems, tourist, scenic, historic, and excursion rail operations (whether operating on or off the general railroad system of transportation), and private rail car operations (on or connected to the general railroad system of transportation) to immediately report potential threats and significant security concerns to DHS; and (4) freight railroad carriers and certain rail hazardous materials shippers and receivers to provide for a secure chain of custody and control of rail cars containing a specified quantity and type of hazardous material.

This proposal would support the information needs of TSA to enhance security in the following modes of transportation: freight rail, including freight railroad carriers, rail hazardous materials facilities which offer, load, prepare, receive and/or unload certain types and quantities of hazardous materials, and private cars; passenger rail, including passenger railroad carriers such as intercity and commuter passenger rail operations, rail transit systems, tourist, scenic, historic, and excursion rail operations (whether operating on or off the general railroad system of transportation), and private rail car operations (on or connected to the general railroad system of transportation).

TSA estimates that the final rule will affect 945 respondents, including freight railroad carriers, passenger railroad carriers and rail hazardous materials facilities. TSA has revised this estimate slightly from 949 respondents estimated in the NPRM after further consideration. These different respondents will have different reporting responsibilities under this final rule. TSA will require all affected entities to submit RSC contact information to TSA. The agency estimates that each of the 945 freight and passenger railroad carriers, rail transit systems, and rail hazardous materials shippers and receivers will respond once to submit RSC information to TSA, resulting in 945 responses.

Additionally, all affected entities will need to report significant security concerns to TSA. To forecast the number of responses, TSA adopted assumptions on the number of incidents by industry segment (*e.g.*, freight rail, passenger rail, etc.). First, the agency estimates that each freight railroad carrier will respond anywhere from one to 36 times per year depending on the amount of PIH materials the carrier transports. TSA estimates that each passenger railroad and rail transit entity will respond between zero and 1,460 times per year. TSA estimates that each rail hazardous materials shipper and receiver facility will respond from zero to two times per year. In total, the agency expects the affected entities to send the government information anywhere from 45,893 to 93,073 times per year for this requirement, down from the 49,762–99,862 annually frequency TSA estimated in the NPRM. As a primary estimate, TSA estimates that there will be 69,483 incident reports per year.

Finally, this final rule will require affected entities to provide TSA with information on the location and shipping information on certain railcars upon request. TSA estimates that it will initiate between 105 and 255 requests per year, with a primary estimate of 150 requests per year.

Thus, the annual frequency of information requirements is between 46,943 and 94,273. Adding the three primary estimates yields a total of 70,578 responses per year. (945 + 69,483 + 150 = 70,578).

TSA estimates that the total annual hour burden is 288,945 hours. This figure was derived by adding the annual burdens for RSC reporting (312) + location and shipping reporting (150) + primary significant security concerns reporting (69,483) + chain of custody reporting (219,000) = 288,945. After further consideration, TSA has revised its annual recordkeeping and reporting cost burden from the range of $3,420,655 to $6,576,955 to an estimated $9,388,567. This figure was derived by adding the annual costs for RSC reporting ($28,378) + location and shipping reporting ($13,650) + primary significant security concerns reporting ($4,377,429) + chain of custody reporting ($4,969,110) = $9,388,567. Larger reporting burdens are anticipated

for passenger rail systems due to higher estimates of suspicious incident reports.

TSA received various comments related to the information collection generally. One mass transit agency asked whether a list of security coordinators previously sent to TSA to comply with the rail security directives would satisfy § 1580.201's requirement to appoint an RSC. Passenger railroad carriers and rail transit systems that have already provided the required information on their primary and alternate RSCs to TSA do not have to take further action unless any of the contact information changes. However, all changes to the names, titles, telephone numbers, and e-mail addresses of the RSCs and alternate RSCs must be reported to TSA within seven calendar days.

TSA received numerous comments about the interrelationship between the reporting requirements of this rule and the reporting that occurs in response to other regulatory programs or other procedures. Commenters urged TSA to increase coordination and eliminate unnecessary duplication. For example, one trade association said that certain facilities are currently reporting significant security concerns to the FBI, local authorities, and the Coast Guard. The association said that TSA should use these existing reports to gather information rather than creating an additional reporting requirement. The association suggested that if TSA maintains this reporting requirement in the final rule, it should only apply to the certain hazardous materials determined to pose a higher security risk (such as materials poisonous by inhalation, explosives, and radioactive materials).

Several commenters wrote about the relationship between the proposed reporting requirement and the reporting requirement in 49 CFR 659.33, asking TSA to clarify the role of State oversight agencies in the reporting process. Some State DOTs said that the proposed reporting would partially duplicate the reporting requirements of the State oversight program, which would force rail systems to develop multiple sets of procedures and processes.

Commenters suggested the following options for coordinating or merging the proposed reporting requirement with similar existing requirements:

- Create a centralized or "one stop" reporting process for stakeholders.
- Avoid any "excessive" duplication between the safety oversight and rail security programs.
- Minimize redundant reporting and ensure there is coordination of FRA, National Transportation Safety Board (NTSB), and TSA reporting requirements.
- Parallel the proposed reporting requirement with existing requirements (or vice versa).
- Allow reporting to other jurisdictional law enforcement agencies to meet the requirement of reporting to TSA.
- Allow reporting to the State oversight agency to fulfill TSA's requirement.
- Make the proposed reporting requirement more consistent with posting to the public transportation portion of the Homeland Security Information Network.
- Modify the reporting requirements for the National Transit Database to support TSA's needs.
- Require that covered entities send reports to the National Response Center as the primary and sole reporting center for the purposes of this section and develop a mechanism for TSA to receive reports of significant security concerns from the National Response Center.

A trade association asserted that many jurisdictions and authorities also want immediate reports. The association suggested that TSA consider adding language that helps regulated entities prioritize all of the notifications that they are required to make.

In response to these comments, TSA has determined that it needs information immediately on potential threats, suspicious activities, and security incidents for the purposes of comprehensive intelligence analysis, threat assessment, and allocation of security resources. Reporting of security concerns must be made to the Freedom Center, which maintains communications networks with other Federal operations centers, such as DOT's Crisis Management Center, to convey reported security concerns to interested entities throughout the Federal government.

Reports submitted to State oversight agencies under 49 CFR 659.33 will not satisfy the requirements of this final rule. Reports to the oversight agencies meet a more general need for situational awareness, particularly pertaining to safety conditions. There is not extensive overlap between the required reporting under this final rule and the reporting under 49 CFR 659.33. Where there is overlap, TSA would expect that rail transit systems would follow procedures for reporting to TSA as well as to the State agencies.

Reporting requirements to the National Response Center are not co-extensive with the reporting requirements of this rule, which is broader in scope. For example, this rule would require reporting of such things as threat information and the discovery of suspicious items. Covered entities need not report these to the National Response Center, but are useful pieces of information to TSA as indicators of potential terrorist activities. Therefore, TSA cannot rely on obtaining reports from the National Response Center. Moreover, obtaining reports indirectly from the National Response Center, the States, or other third parties might delay a needed response or may not contain adequate information for TSA's purposes.

The Chairman and four members of the U.S. House Committee on Homeland Security expressed the view that the proposed reporting requirements would not improve rail security. They commented that the reporting requirements would not make the industry proactive in deterring terrorists and that, instead of collecting data for study after incidents have occurred, TSA should provide the industry with mandatory, standardized security practices and mandated training programs. TSA believes that the requirements to report significant security concerns have great value in the overall approach to enhancing rail security, and disagrees with the commenters' view that the reporting requirements do not advance that objective. When TSA analyzes reports of significant security concerns from passenger rail carriers (including rail transit systems), freight railroad carriers, and rail hazardous materials shippers and receivers, TSA will be able to determine if there are geographic or other patterns to the reported activities. These analyses may enable TSA to prevent or interrupt terrorist planning or attack. In addition, these analyses assist TSA in determining whether inspections should be targeted at particular areas or activities. Finally, TSA can use the reported incidents to determine whether to encourage or require particular security measures either immediately or in the future.

Many commenters said that TSA's definition of reportable events is too broad and should be more narrowly focused. Several comments from transit authorities said that the proposed reporting requirements would impose a substantial burden on transit systems and even on TSA itself. They also asserted that the proposed requirements would result in an overload of information that would divert attention from truly significant threats and dilute the effectiveness of the reporting system. Other commenters asked for a more specific description of "suspicious" activities or a list of

examples that would, or would not, be considered "suspicious." A commenter identified "youth vandalism" as an incident that should not be reportable.

Several commenters offered specific suggestions for which activities or incidents should be considered reportable. Some commenters suggested that the requirement focus only on activities that pose a security threat to rail cars carrying the hazardous materials specifically covered by the regulation.

An industry association noted that the events that must be reported to DOT are very specific (such as a person being killed or requiring hospitalization) and suggested that TSA's reportable events be more specific and similar to DOT's. One commenter suggested that TSA only require the reporting of certain specific crimes. Another commenter made specific suggestions regarding the categories of events that should be reported to TSA.

In response to these comments, TSA is aware that the proposed reporting requirements are broad and, in some respects—such as the requirement to report "suspicious" activities—are not as specific as the regulated community would like. However, TSA has not changed the reporting requirements in the final rule for several reasons. The reporting requirements are intended to reduce risk to the rail transportation systems by providing TSA with information to intervene on a timely basis to thwart a threat or further attack. Detecting activities that may compromise transportation security entails piecing together seemingly unrelated incidents or observations and conducting analysis in context with information from other sources. As the threat environment is dynamic and indications of planning and preparation for an incident that may compromise transportation security are subject to change, a threshold for reportable events or a specific definition cannot be provided.

TSA has decided not to accept commenters' suggestions to limit the scope of the reporting requirement. Limiting the scope to the DOT reporting requirements, which are intended to identify safety concerns, would reduce the data that TSA could use for trend analysis to anticipate and prevent an attack. Limiting incident reporting to only those materials that are determined to be sensitive security materials also would limit TSA's domain awareness and intelligence gathering.

As provided by the PRA, as amended, 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. Under the PRA, TSA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number. TSA will publish the OMB control number for this information collection in the **Federal Register** after OMB approves it.

D. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. TSA has assessed the potential effect of this rulemaking and has determined that it will have only a domestic impact and therefore no effect on any trade-sensitive activity.

E. Unfunded Mandates Reform Act Analysis

The Unfunded Mandates Reform Act of 1995 is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action." This rulemaking does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply, and TSA has not prepared a statement under the Act.

F. Executive Order 13132, Federalism

TSA has analyzed this final rule under the principles and criteria of E.O. 13132, entitled "Federalism," issued August 4, 1999. Executive Order 13132 requires TSA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." According to the E.O.,"[p]olicies that have federalism implications" include regulations that have "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."

In this final rule, TSA is preempting certain State, local, and tribal requirements, including any such requirements prescribing or restricting security measures during the physical transfer of custody and control of a rail car containing hazardous materials. This is consistent with applicable statutes and with sound policy. Congress has enacted comprehensive Federal railroad laws (49 U.S.C. 20101 *et seq.*), which mandate that "[l]aws, regulations and orders related to railroad safety and laws, regulations, and orders related to railroad security [] be nationally uniform to the extent practicable." *See* 49 U.S.C. 20106. To achieve national uniformity, the Federal railroad laws "expressly preempt[] state authority to adopt safety rules, save for two exceptions." *See Union Pacific Railroad Co.* v. *California Public Utilities Comm'n*, 346 F.3d 851, 858 (9th Cir. 2003); *see also* 49 U.S.C. 20106. A state may enact or continue in force a law related to railroad safety or security "until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. 20106. "Even after such a federal regulation issues, a State may adopt a more stringent law when 'necessary to eliminate or reduce an essentially local safety or security hazard' if it 'is not incompatible' with the federal regulation and 'does not unreasonably burden interstate commerce.' " *CSX Transportation, Inc.* v. *Williams*, 406 F.3d at 670–71; 49 U.S.C. 20106.

A primary security concern related to the rail transportation of hazardous materials is the prevention of a catastrophic release or explosion in proximity to densely populated areas, including urban areas and events or venues with large numbers of people in attendance. Also of major concern is the release or explosion of a rail car in proximity to iconic buildings, landmarks, or environmentally significant areas. These are national concerns that require a uniform national regulatory approach that does not require regulated parties to implement different measures in different jurisdictions across the nation. TSA is therefore proposing a nationally-uniform regulatory provision requiring chain of custody procedures. This would avoid the burden on interstate commerce that would result if multiple

States, localities, and tribes established their own chain of custody requirements.

Although § 1580.107 preempts State and local requirements addressing the same matters, TSA does not believe that the custody and control requirements of this rulemaking will have an immediate substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. The final rule will not require any actions by States, localities, or tribes. In addition, only one State has enacted a measure addressing chain of custody and control requirements for the rail transportation of hazardous materials.[74] Thus, the final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

G. Environmental Analysis

TSA reviewed this action under DHS Management Directive 5100.1, Environmental Planning Program (effective April 19, 2006), which guides TSA compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f). We determined that this final rule is categorically excluded under number A3(a) (administrative and regulatory activities involving the promulgation of rules and the development of policies), number A4 (information gathering and data analysis), number A7(d) (conducting audits, surveys and data collection of a minimally intrusive nature, to include vulnerability, risk and structural integrity assessments of infrastructures), number B3 (proposed activities and operations to be conducted in existing structures that are compatible with ongoing functions), and number B11 (routine monitoring and surveillance activities that support homeland security, such as patrols, investigations and intelligence gathering).

H. Energy Impact Analysis

TSA has assessed the energy impact of the final rule in accordance with the Energy Policy and Conservation Act (EPCA), Public Law 94–163, as amended (42 U.S.C. 6362). We have determined that this rulemaking is not a major regulatory action under the provisions of the EPCA. We also have analyzed this final rule under E.O. 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 18, 2001). We have determined that it is not a "significant energy action" under that order. While it is a "significant regulatory action" under E.O. 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, a Statement of Energy Effects is not required for this rule under E.O. 13211.

List of Subjects

49 CFR Part 1520

Air carriers, Aircraft, Airports, Maritime carriers, Rail hazardous materials receivers, Rail hazardous materials shippers, Rail transit systems, Railroad carriers, Railroad safety, Railroads, Reporting and recordkeeping requirements, Security measures, Vessels.

49 CFR Part 1580

Hazardous materials transportation, Mass transportation, Rail hazardous materials receivers, Rail hazardous materials shippers, Rail transit systems, Railroad carriers, Railroad safety, Railroads, Reporting and recordkeeping requirements, Security measures.

The Final Rule

■ For the reasons set forth in the preamble, the Transportation Security Administration amends Chapter XII, of Title 49, Code of Federal Regulations, as follows:

PART 1520—PROTECTION OF SENSITIVE SECURITY INFORMATION

■ 1. The authority citation for part 1520 continues to read as follows:

Authority: 46 U.S.C. 70102–70106, 70117; 49 U.S.C. 114, 40113, 44901–44907, 44913–44914, 44916–44918, 44935–44936, 44942, 46105.

■ 2. In § 1520.3, add definitions of "Rail facility," "Rail hazardous materials receiver," "Rail hazardous materials shipper," "Rail secure area," "Rail transit facility," "Rail transit system," "Railroad," and "Railroad carrier" in alphabetical order, and revise the definition of "Vulnerability assessment" to read as follows:

§ 1520.3 Terms used in this part.

* * * * *

Rail facility means "rail facility" as defined in 49 CFR 1580.3.

Rail hazardous materials receiver means "rail hazardous materials receiver" as defined in 49 CFR 1580.3.

Rail hazardous materials shipper means "rail hazardous materials shipper" as defined in 49 CFR 1580.3.

Rail secure area means "rail secure area" as defined in 49 CFR 1580.3.

Rail transit facility means "rail transit facility" as defined in 49 CFR 1580.3.

Rail transit system or *Rail Fixed Guideway System* means "rail transit system" or "Rail Fixed Guideway System" as defined in 49 CFR 1580.3.

Railroad means "railroad" as defined in 49 U.S.C. 20102(1).

Railroad carrier means "railroad carrier" as defined in 49 U.S.C. 20102(2).

* * * * *

Vulnerability assessment means any review, audit, or other examination of the security of a transportation infrastructure asset; airport; maritime facility, port area, or vessel; aircraft; railroad; railroad carrier, rail facility; train; rail hazardous materials shipper or receiver facility; rail transit system; rail transit facility; commercial motor vehicle; or pipeline; or a transportation-related automated system or network to determine its vulnerability to unlawful interference, whether during the conception, planning, design, construction, operation, or decommissioning phase. A vulnerability assessment may include proposed, recommended, or directed actions or countermeasures to address security concerns.

* * * * *

■ 3. In § 1520.5, revise paragraphs (b)(6)(i), (b)(8) introductory text, (b)(10), (b)(11)(i)(A), (b)(12) introductory text, and (b)(15) to read as follows:

§ 1520.5 Sensitive security information.

* * * * *

(b) * * *

(6) *Security inspection or investigative information.* (i) Details of any security inspection or investigation of an alleged violation of aviation, maritime, or rail transportation security requirements of Federal law that could reveal a security vulnerability, including the identity of the Federal special agent or other Federal employee who conducted the inspection or audit.

* * * * *

(8) *Security measures.* Specific details of aviation, maritime, or rail transportation security measures, both operational and technical, whether applied directly by the Federal government or another person, including—

* * * * *

(10) *Security training materials.* Records created or obtained for the purpose of training persons employed

[74] California adopted the "Local Community Rail Security Act of 2006" on October 1, 2006.

by, contracted with, or acting for the Federal government or another person to carry out aviation, maritime, or rail transportation security measures required or recommended by DHS or DOT.

(11) * * *

(i) * * *

(A) Having unescorted access to a secure area of an airport, a rail secure area, or a secure or restricted area of a maritime facility, port area, or vessel;

* * * * *

(12) *Critical aviation, maritime, or rail infrastructure asset information.* Any list identifying systems or assets, whether physical or virtual, so vital to the aviation, maritime, or rail transportation system (including rail hazardous materials shippers and rail hazardous materials receivers) that the incapacity or destruction of such assets would have a debilitating impact on transportation security, if the list is—

* * * * * *

(15) *Research and development.* Information obtained or developed in the conduct of research related to aviation, maritime, or rail transportation security activities, where such research is approved, accepted, funded, recommended, or directed by DHS or DOT, including research results.

* * * * * *

■ 4. In § 1520.7, add new paragraph (n) to read as follows:

§ 1520.7 Covered persons.

* * * * * *

(n) Each railroad carrier, rail hazardous materials shipper, rail hazardous materials receiver, and rail transit system subject to the requirements of part 1580 of this chapter.

■ 5. In § 1520.11, revise paragraph (b) to read as follows:

* * * * * *

(b) *Federal, State, local, or tribal government employees, contractors, and grantees.* (1) A Federal, State, local, or tribal government employee has a need to know SSI if access to the information is necessary for performance of the employee's official duties, on behalf or in defense of the interests of the Federal, State, local, or tribal government.

(2) A person acting in the performance of a contract with or grant from a Federal, State, local, or tribal government agency has a need to know SSI if access to the information is necessary to performance of the contract or grant.

* * * * * *

■ 6. Add part 1580 to read as follows:

PART 1580—RAIL TRANSPORTATION SECURITY

Subpart A—General

Sec.

Subpart B—Freight Rail Including Freight Railroad Carriers, Rail Hazardous Materials Shippers, Rail Hazardous Materials Receivers, and Private Cars

Subpart C—Passenger Rail Including Passenger Railroad Carriers, Rail Transit Systems, Tourist, Scenic, Historic and Excursion Operators, and Private Cars

Authority: 49 U.S.C. 114.

Subpart A—General

§ 1580.1 Scope.

(a) Except as provided in paragraph (b) of this section, this part includes requirements for the following persons. Appendix B of this part summarizes the general requirements for each person, and the specific sections in this part provide detailed requirements.

(1) Each freight railroad carrier that operates rolling equipment on track that is part of the general railroad system of transportation;

(2) Each rail hazardous materials shipper that offers, prepares, or loads for transportation in commerce by rail one or more of the categories and quantities of rail security-sensitive materials set forth in § 1580.100(b) of this part;

(3) Each rail hazardous materials receiver, located within a High Threat Urban Area (HTUA) that receives in commerce by rail or unloads one or more of the categories and quantities of rail security-sensitive materials set forth in § 1580.100(b) of this part;

(4) Each passenger railroad carrier, including each carrier operating light rail or heavy rail transit service on track that is part of the general railroad system of transportation, each carrier operating or providing intercity passenger train service or commuter or other short-haul railroad passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102), and each public authority operating passenger train service;

(5) Each passenger or freight railroad carrier hosting an operation described in paragraph (a)(4) of this section;

(6) Each tourist, scenic, historic, and excursion rail operator, whether operating on or off the general railroad system of transportation;

(7) Each operator of private cars, including business/office cars and circus trains, on or connected to the general railroad system of transportation; and

(8) Each operator of a rail transit system that is not operating on track that is part of the general railroad system of transportation, including heavy rail transit, light rail transit, automated guideway, cable car, inclined plane, funicular, and monorail systems.

(b) This part does not apply to a freight railroad carrier that operates rolling equipment only on track inside an installation that is not part of the general railroad system of transportation.

§ 1580.3 Terms used in this part.

For purposes of this part:

Commuter passenger train service means "train, commuter" as defined in 49 CFR 238.5, and includes a railroad operation that ordinarily uses diesel or electric powered locomotives and railroad passenger cars to serve an urban area, its suburbs, and more distant outlying communities in the greater metropolitan area. A commuter operation is part of the general railroad system of transportation regardless of whether it is physically connected to other railroads.

General railroad system of transportation means the network of standard gage track over which goods may be transported throughout the Nation and passengers may travel between cities and within metropolitan and suburban areas. *See* 49 CFR part 209, Appendix A.

Hazardous material means "hazardous material" as defined in 49 CFR 171.8.

Heavy rail transit means service provided by self-propelled electric railcars, typically drawing power from a third rail, operating in separate rights-of-way in multiple cars; also referred to as subways, metros, or regional rail.

High Threat Urban Area (HTUA) means an area comprising one or more cities and surrounding areas including a 10-mile buffer zone, as listed in Appendix A to this part.

Improvised explosive device means a device fabricated in an improvised manner that incorporates explosives or destructive, lethal, noxious, pyrotechnic, or incendiary chemicals in its design, and generally includes a power supply, a switch or timer, and a detonator or initiator.

Intercity passenger train service means both "train, long-distance intercity passenger" and "train, short-distance intercity passenger" as defined in 49 CFR 238.5.

Light rail transit means service provided by self-propelled electric railcars, typically drawing power from an overhead wire, operating in either exclusive or non-exclusive rights-of-way in single or multiple cars and with shorter distance trips and frequent stops; also referred to as streetcars, trolleys, and trams.

Offers or *offeror* means:

(1) Any person who does either or both of the following:

(i) Performs, or is responsible for performing, any pre-transportation function for transportation of the hazardous material in commerce.

(ii) Tenders or makes the hazardous material available to a carrier for transportation in commerce.

(2) A carrier is not an offeror when it performs a function required as a condition of acceptance of a hazardous material for transportation in commerce (such as reviewing shipping papers, examining packages to ensure that they are in conformance with the HMR, or preparing shipping documentation for its own use) or when it transfers a hazardous material to another carrier for continued transportation in commerce without performing a pre-transportation function. *See* 49 CFR 171.8.

Passenger car means rail rolling equipment intended to provide transportation for members of the general public and includes a self-propelled car designed to carry passengers, baggage, mail, or express. This term includes a passenger coach, cab car, and a Multiple Unit (MU) locomotive. In the context of articulated equipment, "passenger car" means that segment of the rail rolling equipment located between two trucks. This term does not include a private car. *See* 49 CFR 238.5.

Passenger train means a train that transports or is available to transport members of the general public. *See* 49 CFR 238.5.

Private car means rail rolling equipment that is used only for excursion, recreational, or private transportation purposes. A private car is not a passenger car. *See* 49 CFR 238.5.

Rail facility means a location at which rail cargo or infrastructure assets are stored, cargo is transferred between conveyances and/or modes of transportation, where transportation command and control operations are performed, or maintenance operations are performed. The term also includes, but is not limited to, passenger stations and terminals, rail yards, crew management centers, dispatching centers, transportation terminals and stations, fueling centers, and telecommunication centers.

Rail hazardous materials receiver means any operator of a fixed-site facility that has a physical connection to the general railroad system of transportation and receives or unloads from transportation in commerce by rail one or more of the categories and quantities of rail security-sensitive materials set forth in § 1580.100(b) of this part, but does not include the operator of a facility owned or operated by a department, agency, or instrumentality of the Federal government.

Rail hazardous materials shipper means the operator of any fixed-site facility that has a physical connection to the general railroad system of transportation and offers, prepares, or loads for transportation by rail one or more of the categories and quantities of rail security-sensitive materials set forth in § 1580.100(b) of this part, but does not include the operator of a facility owned or operated by a department, agency, or instrumentality of the Federal government.

Rail secure area means a secure location(s) identified by a rail hazardous materials shipper or rail hazardous materials receiver where security-related pre-transportation or transportation functions are performed or rail cars containing the categories and quantities of rail security-sensitive materials are prepared, loaded, stored, and/or unloaded.

Rail security-sensitive material means one or more of the categories and quantities of hazardous materials set forth in § 1580.100(b) of this part.

Rail transit facility means rail transit stations, terminals, and locations at which rail transit infrastructure assets are stored, command and control operations are performed, or maintenance is performed. The term also includes rail yards, crew management centers, dispatching centers, transportation terminals and stations, fueling centers, and telecommunication centers.

Rail transit system or "Rail Fixed Guideway System" means any light, heavy, or rapid rail system, monorail, inclined plane, funicular, cable car, trolley, or automated guideway that traditionally does not operate on track that is part of the general railroad system of transportation.

Railroad means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including: Commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation. The term includes rail transit service operating on track that is part of the general railroad system of transportation but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation. *See* 49 U.S.C. 20102(1).

Railroad carrier means a person providing railroad transportation. *See* 49 U.S.C. 20102(2).

Residue means the hazardous material remaining in a packaging, including a tank car, after its contents have been unloaded to the maximum extent practicable and before the packaging is either refilled or cleaned of hazardous material and purged to remove any hazardous vapors. *See* 49 CFR 171.8.

Tourist, scenic, historic, or excursion operation means a railroad operation that carries passengers, often using antiquated equipment, with the conveyance of the passengers to a particular destination not being the principal purpose. Train movements of new passenger equipment for demonstration purposes are not tourist, scenic, historic, or excursion operations. *See* 49 CFR 238.5.

Transit means mass transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, or sightseeing transportation. *See* 49 U.S.C 5302(a). Transit may occur on or off the general railroad system of transportation. For purposes of this part, the term "transit" excludes buses and commuter passenger train service.

Transportation or transport means the movement of property including loading, unloading, and storage. Transportation or transport also includes the movement of people,

boarding, and disembarking incident to that movement.

§ 1580.5 Inspection authority.

(a) This section applies to the following:

(1) Each freight railroad carrier that operates rolling equipment on track that is part of the general railroad system of transportation.

(2) Each rail hazardous materials shipper.

(3) Each rail hazardous materials receiver located within an HTUA.

(4) Each passenger railroad carrier, including each carrier operating light rail or heavy rail transit service on track that is part of the general railroad system of transportation, each carrier operating or providing intercity passenger train service or commuter or other short-haul railroad passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102), and each public authority operating passenger train service.

(5) Each passenger or freight railroad carrier hosting an operation described in paragraph (a)(4) of this section.

(6) Each tourist, scenic, historic, and excursion rail operator, whether operating on or off the general railroad system of transportation.

(7) Each operator of private cars, including business/office cars and circus trains, on or connected to the general railroad system of transportation.

(8) Each operator of a rail transit system that is not operating on track that is part of the general railroad system of transportation, including heavy rail transit, light rail transit, automated guideway, cable car, inclined plane, funicular, and monorail systems.

(b) The persons described in paragraph (a) of this section must allow TSA and other authorized DHS officials, at any time and in a reasonable manner, without advance notice, to enter, inspect, and test property, facilities, equipment, and operations; and to view, inspect, and copy records, as necessary to carry out TSA's security-related statutory or regulatory authorities, including its authority to—

(1) Assess threats to transportation;

(2) Enforce security-related regulations, directives, and requirements;

(3) Inspect, maintain, and test the security of facilities, equipment, and systems;

(4) Ensure the adequacy of security measures for the transportation of passengers and freight, including hazardous materials;

(5) Oversee the implementation, and ensure the adequacy, of security measures at rail yards, stations, terminals, transportation-related areas of rail hazardous materials shipper and receiver facilities, crew management centers, dispatch centers, telecommunication centers, and other transportation facilities and infrastructure;

(6) Review security plans; and

(7) Carry out such other duties, and exercise such other powers, relating to transportation security, as the Assistant Secretary of Homeland Security for the TSA considers appropriate, to the extent authorized by law.

(c) TSA and DHS officials working with TSA, may enter, without advance notice, and be present within any area or within any conveyance without access media or identification media issued or approved by a railroad carrier, rail transit system owner or operator, rail hazardous materials shipper, or rail hazardous materials receiver in order to inspect or test compliance, or perform other such duties as TSA may direct.

(d) TSA inspectors and DHS officials working with TSA will, on request, present their credentials for examination, but the credentials may not be photocopied or otherwise reproduced.

Subpart B—Freight Rail Including Freight Railroad Carriers, Rail Hazardous Materials Shippers, Rail Hazardous Materials Receivers, and Private Cars

§ 1580.100 Applicability.

(a) *Applicability.* The requirements of this subpart apply to:

(1) Each freight railroad carrier that operates rolling equipment on track that is part of the general railroad system of transportation.

(2) Each rail hazardous materials shipper.

(3) Each rail hazardous materials receiver located with an HTUA.

(4) Each freight railroad carrier hosting a passenger operation described in § 1580.1(d) of this part.

(5) Each operator of private cars, including business/office cars and circus trains, on or connected to the general railroad system of transportation.

(b) *Rail security-sensitive materials.* The requirements of this subpart apply to:

(1) A rail car containing more than 2,268 kg (5,000 lbs) of a Division 1.1, 1.2, or 1.3 (explosive) material, as defined in 49 CFR 173.50;

(2) A tank car containing a material poisonous by inhalation as defined in 49 CFR 171.8, including anhydrous ammonia, Division 2.3 gases poisonous by inhalation as set forth in 49 CFR 173.115(c), and Division 6.1 liquids meeting the defining criteria in 49 CFR 173.132(a)(1)(iii) and assigned to hazard zone A or hazard zone B in accordance with 49 CFR 173.133(a), excluding residue quantities of these materials; and

(3) A rail car containing a highway route-controlled quantity of a Class 7 (radioactive) material, as defined in 49 CFR 173.403.

§ 1580.101 Rail security coordinator.

(a) *Applicability.* This section applies to:

(1) Each freight railroad carrier that operates rolling equipment on track that is part of the general railroad system of transportation.

(2) Each rail hazardous materials shipper.

(3) Each rail hazardous materials receiver located with an HTUA.

(4) Each freight railroad carrier hosting the passenger operations described in § 1580.1(d) of this part.

(5) Each operator of private cars, including business/office cars and circus trains, on or connected to the general railroad system of transportation, when notified by TSA in writing, that a threat exists concerning that operation.

(b) Each person described in paragraph (a) of this section must designate and use a primary and at least one alternate Rail Security Coordinator (RSC).

(c) The RSC and alternate(s) must be appointed at the corporate level.

(d) Each freight railroad carrier, rail hazardous materials shipper, and rail hazardous materials receiver required to have an RSC must provide to TSA the names, title, phone number(s), and e-mail address(es) of the RSCs and alternate RSCs, and must notify TSA within 7 calendar days when any of this information changes.

(e) Each freight railroad carrier, rail hazardous materials shipper, and rail hazardous materials receiver required to have an RSC must ensure that at least one RSC:

(1) Serves as the primary contact for intelligence information and security-related activities and communications with TSA. Any individual designated as an RSC may perform other duties in addition to those described in this section;

(2) Is available to TSA on a 24-hours a day, 7 days a week basis; and

(3) Coordinates security practices and procedures with appropriate law enforcement and emergency response agencies.

§ 1580.103 Location and shipping information for certain rail cars.

(a) *Applicability.* This section applies to:

(1) Each freight railroad carrier transporting one or more of the categories and quantities of rail security-sensitive materials.

(2) Each rail hazardous materials shipper.

(3) Each rail hazardous materials receiver located with an HTUA.

(b) *General requirement.* Each person described in paragraph (a) of this section must have procedures in place to determine the location and shipping information for each rail car under its physical custody and control that contains one or more of the categories and quantities of rail security-sensitive materials.

(c) *Required information.* The location and shipping information required in paragraph (b) of this section must include the following:

(1) The rail car's current location by city, county, and state, including, for freight railroad carriers, the railroad milepost, track designation, and the time that the rail car's location was determined.

(2) The rail car's routing, if a freight railroad carrier.

(3) A list of the total number of rail cars containing the materials listed in § 1580.100(b) of this part, broken down by:

(i) The shipping name prescribed for the material in column 2 of the table in 49 CFR 172.101;

(ii) The hazard class or division number prescribed for the material in column 3 of the table in 49 CFR 172.101; and

(iii) The identification number prescribed for the material in column 4 of the table in 49 CFR 172.101.

(4) Each rail car's initial and number.

(5) Whether the rail car is in a train, rail yard, siding, rail spur, or rail hazardous materials shipper or receiver facility, including the name of the rail yard or siding designation.

(d) *Timing-class I freight railroad carriers.* Upon request by TSA, each Class I freight railroad carrier described in paragraph (a) of this section must provide the location and shipping information to TSA no later than:

(1) Five minutes if the request concerns only one rail car; and

(2) Thirty minutes if the request concerns two or more rail cars.

(e) *Timing-other than class I freight railroad carriers.* Upon request by TSA, all persons described in paragraph (a) of this section, other than Class I freight railroad carriers, must provide the location and shipping information to TSA no later than 30 minutes, regardless of the number of cars covered by the request.

(f) *Method.* All persons described in paragraph (a) of this section must provide the requested location and shipping information to TSA by one of the following methods:

(1) Electronic data transmission in spreadsheet format.

(2) Electronic data transmission in Hyper Text Markup Language (HTML) format.

(3) Electronic data transmission in Extensible Markup Language (XML).

(4) Facsimile transmission of a hard copy spreadsheet in tabular format.

(5) Posting the information to a secure website address approved by TSA.

(6) Another format approved by TSA.

(g) *Telephone number.* Each person described in paragraph (a) of this section must provide a telephone number for use by TSA to request the information required in paragraph (a)(4) of this section.

(1) The telephone number must be monitored at all times.

(2) A telephone number that requires a call back (such as an answering service, answering machine, or beeper device) does not meet the requirements of paragraph (f) of this section.

(h) *Definition.* As used in this section, *Class I* has the meaning assigned by regulations of the Surface Transportation Board (STB) (49 CFR part 1201; General Instructions 1–1).

§ 1580.105 Reporting significant security concerns.

(a) *Applicability.* This section applies to:

(1) Each freight railroad carrier that operates rolling equipment on track that is part of the general railroad system of transportation.

(2) Each rail hazardous materials shipper.

(3) Each rail hazardous materials receiver located with an HTUA.

(4) Each freight railroad carrier hosting a passenger operation described in § 1580.1(d) of this part.

(5) Each operator of private cars, including business/office cars and circus, on or connected to the general railroad system of transportation.

(b) Each person described in paragraph (a) of this section must immediately report potential threats and significant security concerns to DHS by telephoning the Freedom Center at 703–563–3240 or 1–877–456–8722.

(c) Potential threats or significant security concerns encompass incidents, suspicious activities, and threat information including, but not limited to, the following:

(1) Interference with the train crew.

(2) Bomb threats, specific and non-specific.

(3) Reports or discovery of suspicious items that result in the disruption of railroad operations.

(4) Suspicious activity occurring onboard a train or inside the facility of a freight railroad carrier, rail hazardous materials shipper, or rail hazardous materials receiver that results in a disruption of operations.

(5) Suspicious activity observed at or around rail cars, facilities, or infrastructure used in the operation of the railroad, rail hazardous materials shipper, or rail hazardous materials receiver.

(6) Discharge, discovery, or seizure of a firearm or other deadly weapon on a train, in a station, terminal, facility, or storage yard, or other location used in the operation of the railroad, rail hazardous materials shipper, or rail hazardous materials receiver.

(7) Indications of tampering with rail cars.

(8) Information relating to the possible surveillance of a train or facility, storage yard, or other location used in the operation of the railroad, rail hazardous materials shipper, or rail hazardous materials receiver.

(9) Correspondence received by the freight railroad carrier, rail hazardous materials shipper, or rail hazardous materials receiver indicating a potential threat. Other incidents involving breaches of the security of the freight railroad carrier, rail hazardous materials shipper, or rail hazardous materials receiver's operations or facilities.

(d) Information reported should include, as available and applicable:

(1) The name of the reporting freight railroad carrier, rail hazardous materials shipper, or rail hazardous materials receiver and contact information, including a telephone number or e-mail address.

(2) The affected train, station, terminal, rail hazardous materials facility, or other rail facility or infrastructure.

(3) Identifying information on the affected train, train line, and route.

(4) Origination and termination locations for the affected train, including departure and destination city and the rail line and route, as applicable.

(5) Current location of the affected train.

(6) Description of the threat, incident, or activity.

(7) The names and other available biographical data of individuals involved in the threat, incident, or activity.

(8) The source of any threat information.

§ 1580.107 Chain of custody and control requirements.

(a) *Within or outside of an HTUA, rail hazardous materials shipper transferring to carrier.* Except as provided in paragraph (e) of this section, at each location within or outside of an HTUA, a rail hazardous materials shipper transferring custody of a rail car containing one or more of the categories and quantities of rail security-sensitive materials to a freight railroad carrier must:

(1) Physically inspect the rail car before loading for signs of tampering, including closures and seals; other signs that the security of the car may have been compromised; suspicious items or items that do not belong, including the presence of an improvised explosive device.

(2) Keep the rail car in a rail secure area from the time the security inspection required by paragraph (a)(1) of this section or by 49 CFR 173.31(d), whichever occurs first, until the freight railroad carrier takes physical custody of the rail car.

(3) Document the transfer of custody to the railroad carrier in writing or electronically.

(b) *Within or outside of an HTUA, carrier receiving from a rail hazardous materials shipper.* At each location within or outside of an HTUA where a freight railroad carrier receives from a rail hazardous materials shipper custody of a rail car containing one or more of the categories and quantities of rail security-sensitive materials, the freight railroad carrier must document the transfer in writing or electronically and perform the required security inspection in accordance with 49 CFR 174.9.

(c) *Within an HTUA, carrier transferring to carrier.* Within an HTUA, whenever a freight railroad carrier transfers a rail car containing one or more of the categories and quantities of rail security-sensitive materials to another freight railroad carrier, each freight railroad carrier must adopt and carry out procedures to ensure that the rail car is not left unattended at any time during the physical transfer of custody. These procedures must include the receiving freight railroad carrier performing the required security inspection in accordance with 49 CFR 174.9. Both the transferring and the receiving railroad carrier must document the transfer of custody in writing or electronically.

(d) *Outside of an HTUA, carrier transferring to carrier.* Outside an HTUA, whenever a freight railroad carrier transfers a rail car containing one or more of the categories and quantities of rail security-sensitive materials to another freight railroad carrier, and the rail car containing this hazardous material may subsequently enter an HTUA, each freight railroad carrier must adopt and carry out procedures to ensure that the rail car is not left unattended at any time during the physical transfer of custody. These procedures must include the receiving railroad carrier performing the required security inspection in accordance with 49 CFR 174.9. Both the transferring and the receiving railroad carrier must document the transfer of custody in writing or electronically.

(e) *Within an HTUA, carrier transferring to rail hazardous materials receiver.* A freight railroad carrier delivering a rail car containing one or more of the categories and quantities of rail security-sensitive materials to a rail hazardous materials receiver located within an HTUA must not leave the rail car unattended in a non-secure area until the rail hazardous materials receiver accepts custody of the rail car. Both the railroad carrier and the rail hazardous materials receiver must document the transfer of custody in writing or electronically.

(f) *Within an HTUA, rail hazardous materials receiver receiving from carrier.* Except as provided in paragraph (j) of this section, a rail hazardous materials receiver located within an HTUA that receives a rail car containing one or more of the categories and quantities of rail security-sensitive materials from a freight railroad carrier must:

(1) Ensure that the rail hazardous materials receiver or railroad carrier maintains positive control of the rail car during the physical transfer of custody of the rail car.

(2) Keep the rail car in a rail secure area until the car is unloaded.

(3) Document the transfer of custody from the railroad carrier in writing or electronically.

(g) *Within or outside of an HTUA, rail hazardous materials receiver rejecting car.* This section does not apply to a rail hazardous materials receiver that does not routinely offer, prepare, or load for transportation by rail one or more of the categories and quantities of rail security-sensitive materials. If such a receiver rejects and returns a rail car containing one or more of the categories and quantities of rail security-sensitive materials to the originating offeror or shipper, the requirements of this section do not apply to the receiver. The requirements of this section do apply to any railroad carrier to which the receiver transfers custody of the rail car.

(h) *Document retention.* Covered entities must maintain the documents required under this section for at least 60 calendar days and make them available to TSA upon request.

(i) *Rail secure area.* The rail hazardous materials shipper and the rail hazardous materials receiver must use physical security measures to ensure that no unauthorized person gains access to the rail secure area.

(j) *Exemption for rail hazardous materials receivers.* A rail hazardous materials receiver located within an HTUA may request from TSA an exemption from some or all of the requirements of this section if the receiver demonstrates that the potential risk from its activities is insufficient to warrant compliance with this section. TSA will consider all relevant circumstances, including—

(1) The amounts and types of all hazardous materials received.

(2) The geography of the area surrounding the receiver's facility.

(3) Proximity to entities that may be attractive targets, including other businesses, housing, schools, and hospitals.

(4) Any information regarding threats to the facility.

(5) Other circumstances that indicate the potential risk of the receiver's facility does not warrant compliance with this section.

(k) *Terms used in this section.* (1) As used in this section, a rail car is *attended* if an employee or authorized representative:

(i) Is physically located on site in reasonable proximity to the rail car;

(ii) Is capable of promptly responding to unauthorized access or activity at or near the rail car, including immediately contacting law enforcement or other authorities; and

(iii) Immediately responds to any unauthorized access or activity at or near the rail car either personally or by contacting law enforcement or other authorities.

(2) As used in this section, *maintains positive control* means that the rail hazardous materials receiver and the railroad carrier communicate and cooperate with each other to provide for the security of the rail car during the physical transfer of custody. *Attending* the rail car is a component part of maintaining positive control.

(3) As used in this section, *document the transfer* means documentation uniquely identifying that the rail car was attended during the transfer of custody, including:

(i) Car initial and number.

(ii) Identification of individuals who attended the transfer (names or uniquely identifying employee number).

(iii) Location of transfer.

(iv) Date and time the transfer was completed.

§ 1580.109 Preemptive effect.

Under 49 U.S.C. 20106, issuance of the regulations in this part preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local security hazard; that is not incompatible with a law, regulation, or order of the United States Government; and that does not unreasonably burden interstate commerce. For example, under 49 U.S.C. 20106, issuance of § 1580.107 of this subpart preempts any State or tribal law, rule, regulation, order or common law requirement covering the same subject matter.

§ 1580.111 Harmonization of federal regulation of nuclear facilities.

TSA will coordinate activities under this subpart with the Nuclear Regulatory Commission (NRC) and the Department of Energy (DOE) with respect to regulation of rail hazardous materials shippers and receivers that are also licensed or regulated by the NRC or DOE under the Atomic Energy Act of 1954, as amended, to maintain consistency with the requirements imposed by the NRC and DOE.

Subpart C—Passenger Rail Including Passenger Railroad Carriers, Rail Transit Systems, Tourist, Scenic, Historic and Excursion Operators, and Private Cars

§ 1580.200 Applicability.

This subpart includes requirements for:

(a) Each passenger railroad carrier, including each carrier operating light rail or heavy rail transit service on track that is part of the general railroad system of transportation, each carrier operating or providing intercity passenger train service or commuter or other short-haul railroad passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102), and each public authority operating passenger train service.

(b) Each passenger railroad carrier hosting an operation described in paragraph (a) of this section.

(c) Each tourist, scenic, historic, and excursion rail operator, whether operating on or off the general railroad system of transportation.

(d) Each operator of private cars, including business/office cars and circus trains, on or connected to the general railroad system of transportation.

(e) Each operator of a rail transit system that is not operating on track that is part of the general railroad system of transportation, including heavy rail transit, light rail transit, automated guideway, cable car, inclined plane, funicular, and monorail systems.

§ 1580.201 Rail security coordinator.

(a) *Applicability.* This section applies to:

(1) Each passenger railroad carrier, including each carrier operating light rail or heavy rail transit service on track that is part of the general railroad system of transportation, each carrier operating or providing intercity passenger train service or commuter or other short-haul railroad passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102), and each public authority operating passenger train service.

(2) Each passenger railroad carrier hosting an operation described in paragraph (a)(1) of this section.

(3) Each operator of a rail transit system that is not operating on track that is part of the general railroad system of transportation, including heavy rail transit, light rail transit, automated guideway, cable car, inclined plane, funicular, and monorail systems.

(4) Each operator of private cars, including business/office cars and circus trains, on or connected to the general railroad system of transportation, when notified by TSA, in writing, that a security threat exists concerning that operation.

(5) Each tourist, scenic, historic, or excursion operations, whether on or off the general railroad system of transportation, when notified by TSA, in writing, that a security threat exists concerning that operation.

(b) Each person described in paragraph (a) of this section must designate and use a primary and at least one alternate RSC.

(c) The RSC and alternate(s) must be appointed at the corporate level.

(d) Each passenger railroad carrier and rail transit system required to have an RSC must provide to TSA the names, titles, phone number(s), and e-mail address(es) of the RSCs, and alternate RSCs, and must notify TSA within 7 calendar days when any of this information changes.

(e) Each passenger railroad carrier and rail transit system required to have an RSC must ensure that at least one RSC:

(1) Serves as the primary contact for intelligence information and security-related activities and communications with TSA. Any individual designated as an RSC may perform other duties in addition to those described in this section.

(2) Is available to TSA on a 24-hours a day, 7 days a week basis.

(3) Coordinate security practices and procedures with appropriate law enforcement and emergency response agencies.

§ 1580.203 Reporting significant security concerns.

(a) *Applicability.* This section applies to:

(1) Each passenger railroad carrier, including each carrier operating light rail or heavy rail transit service on track that is part of the general railroad system of transportation, each carrier operating or providing intercity passenger train service or commuter or other short-haul railroad passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102), and each public authority operating passenger train service.

(2) Each passenger railroad carrier hosting an operation described in paragraph (a)(1) of this section.

(3) Each tourist, scenic, historic, and excursion rail operator, whether operating on or off the general railroad system of transportation.

(4) Each operator of private cars, including business/office cars and circus trains, on or connected to the general railroad system of transportation.

(5) Each operator of a rail transit system that is not operating on track that is part of the general railroad system of transportation, including heavy rail transit, light rail transit, automated guideway, cable car, inclined plane, funicular, and monorail systems.

(b) Each person described in paragraph (a) of this section must immediately report potential threats or significant security concerns to DHS by telephoning the Freedom Center at 703–563–3240 or 1–877–456–8722.

(c) Potential threats or significant security concerns encompass incidents, suspicious activities, and threat information including, but not limited to, the following:

(1) Interference with the train or transit vehicle crew.

(2) Bomb threats, specific and non-specific.

(3) Reports or discovery of suspicious items that result in the disruption of rail operations.

(4) Suspicious activity occurring onboard a train or transit vehicle or inside the facility of a passenger railroad carrier or rail transit system that results in a disruption of rail operations.

(5) Suspicious activity observed at or around rail cars or transit vehicles, facilities, or infrastructure used in the operation of the passenger railroad carrier or rail transit system.

(6) Discharge, discovery, or seizure of a firearm or other deadly weapon on a train or transit vehicle or in a station, terminal, facility, or storage yard, or other location used in the operation of the passenger railroad carrier or rail transit system.

(7) Indications of tampering with passenger rail cars or rail transit vehicles.

(8) Information relating to the possible surveillance of a passenger train or rail transit vehicle or facility, storage yard, or other location used in the operation of the passenger railroad carrier or rail transit system.

(9) Correspondence received by the passenger railroad carrier or rail transit system indicating a potential threat to rail transportation.

(10) Other incidents involving breaches of the security of the passenger railroad carrier or the rail transit system operations or facilities.

(d) Information reported should include, as available and applicable:

(1) The name of the passenger railroad carrier or rail transit system and contact information, including a telephone number or e-mail address.

(2) The affected station, terminal, or other facility.

(3) Identifying information on the affected passenger train or rail transit vehicle including number, train or transit line, and route, as applicable.

(4) Origination and termination locations for the affected passenger train or rail transit vehicle, including departure and destination city and the rail or transit line and route.

(5) Current location of the affected passenger train or rail transit vehicle.

(6) Description of the threat, incident, or activity.

(7) The names and other available biographical data of individuals involved in the threat, incident, or activity.

(8) The source of any threat information.

APPENDIX A TO PART 1580—HIGH THREAT URBAN AREAS (HTUAS)

State	Candidate urban area	Geographic area captured in the data count	Previously designated urban areas included
AZ ...	Phoenix Area*	Chandler, Gilbert, Glendale, Mesa, Peoria, Phoenix, Scottsdale, Tempe, and a 10-mile buffer extending from the border of the combined area.	Phoenix, AZ.
CA ...	Anaheim/Santa Ana Area.	Anaheim, Costa Mesa, Garden Grove, Fullerton, Huntington Beach, Irvine, Orange, Santa Ana, and a 10-mile buffer extending from the border of the combined area.	Anaheim, CA; Santa Ana, CA.
	Bay Area	Berkeley, Daly City, Fremont, Hayward, Oakland, Palo Alto, Richmond, San Francisco, San Jose, Santa Clara, Sunnyvale, Vallejo, and a 10-mile buffer extending from the border of the combined area.	San Francisco, CA; San Jose, CA; Oakland, CA.
	Los Angeles/Long Beach Area.	Burbank, Glendale, Inglewood, Long Beach, Los Angeles, Pasadena, Santa Monica, Santa Clarita, Torrance, Simi Valley, Thousand Oaks, and a 10-mile buffer extending from the border of the combined area.	Los Angeles, CA; Long Beach, CA.
	Sacramento Area*	Elk Grove, Sacramento, and a 10-mile buffer extending from the border of the combined area.	Sacramento, CA.
	San Diego Area*	Chula Vista, Escondido, and San Diego, and a 10-mile buffer extending from the border of the combined area.	San Diego, CA.
CO ..	Denver Area	Arvada, Aurora, Denver, Lakewood, Westminster, Thornton, and a 10-mile buffer extending from the border of the combined area.	Denver, CO.
DC ...	National Capital Region.	National Capital Region and a 10-mile buffer extending from the border of the combined area.	National Capital Region, DC.
FL	Fort Lauderdale Area	Fort Lauderdale, Hollywood, Miami Gardens, Miramar, Pembroke Pines, and a 10-mile buffer extending from the border of the combined area.	N/A.
	Jacksonville Area	Jacksonville and a 10-mile buffer extending from the city border	Jacksonville, FL.
	Miami Area	Hialeah, Miami, and a 10-mile buffer extending from the border of the combined area ...	Miami, FL.
	Orlando Area	Orlando and a 10-mile buffer extending from the city border	Orlando, FL.
	Tampa Area*	Clearwater, St. Petersburg, Tampa, and a 10-mile buffer extending from the border of the combined area.	Tampa, FL.
GA ...	Atlanta Area	Atlanta and a 10-mile buffer extending from the city border	Atlanta, GA.
HI	Honolulu Area	Honolulu and a 10-mile buffer extending from the city border	Honolulu, HI.
IL	Chicago Area	Chicago and a 10-mile buffer extending from the city border	Chicago, IL.
IN	Indianapolis Area	Indianapolis and a 10-mile buffer extending from the city border	Indianapolis, IN.
KY ...	Louisville Area*	Louisville and a 10-mile buffer extending from the city border	Louisville, KY.
LA ...	Baton Rouge Area* ..	Baton Rouge and a 10-mile buffer extending from the city border	Baton Rouge, LA.
	New Orleans Area	New Orleans and a 10-mile buffer extending from the city border	New Orleans, LA.
MA ..	Boston Area	Boston, Cambridge, and a 10-mile buffer extending from the border of the combined area.	Boston, MA.
MD ..	Baltimore Area	Baltimore and a 10-mile buffer extending from the city border	Baltimore, MD.
MI	Detroit Area	Detroit, Sterling Heights, Warren, and a 10-mile buffer extending from the border of the combined area.	Detroit, MI.
MN ..	Twin Cities Area	Minneapolis, St. Paul, and a 10-mile buffer extending from the border of the combined entity.	Minneapolis, MN; St. Paul, MN.
MO ..	Kansas City Area	Independence, Kansas City (MO), Kansas City (KS), Olathe, Overland Park, and a 10-mile buffer extending from the border of the combined area.	Kansas City, MO.
	St. Louis Area	St. Louis and a 10-mile buffer extending from the city border	St. Louis, MO.
NC ...	Charlotte Area	Charlotte and a 10-mile buffer extending from the city border	Charlotte, NC.
NE ...	Omaha Area*	Omaha and a 10-mile buffer extending from the city border	Omaha, NE.
NJ ...	Jersey City/Newark Area.	Elizabeth, Jersey City, Newark, and a 10-mile buffer extending from the border of the combined area.	Jersey City, NJ; Newark, NJ.
NV ...	Las Vegas Area*	Las Vegas, North Las Vegas, and a 10-mile buffer extending from the border of the combined entity.	Las Vegas, NV.
NY ...	Buffalo Area*	Buffalo and a 10-mile buffer extending from the city border	Buffalo, NY.

APPENDIX A TO PART 1580—HIGH THREAT URBAN AREAS (HTUAs)—Continued

State	Candidate urban area	Geographic area captured in the data count	Previously designated urban areas included
	New York City Area ..	New York City, Yonkers, and a 10-mile buffer extending from the border of the combined area.	New York, NY.
OH ..	Cincinnati Area	Cincinnati and a 10-mile buffer extending from the city border	Cincinnati, OH.
	Cleveland Area	Cleveland and a 10-mile buffer extending from the city border	Cleveland, OH.
	Columbus Area	Columbus and a 10-mile buffer extending from the city border	Columbus, OH.
	Toledo Area*	Oregon, Toledo, and a 10-mile buffer extending from the border of the combined area ..	Toledo, OH.
OK ...	Oklahoma City Area*	Norman, Oklahoma and a 10-mile buffer extending from the border of the combined area.	Oklahoma City, OK.
OR ..	Portland Area	Portland, Vancouver, and a 10-mile buffer extending from the border of the combined area.	Portland, OR.
PA ...	Philadelphia Area	Philadelphia and a 10-mile buffer extending from the city border	Philadelphia, PA.
	Pittsburgh Area	Pittsburgh and a 10-mile buffer extending from the city border	Pittsburgh, PA.
TN ...	Memphis Area	Memphis and a 10-mile buffer extending from the city border	Memphis, TN.
TX ...	Dallas/Fort Worth/Arlington Area.	Arlington, Carrollton, Dallas, Fort Worth, Garland, Grand Prairie, Irving, Mesquite, Plano, and a 10-mile buffer extending from the border of the combined area.	Dallas, TX; Fort Worth, TX; Arlington, TX.
	Houston Area	Houston, Pasadena, and a 10-mile buffer extending from the border of the combined entity.	Houston, TX.
	San Antonio Area	San Antonio and a 10-mile buffer extending from the city border	San Antonio, TX.
WA ..	Seattle Area	Seattle, Bellevue, and a 10-mile buffer extending from the border of the combined area	Seattle, WA.
WI ...	Milwaukee Area	Milwaukee and a 10-mile buffer extending from the city border	Milwaukee, WI.

*FY05 Urban Areas eligible for sustainment funding through the FY06 Urban Areas Security Initiative (UASI) program; any Urban Area not identified as eligible through the risk analysis process for two consecutive years will not be eligible for continued funding under the UASI program.

APPENDIX B TO PART 1580—SUMMARY OF THE APPLICABILITY OF PART 1580

[This is a summary—see body of text for complete requirements]

Security measure and rule section	Freight railroad carriers NOT transporting specified hazardous materials	Freight railroad carriers transporting specified hazardous materials (§ 1580.100(b))	Rail operations at certain facilities that ship (*i.e.*, offer, prepare, or load for transportation) hazardous materials	Rail operations at certain facilities that receive or unload hazardous materials within an HTUA	Passenger railroad carriers and rail transit systems	Certain other rail operations (private, business/office, circus, tourist, historic, excursion)
Allow TSA to inspect (§ 1580.5)	X	X	X	X	X	X
Appoint rail security coordinator (§ 1580.101 freight; § 1580.201 passenger)	X	X	X	X	X	(1)
Report significant security concerns (§ 1580.105 freight, § 1580.203 passenger)	X	X	X	X	X	X
Provide location and shipping information for rail cars containing specified hazardous materials if requested (§ 1580.103)	.....	X	X	X	.....	.....
Chain of custody and control requirements for transport of specified hazardous materials that are or may be in HTUA (§ 1580.107)	.....	X	X	X	.....	.....

[1] Only if notified in writing that a security threat exists.

Issued in Arlington, Virginia, on November 11, 2008.

Kip Hawley,

Assistant Secretary.

[FR Doc. E8–27287 Filed 11–25–08; 8:45 am]

BILLING CODE 9110–05–P

Federal Register

Wednesday,
November 26, 2008

Part III

Department of Transportation

Pipeline and Hazardous Materials Safety Administration

Federal Railroad Administration

49 CFR Parts 172, 174 and 209

Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments; Railroad Safety Enforcement Procedures; Enforcement, Appeal and Hearing Procedures for Rail Routing Decisions; Final Rules

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 172 and 174

[Docket No. PHMSA–RSPA–2004–18730] [1]

RIN 2137–AE02

Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The Pipeline and Hazardous Materials Safety Administration, in coordination with the Federal Railroad Administration (FRA) and the Transportation Security Administration (TSA), is improving safety by revising the current requirements in the Hazardous Materials Regulations applicable to the safe and secure transportation of hazardous materials by rail. We are requiring rail carriers to compile annual data on certain shipments of explosive, toxic by inhalation, and radioactive materials; use the data to analyze safety and security risks along rail routes where those materials are transported; assess alternative routing options; and make routing decisions based on those assessments. We are also clarifying rail carriers' responsibility to address in their security plans issues related to en route storage and delays in transit. In addition, we are adopting a new requirement for rail carriers to inspect placarded hazardous materials rail cars for signs of tampering or the presence of suspicious items, including improvised explosive devices. We adopted these requirements in an interim final rule published April 16, 2008. This final rule fulfills requirements in Section 1551 of the Implementing Recommendations of the 9/11 Commission Act of 2007. Also, in today's edition of the **Federal Register**, both FRA and TSA are publishing final rules adopting requirements and procedures that promote rail transportation security.

DATES: This final rule is effective December 26, 2008.

FOR FURTHER INFORMATION CONTACT: William Schoonover, (202) 493–6229, Office of Safety Assurance and Compliance, Federal Railroad Administration; or Susan Gorsky or Ben Supko, (202) 366–8553, Office of Hazardous Materials Standards, Pipeline and Hazardous Materials Safety Administration.

SUPPLEMENTARY INFORMATION:

I. Background

On December 21. 2006, the Pipeline and Hazardous Materials Safety Administration (PHMSA) in coordination with the Federal Railroad Administration (FRA) and the Transportation Security Administration (TSA), published a notice of proposed rulemaking (NPRM) under Docket *PHMSA–RSPA–2004–18730* (71 FR 76834) proposing to revise the current requirements in the HMR applicable to the safe and secure transportation of hazardous materials by rail. Specifically, we proposed to require rail carriers to compile annual data on specified shipments of hazardous materials, use the data to analyze safety and security risks along rail routes where those materials are transported, assess alternative routing options, and make routing decisions based on those assessments. We also proposed clarifications of the current security plan requirements to address en route storage, delays in transit, delivery notification, and additional security inspection requirements for hazardous materials shipments.

On April 16, 2008, PHMSA, once again coordinating with FRA and TSA, published an interim final rule (IFR) under Docket *PHMSA–RSPA–2004–18730* (73 FR 20751) that amended the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) to establish requirements that enhance the safe and secure transportation of hazardous materials by rail. The IFR requires rail carriers to compile annual data on certain shipments of explosive, toxic by inhalation, and radioactive materials; use the data to analyze safety and security risks along rail routes where those materials are transported; assess alternative routing options; and make routing decisions based on those assessments. It also clarifies that each rail carrier must address issues related to en route storage and delays in transit in its security plan. In addition, the IFR establishes a new requirement for rail carriers to inspect placarded hazardous materials rail cars for signs of tampering or suspicious items, including improvised explosive devices (IEDs).

We published the rulemaking as an IFR to account for changes mandated by the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act or Act) (Pub. L. 110–53; 121 Stat. 266). Congress enacted the 9/11 Commission Act, which the President signed into law on August 3, 2007, as the final rule was being developed for the Docket *PHMSA–RSPA–2004–18730* proceeding. The 9/11 Commission Act, among other requirements, directed the Secretary of Transportation, in consultation with the Secretary of Homeland Security, to publish a final rule by May 3, 2008, based on a NPRM published under this docket on December 21, 2006. We elected to publish the rule as an IFR rather than a final rule to provide interested persons with an opportunity to comment on changes made to the NRPM that directly relate to the mandates established by the 9/11 Commission Act.

In accordance with Section 1551(e) of the Act, PHMSA's final rule must require rail carriers of "security-sensitive materials" to "select the safest and most secure route to be used in transporting" those materials, based on the rail carrier's analysis of the safety and security risks on primary and alternate transportation routes over which the carrier has authority to operate. Specifically, the final rule must require such rail carriers to perform the following tasks each calendar year:

(1) Collect and compile security-sensitive commodity data, by route, line segment, or series of line segments, as aggregated by the rail carrier and identify the geographic location of the route and the total number of shipments by UN identification number;

(2) Identify practicable alternative routes over which the carrier has authority to operate as compared to the current route for such shipments;

(3) Seek relevant information from state, local, and tribal officials, as appropriate, regarding security risks to high-consequence targets along or in proximity to a route used by a rail carrier to transport security-sensitive materials;

(4) Consider the use of interchange agreements with other rail carriers when determining practicable alternative routes and the potential economic effects of using an alternative route;

(5) Analyze for both the primary route and each practicable alternative route the safety and security risks for the route, railroad facilities, railroad storage facilities, and high-consequence targets along or in proximity to the route; these analyses must be in writing and performed for each calendar year;

(6) Compare the safety and security risks on the primary and alternative routes, including the risk of a catastrophic release from a shipment

[1] This rulemaking was formerly designated as HM–232E; however, with the transition to a new government-wide regulations portal, docket number nomenclature has since changed. Some references to the old docket number are still present in this document.

traveling along these routes, and identify any remediation or mitigation measures implemented on the primary and alternative transportation routes; and

(7) Use the analysis described above to select the practicable route posing the least overall safety and security risk.

In addition, the Act mandates that PHMSA require a covered rail carrier, at least once every three years, to analyze its route selection determinations, including a comprehensive, system-wide review of all operational changes, infrastructure modifications, traffic adjustments, changes in the nature of high-consequence targets located along or in proximity to the route, or other changes affecting the safety and security of the movements of security-sensitive materials that were implemented since the previous analysis was completed. Finally, the Act mandates that PHMSA require covered rail carriers to retain in writing all route review and selection decision documentation and restrict the distribution, disclosure, and availability of this information to appropriate persons.

In this final rule, we are responding to comments submitted on the IFR that relate to our interpretation and application of § 1551 of the 9/11 Commission Act. To review rulemakings, regulatory evaluations, environmental assessments, comments, or public meeting and congressional briefing transcripts for this docket go to *http://www.regulations.gov* under docket number *PHMSA–RSPA–2004–18730.*

II. Summary of Interim Final Rule

Based on comments received in response to the NPRM and the provisions of the 9/11 Commission Act, the April 16 IFR adopted the following revisions to the HMR:

- Rail carriers transporting certain explosives, poisonous by inhalation (PIH), and radioactive materials must compile information and data on the commodities transported, including the routes over which these commodities are transported.
- Rail carriers transporting the specified hazardous materials must use the data they compile and relevant information from state, local, and tribal officials, as appropriate, regarding security risks to high-consequence targets along or in proximity to a route to analyze the safety and security risks for each route used and practicable alternative routes to the route used.
- Using these analyses, rail carriers must select the safest and most secure practicable route for the specified hazardous materials.
- In developing security plans required under Subpart I of Part 172 of the HMR, rail carriers must specifically address the security risks associated with shipments delayed in transit or temporarily stored in transit.
- Rail carriers transporting the covered hazardous materials must notify consignees of any significant unplanned delays affecting the delivery of the hazardous material.
- Rail carriers must work with shippers and consignees to minimize the time a rail car containing one of the specified hazardous materials is placed on track awaiting pick-up, delivery, or transfer.
- Rail carriers must conduct security visual inspections at ground level of rail cars containing hazardous materials to check for signs of tampering or the introduction of an IED.

The IFR became effective on June 1, 2008. Beginning January 1, 2009, rail carriers must compile information on the commodities they transport and the routes they use for the six-month period from July 1, 2008 to December 31, 2008. Rail carriers must complete their data collection by March 1, 2009. By September 1, 2009, rail carriers must complete the safety and security analyses of routes currently utilized and available alternatives, and select the safest, most secure routes for transporting the specified explosive, PIH, and radioactive materials. Beginning January 1, 2010, and for subsequent years, rail carriers must compile information on the commodities they transport and the routes used for the previous calendar year and complete route assessments and selections by the end of the calendar year.

III. Comments in Response to the Interim Final Rule

We received ten sets of comments in response to the IFR. The majority of the comments were submitted by companies, but we also received comments from a public interest group; a state government agency; a county government agency; a university; and an industry association. Overall, commenters are supportive of the rulemaking and welcome enhanced routing requirements that promote the safe and secure transportation of hazardous materials by rail. A major concern for rail carriers is the requirement for consultation with state, local, and tribal officials, as appropriate. Carriers suggest that it is impractical for railroads to consult on a continuous basis with all local governments along railroad rights-of-way. Several commenters also suggest that DOT establish a process for evaluating transportation safety and security risks across the entire rail transportation system, including facilitating the analysis and selection of routes involving more than one carrier. Some commenters suggest that the Federal government should mandate specific routing for high-hazard materials rather than provide rail carriers the discretion to make routing decisions.

The comments in the docket for this rulemaking may be reviewed at *http://www.regulations.gov* under docket number *PHMSA–RSPA–2004–18730.* For your convenience, a listing of the docket entries is provided below.

Name/company	Docket No.
Contra Costa County Board of Supervisors	PHMSA–RSPA–2004–18730–0203
Friends of the Earth	PHMSA–RSPA–2004–18730–0204
The Dow Chemical Company (Dow)	PHMSA–RSPA–2004–18730–0205
California Public Utilities Commission (CalPUC)	PHMSA–RSPA–2004–18730–0206
The Dow Chemical Company (Dow)	PHMSA–RSPA–2004–18730–0207
Theodore S. Glickman	PHMSA–RSPA–2004–18730–0208
Norfolk Southern Railway Company (Norfolk Southern)	PHMSA–RSPA–2004–18730–0211
The Association of American Railroads (AAR)	PHMSA–RSPA–2004–18730–0212
PPG Industries (PPG)	PHMSA–RSPA–2004–18730–0213
BNSF Railway Company (BNSF)	PHMSA–RSPA–2004–18730–0215

IV. Discussion of Comments and Section-by-Section Analysis

In the following paragraphs, we discuss the comments as they apply to the 9/11 Commission Act and explain the impact of the comments on the regulatory text in this final rule.

A. General (§ 172.820(a))

In accordance with the IFR, rail carriers must implement enhanced safety and security measures for shipments of the following classes and quantities of hazardous materials:

(1) More than 2,268 kg (5,000 lbs) in a single carload of a Division 1.1, 1.2 or 1.3 explosive;

(2) A bulk quantity of a PIH material, as defined in § 171.8 of the HMR; or,

(3) A highway route-controlled quantity of a Class 7 (radioactive) material, as defined in § 173.403 of the HMR.

Two commenters focus on the need to include additional hazardous materials. CalPUC suggests that, while the rule will improve the safety and security of rail shipments of explosive, PIH, and radioactive materials, it will not adequately protect the public from accidents or terrorist acts against other types of hazardous materials. CalPUC recommends that the route selection requirements apply to flammable gases, flammable liquids, hydrogen peroxide over 60 percent, Class 5 materials (ammonium nitrate), Class 6 materials (poisons), Class 8 materials (corrosives), and certain marine pollutants. Contra Costa County raises similar concerns regarding the inclusion of liquefied petroleum gas tank cars.

As discussed in more detail in the IFR, PHMSA, FRA, and TSA assessed the safety and security vulnerabilities associated with the transportation of different types and classes of hazardous materials. The list of materials to which the proposed enhanced safety and security requirements apply is based on specific railroad transportation scenarios. These scenarios depict how hazardous materials could be deliberately used to cause significant casualties and property damage or accident scenarios resulting in similar catastrophic consequences. DOT and TSA determined that the materials specified in the IFR present the greatest rail transportation safety and security risks—because of the potential consequences of an unintentional release of these materials—and are the most attractive targets for terrorists—because of the potential for these materials to be used as weapons of opportunity or weapons of mass destruction. While DOT and TSA agree that materials identified by CalPUC and Contra Costa County pose certain safety and security risks in rail transportation, the risks are not as great as those posed by the explosive, PIH, and radioactive materials specified in the IFR, and we are not persuaded that they warrant the additional precautions required by the IFR. We note that the hazardous materials listed by both commenters are currently subject to the security plan requirements in Subpart I of Part 172 of the HMR. Thus, shippers and carriers of these materials must develop and implement security plans based on an assessment of the transportation security risks posed by the materials. Security plans must include measures to address personnel security, unauthorized access, and en route security. DOT, in consultation with TSA, will continue to evaluate the transportation safety and security risks posed by all types of hazardous materials and the effectiveness of our regulations in addressing those risks and will consider revising specific requirements as necessary.

The IFR applied the route analysis and selection requirements to PIH residue shipments in bulk quantities. Several commenters request that we exclude residue shipments from the list of hazardous materials subject to the rail routing provisions, noting that rail security rules proposed by Transportation Security Administration apply only to full tank car loads of PIH materials. In addition, Dow notes that the term "bulk quantity" is not currently defined in the HMR and suggests that if PHMSA decides to regulate residue quantities, we should define the term in the final rule.

As discussed in the IFR, we believe the safety risks posed by the rail transportation of residue quantities of PIH materials should be addressed through enhanced safety requirements, including route assessments. Although target attractiveness from a security standpoint is diminished for residue shipments, significant safety risks persist. We continue to believe that these safety risks are reduced by a requirement for residue quantities of PIH materials remaining in tank cars to travel on the "best" route available—the route that considers factors such as population density, emergency response capabilities, environmentally-sensitive and significant areas, and event venues. Dow is correct that the term "bulk quantity" is not currently defined in the HMR. Our intention in the IFR was to require residue shipments over 119 gallons to be subject to the route analysis and selection criteria. In attempting to develop a definition for the term "bulk quantity," however, we realized that applying such a definition to shipments of compressed gases, such as chlorine and anhydrous ammonia, would be very difficult. Moreover, rail carriers do not have the capability to ascertain the precise amount of residue that may remain in a rail tank car; thus, attempting to distinguish residue shipments that would be subject to the routing requirements from residue shipments that would not would be virtually impossible. For these reasons, in this final rule, we are clarifying that the data collection, route analyses, and route selection requirements apply to shipments of PIH materials, including residue shipments, in a bulk packaging. We note that there will be few, if any, rail routes over which only residue quantities of PIH travel. It is likely that the routes used to transport these residue shipments also carry fully loaded packages of PIH or one of the other hazardous materials covered by this rulemaking, and that the routes would therefore be included in a route analysis.

B. Commodity Data (§ 172.820(b))

The IFR requires rail carriers to begin compiling commodity data by no later than 90 days after the end of the calendar year for the previous calendar year for the covered hazardous materials, including an identification of the routes utilized and the total number of shipments transported. The data are to be used by the rail carriers to identify the routes over which the specified hazardous materials are transported and the number of shipments utilizing each route. Rail carriers are required to analyze the safety and security risks of the routes identified. This provision of the IFR is consistent with the 9/11 Commission Act mandate that rail carriers collect and compile security-sensitive commodity data, by route, line segment, or series of line segments, as aggregated by the rail carrier, and identify the geographic location of the route and the total number of shipments by UN identification number. We did not receive comments addressing this aspect of the IFR. Therefore, in this final rule, we are adopting the commodity flow data collection requirements without change.

AAR requests clarification of the actual date by which the commodity flow data must be compiled in 2009. In addition, AAR seeks clarification of IFR preamble language stating, "For the initial route analysis, we anticipate rail carriers will review the prior two-year period when considering the criteria contained in Appendix D." (73 FR 20762).

Section 172.820(b) requires commodity data to be compiled no later than 90 days after the end of the calendar year; in 2009 the data must be compiled by March 31. In addition, this section requires the initial data to cover six months, from July 1, 2008 to January 31, 2008. PHMSA's preamble language indicating that we anticipate that carriers will review the data from the prior two years when conducting route analysis was our opinion based on knowledge of the data that rail carriers routinely collect. For their initial analysis, rail carriers are only required to collect data from the six-month period described in this section, additional data may be included, but is not required by the IFR or this final rule. As discussed in more detail below, in this final rule we are providing rail carriers the option to use data for all of 2008 in conducting their initial route analyses. If a rail carrier elects to utilize this option, its route analysis and selection process must be completed by March 31, 2010.

C. Rail Transportation Route Analysis (§ 172.820(c))

The IFR requires rail carriers to use the data collected in accordance with § 172.820(b) to analyze the rail routes over which the specified materials are transported. Carriers must analyze the specific safety and security risks for routes identified in the commodity data and the railroad facilities along those routes. Consistent with the 9/11 Commission Act, they are required to seek relevant information from state, local, and tribal officials regarding the security risks to high-consequence targets along or in proximity to the route(s) utilized. If a rail carrier is unable to acquire relevant information from state, local, or tribal officials, then it must document that in its analysis. The route analyses must be in writing and consider, at a minimum, a number of factors specific to each individual route. A non-inclusive list of factors is provided in Appendix D to Subpart I of Part 172.

Several commenters express concern regarding the IFR requirement to seek relevant information from state, local, and tribal officials regarding the security risks to high-consequence targets along or in proximity to a rail transportation route. Contra Costa County suggests that state and local governments be given the opportunity to consult with the railroads and provide all relevant information, rather than be limited to providing specific data requested by the railroads. According to Contra Costa County, local governments should have access to the person who is managing the route analysis so they may request a consultation with the railroad or provide information that goes beyond the specific data requested by the railroad. In addition, Contra Costa County suggests that the final rule specify the types of local agencies that will be part of the consultation process.

By contrast, Norfolk Southern indicates that emergency response capability would be best served by receiving communication from a single state agency, preferably the state homeland security agency. Norfolk Southern also expresses concern regarding the overwhelming amount of state and local correspondence railroads are likely to receive as a result of this requirement. Norfolk Southern suggests the creation of individual railroad Web sites that allow state and local governments to provide data and information that rail carriers should consider when they conduct route evaluations. Similarly, AAR suggests that the Department of Homeland Security (DHS) designate high-consequence targets along railroad lines and serve as the main source of information on security risks to high-consequence targets. AAR also suggests that communication between railroads and state and local governments should, for the most part, be led by a single state agency that advises the railroads on security matters concerning the state and its local governments.

As we noted in the IFR, among the factors to be considered by rail carriers in conducting the safety and security analysis are population density along the route; environmentally-sensitive or significant areas; venues along the route (stations, events, places of congregation); emergency response capability along the route; measures and countermeasures already in place to address apparent safety and security risks; proximity to iconic targets; and areas of high consequence along the route. State and local governments may well be able to assist rail carriers in identifying and assessing this type of information. Moreover, state and local government entities may also be able to assist rail carriers in addressing any safety or security vulnerabilities identified along selected routes, in the scheduling of public events, for example, or enhancing emergency response capabilities. For these reasons, we agree with commenters that rail carriers should seek the broadest possible input from state and local governments as they conduct route analyses. We also agree with Contra Costa County that designation of a single point of contact for routing issues at each railroad would help to facilitate communication and interaction between rail carriers and state and local governments.

At the same time, we recognize the difficulties that rail carriers may encounter in seeking information from every community along a given route and appreciate the need to simplify such interactions to the greatest extent practicable. We believe that rail carriers should have the flexibility to establish mechanisms to accomplish the required consultations that are tailored to each railroad's specific circumstances, routes, and operating environments. Web-based systems for providing and assessing state and local concerns, as suggested by Norfolk Southern, are certainly options that may prove to be very effective. Alternatively, a railroad may wish to work with state governments to establish a state government focal point for consolidating and communicating local government concerns.

Since 2003, many states and larger cities have created State and Local fusion centers, and States have created regional fusion centers to share security and first responder information and intelligence within their jurisdictions as well as with the Federal government. Fusion centers vary from State to State, but most contain similar elements, including members of State law enforcement, public health, social services, public safety, and public works organizations. Increasingly, Federal agencies such as the Department of Homeland Security, Federal Bureau of Investigation, Drug Enforcement Administration, and Bureau of Alcohol Tobacco, Firearms, and Explosives have stationed representatives at State-level fusion centers. Most centers operate as "all hazard" centers, addressing all types of emergencies, and not just those that might be related to homeland security or terrorism. As of March 2008, there were 58 fusion centers around the country.

Railroads have been coordinating with these fusion centers on railroad police and security issues, and the Federal government has officially recognized the importance of these centers in addressing security issues. The 9/11 Commission Act recognized the importance of fusion centers and established a DHS State, Local, and regional fusion center initiative to foster partnerships between centers at all levels of government. Specific language provided at 6 U.S.C. 124(h) establishes: (1) DHS responsibility to support and coordinate with the fusion centers; (2) authority and guidelines for assigning DHS personnel to state fusion centers; (3) uniform guidelines for fusion centers; and (4) funding of $10 million

per year for each of fiscal years 2008–2012 to carry out the Fusion Center Initiative. Since 2001, the Federal government has provided some $380 million to help fund fusion centers that meet guidelines jointly established by DHS and the Department of Justice.

In this final rule, in response to comments related to simplifying and facilitating coordination on routing issues between rail carriers and state and local governments, PHSMA is modifying the IFR to require rail carriers to designate a single point of contact (including the name, title, phone number and e-mail address) on routing issues, and to provide this information to: (1) The State and regional fusion centers located in the portion of the country encompassed by their rail systems; and (2) State, Local, and Tribal officials in jurisdictions that may be affected by a rail carrier's routing decisions who directly contact the railroad to discuss these decisions.

States, Local Governments, and Indian tribes may contact the State and regional fusion centers to obtain rail carriers' point of contact information. The Department of Homeland Security's National Operation Center is available 24 hours a day to facilitate public and private entities locating and contacting their State or regional fusions centers; the Center's contact number is (202) 282–8101. States, Local Governments, and Indian tribes will have the flexibility to directly consult with rail carriers on matters affecting the railroads' routing decisions, or channeling this information to the railroads through the fusion centers.

PHMSA and FRA note that we are working with DHS to provide railroads with information regarding high-consequence targets, as specified in the 9/11 Commission Act.

The AAR reiterates its comment that PHMSA should adopt a shipment threshold to trigger the route analysis requirement. Specifically, AAR suggests that if there are no more than 15 shipments along a particular route then the route analysis established by the IFR should not be required. AAR comments utilizing such a threshold eliminates unnecessary analysis of routes used only in emergencies and other unique circumstances.

As we stated in the IFR, we are declining to adopt such a threshold. We understand that there may be times when a route is used that would not normally be used in the everyday course of business, and we would expect the analysis to demonstrate that the routing was out of the ordinary. We believe there is utility in doing such an analysis even on a little-used route. Traffic densities and circumstances may change, and natural disasters such as floods and hurricanes may occur. There is an advantage in knowing the characteristics, risks and necessary mitigating measures for a route that may have to be used, even in temporary emergency circumstances.

D. Alternative Route Analysis (§ 172.820(d))

Consistent with 9/11 Commission Act requirements, the IFR requires carriers to analyze and assess the feasibility of all available alternative routes over which they have authority to operate in addition to the routes normally and regularly used for hazardous materials movements. Practicable routes (or routes that are feasible options, both logically and commercially) must be identified and analyzed using, at a minimum, the Rail Risk Analysis Factors of Appendix D to Part 172. Rail carriers must retain a copy (or an electronic image thereof) of all route review and selection decision documentation used when selecting the safest and most secure practicable route available. This documentation should include, but is not limited to, comparative analyses, charts, graphics, or rail system maps.

In accordance with § 1551 of the 9/11 Commission Act, alternative routes must consider the use of interchange agreements. For the purposes of route selection, interchange agreements allow railroads to exchange railcars at specified junction point where rail lines of two or more different railroads meet. Interchange agreements may increase the number of available routes for certain shipments. Routes that utilize interchange agreements may provide a safer, more secure routing option than would otherwise be available.

Overall, rail carriers must account for safety and security risks; comparison of safety and security risks to the primary route, including the risk of catastrophic release; any remediation or mitigation measures taken; and potential economic effects. The goal of the routing analysis requirement is to require that each route used for the transportation of the specified hazardous materials is the one presenting the fewest overall safety and security risks. If the use of an alternative route would significantly increase a carrier's operating costs, as well as the costs to its customers, the carrier should consider and document the cost in its route analysis.

We received several comments on this section of the IFR. One area of concern for commenters is the role that economic factors play in selecting "practicable" alternative routes. Friends of the Earth asserts that these requirements will spare railroads from any inconvenience or even minor expense in having to re-route cargoes onto available alternative routes and suggests that we have put "practicability" on par with safety and security. CalPUC contends that it is not reasonable to make costs to railroads and shippers the ultimate determinant for routing decisions and suggests that in doing so, we have excluded the overall costs and damages to the nation and its population in general. Contra Costa County asserts that the IFR provides too much opportunity for the railroads to let economic concerns drive the process. According to Contra Costa County, the railroads should be required to analyze all possible routes on safety factors alone to determine the safest route.

We do not agree that the consideration of the "practicability" of specific routes will result in routing decisions that are driven solely by economic considerations. Rail carriers must assess available routes using the 27 factors listed in Appendix D to Part 172 to determine the safest, most secure routes. The factors address both safety and security issues, such as the condition of the track and supporting infrastructure; the presence or absence of signals; past incidents; population density along the route; environmentally-sensitive or significant areas; venues along the route (stations, events, places of congregation); emergency response capability along the route; measures and countermeasures already in place to address apparent safety and security risks; and proximity to iconic targets. However, when carriers consider the "practicability" of a specific route some consideration must be given to economic factors. We note in this regard that the Congress recognized this by including in § 1551(d) of the 9/11 Commission Act a requirement for the alternative route analyses to include the potential economic effects of using an alternative route. In accordance with the IFR, rail carriers must balance economic factors with safety and security factors in making route selections. If using a possible alternative route would significantly increase a carrier's operating costs, as well as the costs to its customers, the carrier should consider and document these facts in its route analysis.

Several commenters address the use of interchange agreements between rail carriers when determining practicable alternative routes. Friends of the Earth asserts that the key flaw in the IFR is that it does not force a railroad to "interchange" its most dangerous cargo

over to another railroad to go around a target city. Theodore Glickman suggests that because we require railroads to consider only routes over which they have authority to operate, we are missing an opportunity for identifying routes that reduce time in transit and pose fewer safety and security risks. PPG states that carriers should be required to work together to select the safest, most secure routes. Dow and AAR both suggest that we consider mechanisms, including 49 U.S.C. 333, that would assist a rail carrier in analyzing the safety and security risks of an alternative route over which it has no authority to operate. AAR notes that the § 333 conference discussed in the IFR appears to be the best way to conduct discussions of rerouting through interchanges.

The requirement in the IFR for railroads to consider interchange agreements as they identify and assess alternative routes is consistent with the 9/11 Commission Act. The Act does not mandate the use of interchange agreements. However, we agree with Dow and AAR that safety and security would be further enhanced if rail carriers could together evaluate the safety and security of routes across the entire rail transportation system. We also agree that utilizing existing statutory authority under 49 U.S.C. 333, which provides relief for potential antitrust concerns, provides a mechanism to facilitate a systems approach to evaluating and mitigating safety and security risks. Section 333 authorizes the FRA Administrator, as delegate of the Secretary of Transportation, to convene conferences at the request of one or more railroads to address coordination of operations and facilities of rail carriers in order to achieve a more efficient, economical, and viable rail system. Persons attending a § 333 conference are immune from antitrust liability for any discussions at the conference, and can also receive immunity for any resulting agreements that receive FRA approval. As discussed in the IFR, in 2005, FRA convened a conference under this authority to discuss ways to minimize security and safety risks associated with the transportation of PIH materials. FRA plans to consider ways to expand this conference to provide a forum for rail carriers to evaluate the safety and security of the covered hazardous materials across the entire rail system, and specifically to evaluate risk-reducing arrangements on a national scale. FRA will also consider including shippers as part of the conference.

We continue to believe that the route analyses and selection requirements in the IFR will reduce safety and security risks associated with the rail transportation of explosive, PIH, and radioactive materials. We are not convinced that mandating the use of interchange agreements as part of this process is the most effective way to reduce risk across the entire rail transportation system. Rather, we believe that the next step should be the joint shipper-carrier consultations described above. Therefore, we are adopting the alternative route analysis requirements as established by the IFR.

E. Route Selection (§ 172.820(e))

Consistent with requirements in the 9/11 Commission Act, the IFR requires a carrier to use the analysis, including any remediation measures implemented on a route, to select the route posing the least overall safety and security risk. In selecting a route, the carrier must analyze the safety and security risk for both the primary route and each practicable alternative route including railroad facilities, railroad storage facilities, and high-consequence targets along or in proximity to the route. The analyses must be in writing and performed for each calendar year. Carriers must compare the safety and security risks on the primary and alternative routes, including the risk of a catastrophic release from a shipment traveling along these routes, and identify any remediation or mitigation measures implemented on the primary and alternative transportation routes. The route selection documentation and underlying data will qualify as sensitive security information (SSI), will be handled in accordance with the SSI regulations at 49 CFR Parts 15 and 1520, and may be distributed only to "covered persons" with a "need to know." State and local government officials generally are considered to be "covered persons" with a "need to know" for purposes of sharing data and information applicable to a railroad's route analysis.

One commenter, Contra Costa County, suggests that the analysis and route selection performed by the rail carriers should be made available to local law enforcement, fire, and public health/hazardous materials officials. It also suggests that a distribution chain be established so these agencies can review the route analysis methodology and results of the railroads.

Similar comments were addressed during the IFR stage of this rulemaking proceeding. Specifically, in its comments on the December 2006 NPRM, the City of Cleveland, Ohio, suggested that we revise the proposal in the NPRM to require rail carriers to share the commodity data with local governments responsible for the geographic areas through which hazardous materials are transported. In the preamble to the IFR, we agreed that state and local governments should have access to such information, provided access to the information is limited to those with a "need to know" for transportation safety and security purposes, and further provided that such information may not be publicly disclosed pursuant to any state, local, or tribal law. (73 FR 20759). Again, as part of a vulnerability assessment, the commodity data that will be collected by the railroads will qualify as SSI and will be handled in accordance with those regulations. Because of the security sensitivity of the data and route selection information, it is not appropriate for it to be broadly disclosed to government or private entities. State and local governments may contact FRA to voice concerns and request an inspection of a route plan, security vulnerability, or, more generally, a rail carrier.

Some of the comments raise issues discussed in the IFR, including the availability of rail routing tools and accounting for persons that are more susceptible to exposure from the listed hazardous materials. Contra Costa County asks that rail routing tools be made available to local parties upon request, along with an explanation of how the tool functions and suggests that local governments have an opportunity to appeal the railroad's finding, through a process identified in the final rule for resolving disputes.

Tools used by railroads to complete the route analyses and selection process mandated by this rule will include sensitive information that should not be broadly disseminated. However, we agree that sharing information with state or local government officials about how a rail carrier performed its route analysis and made its route selections could be beneficial to both the carrier and the affected government jurisdictions. Such information will qualify as SSI and must be handled in accordance with SSI regulations, but nothing in this final rule is intended to prohibit sharing of this information upon request to "covered persons" with a "need to know."

We do not believe it is necessary to provide a separate process for local governments to appeal railroad route selections to FRA. FRA has a process in place under which state and local governments may contact FRA to voice concerns about route selections and request an inspection of a route plan, security vulnerability, or, more generally, a rail carrier.

In its comments, AAR suggests that we clarify the meaning of the statement "subpopulations particularly susceptible to such risk and/or more highly exposed" as used in the preamble of the IFR in regard to the population included in the rail carrier's route selection analysis. (73 FR 20763). When assessing the safety and security risks along a specific route, carriers must consider possible impacts to the total population in proximity to that route. In addition, carriers should consider possible impacts on subpopulations—such as children or the elderly—if there are locations or facilities such as schools, hospitals, or assisted living facilities along the route or if such subpopulations are a disproportionate part of the population as a whole.

Some commenters, including BNSF, suggested that PHMSA should dictate to the carriers the routes to be used for transportation of the covered hazardous materials. BNSF has also suggested that once FRA has completed its review of a rail carrier's route selection, the route selected by the carrier should be classified as an approved route. The 9/11 Commission Act does not direct the Federal Government to mandate specific rail routes for security-sensitive materials; rather § 1551 of the Act specifically directs the Secretary of Transportation to; through this final rule, require *rail carriers* to select the safest and most secure routes for the movement of these materials. We continue to believe that rail carriers are in the best position to select the safest and most secure routes, taking into consideration mitigation measures that they may wish to implement to address safety and security vulnerabilities they identify.

As explained in the IFR, we are not requiring rail carriers to submit their route analyses and route selections to DOT for approval. Federal review and approval of these analyses would be resource-intensive and time-consuming and could result in shipment delays if a rail carrier had to await approval from DOT prior to transporting hazardous materials along the routes it identified as posing the fewest safety and security risks. Moreover, the 9/11 Commission Act does not provide for an approval process for route selections made by rail carriers. That being said, we intend to aggressively oversee railroads' route analyses and route selection determinations and will use all available tools to enforce compliance with the rule. As the agency with primary responsibility for railroad safety enforcement, FRA will incorporate review and inspection of route analyses and selections into its inspection programs. FRA inspectors may offer suggestions for modifying or improving the analysis or make changes to a route if the route selection documentation or underlying analysis is found to be deficient. If an inspector's recommendations are not implemented, FRA may compel a rail carrier to make changes and/or assess a civil penalty. Further, if the carrier's chosen route is found not to be the safest and most secure practicable route available, FRA may require the use of an alternative route.

After consideration of comments received, in this final rule, we are adopting the requirements applicable to route selection as established by the IFR.

F. Completion of Route Analysis (§ 172.820(f))

The IFR requires rail carriers to conduct their initial rail transportation route analysis, alternative route analysis, and route selection by September 1, 2009, based on routing data for the six month period from July 1, 2008 to December 31, 2008. In subsequent years, the rail transportation route analysis, alternative route analysis, and route selection, including a comprehensive review of all operational changes, infrastructure modifications, traffic adjustments, or other changes implemented, must be conducted no later than the end of the calendar year following the year to which the analyses apply.

In its comments, AAR suggests that the September 1, 2009, deadline for completing an initial route analysis and route selection may be difficult for rail carriers to meet. AAR explains that the first set of analyses will be resource-intensive and time-consuming and that subsequent analyses will be less so because they can build off previous analyses. AAR suggests that its member railroads would be willing to analyze data for a full year in 2009 (data for all of 2008) in return for elimination of the special September 1 deadline for route analyses in 2009.

We recognize that the IFR established an aggressive timeline for completion of an initial route analysis and route selection process. The IFR provides over 16 months (from April 16, 2008 to September 1, 2009) for completion of this process. We believe that the safety and security risks addressed in the IFR warrant an aggressive approach. However, we recognize that in some cases the last six months of 2008 data may not accurately reflect the seasonality of the rail movement of certain PIH materials (such as anhydrous ammonia) on some carriers, and that an analysis of data for all of 2008 may help facilitate the review in the subsequent year. In this final rule, therefore, we are providing the following options for completing the initial route analysis, alternative route analysis, and route section: (1) A rail carrier may complete the process by September 1, 2009, as established in the IFR, using data for the six month period from July 1, 2008 to December 31, 2008; or (2) a rail carrier may complete the process by March 31, 2010, using data for all of 2008, so long as the rail carrier notifies FRA in writing by September 1, 2009, that it has chosen this second option.

Several commenters also addressed our decision to require rail carriers to conduct an annual comprehensive review of the route analysis and selection process rather than once every three years. Section 1551(g) of the 9/11 Commission Act requires rail carriers to perform a comprehensive review of its route selection determinations at least once every three years. The analysis is to include a system-wide review of all operational changes, infrastructure modifications, traffic adjustments, changes in the nature of high-consequence targets located along or in proximity to the route, and any other changes affecting the safety and security of the movement of security-sensitive materials that were implemented since the previous analysis was completed.

Dow requests that we amend the IFR to require the comprehensive review to be completed once every three years. Dow suggests that PHMSA lacks support in the current administrative record to impose an unduly burdensome annual comprehensive review requirement. On the other hand, CalPUC provided comments in strong support of the requirement to perform comprehensive reviews on an annual basis.

As we indicated in the IFR, we believe there is value in conducting an annual review of the route analysis even in the absence of changes to the way a carrier operates. Conditions along the selected routes may change, for example, or there may be changes affecting other factors utilized in the analyses, such as incidents on the selected route, the capabilities of local emergency response agencies, or venues located in proximity to the selected route. Again, performance of the initial data gathering and analysis will be the most burdensome. We expect that the subsequent yearly analyses will build on the initial analysis and will be easier to do. Therefore, we are adopting the annual comprehensive review

requirement as established by the IFR in this final rule.

G. Storage, Delays in Transit, and Notification (§ 172.820(g))

The IFR clarifies that rail carriers must address delays in transit and *en route* storage in their security plans. Thus, rail carrier security plans must include: (1) A procedure for consulting with offerors and consignees to minimize the time a material is stored incidental to movement; (2) measures to limit access to the materials during storage and delays in transit; (3) measures to mitigate risk to population centers during storage incidental to transportation; (4) measures to be taken in the event of an escalating threat level during storage incidental to transportation; and (5) a procedure that is acceptable by both the rail carrier and consignee for notifying the consignee in the event of transportation delays.

The IFR included language to the effect that all affected parties should agree upon measures to be implemented by the rail carriers to minimize the time that PIH, explosive, and radioactive materials are stored in transit. In its comments, AAR suggests that this provision of the IFR unnecessarily restricts rail carriers' flexibility. According to AAR, customers often lack incentive to reduce storage on railroad property because of their own lack of storage capacity. AAR notes that railroads welcome opportunities to discuss with their customers ways of minimizing the extent to which cars may be delayed on railroad property due to the inability of their customers to receive cars. Norfolk Southern agrees with AAR's comments and adds that if the parties cannot agree, then the railroad carrier must have the final say concerning storage occurring on the railroad's own property.

The intent of the requirement in § 172.820(g)(1) is to establish a procedure that provides an opportunity for offerors and consignees to work with rail carriers to minimize incidental storage of shipments. It was not our intention to limit a carrier's flexibility concerning the storage of rail cars on railroad property. We are aware that rail carriers have worked closely with TSA to voluntarily implement measures to reduce the number of hours PIH cars are held in high-threat urban areas. Therefore, in this final rule, we are removing the sentence in § 172.820(g)(1) that suggests that all parties should agree on measures to be implemented to minimize the time that rail cars are stored in transit.

AAR also requests clarification of the phrase "formally consult," as it applies to the rail carriers working with offerors and consignees to minimize storage incidental to transportation. The requirement for a "formal" procedure should not be read to imply that rail carriers must develop an agenda for the meeting or maintain documentation to keep a record of the consultation. By requiring that the process be formal, we are simply indicating that rail carriers must make offerors and consignees fully aware of the process and how it will work. The procedure should involve offerors and consignees when storage decisions are made that directly affect their operations. The consultation requirement may be met as part of the normal course of communication between the railroad and its customers.

H. Recordkeeping (§ 172.820(h))

Consistent with requirements in the 9/11 Commission Act, in the IFR, we require each rail carrier to maintain an accessible copy of the information and analyses associated with the collection of commodity data and route assessment and selection processes. We further require the distribution of such information to be limited to "covered persons" with a "need to know" in accordance with SSI regulations in 49 CFR Parts 15 and 1520. There were no comments in response to this paragraph; therefore, we are adopting it as established by the IFR.

I. Compliance and Enforcement (§ 172.820(i))

In the IFR, we require carriers to revise their analyses or make changes to a route if the route selection documentation or underlying analyses is found to be deficient. In addition, if the carrier's chosen route is found not to be the safest and most secure practicable route available, the FRA Associate Administrator for Safety, in consultation with TSA, may require the use of an alternative route until such time as identified deficiencies are satisfactorily addressed. FRA and TSA will consult with the Surface Transportation Board regarding whether the contemplated alternative route(s) would be economically practicable.

One commenter specifically addressed the requirements in this section. AAR asks if field inspectors will have the capability to perform route analyses. It suggests that the level of detail involved in the route analysis would make it difficult for inspectors to have the capability to perform route analyses during an inspection. AAR recommends that Federal agencies should designate the employees requiring access to route analyses and provide the railroads with a list of those employees to facilitate coordination between the railroads and Federal agencies.

FRA will continue to coordinate closely with the railroads in its inspection and enforcement activities, including review of security plans and route analyses. We note concerning the AAR comments that FRA's enforcement role is to review the railroads' analyses, not to perform them. FRA employees will be capable of reviewing a rail carrier's route analyses and route selections to ensure compliance with the requirements of this final rule. Further, FRA and its employees will comply with the existing SSI regulations with regard to the handling of the route analyses and the underlying commodity data. Only FRA employees who are "covered persons" with a "need to know" under the SSI regulations at 49 CFR Parts 15 and 1520 will access the routing analyses and data. 9 CFR Part 1 outlines enforcement authority for the modal administrations within DOT. In the hazardous materials arena. modal administrations share broad authority over all modes regardless of agency. In accordance with a DOT-wide memorandum of understanding that delineates normal areas of activity for each modal administration, FRA expects to utilize inspectors from various disciplines as well as other modal partners when evaluating rail carrier compliance with these regulations.

In addition, FRA plans to work closely with TSA to develop a coordinated enforcement strategy to include both FRA and TSA inspection personnel. We note in this regard that while TSA has broad responsibility and authority under the Aviation and Transportation Security Act for security in all modes of transportation, TSA does not have the authority to enforce safety or security requirements established in the HMR. If in the course of an inspection of a railroad carrier or a rail hazardous material shipper, TSA identifies evidence of non-compliance with a DOT security regulation, TSA will provide the information to FRA and PHMSA for appropriate action. TSA will not directly enforce DOT security rules and will not initiate safety inspections. In accordance with the PHMSA–TSA and FRA–TSA annexes to the DOT–DHS MOU, all the involved agencies will cooperate to ensure coordinated, consistent, and effective activities related to rail security issues.

Another commenter, PPG, fully supports the intent of this rulemaking and believes it will aid in the safe and secure transportation of hazardous materials. However, PPG questions whether a risk assessment is necessary

before a rail carrier can accept a shipment for a new route The concern is that the rail carrier will have the right to refuse to accept a shipment until a risk assessment can be done. According to its comments, PPG does not believe this is the intent of the rule but wants some assurance that the rail carriers cannot refuse a shipment based on this rulemaking.

We do not intend for the provisions of this rule to impede the everyday commerce of hazardous materials, or to change the common carrier obligation of the railroads to handle security-sensitive materials that shippers tender to them for shipment. In the event that a railroad accepts a new shipment with a new route, we would expect the railroad to document this new data in its annual data compilation, and to note any new routes, risk factors, and mitigation measures in its analysis. Since new routes are often discussed long before the initial shipment, if the carrier has knowledge of the expected shipments when it conducts its initial or subsequent reviews it should include this information as part of the decision-making process.

J. Federal Preemption (§ 172.822)

We addressed the preemptive effect of the IFR by clarifying that state and local regulation of rail routes for shipments of hazardous materials is preempted under both the Federal Hazardous Materials Transportation Law (Federal Hazmat Law; 49 U.S.C. 5125) and the Federal Rail Safety Act (49 U.S.C. 20106). All comments that were addressed supported the proposed language; therefore, we are adopting it as established by the IFR.

K. Rail Risk Analysis Factors (Appendix D to Part 172)

The IFR adopts minimum criteria in Appendix D to Part 172 to be used by rail carriers when performing the safety and security risk analyses required by § 172.820. We listed 27 factors in this appendix for carriers to consider in the analyses. The IFR adopted the 27 factors as proposed in the NPRM, with modifications for consistency with requirements of the 9/11 Commission Act. Specifically, the IFR added high consequence targets, as defined in § 1551(h)(2), to the list of factors that must be considered.

The comments submitted in response to this section reiterate comments made to the NPRM. BNSF expresses concern that the IFR does not provide any direction as to how the 27 factors are to be prioritized and requests that PHMSA provide guidance on the comparative weight or prioritization that it assigns to each factor. Theodore Glickman suggests that the 27 factors far exceed the number that should be included and recommends that emphasis should be placed on the identification of the most important factors and developing the database required to evaluate those factors. In its comments, Norfolk Southern expresses support for the factors and agrees with the agency's decision not to arbitrarily weight or rank the factors and recognize that weighting of the individual factors listed in Appendix D may vary upon the circumstances and/or the region in which the rail carrier operates.

As we stated in the IFR, the weighting of the factors is an extremely important aspect of an overall safety and security risk assessment methodology. However, we do not believe that prioritizing or limiting the number of factors will allow rail carriers the flexibility necessary to account for unique track conditions and localized concerns. We expect carriers to make conscientious efforts to develop logical and defendable systems using these factors. Tools to assist rail carriers to use the factors to assess the safety and security vulnerabilities of specific routes, including how to weight the factors in performing the analysis, are available from a variety of sources. In addition, DOT and DHS are finalizing a route analysis tool under a grant from the Federal Emergency Management Agency (FEMA). This web-based, interactive tool will assist rail carries to identify route characteristics using the 27 factors and to weigh safety and security impacts, thereby providing a standardized, consistent approach to the process of selecting safe and secure rail routes for high-risk hazardous materials. In addition, the tool provides a methodology for assessment of consequences for a specific commodity released at a specific point on a rail line; assessing natural hazard risks for a specific rail asset; and for corridor analysis entailing a review of all route or asset analysis results for a given rail corridor (i.e., geographic area). We expect this analysis tool to be available in 2008.

We addressed similar comments regarding the rail risk analysis factors in the IFR. After thoroughly reviewing the comments submitted in response to the IFR, we are confident that the list of rail risk analysis factors is sufficient. The flexibility provided is necessary to allow rail carriers to fully assess the potential routes. Therefore, this final rule adopts Appendix D to Part 172 as established by the IFR.

L. Pre-Trip Security Inspections (§ 174.9)

The IFR increases the scope of the currently required rail car safety inspection to include a security inspection of all rail cars carrying placarded loads of hazardous materials. The primary focus of the enhanced inspection is to recognize an IED, which is a device fabricated in an improvised manner incorporating explosives or destructive, lethal, noxious, pyrotechnic, or incendiary chemicals in its design, and generally including a power supply, a switch or timer, and a detonator or initiator. The IFR requires the rail carriers' pre-trip inspections of placarded rail cars to include an inspection for signs of tampering with the rail car, including its seals and closures, and an inspection for any item that does not belong, is suspicious, or may be an IED. When an indication of tampering or a foreign object is found, the rail carrier must take appropriate actions before accepting the rail car for further movement; the carrier will verify that the rail car is secure and its contents have not been compromised. Instructional materials have been developed by TSA that may be used by rail carriers to train their employees on detection of tampering and identification of IEDs. The comments submitted in response to the IFR do not address the pre-trip security inspections. Therefore, we are adopting § 174.9 as established by the IFR.

VII. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This final rule is published under authority of the Federal Hazmat Law. Section 5103(b) of Federal Hazmat Law authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce. In addition, this final rule is published under authority of the 9/11 Commission Act. Section 1551 of the 9/11 Commission Act directs the Secretary of Transportation, in consultation with the Secretary of Homeland Security, to publish a final rule by May 3, 2008, based on the NPRM published under this docket on December 21, 2006. In accordance with § 1551(e) of the Act, PHMSA's final rule must require rail carriers of "security-sensitive materials" to "select the safest and most secure route to be used in transporting" those materials, based on the rail carrier's analysis of the safety and security risks on primary and alternate transportation routes over

which the carrier has authority to operate.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is a significant regulatory action under § 3(f) Executive Order 12866 and, therefore, was reviewed by the Office of Management and Budget (OMB). The final rule is a significant rule under the Regulatory Policies and Procedures order issued by the DOT (44 FR 11034). We completed a regulatory evaluation and placed it in the docket for this rulemaking.

Generally, costs associated with the provisions of this final rule include the cost for collecting and retaining data and performing the mandated route safety and security analysis. We estimate total 20-year costs to gather the data and conduct the analyses established by this final rule to be about $20 million (discounted at 7%).

In addition, rail carriers and shippers may incur costs associated with rerouting shipments or mitigating safety and security vulnerabilities identified as a result of their route analyses. Because the final rule builds on the current route evaluation and routing practices already in place for most, if not all, railroads that haul the types of hazardous materials covered, we do not expect rail carriers to incur significant costs associated with rerouting. The railroads already conduct route analyses and re-routing—in line with what this rule would require—in accordance with the AAR comments and AAR Circular OT–55–I. Moreover, the smaller carriers (regionals and short lines) are unlikely to have access to many alternative routes, and where an alternative does exist, it is not likely to be safer and more secure than the route they are currently using. If there is an alternative route the carrier determines to be safer and more secure than the one it is currently using, the carrier could well switch routes, even in the absence of a regulatory requirement, because it reduces the overall risk to its operations. Such reduction in risk offers a significant economic advantage in the long run.

Identifying and mitigating security vulnerabilities along rail routes are currently being done by the railroads. We believe that readily available "high-tech" and "low-tech" measures are being quickly implemented. The development, procurement, and wide-spread installation of the more technology-driven alternatives could take several years. However, PHMSA's previous security rule requires the railroads to have a security plan that includes en route security. This existing regulatory requirement, coupled with industry efforts to address security vulnerabilities, has caused railroads to enhance their security posture. As with routing decisions, such reduction in risk offers a significant economic advantage in the long run. Therefore, we expect that the cost of mitigation attributed solely to this final rule will not be significant. We note in this regard that safety and security measures are intertwined and often complementary; therefore, separating security costs from safety costs is not feasible.

We do not expect this final rule to result in a diversion from railroads to trucks. For the movements subject to this rule, transportation and distribution patterns, with associated infrastructure, tend to be well-established. For example, the vast majority of PIH offerors ship by rail; indeed, many do not have the infrastructure (loading racks, product transfer facilities) necessary to utilize trucks for such transportation. Moreover, the current fleet of cargo tank motor vehicles is insufficient to handle a significant shift of PIH cargoes from rail to highway—for example, there are only 85 cargo tank motor vehicles used for the transportation of chlorine. Because it takes about four tank trucks to haul the amount of product that can be moved in a rail tank car, the industry would have to build many more trucks to accommodate a shift in transportation from rail to highway, necessitating a significant expansion in current tank truck manufacturing capacity. In addition, because it takes four trucks to transport the same amount of product as a single rail tank car, it generally is only cost-effective to utilize trucks for relatively limited distances. A farm cooperative or agricultural products distributor, for example, typically receives large quantities of anhydrous ammonia by rail car and offloads the material into storage tanks for subsequent truck movement to local customers.

Changing these established transportation patterns would require substantial investment in new capacity and infrastructure, vastly exceeding the costs of complying with the final rule. Under these circumstances, we do not expect any shift in transportation mode as a result of implementation of this final rule. We note in this regard that no commenters raised this issue in their discussions of the potential impacts of the proposals in the NPRM. Overall transportation costs should not substantially increase because of this final rule.

Estimating the security benefits of the new requirements is challenging. Accident causation probabilities can be estimated based on accident histories in a way that the probability of a criminal or terrorist act cannot. The threat of an attack is virtually impossible to assess from a quantitative standpoint. It is undeniable that hazardous materials in transportation are a possible target of terrorism or sabotage. The probability that hazardous materials will be targeted is, at best, a guess. Similarly, the projected outcome of a terrorist attack cannot be precisely estimated. It is assumed choices will be made to maximize consequences and damages. Scenarios can be envisioned in which hazardous materials could be used to inflict hundreds or even thousands of fatalities. To date, there have been no known or specific threats against freight railroads, rail cars, or tank cars, which makes all of these elements even more difficult to quantify. Security plans lower risk through the identification and mitigation of vulnerabilities. Therefore, rail carriers and the public benefit from the development and implementation of security plans. However, forecasting the benefits likely to result from plan implementation requires the exercise of judgment and necessarily includes subjective elements.

The major benefits expected to result from this final rule relate to enhanced safety and security of rail shipments of hazardous materials. The requirements of the final rule are intended to reduce the safety and security risks associated with the transportation of the specified hazardous materials. Accidents that result in the release of hazardous materials can be very costly. Given the level of such costs, it is not unreasonable to assume that the benefits associated with assessing safety and security risks and identifying opportunities to reduce those risks will also be significant.

C. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Orders 13132 ("Federalism") and 13175 ("Consultation and Coordination With Indian Tribal Governments"). This final rule would not have any direct effect on the states, their political subdivisions, or Indian tribes; it would not impose any compliance costs; and it would not affect the relationships between the national government and the states, political subdivisions, or Indian tribes, or the distribution of power and responsibilities among the various levels of government.

Section VII.K of the IFR (73 FR 20766) includes a discussion of PHMSA's conclusion that the decision in the

March 25, 2003, final rule in HM–232 to leave to rail carriers the specifics of routing rail shipments of hazardous materials preempts all states, their political subdivisions, and Indian tribes from prescribing or restricting routes for rail shipments of hazardous materials, under Federal Hazmat Law (49 U.S.C. 5125) and the Federal Rail Safety Act (49 U.S.C. 20106). In that section, we also discuss the comments on the proposed language in the NPRM concerning the preemptive effect of HM–232 and this final rule and explain the reasons for adopting revised language in 49 CFR 172.822.

D. Executive Order 13175

We analyzed this final rule in accordance with the principles and criteria prescribed in Executive Order 13175 ("Consultation and Coordination With Indian Tribal Governments"). Because this final rule does not significantly or uniquely affect tribes, and does not impose substantial and direct compliance costs on Indian tribal governments, the funding and consultation requirements of Executive Order 13175 do not apply; thus, a tribal summary impact statement is not required.

E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies

In consideration of the potential impacts of rules on small entities, we developed this final rule in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant impact on a substantial number of small entities.

The Small Business Administration (SBA) permits agencies to alter the SBA definitions for small businesses upon consultation with SBA and in conjunction with public comment. Pursuant to this authority, FRA published a final rule (68 FR 24891; May 9, 2003) defining a "small entity" as a railroad meeting the line haulage revenue requirements of a Class III railroad. Currently, the revenue requirements are $20 million or less in annual operating revenue. This is the definition used by PHMSA to determine the potential impact of this final rule on small entities.

Not all small railroads will be required to comply with the provisions of this final rule. Most of the 510 small railroads transport no hazardous materials. PHMSA and FRA estimate there are about 100 small railroads—or 20% of all small railroads—that could potentially be affected by this final rule. Cost impacts for small railroads will result primarily from the costs for data collection and analysis. PHMSA estimates the cost to each small railroad to be $2,776.70 per year over 20 years, discounted at 7%. Based on small railroads' annual operating revenues, these costs are not significant. Small railroads' annual operating revenues range from $3 million to $20 million. Thus, the costs imposed by the final rule amount to between 0.01% and 0.09% of a small railroad's annual operating revenue.

This final rule will not have a noticeable impact on the competitive position of the affected small railroads or on the small entity segment of the railroad industry as a whole. The small entity segment of the railroad industry faces little in the way of intramodal competition. Small railroads generally serve as "feeders" to the larger railroads, collecting carloads in smaller numbers and at lower densities than would be economical for the larger railroads. They transport those cars over relatively short distances and then turn them over to the larger systems, which transport them relatively long distances to their ultimate destination or for handoff back to a smaller railroad for final delivery. Although their relative interests do not always coincide, the relationship between the large and small entity segments of the railroad industry is more supportive and co-dependent than competitive.

It is also rare for small railroads to compete with each other. As mentioned above, small railroads generally serve smaller, lower density markets and customers. They tend to operate in markets where there is not enough traffic to attract or sustain rail competition, large or small. Given the significant capital investment required (to acquire right-of-way, build track, purchase fleet, etc.), new entry in the railroad industry is especially rare. Thus, even to the extent the final rule may have an economic impact, it should have no impact on the intramodal competitive position of small railroads.

We did not receive any comments in opposition to our conclusion that this rulemaking will not have a significant impact on a substantial number of small entities. Based on the lack of opposing comments, the foregoing discussion, and more detailed analysis in the regulatory evaluation for this final rule, PHMSA certifies that the provisions of this final rule, if adopted, will not have a significant impact on a substantial number of small entities.

F. Paperwork Reduction Act

This final rule may result in an increase in annual burden and costs under OMB Control Number 2137–0612. PHMSA currently has an approved information collection under OMB Control No. 2137–0612, "Hazardous Materials Security Plans", expiring June 30, 2011.

Under the Paperwork Reduction Act of 1995, no person is required to respond to an information collection unless it has been approved by OMB and displays a valid OMB control number. 5 CFR 1320.8(d) requires that PHMSA provide interested members of the public and affected agencies an opportunity to comment on information and recordkeeping requests.

This identifies a revised information collection request that PHMSA submitted to OMB for approval based on the requirements in this rule. PHMSA has developed burden estimates to reflect changes in this proposed rule. We estimate that the total information collection and recordkeeping burden for the current requirements and as specified in this rule would be as follows:

OMB No. 2137–0612, "Hazardous Materials Security Plans"

First Year Annual Burden

Total Annual Number of Respondents: 139.
Total Annual Responses: 139.
Total Annual Burden Hours: 51,469.
Total Annual Burden cost: $3,130,859.27.

Subsequent Year Burden

Total Annual Number of Respondents: 139.
Total Annual Responses: 139.
Total Annual Burden Hours: 13,677.
Total Annual Burden Cost: $831,971.91.

Direct your requests for a copy of the information collection to Deborah Boothe or T. Glenn Foster, U.S. Department of Transportation, Pipeline & Hazardous Materials Safety Administration (PHMSA), East Building, Office of Hazardous Materials Standards (PHH–11), 1200 New Jersey Avenue, SE., Washington, DC 20590; telephone (202) 366–8553.

G. Regulation Identifier Number (RIN)

A regulation identifier 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.

H. Unfunded Mandates Reform Act

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $120.7 million or more to either state, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative to achieve the objective of the rule.

I. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. 4321–4375, requires that Federal agencies analyze proposed actions to determine whether the action will have a significant impact on the human environment. The Council on Environmental Quality (CEQ) regulations order Federal agencies to conduct an environmental review considering: (1) The need for the proposed action; (2) alternatives to the proposed action; (3) probable environmental impacts of the proposed action and alternatives; and (4) the agencies and persons consulted during the consideration process. 40 CFR 1508.9(b).

In accordance with the CEQ regulations, we completed an environmental assessment for this final rule that considers the potential environmental impacts of three alternatives—(1) do nothing; (2) impose enhanced safety and security requirements for a broad list of hazardous materials transported by rail; or (3) impose enhanced safety and security requirements for specified rail shipments of highly hazardous materials. The environmental assessment is available for review in the public docket for this rulemaking.

The provisions of this final rule build on current regulatory requirements to enhance the transportation safety and security of shipments of hazardous materials transported by rail, thereby reducing the risks of an accidental or intentional release of hazardous materials and consequent environmental damage. The net environmental impact, therefore, will be moderately positive. There are no significant environmental impacts associated with this final rule.

J. Privacy Act

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document, or the name of the individual signing the document if submitted on behalf of an association, business, labor union, etc. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000, (65 FR 19477) or you may visit *http://www.regulations.gov*.

List of Subjects

49 CFR Part 172

Hazardous materials transportation, Hazardous waste, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 174

Hazardous materials transportation, Rail carriers, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, the interim final rule published on April 16, 2008 (73 FR 20752), amending title 49 Chapter I, Subchapter C, Parts 172 and 174, is confirmed as final with the following changes:

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, AND TRAINING REQUIREMENTS

■ 1. The authority citation for part 172 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; 49 CFR 1.53.

■ 2. In § 172.820:
■ A. Revise paragraph (a)(2),
■ B. Redesignate paragraphs (g), (h), and (i) as paragraphs (h), (i), and (j), respectively,
■ C. Add new paragraph (g), and
■ D. Revise paragraphs (f) and newly designated paragraph (h)(1), to read as follows:

§ 172.820 Additional planning requirements for transportation by rail.

(a) * * *

(2) A quantity of a material poisonous by inhalation in a single bulk packaging; or

* * * * *

(f) *Completion of route analyses.* (1) Rail carriers have the following options for completing the initial route analysis, alternative route analysis, and route selection process required under paragraphs (c), (d), and (e) of this section:

(i) A rail carrier may complete the initial process by September 1, 2009, using data for the six month period from July 1, 2008 to December 31, 2008; or

(ii) A rail carrier may complete the initial process by March 31, 2010, using data for all of 2008, provided the rail carrier notifies the FRA Associate Administrator of Safety in writing by September 1, 2009 that it has chosen this second option.

(2) Beginning in 2010, the rail transportation route analysis, alternative route analysis, and route selection process required under paragraphs (c), (d), and (e) of this section must be completed no later than the end of the calendar year following the year to which the analyses apply.

(3) The initial analysis and route selection determinations required under paragraphs (c), (d), and (e) of this section must include a comprehensive review of the entire system. Subsequent analyses and route selection determinations required under paragraphs (c), (d), and (e) of this section must include a comprehensive, system-wide review of all operational changes, infrastructure modifications, traffic adjustments, changes in the nature of high-consequence targets located along, or in proximity to, the route, and any other changes affecting the safety or security of the movements of the materials specified in paragraph (a) of this section that were implemented during the calendar year.

(4) A rail carrier need not perform a rail transportation route analysis, alternative route analysis, or route selection process for any hazardous material other than the materials specified in paragraph (a) of this section.

(g) *Rail carrier point of contact on routing issues.* Each rail carrier must identify a point of contact (including the name, title, phone number and e-mail address) on routing issues involving the movement of materials covered by this section in its security plan and provide this information to:

(1) State and/or regional Fusion Centers that have been established to coordinate with state, local and tribal officials on security issues and which are located within the area encompassed by the rail carrier's rail system; and

(2) State, local, and tribal officials in jurisdictions that may be affected by a rail carrier's routing decisions and who directly contact the railroad to discuss routing decisions.

(h) *Storage, delays in transit, and notification.* * * *

(1) A procedure under which the rail carrier must consult with offerors and consignees in order to develop measures for minimizing, to the extent practicable, the duration of any storage

of the material incidental to movement (see § 171.8 of this subchapter).

* * * * *

Issued in Washington, DC, on November 18, 2008, under the authority delegated in 49 CFR Part 1.

Carl T. Johnson,

Administrator.

[FR Doc. E8–27826 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 209

[FRA–2007–28573]

RIN 2130–AB87

Railroad Safety Enforcement Procedures; Enforcement, Appeal and Hearing Procedures for Rail Routing Decisions

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

ACTION: Final rule.

Summary: In this final rule, FRA is establishing procedures to enable railroad carriers to challenge rail routing decisions made by FRA's Associate Administrator for Safety (Associate Administrator) that carry out the requirements adopted in a separate rulemaking of the Pipeline and Hazardous Materials Safety Administration (PHMSA). In PHMSA's final rule published today, railroad carriers are required to take the following actions to enhance the safety and security of certain shipments of explosive, toxic by inhalation (TIH), and radioactive materials: Compile annual data on shipments of these materials; use the data to analyze safety and security risks along rail routes where those materials are transported; assess alternative routing options, including interchanging the traffic with other railroad carriers; seek information from State, local and tribal officials regarding security risks to high-consequence targets along or in proximity to the routes; consider mitigation measures to reduce safety and security risks, and select the practicable routes that pose the least overall safety and security risk. Under PHMSA's final rule, FRA's Associate Administrator may require a railroad carrier to use an alternative route to the route selected by the railroad carrier if the Associate Administrator determines that the carrier's route selection documentation and underlying analysis are deficient and fail to establish that the route chosen by the carrier poses the least overall safety and security risk based on the information available.

DATES: This final rule is effective November 26, 2008.

FOR FURTHER INFORMATION CONTACT: Roberta Stewart, Office of Chief Counsel, Federal Railroad Administration, 202–493–6027.

SUPPLEMENTARY INFORMATION:

I. Background

In coordination with FRA and the Transportation Security Administration (TSA), PHMSA has amended the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) to adopt requirements to enhance the safe and secure transportation of hazardous materials by rail. *See* PHMSA's interim final rule (73 FR 20751 [Apr. 16, 2008]) and final rule. Railroad carriers are required to: Compile annual data on certain shipments of explosive, toxic by inhalation, and radioactive materials; use the data to analyze safety and security risks along rail routes where those materials are transported; assess alternative routing options; seek information from State, local and tribal officials regarding security risks to high-consequence targets along or in proximity to the routes; consider mitigation measures to reduce safety and security risks, and select the practicable routes that pose the least overall safety and security risk. In addition, each railroad carrier must address issues related to en route storage and delays in transit in its security plan and railroad inspect placarded hazardous materials rail cars for signs of tampering or suspicious items, including improvised explosive devices.

PHMSA initially adopted these requirements in its April 16, 2008 IFR to carry out the mandate in Section 1551 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act or Act) (Pub. L. 110–53; 121 Stat. 469). The 9/11 Commission Act required publication of a final rule by May 3, 2008, based on PHMSA's December 21, 2006 notice of proposed rulemaking (NPRM) and the requirements of the Act. The Act provides in § 1551(e) that DOT shall "ensure that the final rule requires each railroad carrier transporting security-sensitive materials in commerce to * * * select the safest and most secure route to be used in transporting" those materials, based on the railroad carrier's analysis of the safety and security risks on primary and alternate transportation routes over which the carrier has authority to operate. Specifically, the Act requires that railroad carriers perform the following tasks each calendar year:

(1) Collect and compile security-sensitive commodity data, by route, line segment, or series of line segments, as aggregated by the railroad carrier and identify the geographic location of the route and the total number of shipments by UN identification number;

(2) Identify practicable alternative routes over which the carrier has authority to operate as compared to the current route for such shipments;

(3) Consider the use of interchange agreements with other railroad carriers when determining practicable alternative routes and the potential economic effects of using an alternative route;

(4) Seek relevant information from State, local, and tribal officials, as appropriate, regarding security risks to high-consequence targets along or in proximity to a route used by a railroad carrier to transport security-sensitive materials;

(5) Analyze for both the primary route and each practicable alternative route the safety and security risks for the route, railroad facilities, railroad storage facilities, and high-consequence targets along or in proximity to the route; these analyses must be in writing and performed for each calendar year;

(6) Compare the safety and security risks on the primary and alternative routes, including the risk of a catastrophic release from a shipment traveling along these routes, and identify any remediation or mitigation measures implemented on the primary and alternative transportation routes; and

(7) Use the analysis described above to select the practicable route posing the least overall safety and security risk.

In its December 21, 2006 NPRM, April 16, 2008 IFR, and the final rule published today, PHMSA has indicated that FRA would provide a procedure for administrative due process so that a railroad carrier may seek redress of a decision by the Associate Administrator that the carrier's routing analysis is deficient and directing a carrier to use an alternate route while the deficiencies are corrected. Accordingly, FRA published an NPRM on April 16, 2008 (73 FR 20774), proposing to adopt procedures governing the review of rail routing decisions, including appeal of the Associate Administrator's decisions and solicited public comments on these procedures. This final rule completes FRA's adoption of those procedural provisions.

II. Summary of the FRA NPRM

The procedures proposed by FRA in the NPRM are summarized below.

Proposed Section 209.501 provided that if the Associate Administrator determines that a railroad carrier's route selection documentation and underlying analysis are deficient and fail to establish that the route chosen by the carrier is the route with the least overall safety and security risk, the Associate Administrator would issue a written notice of review ("Notice") to the railroad carrier. The Notice will specifically address each deficiency found in the railroad carrier's route analysis, and may also include suggested mitigation measures that may be taken to remedy the deficiencies, including selection and use of an alternative commercially practicable route. After issuing the Notice, the Associate Administrator will conference with the railroad carrier for a 30-day period (or longer, if necessary, as determined by the Associate Administrator) to resolve the deficiencies. The Associate Administrator will keep a record of all written correspondence with the railroad carrier, as well as written summaries of each meeting and telephone conversation with the carrier pertaining to the Notice.

If, after the close of the 30-day period, the Associate Administrator concludes that the identified deficiencies have not been satisfactorily resolved, the Associate Administrator will:

(1) Consult with TSA and PHMSA regarding the safety and security of the route proposed by the railroad carrier and any alternative route(s) over which the carrier is authorized to operate that are being considered by the Associate Administrator. A written summary of the recommendations from TSA and PHMSA will be prepared;

(2) Obtain the comments of the STB regarding whether the alternative rail route(s) under consideration by the Associate Administrator would be commercially practicable; and

(3) After fully considering the input of TSA, PHMSA and STB, render a decision.

In proposed section 209.501(d), there were two possible outcomes of a decision by the Associate Administrator. First, the Associate Administrator may find that the route analysis and documentation provided by the railroad carrier are sufficient to support the route selected by the carrier or that commercial practicability issues preclude the use of an alternative route. In either of those circumstances, the Associate Administrator would conclude the route review without further action, and notify the railroad carrier of the decision in writing.

Alternately, the Associate Administrator may conclude that the railroad carrier's route analysis does not support the railroad carrier's original selected route, that safety and security considerations establish a significant preference for an alternative route, and that the alternative route is commercially practicable. The Associate Administrator would then issue a second written notice (2nd Notice) to the railroad carrier that specifically identifies deficiencies in the route analysis, including a clear description of the risks that have not been satisfactorily mitigated; explains why the available data and reasonable inferences support an alternative route; and directs the railroad carrier to temporarily use the alternative route determined by the Associate Administrator to be the route with the overall least safety and security risk. The railroad carrier would be required to start using the alternative route selected by the Associate Administrator within 20 days after the issuance date of the 2nd Notice. The railroad carrier would be required to use the alternative route until such time as the carrier has adequately mitigated the risks identified by the Associate Administrator on the original route selected by the carrier, the decision is stayed by the Associate Administrator pending the outcome of a court challenge to the decision, or the decision is overturned by a United States court of appeals.

When the Associate Administrator issues a 2nd Notice directing the use of an alternative route pursuant to section 209.501(d)(2), the Associate Administrator shall make available to the railroad carrier the administrative record relied upon in issuing the 2nd Notice, including the recommendations of TSA, PHMSA and the STB to FRA.

Within 20 days after the issuance date of the 2nd Notice, the railroad carrier may: (1) Comply with the Associate Administrator's directive to use an alternative route while addressing deficiencies in its route analysis identified by the Associate Administrator; or (2) file a petition for judicial review of the Associate Administrator's 2nd Notice. Judicial review would be available in an appropriate United States court of appeals as provided in 49 U.S.C. 5127. The filing of a petition for judicial review will not stay or modify the force and effect of final agency action unless otherwise ordered by the Associate Administrator or the court of appeals.

III. Discussion of Comments Received; Section-by-Section Analysis

Only three comments were submitted in response to its NPRM. These came from the Association of American Railroads (AAR), a trade association representing Class I railroads; Dow Chemical Company (Dow), a private company; and the Mayo Clinic (Mayo Clinic). Commenters were generally supportive of having procedures to appeal routing decisions made by railroads. Concern was voiced by all commenters regarding the standard that the routing decisions would be held to. Commenters also expressed interest in having parties other than the affected railroad carriers be able to provide input to and challenge routing decisions made by railroads or FRA. In the following paragraphs, we discuss the comments as they relate to each section of the regulatory text in this final rule.

A. Review of Route Analysis (§ 209.501(a))

In the NPRM, we proposed that the Associate Administrator shall issue a written notice of review ("Notice") to the railroad carrier where it is determined that the railroad carrier's route selection, analysis and documentation are deficient and fail to establish that the route chosen by the carrier is the safest and most secure route. The Notice shall specifically address each deficiency that the Associate Administrator found in the railroad carrier's route analysis. The Associate Administrator may also include in the Notice suggested mitigation measures that the railroad carrier may take to remedy the deficiencies found, such as the selection of an alternative commercially feasible route.

The AAR commented that FRA's proposed requirement in § 209.501(a) that railroads select the "safest and most secure route" imposes a new substantive obligation on railroads that contradicts the PHMSA IFR. The PHMSA IFR requires railroads to "select the practicable route posing the least overall safety and security risk." 73 FR 20772 (April 16, 2008). AAR suggests amending proposed 49 CFR 209.501(a) by inserting "poses the least overall safety and security risk" in the place of "is the safest most secure route."

We agree that the language in this final rule should be consistent with the PHMSA IFR and final rule, and we have changed the phrasing throughout the regulatory text accordingly.

In its comments, Dow suggests revision of proposed § 209.501(a) to require that the railroad carrier identify

affected shippers of covered materials for the purposes of § 209.501(b) and (c). Dow states that that this change is necessary because shippers of covered hazardous materials will be significantly affected by an FRA determination that a railroad's route selection is deficient; therefore, shippers of covered hazardous materials should be involved in the FRA's process for determining the acceptability of a railroad's routing decision.

FRA is not adopting Dow's proposed revision because we do not believe a separate requirement for shipper information is necessary in this subsection. The railroad carriers' route analyses conducted under the requirements of the PHMSA Final Rule will include detailed information regarding the origins, destinations, number of shipments, and routes of the specific security sensitive materials. FRA will already have access to and be able to evaluate this detailed data and take it into account regarding any findings or decisions on a railroad's route. In addition, FRA will consult with the STB before any routing change is mandated, which is an additional protection to ensure that interstate commerce and the timely movement of goods is not unduly impacted.

The Mayo Clinic suggested amending proposed § 209.501(a) to require that FRA provide notice in writing to affected jurisdictions whenever a written notice of review is issued to a railroad carrier. It stated that jurisdictions that would be potentially harmed in the event of a catastrophic release or explosion of hazardous materials should have an opportunity to challenge a railroad carrier's routing decision.

Congress did not afford jurisdictions traversed by a railroad with an opportunity to challenge a railroad carrier's routing decision, and FRA does not think it wise to do so in this final rule. Local jurisdictions had no ability prior to the Act to challenge railroad routing decisions and the Act did not create such an ability. The Act provides for routing decisions to be made on the basis of safety and security by those with expertise to do so and the national perspective needed to ensure that the general railroad system of transportation works well and performs its essential role in the Nation's economy. Experience teaches that local communities are often eager to divert trains carrying hazardous materials away from themselves. A cacophony of "not-in-my-backyard" challenges from the hundreds of local communities along a typical railroad route would impair the ability of the FRA or any other body to make timely, annual routing decisions as required by the Act. Moreover, FRA believes that the specific requirements and factors that must be included in a railroad carrier's route analysis, as well as the requirement for input from State, local and tribal officials imposed by PHMSA Final Rule are adequate to protect the interests of jurisdictions along each rail route. A railroad carrier also faces extremely high liability and remediation costs if a hazardous materials accident or incident occurs on one of its routes, which acts as a powerful incentive for the railroad to indeed conduct its operations in the manner posing the least overall safety and security risk. For example, the January 2005 Graniteville, South Carolina, rail accident killed nine people and injured 554 more. In addition, the accident necessitated the evacuation of more than 5,400 people. Total costs associated with the Graniteville accident are currently almost $126 million. Should a rail accident involving the release of TIH materials result in tort judgments that exceed a railroad's insurance coverage, payment of the judgments could jeopardize the ability of the railroad to continue operations.

Each rail route may be hundreds of miles long and could pass dozens of jurisdictions, making it potentially burdensome and time-consuming for FRA to provide notice in writing to each individual affected jurisdiction. One of the purposes of this rulemaking was to design an appeal process that would not unduly hinder rail traffic and interstate commerce, thereby ensuring that rail traffic is not congested or delayed by a pending FRA decision, and ensuring that critical commodities continue to reach the communities that need them in a timely, safe, and secure manner. That purpose would be thwarted by soliciting the views of each jurisdiction along a route, waiting for those views to be delivered, and then taking the time needed to consider and respond to all of those views.

B. Conference to Resolve Deficiencies (§ 209.501(b))

The NPRM proposed that the Associate Administrator conference with the railroad carrier for a thirty (30)-day period after issuing the Notice to resolve the deficiencies identified in the Notice. The Associate Administrator would be required to keep a record of all written correspondence with the railroad carrier and a summary of each meeting and telephone conversation as it pertains to the Notice. Additionally, the Associate Administrator may extend the 30-day conference period.

Dow requests that proposed § 209.501(b) be revised to allow shippers of covered hazardous materials to participate in the conference between the railroad carrier and the Associate Administrator. It states that shippers of covered hazardous materials will be significantly affected by an FRA determination that a railroad's route selection is deficient.

Again, FRA believes that the detailed commodity information required to be included in a railroad carrier's route analysis and supporting data will sufficiently protect shippers' interests. As stated above, this appeals process is not intended to hinder rail transportation, or to delay the timely, safe, and secure delivery of the covered commodities to their final destinations.

In the normal course of business, shippers may express some preference for the specific routing of their shipments, but the routing decisions are usually left to the full discretion of the railroad carriers, who are in a better position to analyze the efficiencies of their systems, and to select route posing the least safety and security risks. We note that the PHMSA Final Rule does not include an opportunity for shippers to provide input into the data gathering, route analysis and route choice performed by the railroad carriers. In comments submitted to the PHMSA NPRM docket, Dow and the Institute of Makers of Explosives suggested that consistent with fundamental concepts of due process, PHMSA should provide an immediate procedure to appeal an FRA determination to require the use of an alternative route. To address that concern, FRA issued its NPRM proposing these appeal procedures concurrently with the PHMSA IFR on April 16, 2008.

The 9/11 Commission Act does not require PHMSA to provide for hazardous materials shippers to participate in the route analysis process, and PHMSA's IFR and final rule do not include any requirement for railroad carriers to consult with shippers or for shippers to submit any input or data to railroad carriers for their route analyses. In § 1551(h) of the Act, in contrast, Congress did require that railroad carriers must "seek relevant information from State, local, and tribal officials, as appropriate, regarding security risks to high-consequence targets along or in proximity to a route." Thus, Congress was quite specific in the Act about what information railroad carriers should consider when gathering data and analyzing rail routes, and explicitly included this consultation requirement with State, local and tribal officials.

As discussed below, the Associate Administrator will consult with the STB concerning the commercial practicability of alternative routes before reaching any final routing decision. FRA believes that this regulatory provision—together with the detailed data and analysis by the railroad carriers, and the carriers' own economic interests in ensuring the efficient, safe and secure transportation of all freight, including hazardous materials—will adequately safeguard the interests of hazardous materials shippers.

There are additional problems with including other parties, such as shippers, in the conference between the Associate Administrator and a railroad. The railroads' commodity data and route analyses will contain information that qualifies as Sensitive Security Information (SSI) under 49 CFR parts 15 and 1520; much of that information is also likely to be commercially sensitive or confidential. Sharing or release of such information by the Federal government is necessarily limited by a number of regulations and statutes in order to protect national security interests and prevent financial harm to private companies. Because the railroad carriers' commodity data, route analyses, and the conference record will contain sensitive information with a distribution limited by statute and regulation, it cannot be made available for review or comment to outside parties. To allow the detailed railroad routing information to be released to parties beyond authorized government officials and the railroad itself would defeat the purpose of the 9/11 Commission Act and the PHMSA Final Rule: To make railroad transportation of security sensitive hazardous materials safer and more secure.

In its comments to the PHMSA IFR Dow also suggested the use of conferences under 49 U.S.C. 333 (Section 333 conference) to bring together the government, shippers, and carriers. In 2005, FRA convened a Section 333 conference to discuss ways to minimize security and safety risks associated with the transportation of TIH materials. The conference has permitted railroads to share information on how TIH traffic is routed, and the reason for that routing. As indicated in the PHMSA Final Rule, FRA will continue to make the conference available to the railroads to jointly evaluate the safety and security risks associated with rail movements of high-risk hazardous materials across the entire rail system, and to evaluate risk-reducing arrangements on a national scale, including rerouting of these materials. FRA will also consider further hazardous material shipper participation in future Section 333 conferences.

C. Consultation With and Comment From Other Agencies (§ 209.501(c))

The NPRM proposed that, when issues identified in the Notice and conference period are not adequately resolved, the Associate Administrator is to: (1) Consult with the Transportation Security Administration (TSA) and PHMSA concerning the safety and security of the railroad carrier's proposed route and any alternative routes over which the railroad carrier is authorized to operate; (2) obtain comments from the Surface Transportation Board (STB) regarding whether the alternative routes being considered would be commercially practicable; and (3) fully consider the input of TSA, PHMSA, and STB in rendering a decision pursuant to proposed § 209.501(d), which shall be administratively final.

Dow suggested a revision of proposed § 209.501(c) to require that FRA take into consideration the input of shippers of covered hazardous materials prior to making its decision under proposed § 209.501(d). As stated above, FRA believes the detailed information that will be in the railroad carriers' analyses and input from the STB will be sufficient to protect shippers' interests, and that no separate provision for securing shippers' input is necessary.

D. Decision (§ 209.501(d)(1))

In the NPRM, we proposed that the Associate Administrator conclude the review and notify the railroad carrier in writing where it is found that the route analysis and documentation provided by the railroad carrier are sufficient to support the route that the carrier has selected or that valid issues of commercial practicability preclude the use of alternative routes.

The Mayo Clinic suggests two amendments to this subsection: (1) Allow affected jurisdictions, particularly those where high-consequence targets are located, to petition the FRA to review its decision to allow a railroad carrier to use a route based on the railroad's determination that it has chosen the safest and most secure route or that no commercially practicable alternative exists, and (2) make clear that the Associate Administrator's written decision is a final agency action and that a denial of a petition by an affected jurisdiction also would be treated as a final agency action for the purposes of judicial review.

For the reasons stated above regarding the Mayo Clinic's comments on section 209.501(a), FRA declines to adopt these suggested changes. The Associate Administrator's written decision is not intended to be the exhaustion of FRA's administrative process, and is not final agency action. As discussed in the NPRM, final agency action will occur only when the FRA Associate Administrator issues a 2nd Notice, per subsections 209.501(e) and (g).

E. Actions Following 2nd Notice and Re-Routing Directive (§ 209.501(e))

The NPRM proposed that a railroad carrier may file a petition for judicial review pursuant to paragraph (f) of this section where the Associate Administrator issues a 2nd Notice directing the use of an alternate route.

Dow points out that there appears to be a typographical error in proposed § 209.501(e)(2). FRA agrees that "paragraph (g)" should be inserted to replace the reference to "paragraph (f)" and has made the change to the regulatory text.

F. Review and Decision by Associate Administrator on Revised Route Analysis Submitted in Response to 2nd Notice (§ 209.501(f))

In the NPRM, FRA proposed that upon submission of a revised route analysis containing an adequate showing by the railroad carrier that its original selected route poses the least overall safety and security risk, the Associate Administrator will notify the carrier in writing that the original selected route may be used. No comments were received in response to this paragraph; therefore, we are adopting it as proposed in the NPRM.

G. Appellate Review (§ 209.501(g))

The NPRM proposed that a railroad carrier that is aggrieved by final agency action may petition the appropriate United States court of appeals as provided by 49 U.S.C. 5127. Under the proposed rule, the filing of a petition for review would not stay or modify the force and effect of the final agency action unless the Associate Administrator or the Court orders otherwise.

Dow comments that the proposed rule improperly restricts the rights of shippers to judicial review, as provided in 49 U.S.C. 5127, by failing to extend the right of appellate review to a shipper adversely affected or aggrieved by an FRA decision on route selection. Dow seeks an amendment to proposed § 209.501(g) to extend appellate review rights to shippers adversely affected or

aggrieved by an FRA decision on route selection.

FRA is declining to adopt Dow's suggested change in the final rule. We and PHMSA have reviewed the statute and it is our position that section 49 U.S.C. 5127 does not afford a party not directly regulated by this final rule with a private right of action in an appellate court to challenge a decision by FRA requiring rerouting.

Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The statutory intent is determinative in deciding whether a statute creates not just a private right but also a private remedy, and a statute does not give rise to a civil cause of action unless the language of the statute is explicit or it can be determined by clear implication. *See Alexander* v. *Sandoval,* 532 U.S. 275 (2001); *Virginia Bankshares, Inc.* v. *Sandberg,* 501 U.S. 1083 (1991); *Merrel Dow Pharmaceuticals Inc.* v. *Thompson,* 478 U.S. 804 (1986); *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 578 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11 (1979). In determining whether a private right of action exists under a federal statute, the central inquiry is whether Congress intended to create, either expressly or by implication, a private cause of action. *Cort* v. *Ash,* 422 U.S. 66 (1975). Where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under a particular statute or under an implied right of action. *Gonzaga University* v. *Doe,* 536 U.S. 273 (2002) (referring to 42 U.S.C. 1983). Such a private right of action is not afforded by 49 U.S.C. 5127 to entities not part of the underlying regulatory scheme and enforcement action.

The text of section 5127(a) states: "Filing and venue. Except as provided in section 20114(c), a person adversely affected or aggrieved by a final action of the Secretary under this chapter may petition for review of the final action in the United States court of appeals for the District of Columbia or in the court of appeals for the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not more than 60 days after the Secretary's action becomes final."

The legislative history for section 5127 indicates that it was intended only to provide an appropriate and consistent judicial forum for the appeal of final actions taken by the Secretary of Transportation under Chapter 51. Prior to the passage of section 5127 in the Safe, Efficient, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, 119 Stat. 1907 (Aug. 10, 2005), several different statutes designated the proper court for judicial review of final agency actions under Chapter 51, depending on the mode of transportation to which the final agency action applied. In some cases, a petition for judicial review was required to be filed in a Federal district court, and in other cases, only a U.S. court of appeals had jurisdiction. To provide a consistent procedure and eliminate confusion, section 5127 specifically established the appropriate judicial forum for review of final agency actions in the areas of compliance, enforcement, civil penalties, rulemaking, and preemption.[1] Therefore, it appears that Congress only intended 49 U.S.C. 5127 to confer exclusive jurisdiction of final agency actions under the authority of Chapter 51 to the U.S. courts of appeals.

There is no other provision suggesting that Congress intended to provide a right of action to third parties not involved in an enforcement proceeding under Chapter 51. On the contrary, in the context of the entire statute and the congressionally developed enforcement scheme, those aggrieved, and provided an opportunity to judicial review, are limited to those who participated in the underlying enforcement proceeding. The requirements of the PHMSA Final Rule only apply to railroad carriers of certain hazardous materials, not shippers and not communities traversed by the railroads. Accordingly, this final rule, which establishes appeal procedures for the PHMSA Final Rule also only applies to railroad carriers as the regulated entities. Entities not covered by the PHMSA Final Rule and not included in the administrative proceeding, including a railroad carrier's customers (e.g., shippers) and communities traversed by the railroad, would therefore not be entitled to judicial review under § 5127.

Additionally, Dow's comments suggest amending proposed § 209.501(g) to stay any FRA-required route alteration during the pendency of an appeal in order to minimize operational and economic disruptions until the appellate process is complete. With respect to this second suggested amendment to section 209.501(g), FRA will decline to make that change. We reiterate that we have designed these procedures specifically to avoid undue disruption and delay to rail transportation. But in the case of a serious or immediate security threat to rail transportation or a commodity in transportation, FRA and other Federal agencies must retain the ability to reroute or stop rail transportation to mitigate any accident, incident, release or terrorist act that would cause harm to the public and the transportation system.

[1] *See, e.g.,* H.R. Rep. 109–12 § 7024 (Mar. 7, 2005).

H. Time (§ 209.501(h))

This section proposed a method for computing time for all deadlines and time periods in the proposed rule. No comments were received on this section, and it will be adopted as proposed in the NPRM.

I. Penalties (Appendix B to Part 209)

In the NPRM, FRA proposed civil penalty assessments and guidelines for violations of PHMSA's rail security and routing regulations. These penalty guidelines would be added to FRA's existing penalty guidelines for hazardous materials violations. No comments were received on the proposed penalty guidelines, and they will be adopted as proposed in the NPRM.

J. Miscellaneous Comments

AAR comments that FRA's proposed rule does not address the protection of security-sensitive information, particularly route analysis information. AAR requests that FRA restrict access to route analysis information to those FRA employees who need the information for enforcement purposes, and that FRA designate those employees who need access to rail routing information for enforcement purposes to facilitate the transmission of said information.

The AAR submitted substantially the same comment in response to the PHMSA IFR, and we will respond to it in the same way here. FRA will continue to coordinate closely with the railroads in its inspection and enforcement activities regarding security plans. To date, FRA is not aware of issues surrounding access to or inspection of railroad security plans. FRA's enforcement role is to review the railroads' analyses, not to perform them. FRA and its employees will comply with the existing SSI regulations with regard to the handling of the route analyses and the underlying commodity data. Only FRA employees who are "covered persons" with a "need-to-know" under the SSI regulations at 49 CFR parts 15 and 1520 will be accessing the routing analyses and data.

The Mayo Clinic comments on FRA's statement in the Background Information section of the NPRM, which provides that the FRA expects to mandate temporary changes to routes only in the most exigent circumstances.

It contends that there is no basis in the Implementing Recommendations of the 9/11 Commission Act to substitute the exigent circumstances standard for the "safest and most secure" and "least overall safety and security risks" statutory standards.

FRA's response is that this was simply an explanatory statement in the preamble which does not propose to substitute a standard or regulation for any standards established by the 9/11 Commission Act or the regulatory text in the PHMSA Final Rule or this final rule. As previously noted, railroads have every incentive to choose routes posing the least overall safety and security risks for moving security-sensitive materials and FRA anticipates that it will rarely have to overturn a railroad carrier's routing decision.

IV. Rulemaking Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This NPRM is published under authority of the Federal hazmat law (49 U.S.C. 5101 et seq.). Section 5103(b) of Federal hazardous materials law authorizes the Secretary to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce. The HMR are issued by PHMSA. 49 CFR 1.53(b). FRA inspects railroads and rail shippers for compliance with the hazardous materials transportation law and regulations. 49 CFR 1.49(s).

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. This final rule is not significant under the Regulatory Policies and Procedures of DOT (44 FR 11034). The economic impact of this final rule is minimal to the extent that preparation of a regulatory evaluation is not warranted.

C. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This final rule would not have any direct effect on the States or their political subdivisions; it would not impose any compliance costs; and it would not affect the relationships between the national government and the States or their political subdivisions, or the distribution of power and responsibilities among the various levels of government.

D. Regulatory Flexibility Act and Executive Order 13272

FRA certifies that this final rule will not have a significant economic impact on a substantial number of small entities. This final rule would apply to carriers of hazardous materials by rail. Some of these entities are classified as small entities; however, there is no economic impact on any person that complies with Federal hazardous materials law and the regulations and orders issued under that law.

E. Paperwork Reduction Act

There are no new information requirements in this final rule.

F. Unfunded Mandates Reform Act of 1995

This final rule does not impose unfunded mandates under the Unfunded Mandates Act of 1995. It does not result in annual costs of $141,100,000 or more, in the aggregate, to any of the following: State, local, or Indian tribal governments, or the private sector, and is the least burdensome alternative to achieve the objective of the rule.

G. Environmental Assessment

There are no significant environmental impacts associated with this final rule.

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." 66 FR 28355 (May 22, 2001). Under the Executive Order, a "significant energy action" is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking, that: (1)(i) Is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this final rule in accordance with Executive Order 13211, and determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a "significant energy action" within the meaning of Executive Order 13211.

I. Regulation Identifier Number (RIN)

A regulation identifier 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 spring and fall of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 209

Administrative practice and procedure, Hazardous materials transportation, Penalties, Railroad safety, Railroad safety enforcement procedures, Reporting and recordkeeping requirements.

■ Therefore, in consideration of the foregoing, chapter II, subtitle B of title 49 of the Code of Federal Regulations is amended as follows:

PART 209—[AMENDED]

■ 1. The authority citation for part 209 continues to read as follows:

Authority: 49 U.S.C. 5123, 5124, 20103, 20107, 20111, 20112, 20114; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 2. Amend § 209.3 by adding the following new definitions:

§ 209.3 Definitions.

* * * * *

Associate Administrator means the Associate Administrator for Safety, Federal Railroad Administration, or that person's delegate as designated in writing.

* * * * *

Railroad carrier means a person providing railroad transportation.

* * * * *

■ 3. Add new Subpart F, consisting of § 209.501, to read as follows:

Subpart F—Enforcement, Appeal and Hearing Procedures for Rail Routing Decisions Pursuant to 49 CFR § 172.820

§ 209.501 Review of rail transportation safety and security route analysis.

(a) *Review of route analysis.* If the Associate Administrator for Safety determines that a railroad carrier's route selection, analysis and documentation pursuant to § 172.820 of chapter I of this title is deficient and fails to establish that the route chosen by the carrier poses the least overall safety and security risk, the Associate Administrator shall issue a written notice of review ("Notice") to the

railroad carrier. The Notice shall specifically address each deficiency found in the railroad carrier's route analysis. The Notice may also include suggested mitigation measures that the railroad carrier may take to remedy the deficiencies found, including selection of an alternative commercially feasible routing.

(b) *Conference to resolve deficiencies.* After issuing the Notice, the Associate Administrator conferences with the railroad carrier for a thirty (30)-day period, or such longer period as provided by the Associate Administrator, to resolve the deficiencies identified in the Notice. The Associate Administrator keeps a record of all written correspondence with the railroad carrier and a summary of each meeting and telephone conversation with the railroad carrier that pertains to the Notice.

(c) *Consultation with and comment from other agencies.* If, after the close of the conference period, the Associate Administrator concludes that the issues identified have not been satisfactorily resolved, the Associate Administrator:

(1) Consults with the Transportation Security Administration ("TSA") and the Pipeline and Hazardous Materials Safety Administration (PHMSA) regarding the safety and security of the route proposed by the railroad carrier and any alternative route(s) over which the carrier is authorized to operate that are being considered by the Associate Administrator and prepares a written summary of the recommendations from TSA and PHMSA;

(2) Obtains the comments of the Surface Transportation Board ("STB") regarding whether the alternative route(s) being considered by the Associate Administrator would be commercially practicable; and

(3) Fully considers the input of TSA, PHMSA and the STB and renders a decision pursuant to paragraph (d) of this section which shall be administratively final.

(d) *Decision.* (1) If the Associate Administrator finds that the route analysis and documentation provided by the railroad carrier are sufficient to support the route selected by the carrier or that valid issues of commercial practicability preclude an alternative route, the Associate Administrator concludes the review without further action and so notifies the railroad carrier in writing.

(2) If the Associate Administrator concludes that the railroad carrier's route analysis does not support the railroad carrier's original selected route, that safety and security considerations establish a significant preference for an alternative route, and that the alternative route is commercially practicable, the Associate Administrator issues a second written notice (2nd Notice) to the railroad carrier that:

(i) Specifically identifies deficiencies found in the railroad carrier's route analysis, including a clear description of the risks on the selected route that have not been satisfactorily mitigated;

(ii) Explains why the available data and reasonable inferences indicate that a commercially practicable alternative route poses fewer overall safety and security risks than the route selected by the railroad carrier; and

(iii) Directs the railroad carrier, beginning within twenty (20) days of the issuance date of the 2nd Notice on the railroad carrier, to temporarily use the alternative route that the Associate Administrator determines poses the least overall safety and security risk until such time as the railroad carrier has adequately mitigated the risks identified by the Associate Administrator on the original route selected by the carrier.

(e) *Actions following 2nd Notice and re-routing directive.* When issuing a 2nd Notice that directs the use of an alternative route, the Associate Administrator shall make available to the railroad carrier the administrative record relied upon by the Associate Administrator in issuing the 2nd Notice, including the recommendations of TSA, PHMSA and STB to FRA made pursuant to paragraphs (c)(1) and (2) of this section. Within twenty (20) days of the issuance date of the Associate Administrator's 2nd Notice, the railroad carrier may:

(1) Comply with the Associate Administrator's directive to use an alternative route while the carrier works to address the deficiencies in its route analysis identified by the Associate Administrator; or

(2) File a petition for judicial review of the Associate Administrator's 2nd Notice, pursuant to paragraph (g) of this section.

(f) *Review and decision by Associate Administrator on revised route analysis submitted in response to 2nd Notice.* Upon submission of a revised route analysis containing an adequate showing by the railroad carrier that its original selected route poses the least overall safety and security risk, the Associate Administrator notifies the carrier in writing that the carrier may use its original selected route.

(g) *Appellate review.* If a railroad carrier is aggrieved by final agency action, it may petition for review of the final decision in the appropriate United States court of appeals as provided in 49 U.S.C. 5127. The filing of the petition for review does not stay or modify the force and effect of the final agency action unless the Associate Administrator or the Court orders otherwise.

(h) *Time.* In computing any period of time prescribed by this part, the day of any act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days.

■ 4. In appendix B to part 209, amend the civil penalty guideline table by adding the following entries:

Appendix B to Part 209—Federal Railroad Administration Guidelines for Initial Hazardous Materials Assessments

* * * * *

49 CFR section	Description	Guideline amount
*	* * * * * *	*
	PART 172—SHIPPING PAPERS	
*	* * * * * *	*
172.820(a)–(e)	General failure to perform safety and security route analysis *Factors to consider are the size of the railroad carrier, and the quantities of hazmat transported.*	5,000 to 10,000
172.820(a)–(e)	Partial failure to complete route analysis; failure to complete a component of the route analysis —Compilation of security-sensitive commodity data. —Identification of practicable alternative routes. —Consultation with State, local, and tribal officials, as appropriate regarding security risks to high-consequence targets along or in proximity to a route used by the carrier to transport security-sensitive materials. —Safety and security route analysis of route used. —Safety and security alternative route analysis.	5,000
172.820(f)	Failure to complete route analyses within the prescribed time frame	2,000
172.820(g)	Failure to include one of the following components in safety and security plan —Procedure for consultation with offerors and consignees to minimize storage of security-sensitive materials incidental to movement. —Measures to limit unauthorized access to the materials during storage or delays in transit. —Measures to mitigate risk to population centers associated with in-transit storage of the materials. —Measures to be taken in the event of escalating threat levels for the materials stored in transit. (*Unit of violation is the component. For a total failure to have a security plan, cite § 172.800 and use the penalties provided for that section.*).	2,000
172.820(h)	Failure to maintain records and make available to DOT and DHS authorized officials	2,000
172.820(i)	Failure to use route designated by FRA Associate Administrator for Safety	10,000
*	* * * * * *	*

Issued in Washington, DC, on November 18, 2008.

Joseph H. Boardman,

Administrator.

[FR Doc. E8–27827 Filed 11–25–08; 8:45 am]

BILLING CODE 4910–06–P

Federal Register

Wednesday,
November 26, 2008

Part IV

Department of Housing and Urban Development

24 CFR Part 15

Public Access to HUD Records under the Freedom of Information Act (FOIA) and Production of Material or Provision of Testimony by HUD Employees: Revisions to Policies and Practices Regarding Subpoenas and Other Demands for Testimony; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 15

[Docket No. FR–5206–F–02]

RIN 2501–AD39

Public Access to HUD Records Under the Freedom of Information Act (FOIA) and Production of Material or Provision of Testimony by HUD Employees: Revisions to Policies and Practices Regarding Subpoenas and Other Demands for Testimony

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule modifies HUD's policies and practices regarding responses to subpoenas and other demands for testimony of HUD employees, or for production of documents by HUD. This rule delegates authority to additional officials within HUD's Office of General Counsel and revises the criteria used to evaluate such demands. Finally, this rule eliminates unnecessary provisions covering HUD's response to demands in cases in which the United States is a party to the case in which testimony or documents are requested. This rule follows publication of an August 12, 2008 proposed rule, but makes no changes at this final rule stage.

DATES: *Effective Date:* December 26, 2008.

FOR FURTHER INFORMATION CONTACT: Nancy Christopher, Associate General Counsel for Litigation, Office of Litigation, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10258, Washington, DC 20410–0500; telephone number 202–708–0300 (this is not a toll-free telephone number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

HUD's regulations at 24 CFR part 15 describe the policies and procedures governing public access to HUD records under the Freedom of Information Act (FOIA) (5 U.S.C. 552) and the policies and procedures governing the production of material or provision of testimony by HUD employees. On February 26, 2007 (72 FR 8580), HUD published a final rule to clarify and explain the various types of requests for HUD documents and testimony by HUD employees that are intended to be covered by HUD's document production and testimony approval regulations. The final rule revised subparts C and D to describe the procedures to be followed by a party in making a demand to HUD for documents or testimony, and to explain the standards followed by HUD in determining whether production or testimony should be permitted. A technical correction to the final rule was published on September 20, 2007 (72 FR 53876).

After implementing the revised procedures for consideration of demands for documents or testimony, HUD determined that additional changes were necessary to ensure the careful and efficient processing of all such demands. Those changes were proposed in a rule published on August 12, 2008 (73 FR 46826). The changes included, among other things, adding reference to the various officials within the Office of General Counsel (OGC) with responsibility for addressing a demand for production of material or provision of testimony, and providing guidance to persons engaged in private litigation, to which the United States is not a party, on the procedures to be followed when making a demand on HUD for documents or testimony. The preamble to the August 12, 2008 proposed rule, at 73 FR 46826 and 46827, explained in detail the changes proposed to the regulations in 24 CFR part 15, and HUD refers the reader to the proposed rule for the full listing of the regulatory changes proposed.

The August 12, 2008 proposed rule provided a 60-day public comment period, which ended on October 14, 2008. At the end of the public comment period, HUD received only one public comment. The commenter complained that the proposed rule, in § 15.206, appeared to direct HUD employees not to cooperate with court orders for the production of testimony or materials. The language in § 15.206, which directs HUD employees not to produce documents or testimony without official HUD approval, is longstanding. This regulatory section was amended by the August 2008 proposed rule primarily to add reference to the "Authorized Approving Official," the official who is in the best position to consider and approve demands for testimony or documents.

HUD believes that the commenter misunderstands the directions to HUD employees provided in § 15.206. What "official HUD approval" provides is confirmation that the subpoena is directed to matters within the scope of the individual's employment, and the employee was not acting outside the scope of his or her employment. Official HUD approval is required for the protection of the employee, not to frustrate a court proceeding.

II. This Final Rule

At this final rule stage, HUD adopts the August 12, 2008 proposed rule without change.

III. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this rule were submitted to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Under this Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a valid control number.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule that is subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The regulatory amendments made by this rule are procedural and serve to advise on the process and procedures engaged in by the Department when producing material or providing testimony in response to demands in legal proceedings. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

This rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from the requirements of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on

state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any federal mandates on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

List of Subjects in 24 CFR Part 15

Classified information, Courts, Freedom of information, Government employees, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons discussed in the preamble, HUD amends 24 CFR part 15 as follows:

PART 15—PUBLIC ACCESS TO HUD RECORDS UNDER THE FREEDOM OF INFORMATION ACT AND TESTIMONY AND PRODUCTION OF INFORMATION BY HUD EMPLOYEES

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

Authority: 42 U.S.C. 3535(d).

Subpart A also issued under 5 U.S.C. 552. Section 15.107 also issued under E.O. 12958, 60 FR 19825, 3 CFR Comp., p. 333.

Subparts C and D also issued under 5 U.S.C. 301.

■ 2. Amend § 15.2(b) by adding, in alphabetical order, definitions of the terms "Appropriate Associate General Counsel," "Appropriate Regional Counsel," and "Authorized Approving Official," to read as follows:

§ 15.2 Definitions.

* * * * *

(b) * * *

Appropriate Associate General Counsel means the Associate General Counsel for Litigation or the Associate General Counsel for HUD Headquarters employees in those programs for which the Associate provides legal advice.

Appropriate Regional Counsel means the Regional Counsel for the Regional Office having delegated authority over the project or activity with respect to which the information is sought. For assistance in identifying the Appropriate Regional Counsel, see Appendix A to this part.

Authorized Approving Official means the Secretary, General Counsel, Appropriate Associate General Counsel, or Appropriate Regional Counsel.

* * * * *

§ 15.102 [Amended]

■ 3. In § 15.102(b), remove the reference "*http://www.hud.gov/ogc/bshelf2a.html*" and, in its place, add the reference "*http://www.hud.gov.*"

§ 15.103 [Amended]

■ 4. In § 15.103(c), remove the reference "*http://www.hud.gov/ogc/foiafree.html*" and, in its place, add the reference "*http://www.hud.gov.*"

■ 5. Add § 15.201(c) to read as follows:

§ 15.201 Purpose and Scope.

* * * * *

(c) This subpart also provides guidance to persons engaged in private litigation, to which the United States is not a party, on the procedures to be followed when making a demand for documents or testimony on the Department of Housing and Urban Development. This subpart does not, and may not be relied upon to, create any affirmative right or benefit, substantive or procedural, enforceable against HUD.

■ 6. Revise § 15.202 to read as follows:

§ 15.202 Production of material or provision of testimony prohibited unless approved.

Neither the Department nor any employee of the Department shall comply with any demand for production of material or provision of testimony in a legal proceeding among private litigants, unless the prior approval of the Authorized Approving Official has been obtained in accordance with this subpart. This rule does not apply to any legal proceeding in which an employee may be called to participate, either through the production of documents or the provision of testimony, not on official time, as to facts or opinions that are in no way related to material described in § 15.201.

■ 7. Revise § 15.203 to read as follows:

§ 15.203 Making a demand for production of material or provision of testimony.

(a) Any demand made to the Department or an employee of the Department to produce any material or provide any testimony in a legal proceeding among private litigants must:

(1) Be submitted in writing to the Department or employee of the Department, with a copy to the Appropriate Associate General Counsel or Appropriate Regional Counsel, no later than 30 days before the date the material or testimony is required;

(2) State, with particularity, the material or testimony sought;

(3) If testimony is requested, state:

(i) The intended use of the testimony, and

(ii) Whether expert or opinion testimony will be sought from the employee;

(4) State whether the production of such material or provision of such testimony could reveal classified, confidential, or privileged material;

(5) Summarize the need for and relevance of the material or testimony sought in the legal proceeding and include a copy of the complaint, if available;

(6) State whether the material or testimony is available from any other source and, if so, state all such other sources;

(7) State why no document[s], or declaration[s] or affidavit[s], could be used in lieu of oral testimony that is being sought;

(8) Estimate the amount of time the employee will need in order to prepare for, travel to, and attend the legal proceeding, as appropriate;

(9) State why the production of the material or provision of the testimony is appropriate under the rules of procedure governing the legal proceeding for which it is sought (e.g., not be unduly burdensome or otherwise inappropriate under the relevant rules governing discovery); and

(10) Describe how producing such material or providing such testimony would affect the interests of the United States.

(b) If the Department determines that the requestor has failed to provide the information required by paragraph (a) of this section, or that the information provided is insufficient to consider the demand in accordance with § 15.204, the Department may require that additional information be provided by the requestor before the demand is considered.

(c) Whenever a demand is made upon the Department or an employee of the Department for the production of material or provision of testimony, the employee shall immediately notify the Appropriate Associate General Counsel or Appropriate Regional Counsel.

■ 8. Revise § 15.204 to read as follows:

§ 15.204 Consideration of demands for production of material or provision of testimony.

(a) The Authorized Approving Official shall determine what material is to be produced or what testimony is to be provided, based upon the following standards:

(1) *Expert or opinion material or testimony.* In any legal proceeding among private litigants, no employee of the Department may produce material or provide testimony as described in § 15.201(a) that is of an expert or opinion nature, unless specifically authorized by the Authorized Approving Official for good cause shown.

(2) *Factual material or testimony.* In any legal proceeding among private litigants, no employee of the Department may produce material or provide testimony as described in § 15.201(a) that is of a factual nature, unless specifically authorized by the Authorized Approving Official. The Authorized Approving Official shall determine whether any of the following factors are applicable. Such a demand may either be denied, or conditionally granted in accordance with § 15.204(c), if any such factors are applicable:

(i) Producing such material or providing such testimony would violate a statute or regulation;

(ii) Producing such material or providing such testimony would reveal classified, confidential, or privileged material;

(iii) Such material or testimony would be irrelevant to the legal proceeding;

(iv) Such material or testimony could be obtained from any other source;

(v) One or more documents, or a declaration or affidavit, could reasonably be provided in lieu of oral testimony;

(vi) The amount of employees' time necessary to comply with the demand would be unreasonable;

(vii) Production of the material or provision of the testimony would not be required under the rules of procedure governing the legal proceeding for which it is sought (e.g., unduly burdensome or otherwise inappropriate under the relevant rules governing discovery);

(viii) Producing such material or providing such testimony would impede a significant interest of the United States; or

(ix) The Department has any other legally cognizable objection to the release of such information or testimony in response to a demand.

(b) Once a determination has been made, the requester will be notified of the determination. If the demand is denied, the requestor shall be notified of the reasons for the denial. If the demand is conditionally approved, the requestor shall be notified of the conditions that have been imposed upon the production of the material or provision of the testimony demanded, and the reasons for the conditional approval of the demand.

(c) The Authorized Approving Official may impose conditions or restrictions on the production of any material or provision of any testimony. Such conditions or restrictions may include the following:

(1) A requirement that the parties to the legal proceeding obtain a protective order or execute a confidentiality agreement to limit access to, and limit any further disclosure of, material or testimony;

(2) A requirement that the requester accept examination of documentary material on HUD premises in lieu of production of copies;

(3) A limitation on the subject areas of testimony permitted;

(4) A requirement that testimony of a HUD employee be provided by deposition at a location prescribed by HUD or by written declaration;

(5) A requirement that the parties to the legal proceeding agree that a transcript of the permitted testimony be kept under seal or will only be used or only made available in the particular legal proceeding for which testimony was demanded;

(6) A requirement that the requester purchase an extra copy of the transcript of the employee's testimony from the court reporter and provide the Department with a copy at the requester's expense; or

(7) Any other condition or restriction deemed to be in the best interests of the United States, including reimbursement of costs to the Department.

(d) The determination made with respect to the production of material or provision of testimony pursuant to this subpart is within the sole discretion of the Authorized Approving Official and shall constitute final agency action from which no administrative appeal is available.

■ 9. Revise § 15.205 to read as follows:

§ 15.205 Method of production of material or provision of testimony.

(a) Where the Authorized Approving Official has authorized the production of material or provision of testimony, the Department shall produce such material or provide such testimony in accordance with this section and any conditions imposed upon production of material or provision of testimony pursuant to § 15.204(c).

(b) In any legal proceeding where the Authorized Approving Official has authorized the production of documents, the Department shall respond by producing authenticated copies of the documents, to which the seal of the Department has been affixed, in accordance with its authentication procedures. The authentication shall be evidence that the documents are true copies of documents in the Department's files and shall be sufficient for the purposes of Rules 803(8) and 902 of the Federal Rules of Evidence and Rule 44(a)(1) of the Federal Rules of Civil Procedure.

(c) If response to a demand is required before the determination from the Authorized Approving Official is received, the U.S. Attorney, Department of Justice Attorney, or such other attorney as may be designated for the purpose will appear or make such filings as are necessary to furnish the court or other authority with a copy of the regulations contained in this subpart and will inform the court or other authority that the demand has been, or is being, as the case may be, referred for prompt consideration. The court or other authority shall be requested respectfully to stay the demand pending receipt of the requested determination from the Authorized Approving Official.

■ 10. Revise § 15.206 to read as follows:

§ 15.206 Procedure in the event of an adverse ruling regarding production of material or provision of testimony.

If the court or other authority declines to stay the demand made in accordance with § 15.205(c) pending receipt of the determination from the Authorized Approving Official, or if the court or other authority rules that the demand must be complied with irrespective of the determination by the Authorized Approving Official not to produce the material or provide the testimony demanded or to produce subject to conditions or restrictions, the employee upon whom the demand has been made shall, if so directed by an attorney representing the Department, respectfully decline to comply with the demand. (*United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951)).

■ 11. Revise § 15.302 to read as follows:

§ 15.302 Production of material or provision of testimony prohibited unless approved.

Neither the Department nor any employee of the Department shall comply with any demand for production of material or provision of testimony in a legal proceeding in which the United States is a party, unless the prior approval of the attorney

representing the United States has been obtained in accordance with this subpart. This rule does not apply to any legal proceeding in which an employee may be called to participate, either through the production of documents or the provision of testimony, not on official time, as to facts or opinions that are in no way related to material described in § 15.301.

■ 12. Revise § 15.303 to read as follows:

§ 15.303 Procedure for review of demands for production of material or provision of testimony in any legal proceeding in which the United States is a party.

Whenever a demand is made upon the Department or an employee of the Department for the production of material or provision of testimony, the employee shall immediately notify the Appropriate Associate General Counsel or Appropriate Regional Counsel.

■ 13. Revise § 15.304 to read as follows:

§ 15.304 Consideration of demands for production of material or provision of testimony.

Consideration of demands shall be within the province of the attorney representing the United States, who may raise any valid objection to the production of material or provision of testimony in response to the demand.

■ 14. Add § 15.305 to read as follows:

§ 15.305 Method of production of material or provision of testimony.

If the production of material or provision of testimony has been authorized, the Department may respond by producing authenticated copies of the documents, to which the seal of the Department has been affixed in accordance with its authentication procedures. The authentication shall be evidence that the documents are true copies of documents in the Department's files and shall be sufficient for the purposes of Rules 803(8) and 902 of the Federal Rules of Evidence and Rule 44(a)(1) of the Federal Rules of Civil Procedure.

■ 15. Revise Appendix A to read as follows:

Appendix A to Part 15—Location Information for HUD FOIA Reading Rooms and Contact Information for Regional Counsel

The Department maintains a reading room in Headquarters and in each of the Secretary's Representative's Offices. In addition, each of the Secretary's Representative's Offices has a Regional Counsel. The location and contact information for HUD's FOIA Reading Rooms and for the Regional Counsel can be found in HUD's Local Office Directory, on HUD's Internet site at *http://www.hud.gov*.

Dated: November 17, 2008.

Roy A. Bernardi,

Deputy Secretary.

[FR Doc. E8–27872 Filed 11–25–08; 8:45 am]

BILLING CODE 4210–67–P

Federal Register

Wednesday,
November 26, 2008

Part V

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 226

Endangered and Threatened Species; Critical Habitat for Threatened Elkhorn and Staghorn Corals; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 226

[Docket No. 070801431–81370–02]

RIN 0648–AV35

Endangered and Threatened Species; Critical Habitat for Threatened Elkhorn and Staghorn Corals

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

ACTION: Final rule.

SUMMARY: We, the National Marine Fisheries Service (NMFS), issue a final rule designating critical habitat for elkhorn (*Acropora palmata*) and staghorn (*A. cervicornis*) corals, which we listed as threatened under the Endangered Species Act of 1973, as amended (ESA), on May 9, 2006. Four specific areas are designated: the Florida area, which comprises approximately 1,329 square miles (3,442 sq km) of marine habitat; the Puerto Rico area, which comprises approximately 1,383 square miles (3,582 sq km) of marine habitat; the St. John/St. Thomas area, which comprises approximately 121 square miles (313 sq km) of marine habitat; and the St. Croix area, which comprises approximately 126 square miles (326 sq km) of marine habitat. We are excluding one military site, comprising approximately 5.5 square miles (14.3 sq km), because of national security impacts.

DATES: This rule becomes effective December 26, 2008.

ADDRESSES: The final rule, maps, Final Regulatory Flexibility Analysis, and 4(b)(2) Report used in preparation of this final rule, as well as comments and information received, are available on the NMFS Southeast Regional website at *http://www.sero.noaa.gov/*.

FOR FURTHER INFORMATION CONTACT: Jennifer Moore or Sarah Heberling, NMFS, at the address above or at 727–824–5312; or Marta Nammack, NMFS, at 301–713–1401.

SUPPLEMENTARY INFORMATION:

Background

On May 9, 2006, we listed elkhorn and staghorn corals as threatened under the ESA (71 FR 26852; May 9, 2006). At the time of listing, we also announced our intention to propose critical habitat for elkhorn and staghorn corals. Critical habitat for both elkhorn and staghorn corals was proposed on February 6, 2008 (73 FR 6895); a correction notice regarding one of the maps was published on March 6, 2008 (73 FR 12068). We solicited comments from the public on all aspects of the proposed rule. An initial regulatory flexibility analysis (IRFA) and a draft impacts report prepared pursuant to section 4(b)(2) of the ESA were available for public review and comment along with the proposed rule. These documents have been finalized in support of the final critical habitat designation.

The proposed rule identified the key conservation objective for the corals as facilitating increased incidence of successful sexual and asexual reproduction. We determined the feature essential to the conservation of the species (also known as essential feature), which supports the identified conservation objective, was substrate of suitable quality and availability, in water depths from the mean high water (MHW) line to 30 m, to support successful larval settlement, recruitment, and reattachment of fragments. For purposes of this definition, "substrate of suitable quality and availability" meant consolidated hardbottom or dead coral skeleton that is free from fleshy macroalgae cover and sediment cover. We proposed to designate four specific areas that contain the essential feature: (1) the Florida area, which comprised approximately 3,301 square miles (8,550 sq km) of marine habitat; the Puerto Rico area, which comprised approximately 1,383 square miles (3,582 sq km) of marine habitat; the St. John/St. Thomas area, which comprised approximately 121 square miles (313 sq km) of marine habitat; and the St. Croix area, which comprised approximately 126 square miles (326 sq km) of marine habitat. We also proposed to exclude one military site, comprising approximately 47 square miles (123 sq km), because of national security impacts.

Elkhorn and Staghorn Coral Natural History

The following discussion of the life history and reproductive biology of threatened corals is based on the best scientific data available, including the Atlantic *Acropora* Status Review Report (*Acropora* Biological Review Team, 2005), and additional information, particularly concerning the genetics of these corals.

Acropora spp. are widely distributed throughout the Caribbean (U.S. - Florida, Puerto Rico, U.S. Virgin Islands (U.S.V.I.), Navassa; and Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Grenada, Guadeloupe, Haiti, Honduras, Jamaica, Martinique, Mexico, Netherlands Antilles, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and Venezuela). In general, elkhorn and staghorn corals have the same geographic distribution, with a few exceptions. The maximum northern extent (Palm Beach County, Florida) of staghorn coral occurrence is farther north than that of elkhorn coral (Broward County, Florida). Staghorn coral commonly grows in more protected, deeper water ranging from 5 to 20 m in depth and has been found in rare instances to 60 m. Elkhorn coral commonly grows in turbulent shallow water on the seaward face of reefs in water ranging from 1 to 5 m in depth but has been found to 30 m depth.

Elkhorn and staghorn corals were once the most abundant and most important species on Caribbean coral reefs in terms of accretion of reef structure. Relative to other corals, elkhorn and staghorn corals have high growth rates that have allowed reef growth to keep pace with past changes in sea level. Both species exhibit branching morphologies that provide important habitat for other reef organisms. Environmental influences (e.g., wave action, currents) result in morphological variation (e.g., length and shape of branches) in both species.

Staghorn coral is characterized by staghorn antler-like colonies with cylindrical, straight, or slightly curved branches. The diameter of staghorn coral branches ranges from 1 to 4 cm, and tissue color ranges from golden yellow to medium brown. The growing tips of staghorn coral tend to be lighter or lack color. The linear growth rate for staghorn coral has been reported to range from 3 to 11.5 cm/year. Today, staghorn coral colonies typically exist as isolated branches and small thickets, 0.5 to 1 m across in size, unlike the vast fields (thickets) of staghorn found commonly during the 1970s.

Elkhorn coral is the larger species of *Acropora* found in the Atlantic. Colonies are flattened to near round with frond-like branches. Branches are up to 50 cm across and range in thickness from 2 to 10 cm, tapering towards the branch terminal. Like staghorn coral, branches are white near the growing tip, and brown to tan away from the growing area. The linear growth rate for elkhorn coral is reported to range from 4 to 11 cm/year. Individual colonies can grow to at least 2 m in height and 4 m in diameter.

Elkhorn and staghorn corals require relatively clear, well-circulated water

and are almost entirely dependent upon sunlight for nourishment through the photosynthetic products of their symbiotic zooxanthellae. Unlike other coral species, neither acroporid species is likely to compensate for long-term reductions in water clarity with alternate food sources, such as zooplankton and suspended particulate matter. Typical water temperatures in which *Acropora* spp. occur range from 21° to 29° C, with the species being able to tolerate temperatures higher than the seasonal maximum for a brief period of time (days to weeks, depending on the magnitude of the temperature elevation). The species' response to temperature perturbations is dependent on the duration and intensity of the event. Both acroporids are susceptible to bleaching (loss of symbiotic algae) under adverse environmental conditions.

Acropora spp. reproduce both sexually and asexually. Elkhorn and staghorn corals do not differ substantially in their sexual reproductive biology. Both species are broadcast spawners: male and female gametes are released into the water column where fertilization takes place. Additionally, both species are simultaneous hermaphrodites, meaning that a given colony will contain both male and female reproductive parts during the spawning season; however, an individual colony or clone will not produce viable offspring. The spawning season for elkhorn and staghorn corals is relatively short, with gametes released on only a few nights during July, August, or September. In most populations, spawning is synchronous after the full moon during any of these 3 months. Larger colonies of elkhorn and staghorn corals have much higher fecundity rates (Soong and Lang, 1992).

In elkhorn and staghorn corals, fertilization and development is exclusively external. Embryonic development culminates with the development of planktonic larvae called planulae. Little is known concerning the settlement patterns of planula of elkhorn and staghorn corals. In general, upon proper stimulation, coral larvae, whether released from parental colonies or developed in the water column external to the parental colonies (like *Acropora* spp.), settle and metamorphose on appropriate substrates. Like most corals, elkhorn and staghorn corals require hard, consolidated substrate, including attached, dead coral skeleton, for their larvae to settle. Unlike most other coral larvae, elkhorn (and presumably staghorn) planulae appear to prefer settling on upper, exposed surfaces, rather than in dark, cryptic ones, at least in a laboratory setting (Szmant and Miller, 2005).

Coral planula larvae experience considerable mortality (90 percent or more) from predation or other factors prior to settlement and metamorphosis (Goreau *et al.*, 1981). Because newly settled corals barely protrude above the substrate, juveniles need to reach a certain size to reduce damage or mortality from impacts such as grazing, sediment burial, and algal overgrowth. It is at this size (approximately 1 cm in diameter) and this age (approximately 1 year) that a settled individual can be considered to have recruited into the population. Recent studies examining early survivorship indicated that lab cultured elkhorn coral settled onto experimental limestone plates and placed in the field had substantially higher survivorship than another spawning coral species, *Montastraea faveolata*, and similar survivorship to brooding coral species (species that retain developing larvae within the parent polyp until an advanced stage) over the first 9 months following settlement (Szmant and Miller, 2005). This pattern corresponds to the size of planulae; elkhorn coral eggs and larvae are much larger than those of *Montastraea* spp. Overall, older recruits (i.e., those that survive to a size where they are visible to the human eye, probably 1 to 2 years post-settlement) of *Acropora* spp. appear to have similar growth and post-settlement mortality rates observed in other coral species.

Studies of *Acropora* spp. sexual recruitment from across the Caribbean reveal two problematic patterns: (1) low juvenile densities relative to other coral species; and (2) low juvenile densities relative to the commonness of adults (Porter, 1987). This suggests that the composition of the adult population is based upon variable recruitment. To date, the settlement rates for *Acropora* spp. have not been quantified.

Few data on the genetic population structure of elkhorn and staghorn corals exist; however, due to recent advances in technology, the genetic population structure of the current, depleted populations are beginning to be characterized. Baums *et al.* (2005) examined the genetic exchange in elkhorn coral by sampling and genotyping colonies from eleven locations throughout its geographic range using microsatellite markers. Results indicate that elkhorn populations in the eastern Caribbean (St. Vincent and the Grenadines, U.S.V.I., Curacao, and Bonaire) have experienced little or no genetic exchange with populations in the western Caribbean (Bahamas, Florida, Mexico, Panama, Navassa, and Mona Island). Mainland Puerto Rico is an area of mixing where elkhorn populations show genetic contribution from both regions, though it is more closely connected with the western Caribbean. Within these regions, the degree of larval exchange appears to be asymmetrical, with some locations being entirely self-recruiting and some receiving immigrants from other locations within their region.

Vollmer and Palumbi (2007) examined multilocus sequence data from 276 colonies of staghorn coral spread across 22 populations from 9 regions in the Caribbean, Florida, and the Bahamas. Their data were consistent with the Western-Eastern Caribbean subdivision observed in elkhorn coral populations by Baums *et al.* (2005). Additionally, the data indicated that regional populations of staghorn separated by greater than 500 km are genetically differentiated and that gene flow across the greater Caribbean is low in staghorn coral. This is consistent with studies conducted on other Caribbean corals showing that gene flow is restricted at spatial scales over 500 km (Fukami *et al.*, 2004; Baums *et al.*, 2005; Brazeau *et al.*, 2005). Furthermore, fine-scale genetic differences were observed among reefs separated by as little as 2 km, suggesting that gene flow in staghorn corals may be limited over much smaller spatial scales (Vollmer and Palumbi, 2007).

Both acroporid population genetics studies suggest that no population is more or less significant to the status of the species. Staghorn coral populations on one reef exhibit limited ability to seed another population separated by large distances. Elkhorn coral populations are genetically related over larger geographic distances; however, because sexual recruitment levels are extremely low, re-seeding potential over long distances is also minimal. This regional population structure suggests that conservation should be implemented at local to regional scales because relying on long-distance larval dispersal as a means of recovery may be unreliable and infeasible. Therefore, protecting source populations, in relatively close proximity to each other (<500 km), is likely the more effective conservation alternative (Vollmer and Palumbi, 2007).

Elkhorn and staghorn corals, like most coral species, also reproduce asexually. Asexual reproduction involves fragmentation, wherein colony pieces or fragments break from a larger colony and re-attach to consolidated, hard substrate to form a new colony.

Reattachment occurs when: (1) live coral tissue on the fragment overgrows suitable substrate where it touches after falling; or (2) encrusting organisms settle on the dead basal areas of the fragment and cement it to the adjacent substrate (Tunnicliffe, 1981). Fragmentation results in multiple colonies (ramets) that are genetically identical, while sexual reproduction results in the creation of new genotypes (genets). Fragmentation is the most common means of forming new elkhorn and staghorn coral colonies in most populations and plays a major role in maintaining local populations when sexual recruitment is limited. The larger size of fragments compared to planulae may result in higher survivorship after recruitment (Jackson, 1977, as cited by Lirman, 2000). Also, unlike sexual reproduction, which is restricted seasonally for elkhorn coral (Szmant, 1986, as cited by Lirman, 2000), fragmentation can take place year-round.

Summary of Comments and Responses

We requested comments on the proposed rule to designate critical habitat for elkhorn and staghorn corals (73 FR 6895; February 6, 2008). To facilitate public participation, the proposed rule was made available on our regional web page and comments were accepted via standard mail, facsimile, and through the Federal eRulemaking portal. In addition to the proposed rule, the draft impacts report supporting NMFS' conclusions under Section 4(b)(2) of the ESA was posted. We obtained independent peer review of both the scientific information and of the Draft 4(b)(2) Report (NMFS, 2007) that supported the proposed rule, and we incorporated the peer review comments prior to dissemination of the proposed rule. Four public hearings were held on the following dates and in the following locations:

1. Tuesday, March 4, 2008, Dania Beach, Florida.

2. Wednesday, March 5, 2008, Marathon, Florida.

3. Tuesday, March 11, 2008, St. Thomas, U.S.V.I./Simulcast Location in Kingshill, St. Croix, U.S.V.I.

4. Wednesday. March 12, 2008, Rio Piedras, Puerto Rico.

We have considered all public comments, and those that are germane to the proposed designation are addressed in the following summary. We have assigned comments to major issue categories and, where appropriate, have combined similar comments.

Comments on the Conservation Goal of the Designation

Comment 1: One commenter suggested that the conservation goal of the critical habitat designation should include survival to juvenile sizes.

Response: We stated in the proposed designation that the essential feature supports successful larval settlement, recruitment, and reattachment of fragments. The species' larvae and newly settled spat are microscopic. It takes approximately 1 year from the time of settlement for the recruit to become visible to the unaided human eye. It is at this point that we can conclude that the offspring has recruited into the population. Therefore, the habitat must be suitable to allow for the offspring to reach this size. It is unclear what the commenter specifically considers as a juvenile, thus we clarify that the conservation goal does include survival to recruitment.

Comment 2: One commenter suggested that we do not know what caused the decline of the species; therefore, we cannot identify the essential feature for elkhorn and staghorn corals. Another commenter questioned the utility of critical habitat, given the seemingly unresolved major threats to the species.

Response: The status review, listing process, and supporting literature have identified several causes of the decline of the species. We determined that disease, temperature-induced bleaching, and hurricanes are the major threats to the species. The ESA and our regulations for designating critical habitat (50 CFR 424) specify that we focus on the essential physical or biological features to support the species' conservation. We determined that the identified essential feature of suitable settlement and reattachment substrate will support the key conservation objective for both species of facilitating increased incidence of successful sexual and asexual reproduction.

Comment 3: One commenter said that, although we identified the conservation goal of critical habitat to be the enhancement of sexual and asexual recruitment, our rule focuses on sexual recruitment.

Response: We determined, based on the species' natural history and the threats facing them, that facilitating increased incidence of successful reproduction, both sexual and asexual, is the key objective to the conservation of these species. We stated in the proposed rule that the feature supporting this objective was " substrate of suitable quality and availability to support successful larval settlement, recruitment, and reattachment of fragments." We realize that the placement of the conjunction "and" may have misled the reader that the conservation objective did not support the recruitment of fragments. We are revising the definition of the feature that supports this objective to clarify this point. The feature is now defined as substrate of suitable quality and availability to support successful larval settlement and recruitment and the reattachment and recruitment of fragments. Sexual recruits and asexual recruits require the same feature to allow for settlement or reattachment, respectively. Therefore, the designation does not focus on sexual recruitment alone; rather, we state that increasing the incidence of both modes of reproduction is essential to the conservation of the species.

Comments on the Definition of the Essential Feature

Comment 4: One commenter stated we failed to appropriately define "consolidated hardbottom" in our definition of the essential feature. A second commenter stated that we should not use the term hardbottom, rather the more appropriate term would be hard substrate.

Response: We acknowledge the need to define these terms precisely as there are several definitions of the term hardbottom. The established definition of hardbottom for the NOAA Coral Reef Conservation Program is substrate formed by the deposition of calcium carbonate by reef building corals and other organisms, or existing as bedrock or volcanic rock usually of minimal relief (*http://www.coris.noaa.gov/glossary*). This definition is more restrictive than what we intended for this designation; so we are revising the term "hardbottom" to "hard substrate," as suggested by the second commenter, to be inclusive of all the suitable substrate within the designation that is essential to the conservation of the species. We are retaining the term "consolidated" in the definition of the essential feature because the hard substrate must be stable to support the conservation objective. A disaggregated hard substrate, such as loose rubble, which can become mobilized and abrade the recruits, would not be of suitable quality.

Comment 5: One commenter stated we needed to clarify that absence of macroalgal cover in our definition of "suitable substrate" does not mean absence of crustose coralline algae (CCA), but refers to macroalgae and turf algae.

Response: The commenter is correct: we are not referring to CCA in this instance. Further, as we discussed in the proposed rule, studies have shown that larvae tend to prefer substrate covered with CCA for settlement. The commenter also correctly pointed out that not only fleshy macroalgae, but also turf algae, prevent the settlement of larvae and the reattachment of fragments. Therefore, we are adding the word "turf" to the definition of the essential feature.

Comment 6: Several commenters stated that no reefs exist without macroalgae and sediment; thus no reef would meet the identified definition of critical habitat. One commenter added that conditions change over time and we should add the word "persistent" before "fleshy macroalgae".

Response: Coral reef ecosystems are a mosaic of several different substrate types, including consolidated hard substrate, macroalgae, unconsolidated sediment, and seagrass. Although few reefs exist that are wholly lacking in some macroalgae or sediment cover, at a scale appropriate to a coral larva or coral fragment, a reef must contain available hard substrate for the settlement, attachment, and recruitment. Without the available substrate, the area would cease to be a coral reef because reef accretion would not be possible. The identified essential feature is contained within the specific areas identified as critical habitat. It is not necessary for the entire area or even entire reef to be lacking in macroalgae to designate it as critical habitat.

Regarding the persistence of the essential feature, we acknowledge that conditions within the reef ecosystem may change over time. However, regardless of the persistence of the macroalgae, if the substrate is covered with macroalgae at the time of potential settlement, reattachment, and recruitment, the substrate would not be of suitable availability to support the conservation objective. Thus we are not revising the definition of the essential feature to include the word "persistent.≥

Comment 7: One commenter requested reef covered with macroalgae not be exempted from critical habitat.

Response: Reefs that contain macroalgae are not exempted from critical habitat. While neither coral larvae nor coral fragments can attach to substrate that is covered with macroalgae, and substrate covered with macroalgae does not provide substrate of suitable availability to support the conservation of the species, when these areas are part of the coral reef ecosystem meeting the definition of critical habitat (which as explained above consists of a mosaic of several different substrate types, including consolidated hard substrate, macroalgae, unconsolidated sediment, and seagrass), they are not exempted from the designation.

Comment 8: One commenter stated that parrotfish, other herbivorous fishes, and long-spined sea urchin are biological features essential to the conservation of listed corals (i.e., essential features) because these herbivores reduce the abundance of macroalgae through grazing.

Response: In the proposed rule, we acknowledged that the shift in benthic community structure from the dominance of stony corals to fleshy algae on Caribbean coral reefs is generally attributed to the greater persistence of fleshy macroalgae under reduced grazing regimes due to human overexploitation of herbivorous fishes (Hughes, 1994) and the regional mass mortality of the herbivorous long-spined sea urchin in 1983–84. However, the herbivores themselves are not the essential feature for elkhorn and staghorn corals. Rather, herbivores mediate the availability of the essential feature, similar to the effect nutrients have on the growth of macroalgae.

Comment 9: One commenter suggested "consolidated hardbottom or dead coral skeletons exposed to sunlight, free from sediment, not preempted by other attached organisms, and within 30 m of the water surface" as an alternate way to define the essential feature to make the rule more easily understood.

Response: We believe that our definition encompasses the concepts in the suggested alternative definition. We do not explicitly state that the substrate must be exposed to sunlight, because only artificial structures (e.g., docks or bridges) would preempt the transmission of sunlight to the substrate, given the shallow depths of the areas included in the designation. As discussed in the response to Comment 13, existing federally authorized or permitted man-made structures do not provide the essential feature. Thus, all natural consolidated hard substrate in depths less than 30 m are likely exposed to some sunlight. We define the essential feature as being free from fleshy or turf macroalgae cover, rather than all attached organisms because algae in excessive abundances preempts larva and fragments from attachment and recruitment. No other species is known to be susceptible to proliferation that results in the preemption of substrate. Other reef organisms are naturally occurring and do not necessarily interfere with settlement, recruitment, or reattachment of elkhorn and staghorn corals. Therefore, we believe our definition is sufficient to describe the essential feature for elkhorn and staghorn corals' conservation.

Comment 10: Two commenters requested the essential feature also include any habitat that could be recovered or rehabilitated.

Response: ESA Section 4(a)(3)(i) defines critical habitat, in part, as occupied areas that contain features essential to a species' conservation. We do not have the authority to designate areas where features may exist in the future once habitat is recovered or rehabilitated.

Comment 11: Several commenters stated that the proposed designation fails to account for essential features other than suitable substrate and specifically suggested that we add "suitable water quality and temperature" as essential features. Some of these commenters pointed to statements in the Status Review for the two corals that noted these species' need for "relatively clear, well-circulated water," "sunlight for nourishment," "optimal water temperature," and "near oceanic salinities." Some of the commenters went on to state that the combined stresses of warmer temperatures, rising sea levels, and ocean acidification should be considered as part of the corals' need for good water quality in the critical habitat designation.

Response: We stated in the Status Review that the species' general environmental requirements are those summarized by the commenter. As stated in the proposed critical habitat rule, other than the substrate feature, we determined that no other facet of the corals' environment is appropriate to include as a basis for the critical habitat designation. Rather, we determined that water temperature and aspects of water quality are more appropriately viewed as sources of impacts or stressors that can harm the corals directly. For example, the corals can survive a range of water temperatures, and they exhibit stress at temperatures above and below this range. Similarly, corals exist and function within a range of oceanic acidity levels; if the water becomes too acidic or too alkaline, conditions are unsuitable for secretion of an aragonitic skeleton. However, for elkhorn and staghorn corals, we cannot identify any specific values, ranges, or thresholds for these or other water quality parameters that make them essential to the conservation of these corals. Consultations on whether a proposed action may affect "suitable water quality or temperature" would necessarily be limited to determining whether the

activity would cause harm to the corals, and only provides for analysis under the jeopardy prong. We therefore did not adopt the suggestion to include "suitable water quality and temperature" as essential features. Finally, we stated in the proposed rule that some environmental features are subsumed within the definition of the substrate essential feature. In this final rule, we define "substrate of suitable quality and availability" as "consolidated hard substrate or dead coral skeleton that is free from fleshy or turf macroalgae cover and sediment cover." Substrate free from macroalgae cover and sediment cover would encompass water quality sufficiently free of nutrients and sediments. Therefore, Federal activities that impact water quality by increasing nutrients or sediments may affect the essential substrate feature, and would require ESA section 7 consultation.

Comment 12: One commenter stated that, in identifying the example list of existing man-made structures that do not provide the essential feature, the proposed rule lacked clarity in its description of maintained channels. The commenter requested that we provide an adequate description of what is considered to be a maintained channel (e.g., would it include channel floor, channel walls and any authorized structures associated with the channel like jetties and groins?).

Response: In identifying existing man-made structures that do not provide the essential feature essential to the corals' conservation, our intention was to inform the public that Federal actions, or the effects thereof, limited to these areas would not trigger section 7 consultation under the ESA, unless they may affect the species and/or the essential feature in adjacent critical habitat. In the preamble of this final rule, we are revising the language describing the structures to more clearly reflect our intention (see Specific Areas Within the Geographical Area Occupied by the Species). The statement referring to these structures has been revised to: "All existing (meaning constructed at the time of this critical habitat designation) Federally authorized or permitted man-made structures such as aids-to-navigation (ATONs), artificial reefs, boat ramps, docks, pilings, maintained channels, or marinas do not provide the essential feature that is essential to the species' conservation." To further inform the public, we are specifically not including as part of the critical habitat all existing federally authorized navigation channels and harbors because they do not provide the essential feature.

Comment 13: One commenter requested that we add regulatory language to the critical habitat designation to specifically list those natural and artificial features that do not provide the essential feature.

Response: In the regulatory text, we define the essential feature for elkhorn and staghorn corals as substrate of suitable quality and availability to support larval settlement and recruitment, and reattachment and recruitment of asexual fragments. "Substrate of suitable quality and availability" is defined as natural consolidated hard substrate or dead coral skeleton that is free from fleshy or turf macroalgae cover and sediment cover. We believe this definition is precise enough that natural and artificial features that do not constitute the essential feature are plainly discernable. This type of information is included in the preamble to this final rule to provide context and explanation of the features that do and do not provide the essential feature, but is not intended to be exhaustive, as that would not be practicable.

Comments on the Data Supporting the Designation

Comment 14: Two commenters submitted data containing the locations of occurrences of the species in Puerto Rico and the U.S.V.I.

Response: We appreciate the additional data and have referenced it in the preamble of the designation in the appropriate section. However, the data do not change the geographical range occupied by the species. Further, the data do not change the designation of the critical habitat areas around Puerto Rico and the U.S.V.I.

Comment 15: Two commenters stated we should closely scrutinize the quality of data giving rise to the geographic extent of occupied areas. The commenters were specifically interested in the data collection methodologies as well as the number and location of elkhorn or staghorn coral documented in the waters north of Boca Raton.

Response: The data that we used to identify the occupied area of the species has come from various sources, including literature, researchers, resource agencies, and local divers. Those data submitted by local divers have all included photos of the species and a latitude and longitude of the location where the species was found. We are confident that those who have submitted data are proficient enough in species identification, as evidenced by the photos, and use of a geographic positioning system. Further, the data from the northernmost locations of the species have been submitted by a county natural resource agency employee and an environmental consultant. Though there are few data from the northernmost portion of the species' ranges, this is likely due to the relatively recent expansion of reef research into this geographic area. We believe the quality of the data that we have used to identify the area occupied by the species is the best available and sufficient for the purposes of designation.

Comment 16: One commenter questioned the potential errors in geographical information system (GIS) data developed using aerial photos from a one-time snapshot at an acre pixel scale. The commenter also questioned how we will address presence/absence of the essential feature when it comes time for a consultation.

Response: We fully acknowledge that the GIS data may be imperfect due to the age and methods of collection, but it is the best available. We relied on the data to identify discrete areas that contain the essential feature interspersed among the other natural features of the coral reef ecosystem, including seagrass, macroalgae, and unconsolidated sediment. At the time of consultation, the Federal agency may use all existing data or choose to collect new data to determine whether its action may affect the essential feature.

Comments on the Boundaries of the Designation

Comment 17: We received several comments suggesting that, by designating the north boundary of the Florida area at the boundary between Martin and Palm Beach counties, we included areas outside of the historic or current range for elkhorn and staghorn coral and areas that do not provide for the conservation of the species.

Response: We acknowledge that the northern extent of the ranges of these species is south of the northern Palm Beach County line and, upon additional examination, were able to more accurately designate the northern boundary of the Florida area at Boynton Inlet, Palm Beach County, at 26° 32′ 42.5″ N. We are modifying the northern boundary accordingly in this final rule. We have no knowledge of either species of *Acropora* historically or presently occurring north of this boundary.

Comment 18: Several commenters stated that these corals do not grow in the intertidal zone and requested that we consider mean low water (MLW) as the shoreward boundary rather than mean high water (MHW).

Response: We acknowledge that these species do not grow in the intertidal

zone. The territorial sea baseline is defined at 33 CFR 2.20 as "the mean low water line along the coast of the United States", which further notes that charts depicting the baseline are available for examination. Therefore, we are changing the shoreward boundary to MLW in this final rule.

Comment 19: Two commenters stated that the nearshore surf zones of Palm Beach, Broward, and Miami-Dade Counties are areas with high sediment movement, suspension, and deposition levels. Hard bottom areas found within these nearshore surf zones are ephemeral in nature and are frequently covered by sand, thus not meeting the definition of the proposed essential feature. The commenter requested the shoreward boundary of the Florida area be moved offshore in Palm Beach, Broward, and Miami-Dade Counties to at least the 1–5 meter depth contour.

Response: Conditions along the east coast of Florida in the nearshore surf zone are not conducive for the identified conservation goal of increased sexual and asexual recruitment. The hydrodynamic conditions in this portion of the species' range are very different from those further south in Florida and around islands in the Caribbean, like Puerto Rico and the U.S.V.I. Additionally, upon additional review of the current and historic occurrence data for the two species along the east coast of Florida, there were no occurrences in water less than 6 feet (1.8 m) deep. Therefore, in this final rule, we are changing the shoreward boundary for the Florida area to the 6–ft (1.8 m) contour from the north boundary at Boynton Inlet south to Government Cut, where it moves inshore to MLW. Government Cut was identified as the southernmost boundary where there were no occurrences of either species in less than 6 feet (1.8 m) of water. There are occurrences of the species in less than 6 feet (1.8 m) of water south of Government Cut, thus indicating that hydrodynamic conditions are suitable for recruitment in shallower waters.

Comment 20: One commenter stated that the species does not occur in the Gulf of Mexico and suggested the boundary of the Florida area be changed to the South Atlantic Fishery Management Council (SAFMC) boundary.

Response: We acknowledge that the SAFMC boundary is the appropriate boundary in the Florida area given the occupied range of the coral. Generally, the SAFMC boundary separates the Gulf of Mexico from the Atlantic Ocean. In this final rule, we are changing the northern boundary of the Florida Keys portion of the Florida area to coincide with the boundary between the SAFMC boundary as defined at 50 CFR 600.105(c).

Comment 21: One commenter stated that, based on development trends and the associated anthropogenic-induced impacts, it does not appear reasonable to designate critical habitat within 100 yards (91.4 m) of any platted and improved subdivision with roads, utilities, improved shorelines, etc.

Response: The commenter does not provide a biological basis for the comment and does not describe how the area would not provide for the conservation of the species. Rather, if the "anthropogenic-induced impacts" the commenter identified could result in impacts to the essential feature and there is a Federal nexus, the species could benefit from consultation with us to identify ways to reduce the impact to the essential feature.

Comment 22: One commenter stated that *Acropora* spp. have not been documented any closer than approximately 200 yards (183 m) from the shore on the Atlantic Ocean side in the Upper and Middle Florida Keys.

Response: The commenter is correct that we do not have specific data of the species occurring within the distance stated. While that area has not been surveyed specifically for *Acropora* spp., the area is considered occupied given the range of this species and because the habitat may be conducive for the species. Staghorn coral particularly is often found in the back reef and lagoonal areas of the coral reef ecosystem, the habitat that occurs in the stated distance from shore. Therefore, we have no basis to designate a different shoreward boundary within the Upper and Middle Florida Keys.

Comment 23: One commenter stated that there have been no documented acroporid colonies within any portion of Biscayne Bay, including residential canal systems or tributaries to Biscayne Bay or the Intracoastal Waterway.

Response: Per textual description in the proposed rule and the correction to the maps in the proposed rule (73 FR 12068; March 6, 2008), neither Biscayne Bay nor the Intracoastal Waterway is within the proposed critical habitat.

Comment 24: Two commenters stated that Monroe County and Miami-Dade County typically do not appear to be suitable for colonization of *Acropora* spp. within the residential canals and man-made basins due to poor water quality. These systems usually exhibit high turbidity, suspended sediments, low water clarity, poor flushing/circulation, and nutrient/freshwater influxes from upland runoff.

Response: As stated in this rule, all existing federally authorized or permitted man-made structures, including canals and marinas, do not provide the essential feature; and therefore, are not included in the designation.

Comment 25: One commenter suggested that we more clearly map the designated area's inland boundaries as few people are familiar with the COLREGS line. Another commenter requested that we define the COLREGS line.

Response: The COLREGS line is defined as the lines of demarcation delineating those waters upon which mariners shall comply with the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS) and those waters upon which mariners shall comply with the Inland Navigation Rules. The waters inside of the lines are Inland Rules waters. The waters outside the lines are COLREGS waters. So, in other words, the COLREGS line separates inland from marine waters. We used the COLREGS line because it is depicted on all navigational charts and defined at 33 CFR Part 80. Last, the overview maps provided in the rule are provided for general guidance purposes only, and not as a definitive source for determining critical habitat boundaries.

Comment 26: One commenter stated that the occurrence of the essential feature within the Dry Tortugas (protected by the National Park Service) is questionable as shown by its geological history.

Response: The species have both been documented within the Dry Tortugas, and the essential feature is present. Therefore, the area remains within the designation.

Comment 27: One commenter questioned why the area between the westernmost Florida Keys and the Dry Tortugas was included in the designation. Specifically, the commenter provided information on the area around the Marquesas Keys, which demonstrated that the species do not presently occur, and have never been present in this area, based on the geologic record.

Response: We appreciate the commenter providing us with this information. Additionally, upon further review of the NOAA Biogeography Team's Benthic Habitats of the Florida Keys data, there are very few, small areas that contain the essential feature between Boca Grande Key (approximately 12 miles (19.3 km) west of Key West) and the Dry Tortugas. However, based on the information provided by the commenter, these areas currently do not, and have never,

supported the species. The intent of critical habitat is to provide for the conservation of the species. Based on the data we had at the time of the proposed designation, we included the area between Boca Grande Key and the Dry Tortugas because we believed the area contained the essential feature and would provide for the conservation of the species. With the new information we received and reexamination of information used in developing the proposed rule, we determined that this area does not contain the feature essential to the conservation of the species. Therefore, we are not designating this area as critical habitat in this final rule. The western boundary of the Florida Keys portion of the Florida area will terminate at 82 W longitude. The Dry Tortugas portion of the Florida area will be MLW to the 98–ft (30 m) contour with an eastern boundary of 82 45' W longitude. A full description of the modified Florida area is provided in the preamble and regulatory language of this rule.

Comment 28: Several commenters expressed concern about the areas within the Florida area of the designation that do not contain the essential feature and thus are unsuitable to provide for the conservation of the species. A few commenters requested that we specifically survey and more finely map locations of the essential feature.

Response: The essential feature can be found unevenly dispersed throughout the Florida area due to trends in macroalgae coverage and naturally occurring unconsolidated sediment and seagrasses dispersed within the reef ecosystem. However, as described in the response to Comment 27, we are not designating a large portion of the proposed Florida area based on new information that the area does not contain the essential feature. Within the remainder of the Florida area, larger numbers of smaller specific areas could not be identified because the submerged nature of the essential feature, the limits of available information on the distribution of the essential feature, and limits on mapping methodologies make it infeasible to define the specific areas containing the essential feature more finely than described herein. The ESA requires us to designate critical habitat to the maximum extent prudent and determinable, based on the best information available.

Comment 29: One commenter requested that we identify all roads and bridges within the textual description and on the maps for critical habitat, as has been done for other terrestrial species. Further, the same commenter requested that bridges be added to the list of existing man-made structures that do not provide the essential feature.

Response: We have designated critical habitat using known boundaries that are applicable to the marine ecosystem in which the species occur. We do not believe that it would be more informative to the public to identify roads and bridges on maps of the critical habitat areas. While we agree that bridges do not provide the essential feature, the list of existing man-made structures that do not provide the essential feature is not exhaustive; it is provided to give the public examples of the types of structures to which we are referring.

Comment 30: One commenter stated that we should designate all areas occupied by elkhorn and staghorn corals in Florida - especially Florida Bay - as critical habitat. The commenter also expressed concern about the quality of water entering Florida Bay from the Everglades, and stated that including Florida Bay in the critical habitat designation would benefit corals living there.

Response: As stated in the proposed rule, the critical habitat designation for threatened corals focuses on substrate of suitable quality and availability to support successful sexual and asexual reproduction of the two corals. While hardbottom does exist within Florida Bay, neither elkhorn nor staghorn coral has ever been observed or documented living in this area, making it unlikely that the larvae or fragments of either coral species would settle on or reattach to hardbottom located within Florida Bay. Therefore, we do not believe that any hard substrate in Florida Bay would contribute to the conservation objective for this designation - facilitating increased successful reproduction.

Comment 31: One commenter recommended that the designation be limited and exclude "areas with documented historical low densities, or documented current and historical absence of the species and essential feature". The commenter provided specific references to support the comment (Goenaga and Cintron, 1979; "Benthic Habitats of Puerto Rico and the U.S. Virgin Islands" by NOAA's Biogeography Program; and two maps of occurrences of *Acropora* in Miami-Dade and Monroe Counties).

Response: As stated in the response to Comment 27, we reevaluated the NOAA benthic characterization data, which supported our identification of areas that contain the essential feature. The reevaluation yielded the modification of the Florida critical habitat area based on the documented current and historical absence of the species or essential feature, or both. The data contained in the two maps provided by the commenter were considered in the proposed rule and did not support the identification of any small specific areas that do not contain the essential feature. The reevaluation of the data did not support revision of the Puerto Rico or U.S.V.I. areas. As discussed in the Geographical Areas Occupied by the Species section of this rule, both species have been documented to occur, historically and presently, surrounding the main island and offshore cays within these areas. Goenaga and Cintron's paper is an inventory of the Puerto Rican reefs from the late 1970s. Although we have considered the information provided by the commenter, it does not support the identification of areas that do not contain the essential feature; thus, we are not revising this final rule on the basis of this information.

Comment 32: Two commenters requested exclusions and exemptions for the Port of Key West to provide for normal channel and harbor activities. A buffer around the Port was also requested.

Response: As stated in the response to Comment 13, all existing federally authorized and permitted navigation channels and harbors, which include the Port of Key West, are not included in the critical habitat, because they do not contain the essential feature. The ESA does not allow for the identification of buffers around areas not included per se. Areas that do not contain the essential feature do not meet the definition of critical habitat and therefore may not be designated. Also, areas may be excluded on the basis of economic, national security, or other relevant impacts. The area surrounding the Port of Key West meets the definition of critical habitat, and we did not identify any basis for exclusion of this area.

Comment 33: One commenter stated that we did not mention the offshore islands and cays in the U.S.V.I. as being part of the designation.

Response: As stated in the regulatory language in the proposed rule and this rule, all areas from MLW to the 98–ft (30 m) contour within the U.S.V.I. are included in the designation, which would include the offshore cays and islands.

Comment 34: One commenter requested buffer zones for critical habitat in order to avoid potential indirect impacts for any kind of project that would be developed very close to those critical habitats. A second commenter requested that we identify

the maximum distance from critical habitat a project may be to avoid direct or secondary impacts to the essential feature.

Response: While the ESA does not provide for the identification of buffer zones around critical habitat, Federal agencies authorizing, funding, or carrying out activities that occur outside critical habitat, regardless of distance from critical habitat, that may have effects to the essential feature within critical habitat must conduct an ESA section 7 consultation. Conversely, actions that have no direct or indirect effects on the essential feature - even actions within or immediately adjacent to critical habitat - would not require consultation based on critical habitat.

Comment 35: Several commenters questioned our assertion that we were only designating areas that met the definition of occupied critical habitat, because there are other substrate types interspersed with the essential feature within the designation and because there are particular sites where the corals are not present. Another commenter questioned our interpretation of "geographical area occupied" to mean the range of a species at the time of listing.

Response: We have long interpreted "geographical area occupied" in the definition of critical habitat to mean the range of the species at the time of listing (45 FR 13011; February 27, 1980). The term "specific areas" in the definition of critical habitat refers to areas on which the feature essential to a species' conservation are found. The designated critical habitat areas fall within the geographical area occupied by both species, and the essential feature is found on these areas. We have not identified any areas outside the geographical area occupied by the species that are essential for their conservation. Therefore, we did not designate any unoccupied areas for elkhorn and staghorn corals.

Comment 36: One commenter suggested that we designate critical habitat to allow for shifts in distribution of the species and adaptation in response to global warming.

Response: The ESA does not provide for designation of critical habitat based upon speculation about expansions into habitats or ranges never occupied by the species. While the definition of critical habitat does include areas outside the geographical area occupied by the species at the time of listing, the habitat would have to be essential to the conservation of the species. As determined through the listing of elkhorn and staghorn corals, there has been no range constriction for either species. The species currently occupy their entire historical ranges, only in lower abundances. There is no evidence that any areas outside the historical ranges of the species have suitable conditions to support the species.

Comments on ESA Section 7 Consultations and Economic Impacts

Comment 37: One commenter stated that the rule erroneously mentions only formal consultations but does not analyze informal consultations, which impact Federal agencies also.

Response: In the 4(b)(2) Report, we base our impact analysis on consultations conducted in the last 10 years that occurred in the designated areas and that may affect the designated critical habitat, regardless of whether the consultation was concluded formally or informally. We then assumed that all future consultations would be formal, acknowledging that assumption would result in an overestimation of impacts. Therefore, we did not omit informal consultations from the impacts assessment.

Comment 38: One commenter requested we specifically identify other regulations that address modifications, including those pertaining to water quality, that may be required to avoid destroying or adversely modifying the essential feature and give examples of when compliance with these other regulations would eliminate the need for ESA section 7 consultation.

Response: In our Draft 4(b)(2) Report, we identified potential project modifications that may be required to avoid destruction or adverse modification of critical habitat. Several of the potential project modifications, such as turbidity controls and conditions monitoring, are currently required by other existing regulations, such as a Clean Water Act (ESA) section 404 permit. We intended this example to illustrate that the cost of implementing these project modifications would not be solely attributable to the critical habitat designation; it was not our intention to suggest that ESA section 7 consultation would not be required if the project modification were required by another regulation. The ESA requires all Federal agencies to consult on their actions that may affect critical habitat regardless of any other regulations that may be applicable to the action. It is possible that an action may be modified by another regulatory requirement that results in removing all possible effects to critical habitat. In this case, ESA section 7 consultation would not be necessary. We have not evaluated every water quality standard or National Pollution Discharge Elimination System (NPDES) permit to determine the effects of those Federal actions on critical habitat. It is the responsibility of the Federal action agency to determine the effects of its action on listed species and designated critical habitat. Therefore, we cannot identify specific water quality standards or NPDES conditions that do not affect critical habitat.

Comment 39: The U.S. Army Corps of Engineers (COE) commented that we underestimated the number of consultations resulting from COE regulatory projects that may affect critical habitat.

Response: During discussions with the COE as we developed this final rule, we clarified that projects occurring within (and whose effects are limited to) existing Federally authorized or permitted channels or harbors would not result in consultation because these areas do not contain the essential feature. As a result of these discussions, we continue to rely on the consultation data provided in the draft 4(b)(2) report and use this information in the impacts analysis in the final 4(b)(2) report.

Comment 40: The COE stated that we underestimated the number of Operation and Maintenance Dredging Program consultations due to the existence of the Biological Opinion on "[t]he continued hopper dredging of channels and borrow areas in the southeastern United States," which covers all maintenance dredging of Federal channels with the use of a hopper dredge. The COE said that new individual consultations would be necessary for each maintenance event.

Response: The referenced Biological Opinion was captured in our database query and included in our impact analysis in the 4(b)(2) Report. The COE has reinitiated consultation with us for that action; therefore, the effects of all the events covered in that consultation will be considered in one consultation. The data we used included the projection of this consultation and did not underestimate the number of consultations. Moreover, as stated above, all federally authorized or permitted navigation channels are not included in the designation; thus the analysis in this reinitiated consultation will be limited to turbidity and sediment effects to areas adjacent to the channels that may contain the essential feature.

Comment 41: One commenter said our statement that "no categories of Federal actions would require consultation in the future solely due to the critical habitat designation" is incorrect. The commenter said that the

critical habitat designation is "everywhere".

Response: Our statement referred to categories of activities and not individual actions. We discussed this distinction at length in the Draft 4(b)(2) Report. The categories discussed in the 4(b)(2) Report were all determined to be capable of affecting both critical habitat and the corals themselves; activities that could adversely affect the corals would require consultation even if critical habitat were not designated.

Comment 42: One commenter questioned whether Federal agencies would have to consult on their actions if the species were present, but the project was not within the critical habitat designation.

Response: Yes, as discussed in the response to Comment 41, the responsibility for Federal agencies to consult on their actions that may affect the species initiated with the listing of the species on May 9, 2006. The species are listed wherever they occur, regardless of a critical habitat designation.

Comment 43: One commenter stated that our statement that Florida will be affected, but the Caribbean will be relatively unaffected, reflects the ignorance of the agency regarding Caribbean resources and the level of development in the islands. The commenter said the ignorance of the agency and those who wrote all documents related to this listing, not just the critical habitat rule, is further demonstrated by the statement that the rule will have little impact on dock construction because most dock construction takes place in canals. This may be the case for Florida, but the Caribbean does not have man-made canals unless they are excavated in inland marinas in areas containing salt ponds. coral reefs, and seagrass beds.

Response: Our Draft 4(b)(2) Report used the best available data to estimate potential economic impacts resulting from the designation. Consultations on dock construction are captured in our data under the category of COE-permitted construction activities. The data from the last 10 years were: 235 consultations in Florida on COE-permitted construction activities; 75 consultations in Puerto Rico on COE-permitted construction activities; and 25 consultations in the U.S.V.I on COE-permitted construction activities. These data indicate that Florida had more than twice the amount of consultations in the Caribbean; thus, the impacts to Florida from marine construction activities would be larger as a result of the designation.

We acknowledge the difference in the physical nature of the coast between Florida and the Caribbean. The Florida coastline is highly altered, and most dock construction occurs in man-made canals. Alternatively, the islands of Puerto Rico and the U.S.V.I. have a greater proportion of natural shoreline along which docks may be constructed. Further, dock construction projects are not likely to result in large impacts to critical habitat necessitating large project modifications due to: (1) the typically small action area of docks; (2) the preference for constructing docks in unconsolidated sediment to minimize the difficulty and cost of driving piles into consolidated rock; and (3) the relatively inexpensive measures to minimize impacts through essential feature avoidance and turbidity controls. Further, even given the differences in the physical nature of the shorelines, the impact of project modifications to dock construction projects due to the critical habitat designation in the Caribbean will not solely be the result of the critical habitat designation. The ESA listing and existing regulations, such as the CWA and Magnuson-Stevens Fishery Conservation and Management Act (MSA), would likely require the same avoidance and minimization measures for elkhorn and staghorn corals and other species of corals; thus, many of the costs would be coextensive with these regulations and not solely a result of the critical habitat designation.

Comment 44: One commenter stated that because we identified artificial reefs as an existing man-made structure that does not provide the essential feature, there may be an impact to projects that are required to construct artificial reefs for mitigation under the CWA regulatory programs. Further, the commenter objected to our conclusion that artificial reefs cannot serve as habitat for elkhorn and staghorn corals.

Response: The definition of critical habitat is "the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." Because there is sufficient natural hardbottom existing to provide for the conservation of the species, artificial reefs are not essential to the conservation of the species. We identified artificial reefs in the list of existing man-made structures that do not provide the essential feature to inform the public that activities that would affect only artificial reefs would not require ESA section 7 consultation. However, that identification in no way states whether artificial reefs should or should not be prescribed as mitigation for a particular activity under the CWA or MSA.

Comment 45: One commenter requested that we ensure that the critical habitat designation does not unduly restrict recreational boating in the region. The commenter also requested that our economic analysis recognize that the economic value of coral reefs is only made possible by the preservation and promotion of public vessel access.

Response: Nothing in this rule or the 4(b)(2) Report states that boater access will be restricted within critical habitat. As stated in the proposed rule, the primary impacts of a critical habitat designation result from the ESA section 7(a)(2) requirement that Federal agencies ensure their actions are not likely to result in the destruction or adverse modification of critical habitat. Furthermore, a critical habitat designation does not result in the creation of closed areas, preserves, or refuges. There are no individual prohibitions on any activities within critical habitat. The transit of vessels through or anchoring of vessels in areas designated as critical habitat is not prohibited.

The 4(b)(2) Report acknowledges the economic benefit coral reef associated tourism provides. The absolute value related to the boating component of that benefit can not be extrapolated from existing data. However, nothing in the rule or the 4(b)(2) Report is contrary to the supposition that recreational boating contributes to the economic benefit coral reefs provide.

Comment 46: One commenter stated that we should clarify our intentions with respect to secondary impacts from water access projects outside the critical habitat and vessel operations over critical habitat. The commenter recommended we either include language in the preamble and in subsequent guidelines and memoranda generally stating that certain secondary impacts, such as vessel operation, from facilities not located in a critical habitat area are too de minimis to affect the species.

Response: In our proposed designation and Draft 4(b)(2) Report, we did not identify normal vessel operation as an activity that would affect critical habitat.

Comment 47: One commenter stated that the proposed designation may preclude the bypassing of sand from inlets to down drift eroding beaches in

southeast Florida, requiring alternate sites on which to place the sand. This may result in increased costs from the acquisition of disposal lands.

Response: As stated in the response to Comment 20, we have moved the inshore boundary of the Florida critical habitat area to the 6 ft (1.8 m) contour. Therefore, most beaches along the east coast of Florida are no longer directly abutted by critical habitat. Even in areas where beaches may abut critical habitat, the project would only have to undergo ESA section 7 consultation for critical habitat if the essential feature were present and the project were to meet the "may affect" threshold. Even in that event, the project would not be precluded based on the presence of the essential feature and the potential for affecting it. The project would undergo consultation, and modifications appropriate for the specifics of the project to reduce the effect of the project on critical habitat may be implemented. Only in the rare instance where a proposed project was expected to result in destruction or adverse modification of critical habitat would the project be precluded, if no reasonable and prudent alternatives (RPA) were available.

Comment 48: One commenter stated that using the "Interim *Acropora* Survey Protocol for Section 7 Consultation" to survey disposal areas for inlet management projects within critical habitat was too cost prohibitive. Another commenter requested that NMFS specifically identify survey costs. One other commenter stated that requiring other agencies or the public to locate the essential feature is not consistent with the ESA.

Response: The Interim *Acropora* Survey Protocol for Section 7. Consultation is a suggested survey protocol to determine if elkhorn or staghorn is present within the action area of a Federal project. It was never intended to be a survey protocol for critical habitat. Because the need to survey for the species is a result of the listing, the associated cost would also be a result of the listing. While these surveys would also need to determine whether the hardbottom substrate PCE is present as a result of this designation, the cost of these surveys is at least partially coextensive with the listing. In addition, other existing State and Federal regulations require applicants to determine the extent of impact to benthic resources, and the benthic resources in a project area can be determined by using various survey methods. Pursuant to the ESA, it is the responsibility of the action agency to determine, on the basis of the best scientific information available, whether its action may affect the listed species or the critical habitat. Please see the response to Comments 13 and 20 explaining why few inlet management projects would be included in the Florida area.

Comment 49: One commenter stated concern over the effect of beach renourishment projects that do not require a Federal permit because there is no in-water work. A second commenter stated concern about the effects of beach renourishment and requested less destructive techniques.

Response: The commenter is correct that non-Federal projects are not subject to ESA section 7 consultation, and the ESA does not prohibit individuals from affecting critical habitat. However, if an activity occurs on land and has effects in the waters of the United States, such as discharges of sediments or other pollutants, a Federal permit may be required for that activity, potentially under the CWA or other statutes, depending on the location. Such permits would constitute a Federal agency action requiring a section 7 consultation on affected species listed under the ESA; the effects of such a project on critical habitat would be analyzed through a biological opinion resulting from the consultation. The consultation may result in modifications to the project to reduce the impact on the critical habitat.

Comment 50: Two commenters stated that there would be economic impacts associated with the loss of shoreline protection resulting from the designation's impact on shoreline protection and beach renourishment projects by prohibiting the placement of sand along eroded beaches.

Response: We did not include the economic impact associated with loss of shoreline protection as an impact of the designation, because we do not foresee the designation prohibiting the placement of sand along beaches. The purpose of ESA section 7 consultation is to ensure the Federal activity does not result in the destruction or adverse modification of the designated critical habitat, while still meeting the objectives of the project. While beach renourishment was identified as an activity that may be affected by the designation, it is not certain that every beach renourishment project would result in destruction or adverse modification. Rather, as stated in the 4(b)(2) Report, with the implementation of modifications already required by existing regulations, beach renourishment projects may not result in large impacts to critical habitat.

Comment 51: One commenter had several comments on how the designation would affect bridge projects, including maintenance, replacement, and new construction. The commenter requested clarification on the types of activities that would require consultation on critical habitat, specifically since Table 20 of the Draft 4(b)(2) Report did not identify "Bridge Repair" as a category of activity requiring ESA section 7 consultation for critical habitat. The commenter stated that there would be project costs and delays to determine if the species or essential feature were present.

Response: As stated in the response to Comment 13, all existing, federally authorized or permitted structures do not provide the essential feature for elkhorn and staghorn corals. Therefore, if the specific "Bridge Repair" activity only involved modifications to the existing structure and there were no effects to the essential feature, no consultation for critical habitat would be required. If the project were to include the construction of a new structure and that construction may affect listed species or critical habitat, the standard ESA section 7 consultation requirements would apply. Consultation for effects to elkhorn or staghorn coral resulting from the new construction would be required due to the listing whether or not critical habitat is designated.

Comment 52: One commenter requested we revise the 4(b)(2) Report to include the costs of anticipated measures and best management practices resulting from the designation.

Response: The Final 4(b)(2) Report includes the best available information on the costs of the identified project modifications. We did not receive any specific information during the comment period to alter the cost estimates of any of the identified project modifications; thus the Final 4(b)(2) Report includes the costs expected to result from the designation.

Comment 53: One commenter stated considerations should be given to the economic effect of the critical habitat designation; the designation should especially consider any disproportionate effect on small businesses.

Response. In the final regulatory flexibility analysis (FRFA), we state that small entities may be affected by the designation; however, there is no indication that those affected by the designation would be limited to, nor disproportionately comprised of, small entities. Only those small entities that receive Federal funding or authorization for their activity, which may affect critical habitat, would be affected. We specifically requested comment on

impacts to small entities but did not receive any information during the comment period to assist in refining our analysis presented in the IRFA.

Comment 54: Two commenters stated that the designation would negatively impact Federal projects that would need to be implemented in response to a major storm or hurricane, such as shoreline reconstruction and protection projects.

Response: Our ESA section 7 consultation regulations allow for an expedited procedure for consulting on projects under emergency circumstances (50 CFR 402.05). If a Federal action in response to a hurricane were to affect designated critical habitat, we would comply with our regulations and consult as expeditiously as possible.

Comment 55: One commenter stated that we stated that tourism is not important to Puerto Rico.

Response: We believe the statement to which the commenter is referring is: "Tourism is not as important a component of Puerto Rico's overall economy as it is in [Florida and U.S.V.I.]." The economic baseline data summarized in the rule and the 4(b)(2) Report show that tourism-related industries account for the largest proportion of the economy in Florida and the U.S.V.I., whereas manufacturing accounts for the largest proportion of the economy in Puerto Rico. However, we acknowledge that tourism-related industries are within the top five sectors in Puerto Rico. While we believe our statement is correct, we further acknowledge the contribution of tourism to the economy of Puerto Rico.

Comment 56: Several commenters stated concerns that critical habitat would negatively impact fishing. One stated that closing off all waters from 0 to 30 m would not conserve the corals and would negatively impact fishing. Another commenter requested financial compensation for the economic impacts of the designation.

Response: Critical habitat does not create a closed fishing area. The designation of critical habitat for elkhorn and staghorn corals would not close the designated areas to fishing. The designation would require NMFS' Sustainable Fisheries Division to consult with NMFS' Protected Resources Division on Federally-managed fisheries that affect the critical habitat. As stated in the Draft 4(b)(2) Report, the only fisheries likely to affect the essential feature are those that use traps. Further, traps placed legally are not likely to affect the essential feature because they are not placed on corals or coral skeletons. However, traps may become mobilized during storm events and interact with the dead-in-place skeleton portion of the essential feature, resulting in breakage and damage. In the 4(b)(2) Report. we identified gear maintenance as a potential project modification that may be implemented during consultation to reduce the impact of traps on the essential feature. The costs associated with this project modification would be fully co-extensive with the listing because loose traps can also break and damage the listed corals. Although we could not identify a specific monetary value associated with this potential project modification due to the variable number of traps, distance from shore, and price of fuel, it is likely that there would also be a benefit to the fishermen because traps would not be lost during storm events.

Comment 57: Several commenters stated that there are many activities that may affect critical habitat that do not receive Federal funding or authorization, or are not carried out by a Federal agency, and these activities should undergo ESA section 7 consultation. One commenter asked whether coastal habitat restoration projects and coastal bridge or roadway construction projects would require consultation.

Response: The commenters are correct that there may be activities that affect critical habitat that do not have a Federal nexus. These activities are not required to undergo ESA section 7 consultation. ESA section 7 only requires Federal agencies to ensure their activities do not destroy or adversely modify critical habitat. If a Federal restoration, bridge, or roadway construction project would affect the essential feature within designated critical habitat, the Federal agency would be required to consult. There are no other regulatory requirements pertaining to critical habitat in the ESA.

Comment 58: Several commenters identified specific federally regulated activities occurring within the designated critical habitat areas that they believe require profound changes in order to promote recovery of the threatened corals, such as open ocean outfalls and beach renourishment projects.

Response: The designation will allow us to review Federal projects that may affect the essential feature through interagency consultation pursuant to ESA section 7. Further, we are currently conducting consultations on Federal projects that may affect the threatened corals. A Federal agency's responsibility to consult with us is triggered by the listing of a species and proposal of an action that may affect such species; therefore, we have been consulting on projects since the species were listed in May 2006. This rule allows us to consult on Federal projects that affect the essential feature within critical habitat. Project modifications implemented as a result of the consultation process will reduce project impacts and help promote recovery of these species.

Comment 59: One commenter stated that ongoing and proposed projects should undergo consultation for critical habitat. A second commenter asked, if a project changed, such as the size of a pipeline, would it have to be reviewed again?

Response: Once this designation becomes effective, all Federal actions that may affect the essential feature within critical habitat must undergo section 7 consultation. If there is an ongoing Federal action that has already completed consultation for listed species or other designated critical habitats and for which ongoing Federal involvement or control is retained, the consultation must be re-initiated if the action may affect critical habitat for the corals. Also, if such a Federal action is subsequently modified in a manner that causes an effect to the listed species or critical habitat in a manner or to an extent not previously considered, consultation must be reinitiated (50 CFR 402.16).

Comment 60: One commenter requested clarification on how the designation will affect the implementation of the Monroe County Comprehensive Plan to improve water quality conditions in the Florida Keys, the establishment of binding treatment and disposal requirements, and implementation of the Total Maximum Daily Load (TMDL) Program.

Response. Without further details, it is not possible to determine the impact of the critical habitat designation on the referenced programs. However, in our 4(b)(2) Report, we identify discharges to navigable waters and establishment or revision of water quality standards, NPDES permits, and TMDLs as activities that may affect critical habitat. If any of the programs referenced by the commenter require Federal authorization or funding, or are carried out by a Federal agency and may affect the essential feature, then the Federal agency must conduct a section 7 consultation for effects on the designated critical habitat.

Comment 61: One commenter requested we identify the criteria used to assess whether a project may cause destruction or adverse modification (DAM) of critical habitat.

Response: We do not believe that specific DAM criteria can be identified

in this rule. Rather, that analysis is necessarily dependent on the particular facts and circumstances of an individual project's effects on critical habitat. Each project is analyzed individually, and consultation must assess the effects of that particular situation, including the environmental baseline and cumulative effects at the time of consultation. Because the defined critical habitat feature is essential to the listed corals' conservation, a DAM analysis will evaluate whether a project's impacts would impede or diminish the critical habitat's ability to facilitate the recovery of the species.

Comment 62: One commenter requested an explicit statement as to when the designation and the ESA section 7 consultation requirement would become effective.

Response: As stated in the DATES section of this rule, the final designation and all related requirements become effective December 26, 2008.

Comment 63: We received multiple comments, along with supporting data, from one commenter located in northern Palm Beach County regarding specific economic impacts that the designation would have on that commenter.

Response: For the reasons described in the response to Comment 17, we have modified the boundary of the proposed Florida area. The boundary has moved south and no longer encompasses the geographic area discussed by this commenter.

Comment 64: One commenter expressed concern that, because critical habitat surrounds the entire island of Puerto Rico, it will seriously hamper many kinds of maritime commerce, recreation, and subsistence activities.

Response: As stated in the response to several comments, the economic impact of critical habitat is solely a result of administrative and project modification costs of ESA section 7 consultation on Federal activities. The designation does not establish a closed area or prohibit any specific activities. See responses to Comments 43, 45, 46, 55, and 56 regarding the effect of the designation on vessel operation, recreation, and fishing activities.

Comments on National Security Impacts

Comment 65: The Navy stated that the Final Naval Air Station Key West (NASKW) Integrated Natural Resources Management Plan (INRMP) now demonstrates a conservation benefit to elkhorn and staghorn corals and requested critical habitat not be designated on those areas adjacent to NASKW properties under ESA section 4(a)(3)(B). The Navy also requested that the Restricted Anchorage Area (RAA), defined in 33 CFR 334.580 and used by the South Florida Testing Facility (Naval Surface Warfare Center, Carderock Division), Dania, FL, also be excluded due to national security impacts pursuant to ESA section 4(b)(2). The RAA contains underwater cables that enable real-time data acquisition from Navy sensor systems used in Navy exercises.

Response: We appreciate the Navy developing an INRMP which includes a benefit to elkhorn and staghorn corals. Section 4(a)(3)(B)(i) of the ESA states that we may not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DOD), or designated for its use, that are subject to an INRMP prepared under section 101of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. The ESA further states that this provision does not affect the requirement to consult under section 7(a)(2) nor does it affect the obligation of the DOD to comply with section 9. The legislative history for this provision further explains:

"The conferees would expect the Secretary of the Interior to assess an INRMP's potential contribution to species conservation, giving due regard to those habitat protection, maintenance, and improvement projects and other related activities specified in the plan that address the particular conservation and protection needs of the species for which critical habitat would otherwise be proposed" (Conference Committee report, 149 Cong. Rec. H. 10563 (November 6, 2003)."

The NASKW INRMP covers the lands and waters - generally out to 50 yards (45.7 m) - adjacent to NASKW, including several designated restricted areas. As detailed in Appendix C of the INRMP, the plan provides benefits to elkhorn and staghorn corals through the following NASKW programs and activities: (1) erosion control; (2) Boca Chica Clean Marina Designation; (3) stormwater quality improvements; and (4) wastewater treatment. These activities provide a benefit to the species and the identified essential feature in the critical habitat designation by reducing sediment and nutrient discharges into nearshore waters, and this addresses the particular conservation and protection needs that critical habitat will afford. Further, the INRMP includes provisions for monitoring and evaluation of conservation effectiveness, which will ensure continued benefits to the species. On June 26, 2008, we determined that the INRMP provides a benefit to the two corals; thus we are not designating critical habitat within the boundaries covered by the INRMP pursuant to Section 4(a)(3)(B) of the ESA.

We revised our 4(b)(2) Report to reflect the NASKW areas not being designated as a result of the INRMP. Further, as described in the previous response to comments on the boundaries of the designation, we have made several revisions to the boundaries of the Florida area, which removed all other areas of NASKW from the designation. As discussed later in this rule and in the Final 4(b)(2) Report, the Dania RAA, defined in 33 CFR 333.550, will be added to the areas excluded on the basis of national security impacts.

Comment 66: One commenter asked whether the former DOD sites around Puerto Rico and the U.S.V.I. were excluded from the designation.

Response: No. The referenced sites are no longer military installations under the control of the DOD and subject to an INRMP. There were also no identifiable national security impacts associated with these sites and this critical habitat designation.

Comment 67: One commenter requested U.S. Highway 1 and its bridges be excluded from critical habitat on the basis of national security.

Response: As stated in the response to previous comments, existing Federally authorized or maintained structures, including bridges, do not provide the feature essential to the conservation of elkhorn and staghorn corals. Therefore, the road and bridges along U.S. Highway 1 are not included in the designation.

Comment 68: One commenter stated that the DOD exclusions for "readiness areas" is a vague designation that the DOD uses to keep large areas unprotected under the broad "national security" categorization. The commenter suggested that DOD prepare an EIS on the designation of these areas, or be required to consult. Another commenter suggested that we and DOD consider whether military activities could be performed in areas not in critical habitat.

Response: Based on information provided to us by the Navy, national security interests would be negatively impacted by designation of the Dania RAA area because the potential additional consultations and project modifications to avoid adversely modifying the essential feature would interfere with military training and readiness. The Navy is the best

authority to determine the effect the designation will have on national security within those areas where their activities occur. Neither the ESA nor NEPA requires the development of an EIS to support that determination. Furthermore, the overall area excluded from critical habitat because of national security impacts has been reduced from approximately 47 sq miles (121 sq km) in the proposed rule to approximately 5.5 sq miles (14.2 sq km) in this final rule. The reduction is a result of revision of the boundaries of the Florida area as described in the response to previous comments and elsewhere in the preamble, the finalization of the NASKW INRMP, and the additional exclusion of the RAA for the South Florida Testing Facility.

Comments on Existing Regulations Protecting Threatened Corals' Habitat

Comment 69: One commenter stated that the East End Marine Park and Buck Island Reef National Monument in St. Croix, U.S.V.I., already protect elkhorn corals. Another commenter suggested that elkhorn and staghorn corals are more appropriately protected by other existing regulations such as the MSA.

Response: We recognize that elkhorn coral and its habitat, found within the boundaries of East End Marine Park and Buck Island Reef National Monument, are protected by the regulations and management plans for these areas. We also realize that the St. Croix Unit of critical habitat for both threatened elkhorn and staghorn corals encompasses the whole of both of these protected areas. Historical data and current GIS data indicate that St. Croix has coral reef and colonized hardbottom not just within the protected areas named, but in areas surrounding the entire island. Based on these data, we believe that the entire St. Croix Unit provides the feature essential to the conservation of threatened corals, and designation of this unit as critical habitat will contribute to the key conservation objective of facilitating increased incidence of successful sexual and asexual reproduction.

Additionally, as discussed previously, the designation of critical habitat does not set up a closed area, preserve, or refuge. It does require Federal agencies to ensure that their actions are not likely to result in the destruction or adverse modification of critical habitat. Given the potential number and types of future ESA section 7 consultations, we expect that the designation will prevent adverse effects to the essential feature contained not only within East End Marine Park and Buck Island Reef National Monument, but throughout the entire St. Croix Unit. We believe the additional layer of protection provided by the designation of critical habitat will assist in preventing further losses of the feature and, eventually, will increase abundance of the two species. Last, we also describe in our 4(b)(2) Report that the critical habitat designation will provide an important and unique benefit to the corals by protecting settling substrate for future coral recruitment and recovery, compared to existing laws and management plans for these areas that focus on protecting existing coral resources.

Comments on Enforcement of the Designation

Comment 70: Several commenters expressed concerns about the enforcement and monitoring of areas designated as critical habitat for elkhorn and staghorn corals. One commenter stated that the designation would burden the U.S. Coast Guard with more duties, including patroling within critical habitat areas.

Response: As stated in the proposed rule, the primary impacts of a critical habitat designation result from the ESA section 7(a)(2) requirement that Federal agencies ensure their actions are not likely to result in the destruction or adverse modification of critical habitat. Federal agencies whose projects may affect critical habitat must consult with NMFS to analyze potential impacts of the proposed action to each PCE, and to determine whether modifications to such actions are necessary. Examples of Federal agency actions that may trigger consultation under Section 7 of the ESA and of potential project modifications are provided in the Final 4(b)(2) Report for this rule.

Furthermore, a critical habitat designation does not result in the creation of closed areas, preserves, or refuges. There are no individual prohibitions on any activities within critical habitat. The transit of ships through or anchoring of ships in areas designated as critical habitat is not prohibited under the ESA. Existing pipelines within designated critical habitat are also unaffected by this rule. Therefore, the designation of critical habitat does not result in additional enforcement responsibilities for any local, state, or Federal law enforcement agencies, including the U.S. Coast Guard.

Other Comments

We received many helpful comments of an editorial nature. These comments noted inadvertent errors in the proposed rule and offered non-substantive but nonetheless clarifying changes to wording. We have incorporated these editorial comments in the final rule. As these comments do not result in substantive changes to this final rule, we have not detailed the changes made.

In addition to the specific comments detailed above relating to the proposed critical habitat rule, the following comments were also received: (1) general support for the proposed rule and (2) peer-reviewed journal articles regarding threats to the species and their habitat. After careful consideration, we conclude the additional articles received were considered previously or did not pertain to the determination to designate critical habitat for elkhorn and staghorn corals.

Summary of Changes From the Proposed Critical Habitat Designation

Based on the comments received, we have made several substantive changes to the proposed rule:

1. The definition of the essential feature is revised to "substrate of suitable quality and availability to support larval settlement and recruitment, and reattachment and recruitment of asexual fragments."

2. The definition of "substrate of suitable quality and availability" has been modified to "natural consolidated hard substrate or dead coral skeleton that is free from fleshy or turf macroalgae cover and sediment cover."

3. The boundaries and size of the Florida area have been modified. We proposed approximately 3,301 sq miles (8,550 sq km), but based on comments received, we are designating 1,329 sq miles (3,442 sq km) to more accurately reflect the specific areas that contain the essential feature. The reduction in the area resulted from: (a) moving the northern boundary south to Boynton Inlet, Palm Beach County; (b) moving the shoreward boundary to the 6–ft (1.8 m) contour from Boynton Inlet to Government Cut, Miami-Dade County; (c) moving the shoreward boundary to MLW in all other areas; (d) using the SAFMC boundary; and (e) removing the area between Boca Grande Key and the Dry Tortugas.

4. The areas covered by the INRMP for NASKW are not being designated as critical habitat.

5. The RAA, Dania, FL, is the only DOD installation being excluded from critical habitat due to national security impacts.

6. Twelve existing federally authorized channels and harbors are being explicitly not included in this final rule for greater clarity. The proposed rule stated that maintained channels do not provide the essential feature.

Critical Habitat Identification and Designation

Critical habitat is defined by section 3 of the ESA (and further by 50 CFR 424.02(d)) as "(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species."

Geographical Areas Occupied by the Species

The best scientific data available show the current geographical area occupied by both elkhorn and staghorn corals has remained unchanged from their historical ranges. In other words, there is no evidence of range constriction for either species. "Geographical areas occupied" in the definition of critical habitat is interpreted to mean the range of the species at the time of listing and not every discrete location on which individuals of the species physically are located (45 FR 13011; February 27, 1980). In general, elkhorn and staghorn corals have the same distribution, with few exceptions, and are widely distributed throughout the Caribbean. The Status of Coral Reefs in the Western Atlantic: Results of Initial Surveys, Atlantic and Gulf Rapid Reef Assessment (AGRRA) Program (Lang, 2003) provides results (1997–2004) of a regional systematic survey of corals, including *Acropora* spp., from many locations throughout the Caribbean. AGRRA data (1997–2004) indicate that the historic range of both species remains intact; staghorn coral is rare throughout the range (including areas of previously known dense occurrence), and elkhorn coral occurs in moderation. We also collected data and information pertaining to the geographical area occupied by these species at the time of listing by partnering with our SEFSC, NOAA National Centers for Coastal Ocean Science Biogeography Team, and the U. S. Geological Survey of the Department of the Interior. These partnerships resulted in the collection of GIS and remote sensing data (e.g., benthic habitat data, water depth, and presence/absence location data for *Acropora* spp. colonies), which we supplemented with relevant information collected from the public during comment periods and workshops held throughout the ESA listing and critical habitat designation process.

In Southeast Florida, staghorn coral has been documented along the east coast as far north as Palm Beach County in deeper (16 to 30 m) water (Goldberg, 1973) and is distributed south and west throughout the coral and hardbottom habitats of the Florida Keys (Jaap, 1984), through Tortugas Bank. The northernmost occurrence of staghorn coral is at 26°31′27.2″ N, 80° 1′54.6″ W (CPE, pers. obs.). Elkhorn coral has been reported as far north as Broward County, with significant reef development and framework construction by this species beginning at Ball Buoy Reef in Biscayne National Park, extending discontinuously southward to the Dry Tortugas. The northernmost occurrence of elkhorn coral is at 26° 13′38.4″ N, 80° 4′57.6″ W (K. Banks, pers. obs.).

In Puerto Rico, elkhorn and staghorn corals have been reported in patchy abundance around the main island and isolated offshore locations. In the late 1970s, both elkhorn and staghorn corals occurred in dense and well developed thickets on many reefs off the north, northeast, east, south, west, and northwest coasts, and also the offshore islands of Mona, Vieques, and Culebra (Weil *et al.*, unpublished data). Dense, high profile, monospecific thickets of elkhorn and staghorn corals have been documented in only a few reefs along the southwest shore of the main island and isolated offshore locations (Weil *et al.*, unpublished data), though recent monitoring data for the presence of coral are incomplete in coverage around the islands. Further, the species have been recently documented along the west (e.g., Rincon) and northeast coasts (e.g., La Cordillera). Additionally, large stands of dead elkhorn currently exist on the fringing coral reefs along the south shoreline (e.g., Punta Picua, Punta Miquillo, Rio Grande, Guanica, La Parguera, Mayaguez). Although previously thought to be rare on the north shore of Puerto Rico, recently discovered reefs along the north coast of the main island also support large thickets of elkhorn coral (Hernandez, unpublished data).

The U.S.V.I. also supports populations of elkhorn and staghorn corals, particularly at Buck Island Reef National Monument. St. Croix has coral reef and colonized hard bottom surrounding the entire island. Data from the 1980s indicate that the species were present along the north, eastern, and western shores at that time. The GIS data we compiled indicate the presence of elkhorn and staghorn corals currently along the north, northeastern, south, and southeastern shores of St. Croix. Monitoring data are incomplete, and it is possible that unrecorded colonies are present along the western, northwestern, or southwestern shores. For the islands of St. Thomas, there are limited GIS presence data available for elkhorn and staghorn corals. However, Grober-Dunsmore *et al.* (2006) show that from 2001–2003, elkhorn colonies were distributed in many locations around the island of St. John. GIS data and several reports identify the location of elkhorn colonies around the north and south coasts of the island of St. John (e.g., Rogers *et al.*, 2007). Additionally, the data we have indicate coral reef and coral-colonized hard bottom surrounding each of these islands as well as the smaller offshore islands. Again, it is possible that unrecorded colonies are present in these areas.

Navassa Island is a small, uninhabited, oceanic island approximately 50 km off the southwest tip of Haiti managed by U.S. Fish and Wildlife Service (FWS) as one component of the Caribbean Islands National Wildlife Refuge (NWR). Both acroporid species are known from Navassa, with elkhorn apparently increasing in abundance and staghorn rare (Miller and Gerstner, 2002).

Last, there are two known colonies of elkhorn at the Flower Garden Banks National Marine Sanctuary (FGBNMS), located 100 mi (161 km) off the coast of Texas in the Gulf of Mexico. The FGBNMS is a group of three areas of salt domes that rise to approximately 15 m water depth and are surrounded by depths from 60 to 120 m. The FGBNMS is regularly surveyed, and the two known colonies, which were only recently discovered and are considered to be a potential range expansion, are constantly monitored.

Our regulations at 50 CFR 424.12(h) state: "Critical habitat shall not be designated within foreign countries or in other areas outside of United States jurisdiction." Although the geographical area occupied by elkhorn and staghorn corals includes coastal waters of many Caribbean and Central and South American nations, we are not including these areas for designation. The geographical area occupied by listed coral species which is within the jurisdiction of the United States is therefore limited to four counties in the State of Florida (Palm Beach County, Broward County, Miami-Dade County, and Monroe County), FGBNMS, and the

U.S. territories of Puerto Rico, U.S.V.I, and Navassa Island.

Physical or Biological Features Essential for Conservation (Primary Constituent Elements)

Within the geographical area occupied, critical habitat consists of specific areas on which are found those physical or biological features essential to the conservation of the species (hereafter also referred to as essential features). Section 3 of the ESA (16 U.S.C. 1532(3)) defines the terms "conserve," "conserving," and "conservation" to mean: "to use, and the use of, all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." Further, our regulations at 50 CFR 424.12(b) for designating critical habitat state that physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection may include, but are not limited to: (1) space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally, (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. These regulations state that we shall focus on essential features within the specific areas considered for designation.

As stated in the Atlantic *Acropora* Status Review Report (*Acropora* Biological Review Team, 2005):

> [T]here are several implications of the current low population sizes of *Acropora* spp. throughout much of the wider Caribbean. First, the number of sexual recruits to a population will be most influenced by larval availability, recruitment, and early juvenile mortality. Because corals cannot move and are dependent upon external fertilization in order to produce larvae, fertilization success declines greatly as adult density declines; this is termed an Allee effect (Levitan 1991). To compound the impact, *Acropora* spp., although hermaphroditic, do not effectively self-fertilize; gametes must be outcrossed with a different genotype to form viable offspring. Thus, in populations where fragmentation is prevalent, the effective density (of genetically distinct adults) will be even lower than colony density. It is highly likely that this type of recruitment limitation (Allee effect) is occurring in some local elkhorn and staghorn populations, given their state of drastically reduced abundance/density. Simultaneously, when adult abundances of elkhorn and staghorn corals are reduced, the source for fragments (to provide for asexual recruitment) is also compromised. These conditions imply that once a threshold level of population decline has been reached (i.e., a density where fertilization success becomes negligible) the chances for recovery are low.

Thus, we determined that based on available information, facilitating increased incidence of successful sexual and asexual reproduction is the key objective to the conservation of these species. We then turned to determining the physical or biological features essential to this conservation objective.

Currently, sexual recruitment of elkhorn and staghorn corals is limited in some areas and absent in most locations studied. Compounding the difficulty of documenting sexual recruitment is the difficulty of visually distinguishing some sexual recruits from asexual recruits (Miller *et al.*, 2007). Settlement of larvae or attachment of fragments is often unsuccessful, given limited amounts of appropriate habitat due to the shift in benthic community structure from coral-dominated to algae-dominated that has been documented since the 1980s (Hughes and Connell, 1999). Appropriate habitat for elkhorn and staghorn coral recruits to attach and grow consists of natural consolidated hard substrate. In addition to being limited, the availability of appropriate habitat for successful sexual and asexual reproduction is susceptible to becoming reduced further because of such factors as fleshy macroalgae overgrowing and preempting the space available for larval settlement, fragment reattachment, and recruitment. Similarly, sediment accumulating on suitable substrate impedes sexual and asexual reproductive success by preempting available substrate and smothering coral recruits. Also preempting space and exacerbating the effect of sedimentation is the presence of turf algae, which traps the sediment, leading to greater amounts of accumulations compared to bare substrate alone. As described above, features that will facilitate successful larval settlement and recruitment, and reattachment and recruitment of asexual fragments, are essential to the conservation of elkhorn and staghorn corals. Without successful recruits (both sexual and asexual), the species will not increase in abundance, distribution, and genetic diversity.

Elkhorn and staghorn corals, like most corals, require natural consolidated hard substrate (i.e., attached, dead coral skeleton or hardbottom) for their larvae to settle or fragments to reattach. The type of substrate available directly influences settlement success and fragment survivorship. Lirman (2000) demonstrated this in a transplant experiment using elkhorn coral fragments created by a ship grounding. Fifty fragments were collected within 24 hours of fragmentation and assigned to one of the following four types of substrate: (1) hardbottom (consolidated carbonate framework), (2) rubble (loose, dead pieces of elkhorn and staghorn corals), (3) sand, and (4) live coral. The results showed that the survivorship of transplanted fragments was significantly affected by the type of substrate, with fragment mortality being the greatest for those transplanted to sandy bottom (58 percent loss within the first month and 71 percent after 4 months). Fragments placed on live adult elkhorn coral colonies fused to the underlying tissue and did not experience any tissue loss; and fragments placed on rubble and hardbottom substrates showed high survivorship.

Unlike fragments, coral larvae cannot attach to living coral (Connell *et al.*, 1997). Larvae can settle and attach to dead coral skeleton (Jordan-Dahlgren, 1992; Bonito and Grober-Dunsmore, 2006) and may settle in particular areas in response to chemical cues from certain species of crustose coralline algae (CCA) (Morse *et al.*, 1996; Heyward and Negri, 1999; Harrington and Fabricius, 2004). The recent increase in the dominance of fleshy macroalgae as major space-occupiers on many Caribbean coral reefs impedes the recruitment of new corals. This shift in benthic community structure (from the dominance of stony corals to that of fleshy algae) on Caribbean coral reefs is generally attributed to the greater persistence of fleshy macroalgae under reduced grazing regimes due to human overexploitation of herbivorous fishes (Hughes, 1994) and the regional mass mortality of the herbivorous long-spined sea urchin in 1983–84. Further, impacts to water quality (principally nutrient input) coupled with low herbivore grazing are also believed to enhance fleshy macroalgal productivity. Fleshy macroalgae are able to colonize dead coral skeleton and other available substrate, preempting space available for coral recruitment.

The persistence of fleshy macroalgae under reduced grazing regimes has impacts on CCA growth, which may reduce settlement of coral larvae, as CCA is thought to provide chemical cues for settlement. Most CCA are susceptible to fouling by fleshy algae, particularly when herbivores are absent (Steneck, 1986). Patterns observed in St. Croix, U.S.V.I., also indicate a strong positive correlation between CCA abundance and herbivory (Steneck,

1997). A study in which Miller *et al.* (1999) used cages to exclude large herbivores from the study site resulted in increased cover of both turf algae and macroalgae, and cover of CCA decreased. The response of CCA to the experimental treatment persisted for 2 months following cage removal (Miller *et al.*, 1999). Additionally, following the mass mortality of the urchin Diadema antillarum, significant increases in cover of fleshy and filamentous algae occurred with parallel decreases in cover of CCA (de Ruyter van Steveninck and Bak, 1986; Liddel and Ohlhorst, 1986). The ability of fleshy macroalgae to affect growth and survival of CCA has indirect, yet important, impacts on the ability of coral larvae to successfully settle and recruit.

Several studies show that coral recruitment tends to be greater when algal biomass is low (Rogers *et al.*, 1984; Hughes, 1985; Connell *et al.*, 1997; Edmunds *et al.*, 2004; Birrell *et al.*, 2005; Vermeij, 2006). In addition to preempting space for coral larvae settlement, many fleshy macroalgae produce secondary metabolites with generalized toxicity, which also may inhibit settlement of coral larvae (Kuffner and Paul, 2004; Kuffner, 2006). Furthermore, algal turfs can trap sediments (Eckman *et al.*, 1989; Kendrik, 1991; Steneck, 1997; Purcell, 2000; Nugues and Roberts, 2003; Wilson *et al.*, 2003; Purcell and Bellwood, 2001), which then creates the potential for algal turfs and sediments to act in combination to hinder coral settlement (Nugues and Roberts, 2003; Birrell *et al.*, 2005). These turf algae sediment mats also can suppress coral growth under high sediment conditions (Nugues and Roberts, 2003) and may gradually kill the marginal tissues of stony corals with which they come into contact (Dustan, 1977, 1999, as cited by Roy, 2004).

Sediments enter the reef environment through many processes that are natural or anthropogenic in origin, including erosion of coastline, resuspension of bottom sediments, terrestrial run-off, and nearshore dredging for coastal construction projects and navigation purposes. The rate of sedimentation affects reef distribution, community structure, growth rates, and coral recruitment (Dutra *et al.*, 2003). Accumulation of sediment can smother living corals, dead coral skeleton, and exposed hard substrate. Sediment accumulation on dead coral skeletons and exposed hard substrate reduces the amount of available substrate suitable for coral larvae settlement and fragment reattachment (Rogers, 1990; Babcock and Smith, 2002). Accumulation of sediments is also a major cause of mortality in coral recruits (Fabricius *et al.*, 2003). In some instances, if mortality of coral recruits does not occur under heavy sediment conditions, then settled coral planulae may undergo reverse metamorphosis and not survive (Te, 1992). Sedimentation, therefore, impacts the health and survivorship of all life stages (i.e., fecund adults, fragments, larvae, and recruits) of elkhorn and staghorn corals.

Based on the key conservation objective we have identified to date, the natural history of elkhorn and staghorn corals, and their habitat needs, the physical or biological feature of elkhorn and staghorn corals' habitat essential to their conservation is substrate of suitable quality and availability to support successful larval settlement and recruitment, and reattachment and recruitment of fragments. For purposes of this definition, "substrate of suitable quality and availability" means natural consolidated hard substrate or dead coral skeleton that is free from fleshy or turf macroalgae cover and sediment cover. This feature is essential to the conservation of these two species due to the extremely limited recruitment currently being observed.

We determined that no other facets of the environment are appropriate or necessary for defining critical habitat for the two corals. Other than the substrate essential feature, we cannot conclude there is any other sufficiently definable feature of the environment that is essential to the corals' conservation. Water temperature and other aspects of water quality are more appropriately viewed as sources of impacts or stressors that can harm the corals, rather than habitat features that provide a conservation function. These stressors would therefore be analyzed as factors that may contribute to a jeopardy determination pursuant to section 7 of the ESA, rather than to a determination whether the corals' critical habitat is likely to be destroyed or adversely modified. Some environmental features are also subsumed within the definition of the substrate essential feature; for instance, substrate free from fleshy or turf macroalgal cover would encompass water quality sufficiently free of nutrients.

Specific Areas Within the Geographical Area Occupied by the Species

The definition of critical habitat further instructs us to identify specific areas on which are found the physical or biological features essential to the species' conservation. Our regulations state that critical habitat will be defined by specific limits using reference points and lines on standard topographic maps of the area, and referencing each area by the State, county, or other local governmental unit in which it is located (50 CFR 424.12(c)). As discussed below, we determined that specific areas in FGBNMS and Navassa National Wildlife Refuge that contain the essential feature do not otherwise meet the definition of critical habitat. Hence, in this section we only describe our identification of the specific areas we included in this designation.

In addition to information obtained from the public, we partnered with SEFSC, NOAA Biogeography Team, and U.S. Geological Survey to obtain GIS and remote sensing data (e.g., benthic habitat data, water depth) to compile existing data to identify and map areas that may contain the identified essential feature. NOAA's National Ocean Service (NOS) and the Florida Fish and Wildlife Research Institute completed The Benthic Habitat Mapping of Florida Coral Reef Ecosystems using a series of 450 aerial photographs collected in 1991–1992. For this mapping effort, coral ecosystem ecologists outlined the boundaries of specific habitat types by interpreting color patterns on the photographs. Benthic habitats were classified into four major categories - corals, seagrasses, hardbottom, and bare substrate - and 24 subcategories, such as sparse seagrass and patch reef. Each habitat type was groundtruthed in the field by divers to validate the photo-interpretation of the aerial photography. Habitat boundaries were georeferenced and digitized to create computer maps. A similar method was followed by NOS using 1999 aerial imagery in developing the Benthic Habitat Mapping of Puerto Rico and the U.S.V.I.

Using GIS software, we extracted all areas that could be considered potential recruitment habitat, including hardbottom and coral. The benthic habitat information assisted in identifying any major gaps in the distribution of the substrate essential feature. Given uncertainties in the age and resolution of the data, we were unable to identify smaller, discrete specific areas that contained the essential feature. We concluded that, based upon the best available information, although the essential feature is unevenly dispersed throughout the ranges of the species, all identified areas contained the essential feature. However, based upon information submitted during the public comment period, we were able to refine the proposed designation to remove gaps in the distribution of the essential feature and limit the final designation more precisely to areas that contain the essential feature.

The areas eliminated are those nearshore surf zones along the southeast coast of Florida and the area between Boca Grande Key and the Dry Tortugas in Florida. We further limited the specific areas to the maximum depth of occurrence of the two corals (i.e., 30 m or 98 ft). The 98–ft (30 m) contour was extracted from the National Geophysical Data Center Coastal Relief Model for Puerto Rico & Virgin Islands, and Florida. Because Puerto Rico and the U.S.V.I. are islands, the contours yielded continuous closed polygons. However, because the two species only occur off specific counties in Florida, we used additional boundaries to close the polygons. As previously stated in the response to comments, the northern boundary of critical habitat was shifted south to Boynton Inlet, Palm Beach County (26°32′42.5″ N) to more accurately reflect the occupied range of the species. Additionally, the nearshore surf zones of Palm Beach, Broward, and Miami-Dade Counties are areas with high sediment movement, suspension, and deposition levels. Hard substrate areas found within these nearshore surf zones are ephemeral in nature and are frequently covered by sand, thus not meeting the definition of the essential feature. Therefore, from Boynton Inlet, Palm Beach County, to Government Cut, Miami-Dade County, the inshore boundary of critical habitat is the 6–foot (1.8 m) contour. Government Cut was identified as the southernmost boundary of where there were no occurrences of either species in less than 6 feet (1.8 m) of water. There are occurrences of the species in less than 6 feet (1.8 m) of water south of Government Cut, thus indicating that hydrodynamic conditions are suitable for recruitment. Therefore, from Government Cut south along the Florida Keys, the inshore boundary is the MLW line, the COLREGS line, or the South Atlantic Fishery Management Council boundary. These three boundaries together create a continuous line separating the marine waters of the South Atlantic from land, inshore waters, or the Gulf of Mexico. Lastly, as previously stated in the response to comments, the area between 82 W and 82° 45′ W longitude does not provide the essential feature and is omitted from the designation. The waters surrounding the Dry Tortugas, shallower than 98 feet (30 m) and bounded on the east side by 82V 45′ W longitude are included in the designation because both the species and essential feature are present. In all areas the seaward boundary is the 98–ft (30 m) contour.

Using the above procedure and consistent with our regulations (50 CFR 424.12(c)), we identified four "specific' areas," including a few small adjacent areas separated from main areas by water depth greater than 98 ft (30 m), within the geographical area occupied by the species at the time of listing, that contain the essential feature. These areas comprise all waters in the depths of 98 ft (30 m) and shallower to: (1) the 6–ft (1.8 m) contour from Boynton Inlet, Palm Beach County, to Government Cut, Miami-Dade County; and the MLW line from Government Cut south to 82° W longitude in Monroe Counties; and the MLW line surrounding the Dry Tortugas, Florida; (2) the MLW line in Puerto Rico and associated Islands; (3) the MLW line in St. John/St. Thomas, U.S.V.I.; and (4) the MLW line in St. Croix, U.S.V.I. (see maps).

Within these specific areas, the essential feature consists of natural consolidated hard substrate or dead coral skeleton that are free from fleshy or turf macroalgae cover and sediment cover. The essential feature can be found unevenly dispersed throughout these four areas due to differential macroalgae coverage and naturally occurring unconsolidated sediment and seagrasses dispersed within the reef ecosystem. A larger number of smaller specific areas could not be identified because the submerged nature of the essential feature, the limits of available information on the distribution of the essential feature, and limits on mapping methodologies make it infeasible to define the specific areas containing the essential feature more finely than described herein. Further, based on data about their historical distributions, the corals are capable of successfully recruiting and attaching to available substrate anywhere within the boundaries of the four specific areas. Given these species' reduced abundances, the four specific areas were identified to include all available potential settling substrate within the 98–ft (30 m) contour to maximize the potential for successful recruitment and population growth.

Natural sites covered with loose sediment, fleshy or turf macroalgal covered hard substrate, or seagrasses do not provide the essential feature for elkhorn and staghorn corals. Additionally, all existing (meaning constructed at the time of this critical habitat designation) federally authorized or permitted man-made structures such as aids-to-navigation (ATONs), artificial reefs, boat ramps, docks, pilings, channels, or marinas do not provide the essential feature that is essential to the species' conservation. Substrates within the critical habitat boundaries that do not contain the essential feature are not part of the designation. Federal actions, or the effects thereof, limited to these areas do not trigger section 7 consultation under the ESA for coral critical habitat, unless they may affect the essential feature in adjacent critical habitat. As discussed here and in the supporting impacts analysis, given the precise definition of the essential feature, determining whether an action may affect the feature can be accomplished without entering into an ESA section 7 consultation.

Unoccupied Areas

ESA section 3(5)(A)(ii) further defines critical habitat to include specific areas outside the geographical area occupied if the areas are determined by the Secretary to be essential for the conservation of the species. Regulations at 50 CFR 424.12(e) specify that we shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species. At the present time, the range of these species has not been constricted, and we have not identified any areas outside the geographical area occupied by the species that are essential for their conservation. Therefore, we did not designate any unoccupied areas for elkhorn and staghorn corals.

Special Management Considerations or Protection

Specific areas within the geographical area occupied by a species may be designated as critical habitat only if they contain physical or biological features that "may require special management considerations or protection." A few courts have interpreted aspects of this statutory requirement, and the plain language aids in its interpretation. For instance, the language clearly indicates the features, not the specific area containing the features, are the focus of the "may require" provision. Use of the disjunctive "or" also suggests the need to give distinct meaning to the terms "special management considerations" and "protection." Generally speaking, "protection" suggests actions to address a negative impact or threat of a negative impact. "Management" seems plainly broader than protection, and could include active manipulation of a feature or aspects of the environment. Two Federal district courts, focusing on the term "may," ruled that features can meet this provision based on either present requirements for special management considerations or

protections, or on possible future requirements. See *Center for Biol. Diversity* v. *Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003); *Cape Hatteras Access Preservation Alliance* v. *DOI*, 344 F. Supp. 108 (D.D.C. 2004). The Arizona district court ruled that the provision cannot be interpreted to mean that features already covered by an existing management plan must be determined to require "additional" special management, because the term "additional" is not in the statute. Rather, the court ruled that the existence of management plans may be evidence that the features in fact require special management. *Center for Biol. Diversity* v. *Norton*, 1096–1100. NMFS' regulations define "special management considerations or protections" to mean "any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species" (50 CFR 424.02(j)).

Based on the above, we evaluated whether the essential feature may require special management considerations or protections by evaluating four criteria:

(a) Whether there is presently a need to manage the feature;

(b) Whether there is the possibility of a need to manage the feature;

(c) Whether there is presently a negative impact on the feature; or

(d) Whether there is the possibility of a negative impact on the feature.

In evaluating present or possible future management needs for the essential feature, we recognized that the feature in its present condition must be the basis for a finding that it is essential to the corals' conservation. In addition, the needs for management evaluated in (a) and (b) were limited to managing the feature for the conservation of the species. In evaluating whether the essential feature meets either criterion (c) or (d), we evaluated direct and indirect negative impacts from any source (e.g., human or natural). However, we only considered the criteria to be met if impacts affect or have the potential to affect the aspect of the feature that makes it essential to the conservation of the species. We then evaluated whether the essential feature met the "may require" provision separately for each of the four "specific areas" designated, as well as Navassa Island and FGBNMS (discussed later), as management and protection requirements can vary from area to area based on such factors as the legal authorities applicable to areas and the location of the area within the occupied range.

Suitable habitat available for larval settlement and recruitment, and asexual fragment reattachment and recruitment of these coral species is particularly susceptible to impacts from human activity because of the shallow water depth range (less than 98 ft (30 m)) in which elkhorn and staghorn corals commonly grow. The proximity of this habitat to coastal areas subject this feature to impacts from multiple activities, including, but not limited to dredging and disposal activities, stormwater run-off, coastal and maritime construction, land development, wastewater and sewage outflow discharges, point and non-point source pollutant discharges, fishing, placement of large vessel anchorages, and installation of submerged pipelines or cables. The impacts from these activities, combined with those from natural factors (e.g., major storm events), significantly affect the quality and quantity of available substrate for these threatened species to successfully sexually and asexually reproduce. We concluded that the essential feature is currently and will likely continue to be negatively impacted by some or all of these factors in all four specific areas.

Overfishing of herbivorous fishes and the mass die-off of long-spined sea urchin *Diadema antillarum* are considered two of the primary contributing factors to the recent shift in benthic community structure from the dominance of stony corals to that of fleshy macroalgae on Caribbean coral reefs. In the absence of fish and urchin grazing or at very low grazing pressures, coral larvae, algae, and numerous other epibenthic organisms settle in high numbers, but most young, developing coral larvae are rapidly outcompeted for space, and their mortality levels are high (Sammarco, 1985). The weight of evidence suggests that competition between algae and corals is widespread on coral reefs and is largely mediated by herbivory (McCook *et al.*, 2001).

An additional factor contributing to the dominance of fleshy macroalgae as major space-occupiers on many Caribbean coral reefs is nutrient enrichment. Nutrients are added to coral reefs from both point sources (readily identifiable inputs where pollutants are discharged to receiving surface waters from a pipe or drain) and non-point sources (inputs that occur over a wide area and are associated with particular land uses). Anthropogenic sources of nutrients include sewage, stormwater and agricultural runoff, river discharge, and groundwater; however, natural oceanographic sources like internal waves and upwelling also distribute nutrients on coral reefs. Coral reefs have been considered to be generally nutrient-limited systems, meaning that levels of accessible nitrogen and phosphorus limit the rates of macroalgae growth. When nutrient levels are raised in such a system, growth rates of fleshy macroalgae can be expected to increase, and this can yield imbalance and changes in community structure.

The anthropogenic source routes for nutrients may also bring additional sediments into the coral reef environment. Sources of sediment include erosion of coastline, resuspension of bottom sediments, terrestrial run-off (following clearing of mangroves and deforestation of hillsides), beach renourishment, and nearshore dredging and disposal for coastal construction projects and for navigation purposes. Sediment deposition and accumulation affect the overall amount of suitable substrate available for larval settlement and recruitment, and fragment reattachment and recruitment (Babcock and Davies, 1991), and both sediment composition and deposition affect the survival of juvenile corals (Fabricius *et al.*, 2003).

A major category of habitat-related activities that may affect the essential feature for the two listed corals is water quality management. Activities within this category have the potential to negatively affect the essential feature for elkhorn and staghorn corals by altering the quality and availability of suitable substrate for larval settlement, recruitment, and fragment reattachment. Nutrient enrichment, via sewage, stormwater and agricultural runoff, river discharge, and groundwater, is a major factor contributing to this shift in benthic community structure and preemption of available substrate suitable for larval settlement, recruitment, and asexual fragment reattachment. Additionally, sedimentation resulting from land-use practices and from dredging and disposal activities in all four specific areas reduces the overall availability and quality of substrate suitable for successful sexual and asexual reproduction by the two acroporid corals. Thus, the essential feature currently needs and will likely continue to need special management or protection.

Although they fall within U.S. jurisdiction and may contain the essential feature, we are not including FGBNMS and Navassa National Wildlife Refuge in our critical habitat designation because we do not believe the essential feature in these areas requires special management considerations or protections. Both

FGBNMS and Navassa Island are remote marine protected areas and are not currently exposed to the negative impacts and conditions affecting the essential feature discussed for the other areas above. Additionally, based on available information, we do not expect the essential feature found within these two protected areas to experience negative impacts from human or natural sources that would diminish the feature's conservation value to the two coral species.

Activities That May be Affected

Section 4(b)(8) of the ESA requires that we describe briefly and evaluate, in any proposed or final regulation to designate critical habitat, those activities that may destroy or adversely modify such habitat or that may be affected by such designation. A wide variety of activities may affect critical habitat and, when carried out, funded, or authorized by a Federal agency, require an ESA section 7 consultation. These are discussed at length in the Final 4(b)(2) Report and summarized below. Such activities include, but are not limited to, dredging and disposal, beach renourishment, large vessel anchorages, submarine cable/pipeline installation and repair, oil and gas exploration, pollutant discharge, and oil spill prevention and response. Notably, all the activities identified that may affect the critical habitat may also affect the species themselves, if present within the action area of a proposed Federal action.

We believe this critical habitat designation provides Federal agencies, private entities, and the public with clear notification of critical habitat for elkhorn and staghorn corals and the boundaries of the habitat. This designation allows Federal agencies and others to evaluate the potential effects of their activities on critical habitat to determine if ESA section 7 consultation with NMFS is needed, given the specific definition of the essential feature above. Consistent with recent agency guidance on conducting adverse modification analyses (NMFS, 2005), at the time of consultation we will apply the statutory provisions of the ESA, including those in section 3 that define "critical habitat" and "conservation," to determine whether a proposed action is likely to result in the destruction or adverse modification of critical habitat.

Application of ESA Section 4(a)(3)(B)(i)

Section 4(a)(3)(B) prohibits designating as critical habitat any lands or other geographical areas owned or controlled by the DOD, or designated for its use, that are subject to an INRMP, if we determine that such a plan provides a benefit to the coral species (16 U.S.C. 1533(a)(3)(B)). The legislative history to this provision explains:

The conferees would expect the [Secretary] to assess an INRMP's potential contribution to species conservation, giving due regard to those habitat protection, maintenance, and improvement projects and other related activities specified in the plan that address the particular conservation and protection needs of the species for which critical habitat would otherwise be proposed. Consistent with current practice, the Secretary would establish criteria that would be used to determine if an INRMP benefits the listed species for which critical habitat would be proposed (Conference Committee report, 149 Cong. Rec. H. 10563; November 6, 2003).

At the time of the proposed designation, no areas within the specific areas proposed for designation were covered by relevant INRMPs. Since the publication of the proposed designation, NASKW finalized an updated INRMP. The NASKW INRMP covers the lands and waters - generally out to 50 yards (45.7 m) - adjacent to NASKW, including several designated restricted areas. As detailed in Appendix C of the INRMP, the plan provides benefits to elkhorn and staghorn corals through the following NASKW programs and activities: (1) erosion control; (2) Boca Chica Clean Marina Designation; (3) stormwater quality improvements; and (4) wastewater treatment. These activities provide a benefit to the species and the identified essential feature in the critical habitat designation by reducing sediment and nutrient discharges into nearshore waters, and this addresses the particular conservation and protection needs that critical habitat will afford. Further, the INRMP includes provisions for monitoring and evaluation of conservation effectiveness, which will ensure continued benefits to the species. On June 26, 2008, we determined that the INRMP provides a benefit to the two corals as described above. Thus, we are not designating critical habitat within the boundaries covered by the INRMP pursuant to Section 4(a)(3)(B) of the ESA.

Application of ESA Section 4(b)(2)

The foregoing discussion described the specific areas within U.S. jurisdiction that fall within the ESA section 3(5) definition of critical habitat in that they contain the physical feature essential to the corals' conservation that may require special management considerations or protection. Before including areas in a designation, section 4(b)(2) of the ESA requires the Secretary to take into consideration the economic impact, impact on national security, and any other relevant impacts of designation of any particular area. Additionally, the Secretary has the discretion to exclude any area from designation if he determines the benefits of exclusion (that is, avoiding some or all of the impacts that would result from designation) outweigh the benefits of designation based upon the best scientific and commercial data available. The Secretary may not exclude an area from designation if exclusion will result in the extinction of the species. Because the authority to exclude is discretionary, exclusion is not required for any particular area under any circumstances.

The analysis of impacts below summarizes the comprehensive analysis contained in our Final Section 4(b)(2) Report, first by considering economic, national security, and other relevant impacts that we projected would result from including each of the four specific areas in the critical habitat designation. This consideration informed our decision on whether to exercise our discretion to exclude particular areas from the designation. Both positive and negative impacts were identified and considered (these terms are used interchangeably with benefits and costs, respectively). Impacts were evaluated in quantitative terms where feasible, but qualitative appraisals were used where that is more appropriate to particular impacts.

The ESA does not define what "particular areas" means in the context of section 4(b)(2), or the relationship of particular areas to "specific areas" that meet the statute's definition of critical habitat. As there was no biological basis to subdivide the four specific critical habitat areas into smaller units, we treated these areas as the "particular areas" for our initial consideration of impacts of designation.

Impacts of Designation

The primary impacts of a critical habitat designation result from the ESA section 7(a)(2) requirement that Federal agencies ensure their actions are not likely to result in the destruction or adverse modification of critical habitat. Determining these impacts is complicated by the fact that section 7(a)(2) also requires that Federal agencies ensure their actions are not likely to jeopardize the species' continued existence. One incremental impact of designation is the extent to which Federal agencies modify their proposed actions to ensure they are not

likely to destroy or adversely modify the critical habitat beyond any modifications they would make because of listing and the jeopardy requirement. When a modification would be required due to impacts to both the species and critical habitat, the impact of the designation may be co-extensive with the ESA listing of the species. Additional impacts of designation include state and local protections that may be triggered as a result of designation, and positive impacts that may arise from conservation of the species and their habitat, and education of the public to the importance of an area for species conservation.

A Final ESA 4(b)(2) Report describes the impacts analysis in detail (NMFS, 2008). The only substantive changes made to the Final Report in response to public comments are in the section regarding not designating critical habitat on DOD lands pursuant to 4(a)(3)(B) and the national security exclusions. The report describes the projected future Federal activities that would trigger ESA section 7 consultation requirements because they may affect the essential feature. Additionally, the report describes the project modifications we identified that may reduce impacts to the essential feature, and states whether the modifications are more likely to be solely a result of the critical habitat designation or co-extensive with another regulation, including the ESA listing of the species. The report also identifies the potential national security and other relevant impacts that may arise due to the critical habitat designation. This report is available on NMFS' Southeast Region website at *http://sero.nmfs.noaa.gov/pr/esa/Acropora.htm*.

Economic Impacts

As discussed above, economic impacts of the critical habitat designation result through implementation of section 7 of the ESA in consultations with Federal agencies to ensure their proposed actions are not likely to destroy or adversely modify critical habitat. These economic impacts may include both administrative and project modification costs. Economic impacts that may be associated with the conservation benefits of the designation are described later.

Because elkhorn and staghorn corals are newly listed and we lack a lengthy consultation history for these species, we needed to make assumptions about the types of future Federal activities that might require section 7 consultation under the ESA. We examined the consultation record over the last 10 years, as compiled in our Public Consultation Tracking System (PCTS) database, to identify types of Federal activities that have the potential to adversely affect elkhorn or staghorn coral critical habitat. We identified 13 categories of activities conducted by 7 Federal action agencies: Airport repair and construction; anchorages; construction of new aids to navigation; beach renourishment and bank stabilization; coastal construction; discharges to navigable waters; dredging and disposal; fishery management; maintenance construction; maintenance dredging and disposal; military installation management; resource management; and development or modification of water quality standards. Notably, all categories of projected future actions that may trigger consultation because they have the potential to adversely affect the essential feature also have the potential to adversely affect the corals themselves. There are no categories of activities that would trigger consultation on the basis of the critical habitat designation alone. However, it is feasible that a specific future project within a category of activity would have impacts on critical habitat but not on the species. Because the total surface area covered by the essential feature (although unquantified) is far larger than the total surface area on which the corals (again unquantified) currently occur, it is likely there will be more consultations with impacts on critical habitat than on the species. Nonetheless, it was impossible to determine how many of those projects there may be over the 10–year horizon of our impacts analysis.

To avoid underestimating impacts, we assumed that all of the projected future actions in these categories will require formal consultations for estimation of both administrative and project modification costs. This assumption likely results in an overestimation of the number of future formal consultations.

We next considered the range of modifications we might seek for these activities to avoid adverse modification of elkhorn and staghorn coral critical habitat. We identified 13 potential project modifications that we may require to reduce impacts to the essential feature through section 7 consultation under the ESA. To be conservative in estimating impacts, we assumed that project modifications would be required to address adverse effects from all projected future agency actions requiring consultation. Although we made the assumption that all potential project modifications would be required by NMFS, not all of the modifications identified for a specific category of activity would be necessary for an individual project, so we were unable to identify the exact modification or combinations of modifications that would be required for all future actions.

We also identified whether a project modification would be required due to the listing of the species or another existing regulatory authority to determine if the cost of the project modification was likely to be co-extensive or incremental. Several project modifications (i.e., conditions monitoring, diver education, horizontal directional drilling (HDD), tunneling or anchoring cables and pipelines, sediment control measures, fishing gear maintenance, and water quality standard modification) were characterized as fully co-extensive with the listing of the species or other existing statutory or regulatory authority, because the nature of the actions that would require these modifications typically involve a large action area likely to include both the essential feature and either the listed corals or other coral reef resources. Other project modifications (i.e., project relocation, diver assisted anchoring or mooring buoy use, global positioning system (GPS) and dynamic positioning vessel (DPV) protocol, sand bypassing/backpassing, shoreline protection measures, and use of upland or artificial sources of sand) were characterized as partially co-extensive with the listing of the species or other existing statutory or regulatory authority such as the CWA because of the typically smaller action area of projects that would involve these modifications, and thus the greater likelihood that specific projects would impact only the essential feature. We did not identify any project modification that we expected would result in fully incremental costs due to the critical habitat designation.

Table 1 provides a summary of the estimated costs, where possible, of individual project modifications. The Final ESA 4(b)(2) Report provides a detailed description of each project modification, methods of determining estimated costs, and actions for which it may be prescribed. Although we have a projection of the number of future formal consultations (albeit an overestimation), the lack of information on specific project designs limits our ability to forecast the exact type and amount of modifications required. Thus, while the costs associated with types of project modifications were characterized, no total cost of this rule could be quantified.

TABLE 1. SUMMARY OF POTENTIAL PER-PROJECT COSTS ASSOCIATED WITH SPECIFIC PROJECT MODIFICATIONS. WHERE INFORMATION WAS AVAILABLE, RANGES OF SCOPES ARE INCLUDED.

Project Modification	Cost	Unit	Range	Approx. Totals per Project
Fully Co-extensive				
Conditions Monitoring	$3.5-6K	per day	1-400 days	$3.5K - 2.4M
Diver Education	Administrative cost	n/a	n/a	n/a
HDD/Tunneling	$1.39 -2.44M	per mile	0.2 - 31.5 miles	$278K -76.9M
Fishing Gear Maintenance	Cost of gas and time to retrieve traps. Ultimately a potential cost savings of reduction in lost traps.	n/a	n/a	n/a
Pipe Collars/Cable Anchoring	$1,200	per anchor	13 - 2,529 anchors	$15.6K - 3M
Sediment and Turbidity	-$43K	per mile	0.05 - 7 miles	$2-301K
Control Measures				
Water Quality Standard Modification	Undeterminable	n/a	n/a	n/a
Partially Co-extensive				
Project Relocation	Undeterminable	n/a	n/a	n/a
Diver Assisted Anchoring/ Mooring Buoy Use	$300-1000	per day	n/a	n/a
GPS and DPV protocol	Undeterminable	n/a	n/a	n/a
Sand Bypassing/ Backpassing	$1.5-16K	per cu yd	75-512K cu yds	$113K-8.1M
Shoreline Protection Measures to Reduce Frequency of Beach Nourishment Events	Undeterminable but ultimately a potential cost savings	n/a	n/a	n/a
Upland or Artificial Sources of Sand	Undeterminable	n/a	n/a	n/a

In addition to project modification costs, administrative costs of consultation will be incurred by Federal agencies and project permittees or grantees as a result of this designation. Estimates of the cost of an individual consultation were developed from a review and analysis of the consultation database, as previously discussed, and from the estimated ESA section 7 consultation costs identified in the Economic Analysis of Critical Habitat Designation for the Gulf Sturgeon (IEc, 2003) inflated to 2007 dollars. In the proposed rule and Draft 4(b)(2) Report, costs were reported in 2006 dollars because the 2007 coefficient was not known. Cost figures are based on an average level of effort for consultations of low or high complexity (based on NMFS and other Federal agency information), multiplied by the appropriate labor rates for NMFS and other Federal agency staff. Although the essential feature occurs in greater abundance than the corals and thus the probability that a consultation would be required because of the critical habitat designation is higher than for the listing of corals, we were unable to estimate the number of consultations that may be required on the basis of critical habitat alone. Therefore, we present the estimated maximum incremental administrative costs as averaging $843,223 to $1,664,824, annually. While the total area of the critical habitat designation has been reduced due to the modifications we have made to the boundaries, the data used in the projection of number of consultations can not be reduced from what was presented in the proposed rule. The smallest unit for which the consultation data exist is at the county level. No counties were removed from critical habitat based on our boundary revisions. Thus, our administrative cost estimates are not modified from the proposed rule.

National Security Impacts

Previous critical habitat designations have recognized that impacts to national security result if a designation would trigger future ESA section 7 consultations because a proposed military activity "may affect" the physical or biological feature(s) essential to the listed species' conservation. Anticipated interference with mission-essential training or testing or unit readiness, either through delays caused by the consultation process or through expected requirements to modify the action to prevent adverse modification of critical habitat, has been identified as a negative impact of critical habitat designations.

(See, e.g., Proposed Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover, 71 FR 34571, June 15, 2006, at 34583; and Proposed Designation of Critical Habitat for Southern Resident Killer Whales; 69 FR 75608, Dec. 17, 2004, at 75633)

These same past designations have also recognized that whether national security impacts result from the designation depends on whether future consultations would be required under the jeopardy standard regardless of the critical habitat designation, and whether the critical habitat designation would add new burdens beyond those related to the jeopardy consultation.

As discussed above, based on the past 10–year consultation history, it is likely that consultations with respect to activities on DOD facilities will be triggered as a result of the critical habitat designation. Further, it is possible that some consultations will be due to the presence of the essential feature alone, and that adverse modification of the essential feature could result, thus requiring a reasonable and prudent alternative to the proposed DOD activity.

On May 22, 2007, we sent a letter to DOD requesting information on national security impacts of the proposed critical habitat designation, and received a response from the Department of the Navy (Navy). Further discussions and correspondence identified NASKW as the only installation potentially affected by the critical habitat designation. However, as discussed above, critical habitat is no longer being designated within the boundaries of NASKW pursuant to 4(a)(3)(B) because this facility is covered by an appropriate INRMP. During the public comment period, the Navy added the RAA off Dania, Florida, as an installation likely to be impacted by this designation. The Dania RAA overlays with the Florida specific area of critical habitat (Area 1). No other DOD installations were identified as likely to be impacted by this designation.

The Navy determined activities within the Dania RAA would be adversely impacted by requirements to modify the actions to avoid destroying or adversely modifying critical habitat. The Dania RAA contains underwater cables that enable real-time data acquisition from Navy sensor systems used in Navy exercises. The Navy concluded that the critical habitat designation at the Dania RAA would likely impact national security by diminishing military readiness through the requirement to consult on their activities within critical habitat in addition to the requirement to consult on the two listed corals. We discuss our exclusion analysis based on these national security impacts below.

Other Relevant Impacts

Past critical habitat designations have identified two broad categories of other relevant impacts: conservation benefits, both to the species and to society as a result of designation, and impacts on governmental or private entities that are implementing existing management plans that provide benefits to the listed species. Our Final Section 4(b)(2) Report discusses conservation benefits of designating the four specific areas to the corals, and the benefits of conserving the corals to society, in both ecological and economic metrics.

As summarized in the Final 4(b)(2) Report, elkhorn and staghorn corals currently provide a range of important uses and services to society. Because the features that form the basis of the critical habitat are essential to, and thus contribute to, successful conservation of the two listed corals, protection of critical habitat from destruction or adverse modification may, at minimum, prevent further loss of the benefits currently provided by the species. Moreover, because the essential feature is essential to increasing the abundance of elkhorn and staghorn corals, its successful protection may actually contribute to an increase in the benefits of these species to society in the future. While we cannot quantify nor monetize the benefits, we believe they are not negligible and would be an incremental benefit of this designation. However, although the essential feature is key to the corals' conservation, critical habitat designation alone will not bring about their recovery. The benefits of conserving elkhorn and staghorn coral are, and will continue to be, the result of several laws and regulations.

Elkhorn and staghorn corals are two of the major reef-building corals in the Caribbean. Over the last 5,000 years, they have made a major contribution to the structure that makes up the Caribbean reef system. The structural and ecological roles of Atlantic acroporids in the Caribbean are unique and cannot be filled by other reef-building corals in terms of accretion rates and the formation of structurally complex reefs. At current levels of acroporid abundance, this ecosystem function is significantly reduced. Due to elkhorn and staghorn corals' extremely reduced abundance, it is likely that Caribbean reefs are in an erosional, rather than accretional, state.

In addition to the important functions of reef building and reef maintenance provided by elkhorn and staghorn corals, these species themselves serve as fish habitat (Ogden and Ehrlich, 1977; Appeldoorn *et al.*, 1996), including essential fish habitat (CFMC, 1998), for species of economic and ecological importance. Specifically, Lirman (1999) reported significantly higher abundances of grunts (Haemulidae), snappers (Lutjanidae), and sweepers (Pempheridae) in areas dominated by elkhorn coral compared to other coral sites, suggesting that fish schools use elkhorn colonies preferentially. Additionally, Hill (2001) found that staghorn coral in a Puerto Rican back-reef lagoon was the preferred settlement habitat for the white grunt (Haemulon plumieri). Numerous reef studies have also described the relationship between increased habitat complexity and increased species richness, abundance, and diversity of fishes. Due to their branching morphologies, elkhorn and staghorn corals provide complexity to the coral reef habitat that other common species with mounding or plate morphologies do not provide.

Another benefit of elkhorn and staghorn corals is provided in the form of shoreline protection. Again, due to their function as major reef building species, elkhorn and staghorn corals provide shoreline protection by dissipating the force of waves, which are a major source of erosion and loss of land (NOAA, 2005). For example, in 2005, the coast of Mexico north of Cancun was impacted by Hurricane Wilma; wave height recorded just offshore of the barrier reef was 11 m while wave height at the coast was observed to be 3 m (B. van Tussenbroek, pers. comm.). Damage to coastal structures would have been significantly greater had the 11–m waves not been dissipated by the reef.

Lastly, numerous studies have identified the economic value of coral reefs to tourism and recreation. Of particular relevance, Johns *et al.* (2003) estimated the value of natural reefs to reef users, and the contribution of natural reefs to the economies of the four counties of Florida that are associated with the designation (discussed below). The importance of the benefits elkhorn and staghorn corals provide is also evidenced by the designation of marine protected areas specifically for the protection of these species (e.g., Tres Palmas Reserve, Puerto Rico).

Many previous designations have evaluated the impacts of designation on relationships with, or the efforts of, private and public entities that are involved in management or conservation efforts benefitting listed

species. Similar to national security impacts, impacts on entities responsible for natural resource management or conservation plans that benefit listed species, or on the functioning of those plans, depend on the type and number of ESA section 7 consultations and potential project modifications that may result from the critical habitat designation in the areas covered by the plans. Several existing resource management areas (Florida Keys National Marine Sanctuary, Dry Tortugas National Park, Dry Tortugas Ecological Reserve, Biscayne Bay National Park, Buck Island Reef National Monument, Virgin Islands National Park, and Virgin Islands Coral Reef National Monument) will likely require section 7 consultation under the ESA in the future when the responsible Federal agencies revise their management plans or associated regulations or implement management actions. Negative impacts to these agencies could result if the designation interferes with their ability to provide for the conservation of the species or otherwise hampers management of these areas. Because we identified that resource management was a category of activities that may affect both the species and the critical habitat and that the project modifications required through section 7 consultation would be the same for the species and the essential feature, these costs are considered to be coextensive. However, we found no evidence that relationships would be negatively affected or that negative impacts to other agencies' ability to provide for the conservation of the corals would result from the designation. We also describe in our final 4(b)(2) report that the critical habitat designation will provide an important unique benefit to the corals by protecting settling substrate for future coral recruitment and recovery, compared to existing laws and management plans for these areas that focus on protecting existing coral resources.

Synthesis of Impacts within the Four Specific Areas

As discussed above, no *categories* of Federal actions would require consultation in the future solely due to the critical habitat designation; all projected categories of future actions have the potential to adversely affect both the essential feature and the listed corals. However, an individual action within these categories may ultimately result in impacts to only the essential feature because the species may not be present within the action area. In addition, past actions triggered consultation due to effects on one or more other listed species within the areas covered by the designation (e.g., sea turtles, smalltooth sawfish, Johnson's seagrass), but for purposes of the impacts analysis we assumed these other species consultations would not be co-extensive with consultations for the corals or the essential feature. For each of the specific areas, whether future consultations are incremental impacts of the critical habitat designation or are co-extensive impacts of the listing or other legal authorities will depend on whether the listed corals or other coral species are in the action area. Based on the relative abundance of the essential feature and the listed corals, or all corals combined, there seems to be a higher likelihood that a future project could impact the essential feature alone and thus be an incremental impact of designation. On the other hand, projects with larger or diffuse action areas may have a greater likelihood of impacting both the essential feature and the corals, and the same modifications would alleviate both types of impacts, so the costs of these projects would more likely be co-extensive either with the listing or existing authorities focused on protecting coral reef resources.

In the proposed rule, we related the proportion of consultations within each critical habitat area to the length of shoreline within that area. Upon review of the data used to calculate the length of shoreline, we discovered that the resolution of the individual shorelines between each critical habitat area are not comparable. Thus, we cannot use the shoreline data to evaluate whether or not an area will have disproportionate economic impacts.

The Florida specific area of critical habitat (Area 1) will have the greatest number of ESA section 7 consultations resulting from the critical habitat designation over the next 10 years, 317 consultations, or, on average, 31 per year; the Puerto Rico specific area (Area 2) will have the second highest number of consultations, 115, or, on average, 11–12 per year; and the U.S.V.I. specific areas combined (Areas 3 and 4) will have the lowest number of consultations, 41, or, on average, 4 per year. This ranking of number of consultations by area (Florida>Puerto Rico>U.S.V.I) is also reflected in the "by area" ranking of population, total annual payroll, and annual payroll within the construction sector (which will likely be the most impacted sector of the economy). In all four specific areas COE-permitted marine construction activities comprise the largest number of projected future actions, in similar percentages across the areas (75 percent in Area 1; 65 percent in Area 2; and 61 percent in Areas 3 and 4). Further, because we do know the exact location of future projects, we cannot identify patterns or clumping in the geographic distribution of future consultations and project modifications within any of the specific areas. Thus, we cannot identify any particular areas within the specific areas identified that are expected to incur a disproportionate share of the costs of designation. However, there is no evidence that any portion of any area is geographically predisposed to a greater number of section 7 consultations.

As mentioned above, the majority of projected ESA section 7 consultations in all four specific areas will be COE-authorized marine construction activities, and all of these could involve third-party permittees. Although we assumed all of these projects will require formal consultation due to effects on the essential feature and the corals to avoid underestimating ESA section 7 impacts, as discussed in our impacts report, it is unlikely that all of these projects will trigger consultation for either the essential feature or the corals, or that they would require modification to avoid adverse impacts. Though our database on past consultations is not complete, the data indicate that the majority of the projects in this category were residential dock construction, and, as such, would have been located in protected shorelines such as manmade canals where the essential feature and the corals are not routinely found. Even when these projects trigger consultation in the future, the project modifications that may be required as a result of the critical habitat designation may also be required by an existing regulatory authority, including the ESA listing of the two corals. Thus, if both the essential feature and corals are present, or if another regulatory authority would also require the project modification, the costs associated with these project modifications will be co-extensive. Many of the other categories of activities projected to occur in all four specific areas have the potential to have effects over larger, more diffuse action areas, and thus are more likely to be coextensive costs of the designation (e.g., dredging projects, water discharge, and water quality regulatory projects).

We estimated the maximum incremental administrative costs of conducting ESA section 7 consultation for each of the four specific areas. Multiplying the total number of consultations by the low and high estimates of cost yields the following

ranges of total administrative costs (in 2007 dollars) per area over the next 10 years: $5,651,195 to $11,157,488 in Area 1; $2,050,118 to $4,047,669 in Area 2; and $730,911 to $1,443,082 in Areas 3 and 4. Table 1 above provides a summary of the estimated costs, where possible, of individual project modifications. The Final Section 4(b)(2) Report provides a detailed description of each project modification, methods of determining estimated costs, and the action(s) for which it may be prescribed. Although we have a projection of the number of future formal consultations (albeit an overestimation), the lack of information on the specifics of project design limits our ability to forecast the exact type and amount of modifications required. Therefore, while the costs associated with types of project modifications were characterized, no total cost of this rule can be quantified accurately.

Preventing destruction or adverse modification of critical habitat is expected to contribute to the preservation of, and potential increases in, economic and other conservation benefits in each of the four specific areas, as described in the Final Section 4(b)(2) Report. In Area 1, the natural reefs formed and inhabited by elkhorn and staghorn corals provide over $225 million in average annual use value (2003 dollars) and a capitalized value of over $7 billion to the four Florida counties covered by Area 1. Natural reef-related industries provided over 40,000 jobs in Area 1 in 2003, generating over $1 billion in income. Area 1 experienced almost $6 million in value of commercial reef-dependent fish landings in 2005. Available information also demonstrates the direct link between healthy coral reef ecosystems and the value of scuba-diving related tourism throughout the Caribbean, including Florida, with estimated losses in the hundreds of millions of dollars region-wide per year if reef degradation continues. Coral reefs provided over 87 percent of average annual commercial fish and invertebrate landings in Puerto Rico (Area 2) from 1995 to 2002. In 2005, domestic landings of shallow water reef fish comprised about 66 percent of all fish landed in Puerto Rico and were valued at over $1.7 million. Tourism is not as dominant a component of Puerto Rico's overall economy as it is in Areas 1, 3, and 4, but it may be much more significant for the shoreside communities from which dive and other reef-related tourism activities embark. Tourism accounts for 80 percent of the U.S.V.I.'s (Area 3) Gross Domestic Product and employment. One survey documented that 100 percent of hotel industry respondents stated they believed there would be a significant impact on tourist visits if the coast and beaches were degraded, or fisheries or coral reefs declined. In 2005, domestic landings of shallow water reef fish comprised about 83 percent of all fish landed in the U.S.V.I. that year and were valued at over $3.8 million.

Conservation benefits to the corals in each of the four specific areas are expected to result from the designation. As we have determined, recovery of elkhorn and staghorn corals cannot succeed without protection of the essential feature from destruction or adverse modification. No existing laws or regulations protect the essential feature from destruction or adverse modification with a specific focus on increasing coral abundance and eventual recovery. Given the extremely low current abundance of the corals and characteristics of their sexual reproduction (e.g., limited success over long ranges), protecting the essential feature throughout the corals' range and throughout each of the four specific areas is extremely important for conservation of these species. We also describe the potential educational and awareness benefits to the corals that may result from the critical habitat designation in our Final 4(b)(2) Report.

Regarding economic impacts, the limitations to the type and amount of existing information do not allow us to predict the total costs and benefits of the critical habitat designation. Nevertheless, we believe that our characterization of the types of costs and benefits that may result from the designation, in particular circumstances, may provide some useful information to Federal action agencies and potential project permittees. We have based the designation on a very specifically defined feature essential to the corals' conservation, which allowed us to identify the few, specific effects of human activities that may adversely affect the corals and thus require section 7 consultation under the ESA (sedimentation, nutrification, and physical destruction). We identified potential routine project modifications we may require to avoid destroying or adversely modifying the essential substrate feature. In some cases, these modifications are common environmental mitigation measures that are already being performed under existing laws and regulations that seek to prevent or minimize adverse impacts to coral reef or marine resources in general. Thus, we believe that parties planning future activities within the four specific areas designated as critical habitat for listed corals will be able to predict the potential added costs of their projects resulting from the designation based on their knowledge of the location, size, and timing of their planned activities. We have discussed to the extent possible the circumstances under which section 7 impacts will be incremental impacts of this rule, or co-extensive impacts of this rule and the listing of the corals or another existing legal authority. We believe that the limitations of current information about potential future projects do not allow us to be more specific in our estimates of the section 7 impacts (administrative consultation and project modification costs) of the designation. In addition, based on available information, we could not identify any patterns or clumping in the distribution of future projects (and the associated consultations and potential modifications) either between or within the four specific areas designated as critical habitat for listed corals that would suggest any disproportionate impact of the designation.

Similarly, with regard to the conservation benefits of the designation, we determined that the designation will result in benefits to society. We provide a literature survey of the valuation of coral reefs to provide context for the readers on benefits of protective measures. Given the potential number and types of future ESA section 7 consultations, we expect that the designation will prevent adverse effects to the critical habitat feature, and thus assist in maintaining the feature's conservation function for the two corals. We believe the designation will assist in preventing further losses of the corals and, eventually, in increased abundance of the two species. By contributing to the continued existence of these two species and eventually their increased abundance, the designation, at minimum, prevents loss of important societal benefits described above that are currently provided by the species, and potentially increases these benefits over time.

Regarding impacts on Federal agencies responsible for managing resources in areas designated as critical habitat for listed corals, we expect ESA section 7 consultation responsibilities will result from the designation as described above. However, as explained further in the section 4(b)(2) report, we determined that the designation will not negatively impact the management or operation of existing managed areas or the Federal agencies responsible for these areas. We further determined that the designation provides an added

conservation benefit to the corals beyond the benefits provided by the existing management plans and associated regulations. We believe our evaluation and consideration of the potential impacts above support our conclusion that there are no economic or other relevant impacts that warrant our excluding particular areas from the designation.

As discussed in the next section, we are exercising our discretion to exclude particular areas from the critical habitat designation based on national security impacts.

Exclusions Under Section 4(b)(2)

Impacts to national security as a result of the critical habitat designation are expected to occur in Area 1, specifically on a 5.5 sq mile (14.2 sq km) area of the RAA, Dania, FL. Based on information provided to us by the Navy, national security interests would be negatively impacted by the designation, because the potential additional consultations and project modifications to avoid adversely modifying the essential feature would interfere with military training and readiness. Based on these considerations, we are excluding the particular area identified by the Navy from the critical habitat designation.

The benefit of excluding the Dania RAA particular area is that the Navy would only be required to comply with the jeopardy prohibition of ESA section 7(a)(2) and not the adverse modification prohibition in this area. The Navy maintains that the additional commitment of resources in completing an adverse modification analysis, and any change in its activities to avoid adverse modification of critical habitat, would likely reduce its readiness capability. Given that the Navy is currently actively engaged in training, maintaining, and deploying forces in the current war effort, this reduction in readiness could reduce the ability of the military to ensure national security.

The excluded area comprises only 0.42 percent of Area 1. Navy regulations prohibit anchoring, trawling, dredging, or attaching any object within the area; thus, the corals and their habitat will be protected from these threats. Further, the corals and their habitat will still be protected through ESA section 7 consultations that prohibit jeopardizing the species' continued existence and require modifications to minimize the impacts of incidental take. Further, we do not foresee other Federal activities that might adversely impact critical habitat that would be exempted from future consultation requirements due to this exclusion, since these areas are under exclusive military control. Therefore, in our judgment, the benefit of including the particular area of the Dania RAA is outweighed by the benefit of avoiding the impacts to national security the Navy would experience if they were required to consult based on critical habitat. Given the small percentage of Area 1 encompassed by this area, we conclude that exclusion will not result in extinction of either elkhorn or staghorn coral.

Critical Habitat Designation

We are designating approximately 2,959 square miles (7,664 sq km) of marine habitat within the geographical area occupied by elkhorn and staghorn corals in Florida, Puerto Rico, and the U.S.V.I. The specific areas contain the substrate physical feature we determined to be essential to the conservation of these species and that may require special management considerations or protection.

Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under the Information Quality Act (Public Law 106–554), is intended to enhance the quality and credibility of the Federal Government's scientific information, and applies to influential or highly influential scientific information disseminated on or after June 16, 2005. To satisfy our requirements under the OMB Bulletin, we obtained independent peer review of the scientific information that supported our proposed rule to designate critical habitat for elkhorn and staghorn corals and incorporated the peer review comments prior to dissemination of the proposed rulemaking. The draft 4(b)(2) Report (NMFS, 2007) that supports the proposal to designate critical habitat for elkhorn and staghorn corals was also peer reviewed and the Final 4(b)(2) Report is available on our web site (see **ADDRESSES**).

Classification

We determined that this action is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management programs of Florida, Puerto Rico, and U.S.V.I. The determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. We did not receive responses from Puerto Rico or the U.S.V.I; Florida found the regulation consistent with its approved coastal management programs.

This rule has been determined to be significant under Executive Order (E.O.) 12866. We have integrated the regulatory principles of the E.O. into the development of this final rule to the extent consistent with the mandatory duty to designate critical habitat, as defined in the ESA.

We prepared a FRFA pursuant to section 604 of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*), which describes the economic impact this rule would have on small entities. A description of the action, why it is being considered, and its legal basis are included in the preamble section of this final rule.

Small businesses, small nonprofit organizations, and small governmental jurisdictions may be affected by this designation if they engage in activities that would affect the essential feature identified in this designation and if they receive funding or authorization for such activity from a Federal agency. Such activities would trigger ESA section 7 consultation requirements and potential requirements to modify proposed activities to avoid destroying or adversely modifying the critical habitat. The consultation record from which we have projected likely Federal actions over the next 10 years indicates that applicants for Federal permits or funds have included small entities. For example, marine contractors have been the recipients of COE permits for dock construction; some of these contractors were small entities.

According to the Small Business Administration, businesses in the Heavy and Civil Engineering Construction subsector (NAICS Code 237990), which includes firms involved in marine construction projects such as breakwater, dock, pier, jetty, seawall, and harbor construction, must have average annual receipts of no more than $31 million to qualify as a small business (dredging contractors that perform at least 40 percent of the volume dredged with their own equipment, or equipment owned by another small concern are considered small businesses if their average annual receipts are less than or equal to $18.5 million). Our consultation database does not track the identity of past permit recipients or whether the recipients were small entities, so we have no basis to determine the percentage of grantees or permittees that may be small businesses in the future. We do know from the more recent consultation history that small governmental jurisdictions (population less than or equal to 50,000) have received COE

permits for beach renourishment. Small businesses in the tourist and commercial fishing industries may benefit from the rule, as conservation of elkhorn and staghorn corals is expected to result in increased direct and indirect use of, and values derived from, coral reefs.

We projected that, on average, approximately 39 Federal projects with non-Federal grantees or permittees will be affected by implementation of the critical habitat designation, annually, across all four areas included in the critical habitat designation. Some of these grantees or permittees could be small entities, or could hire small entities to assist in project implementation. Historically, these projects have involved pipeline installation and maintenance, mooring construction and maintenance, dock/pier construction and repair, marina construction, bridge repair and construction, new dredging, maintenance dredging, NPDES/water quality standards, cable installation, beach renourishment, shoreline stabilization, reef ball construction and installation, and port construction. Potential project modifications we have identified that may be required to prevent these types of projects from adversely modifying critical habitat include: project relocation; environmental conditions monitoring; GPS and DPV protocols; diver assisted anchoring or mooring buoy use; pipe collars or cable anchoring; shoreline protection measures; use of upland or artificial sources of sand; directional drilling or tunneling; and sediment and turbidity control measures (see Tables 20, 21 and 24 of the Final Section 4(b)(2) Report).

Even though we cannot determine relative numbers of small and large entities that may be affected by this final rule, there is no indication that affected project applicants would be limited to, nor disproportionately comprise, small entities. It is unclear whether small entities would be placed at a competitive disadvantage compared to large entities. However, as described in the Final Section 4(b)(2) Report, consultations and project modifications will be required based on the type of permitted action and its associated impacts on the essential critical habitat feature. Because the costs of many potential project modifications that may be required to avoid adverse modification of critical habitat are unit costs (e.g., per mile of shoreline, per cubic yard of sand moved) such that total project modification costs would be proportional to the size of the project, it is not unreasonable to assume that larger entities would be involved in implementing the larger projects with proportionally larger project modification costs.

It is also unclear whether the rule will significantly reduce profits or revenue for small businesses. As discussed throughout the Final Section 4(b)(2) Report, we made assumptions that all of the future consultations will be formal, and all will require project modifications; but this is likely an overestimation. In addition, as stated above, though it is not possible to determine the exact cost of any given project modification resulting from consultation, the smaller projects most likely to be undertaken by small entities would likely result in relatively small modification costs. Finally, many of the modifications identified to reduce the impact of a project on critical habitat may be a baseline requirement either due to the ESA listing of the species or under another regulatory authority, notably the CWA.

There are no record-keeping requirements associated with the rule. Similarly, there are no reporting requirements other than those that might be associated with reporting on the progress and success of implementing project modifications, which do not require specific skills to satisfy. However, third party applicants or permittees would be expected to incur costs associated with participating in the administrative process of consultation along with the permitting Federal agency. Such third party costs of consultation were estimated for the 2003 designation of critical habitat for Gulf sturgeon in the southeast United States. In 2007 dollars, per consultation administrative costs for third parties are estimated to average from $3,314 to $4,685.

No Federal laws or regulations duplicate or conflict with this final rule. Existing Federal laws and regulations overlap with the rule only to the extent that they provide protection to marine natural resources or corals generally. However, no existing laws or regulations specifically prohibit destruction or adverse modification of critical habitat for, and focus on the recovery of, elkhorn and staghorn corals.

The alternatives to the designation considered consisted of a no-action alternative and an alternative based on a broader conservation objective that would include multiple physical or biological features of the corals' environment in the designation. The no-action, or no designation, alternative would result in no additional ESA section 7 consultations relative to the status quo of the species' listing and finalization of the ESA section 4(d) rule for these species. However, while additional administrative and potential project modification costs would not be incurred under this alternative, this alternative is not necessarily a no-cost alternative, including to small entities, given the potential loss of existing benefits provided by the corals if they continue to decline due to failure to protect the substrate essential feature from adverse modification. The multiple features alternative was expected to increase the number and complexity of section 7 consultations and associated costs to small entities without concomitant increased conservation benefits to the corals, because we believe the additional features are already effectively managed through the jeopardy analysis required under ESA section 7 or subsumed within the substrate essential feature identified for this designation.

An environmental analysis as provided for under National Environmental Policy Act for critical habitat designations made pursuant to the ESA is not required. See *Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996).

Pursuant to the Executive Order on Federalism, E.O. 13132, the Assistant Secretary for Legislative and Intergovernmental Affairs provided notice of the action and requested comments from the appropriate official(s) of the states and territories in which the two species occur. As mentioned above, Florida found the regulation consistent with its approved coastal management programs, and Puerto Rico and the U.S.V.I. did not respond.

The action has undergone a pre-dissemination review and been determined to be in compliance with applicable information quality guidelines implementing the Information Quality Act (Section 515 of Public Law 106–554).

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

This rule is consistent with E.O. 13089, which is intended to preserve and protect the biodiversity, health, heritage, and social and economic value of U.S. coral reef ecosystems and the marine environment.

References Cited

A complete list of all references cited in this rulemaking can be found on our website at *http://sero.nmfs.noaa.gov/pr/protres.htm* and is available upon request from the NMFS Southeast

Regional Office in St. Petersburg, Florida (see **ADDRESSES**).

List of Subjects

50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transporation.

50 CFR Part 226

Endangered and threatened species.

Dated: November 14, 2008.

James W. Balsiger,

Acting Assistant Administrator of Fisheries, National Marine Fisheries Service.

■ For the reasons set out in the preamble, we amend 50 CFR parts 223 and 226 as set forth below:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.201–202 issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

§ 223.102 [Amended]

■ 2. Amend § 223.102 by removing the text, "NA", from the column labeled "Citation for Critical Habitat Designation" in paragraphs (d)(1) and (d)(2) and adding in its place 73 FR [*Insert FR page number where the document begins*]; November 26, 2008.

PART 226—DESIGNATED CRITICAL HABITAT

■ 3. The authority citation for part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

■ 4. Add § 226.216, to read as follows:

§ 226.216 Critical habitat for elkhorn (*Acropora palmata*) and staghorn (*A. cervicornis*) corals.

Critical habitat is designated for both elkhorn and staghorn corals as described in this section. The textual descriptions of critical habitat in paragraphs (b) and (c) of this section are the definitive source for determining the critical habitat boundaries. The overview maps in paragraph (d) of this section are provided for general guidance purposes only, and not as a definitive source for determining critical habitat boundaries.

(a) *Physical Feature Essential to the Conservation of Threatened Corals.* The physical feature essential to the conservation of elkhorn and staghorn corals is: substrate of suitable quality and availability to support larval settlement and recruitment, and reattachment and recruitment of asexual fragments. "Substrate of suitable quality and availability" is defined as natural consolidated hard substrate or dead coral skeleton that is free from fleshy or turf macroalgae cover and sediment cover.

(b) *Critical Habitat Areas.* Critical habitat includes one specific area of the Atlantic Ocean offshore of Palm Beach, Broward, Miami-Dade, and Monroe counties, Florida, and three specific areas of the Atlantic Ocean and Caribbean Sea offshore of the U.S. Territories of Puerto Rico and the U.S. Virgin Islands. The boundaries of each specific critical habitat area are described below. Except as specified below, the seaward boundary is the 98–ft (30–m) depth contour and the shoreward boundary is the line of mean low water (MLW; 33 CFR 2.20). Within these boundaries, discrete areas of water deeper than 98 ft (30 m) are not included.

(1) *Florida Area:* The Florida area contains three sub-areas.

(i) The shoreward boundary for Florida sub-area A begins at the 6–ft (1.8 m) contour at the south side of Boynton Inlet, Palm Beach County at 26° 32′ 42.5″ N; then runs due east to the point of intersection with the 98–ft (30 m) contour; then follows the 98–ft (30 m) contour to the point of intersection with latitude 25° 45′ 55″ N, Government Cut, Miami-Dade County; then runs due west to the point of intersection with the 6–ft (1.8 m) contour, then follows the 6–ft (1.8 m) contour to the beginning point.

(ii) The shoreward boundary of Florida sub-area B begins at the MLW line at 25° 45′ 55″ N, Government Cut, Miami-Dade County; then runs due east to the point of intersection with the 98–ft (30 m) contour; then follows the 98–ft (30 m) contour to the point of intersection with longitude 82° W; then runs due north to the point of intersection with the South Atlantic Fishery Management Council (SAFMC) boundary at 24° 31′ 35.75″ N; then follows the SAFMC boundary to a point of intersection with the MLW line at Key West, Monroe County; then follows the MLW line, the SAFMC boundary (see 50 CFR 600.105(c)), and the COLREGS line (see 33 CFR 80.727. 730, 735, and 740) to the beginning point.

(iii) The seaward boundary of Florida sub-area C (the Dry Tortugas) begins at the northern intersection of the 98–ft (30 m) contour and longitude 82° 45′ W; then follows the 98–ft (30 m) contour west around the Dry Tortugas, to the southern point of intersection with longitude 82° 45′ W; then runs due north to the beginning point.

(2) *Puerto Rico Area:* All areas surrounding the islands of the Commonwealth of Puerto Rico, 98 ft (30 m) in depth and shallower, seaward of the COLREGS line (see 33 CFR 80.738).

(3) *St. Thomas/St. John Area:* All areas surrounding the islands of St. Thomas and St. John, U.S. Virgin Islands, and smaller surrounding islands, 98 ft (30 m) in depth and shallower.

(4) *St. Croix Area:* All areas surrounding the island of St. Croix, U.S. Virgin Islands, 98 ft (30 m) in depth and shallower.

(c) *Areas not included in critical habitat.* Critical habitat does not include the following particular areas where they overlap with the areas described in paragraph (b) of this section:

(1) Pursuant to ESA section 4(a)(3)(B), all areas subject to the 2008 Naval Air Station Key West Integrated Natural Resources Management Plan.

(2) Pursuant to ESA section 3(5)(A)(i), all areas containing existing (already constructed) federally authorized or permitted man-made structures such as aids-to-navigation (ATONs), artificial reefs, boat ramps, docks, pilings, maintained channels, or marinas.

(3) Pursuant to ESA section 3(5)(A)(i), all waters identified as existing (already constructed) federally authorized channels and harbors as follows:

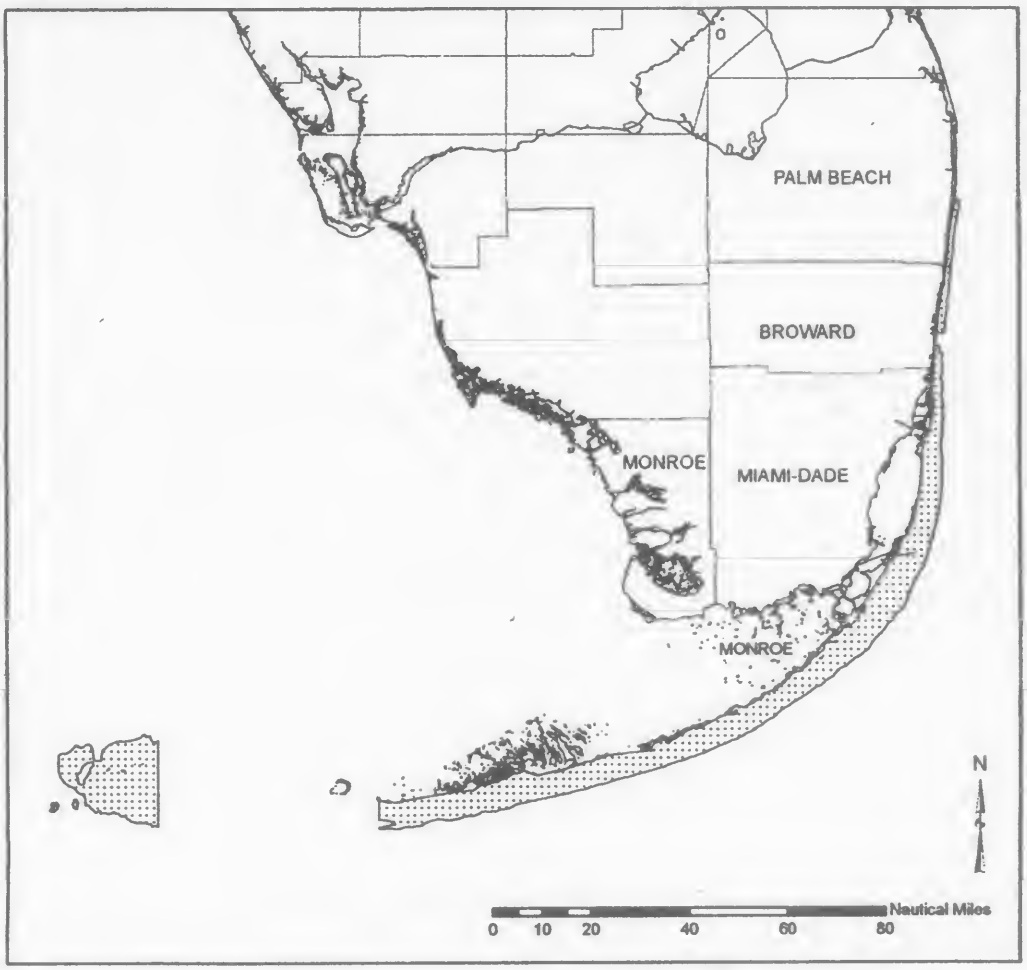
(i) Palm Beach Harbor.
(ii) Hillsboro Inlet.
(iii) Port Everglades.
(iv) Miami Harbor.
(v) Key West Harbor.
(vi) Arecibo Harbor.
(vii) San Juan Harbor.
(viii) Fajardo Harbor.
(ix) Ponce Harbor.
(x) Mayaguez Harbor.
(xi) St. Thomas Harbor.
(xii) Christiansted Harbor.

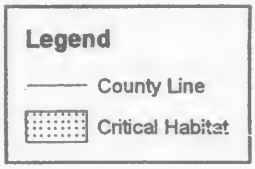
(d) Areas excluded from critical habitat. Pursuant to ESA Section 4(b)(2), all waters of the Restricted Anchorage Area as described at 33 CFR 334.580, beginning at a point located at 26° 05′ 30″ N, 80 03′ 30″ W.; proceed west to 26° 05′ 30″ N, 80° 06′ 30″ W; thence, southerly to 26° 03′ 00″ N, longitude 80° 06′ 42″ W; thence, east to latitude 26° 03′ 00″ N, 80° 05′ 44″ W.; thence, south to 26° 01′ 36″ N, 80° 05′ 44″ W.; thence, east to 26° 01′ 36″ N, 80° 03′ 30″ W; thence, north to the point of beginning.

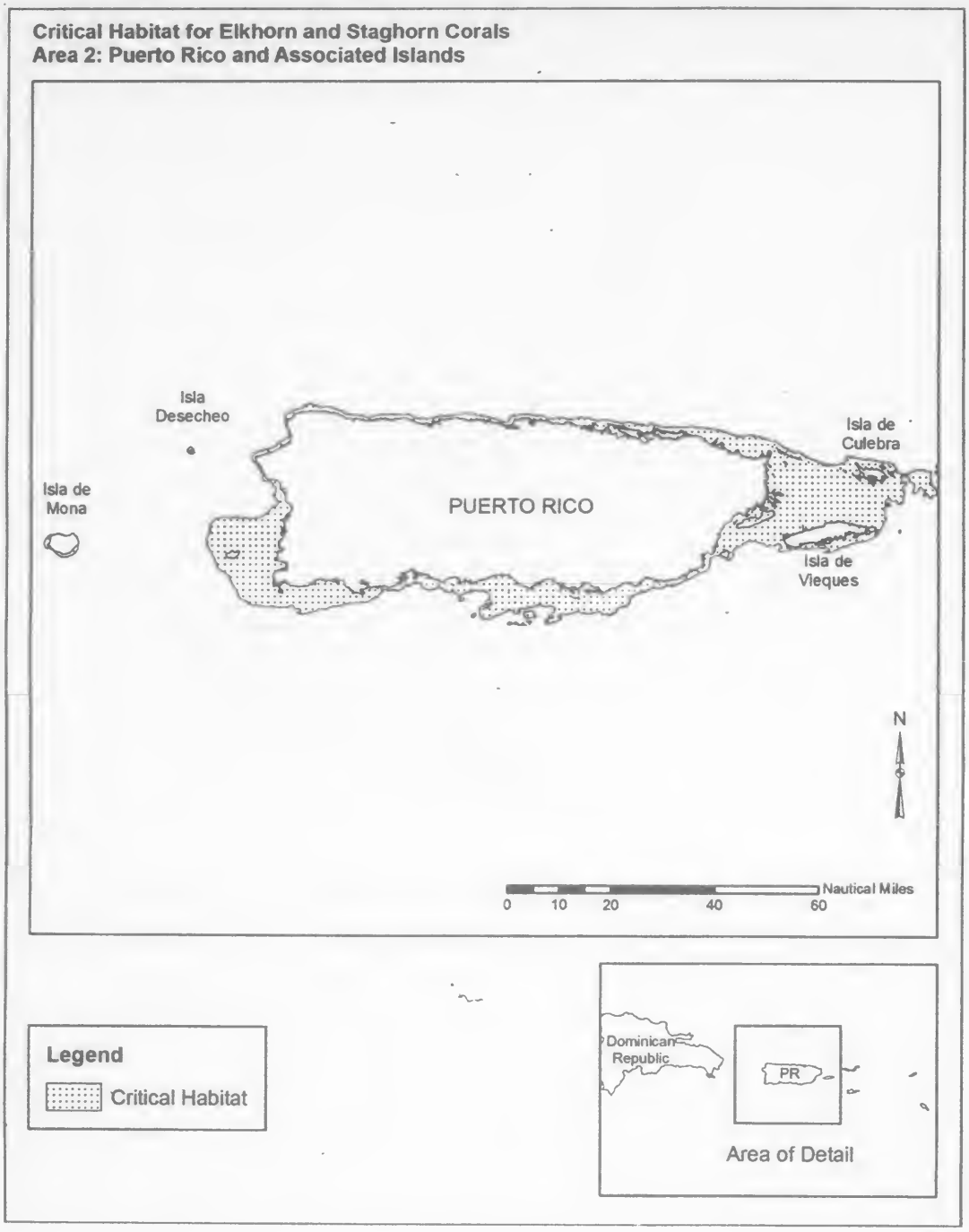
(e) Overview maps of designated critical habitat for elkhorn and staghorn corals follow.

BILLING CODE 3510–22–S

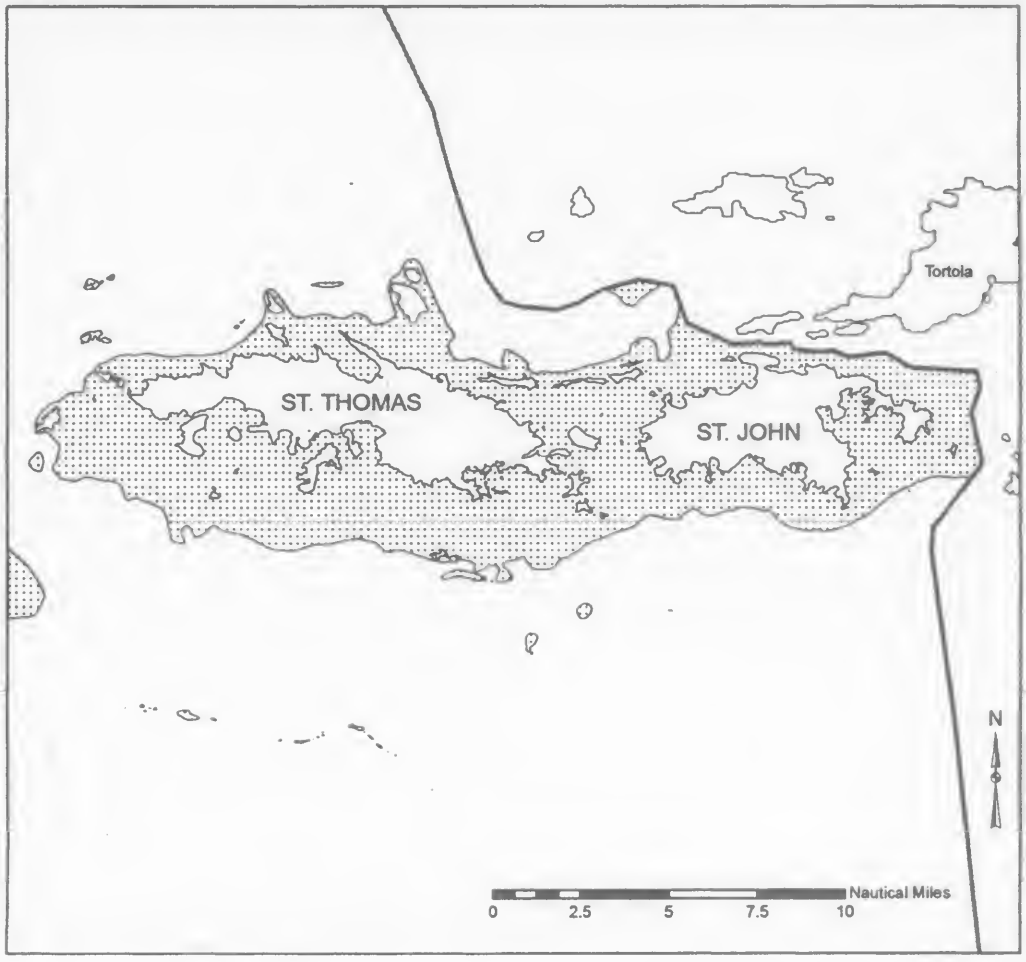
Critical Habitat for Elkhorn and Staghorn Corals
Area 1: Florida






Critical Habitat for Elkhorn and Staghorn Corals
Area 2: Puerto Rico and Associated Islands
Isla Desecheo
Isla de Culebra
Isla de Mona
PUERTO RICO
Isla de Vieques
N
0 10 20 40 60
Nautical Miles
Legend
Critical Habitat
Dominican Republic
PR
Area of Detail

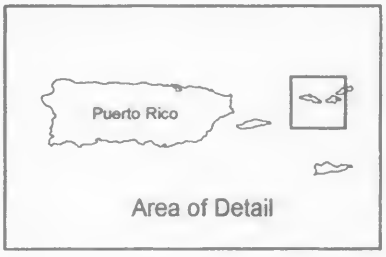
Critical Habitat for Elkhorn and Staghorn Corals
Area 3: St. John/St. Thomas, U.S.V.I.

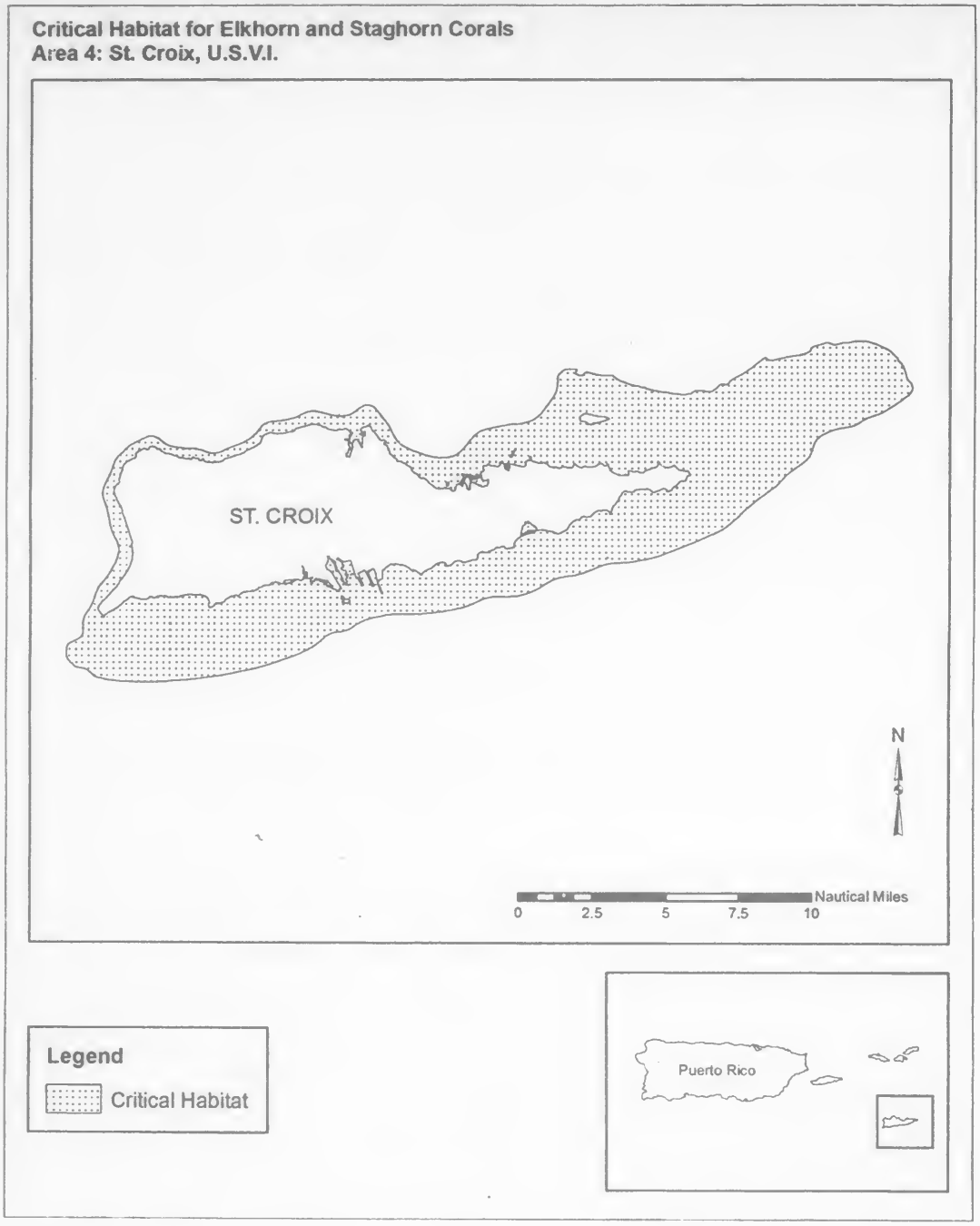


Legend

Exclusive Economic Zone

Critical Habitat





[FR Doc. E8–27748 Filed 11–25–08; 8:45 am]
BILLING CODE 3510–22–C

Federal Register

Wednesday,
November 26, 2008

Part VI

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 2 and 52
Federal Acquisition Regulation; Corrections; Final Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2 and 52

[FAC 2005–29 Correction; Docket 2008–0001; Sequence 1]

Federal Acquisition Regulation; Corrections

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Corrections.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are issuing corrections to FAC 2005–29, FAR Case 2007–013, which was published in the **Federal Register** at 73 FR 67703 and 67704, November 14, 2008.

EFFECTIVE DATE: January 15, 2009.

FOR FURTHER INFORMATION CONTACT Ms. Laurieann Duarte at (202) 501–4755, General Services Administration, Regulatory Secretariat, Washington, DC 20405.

CORRECTIONS

In the final rule document appearing in the issue of November 14, 2008:

2.101 [Corrected]

■ 1. On page 67703, second column, under section 2.101, remove from paragraph (b)(6) "2.1801" and add "22.1801" in its place.

52.222–54 [Corrected]

■ 2. On page 67704, third column, under section 52.222–54, remove from the introductory paragraph "and 12.301(d)(3)".

Dated: November 20, 2008.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. E8–27952 Filed 11–25–08; 8:45 am]

BILLING CODE 6820–EP–S

Federal Register

Wednesday,
November 26, 2008

Part VII

Federal Deposit Insurance Corporation

12 CFR Part 370
Temporary Liquidity Guarantee Program; Final Rule

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 370

RIN 3064–AD37

Temporary Liquidity Guarantee Program

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is adopting a Final Rule to implement its Temporary Liquidity Guarantee Program. The Temporary Liquidity Guarantee Program, designed to avoid or mitigate adverse effects on economic conditions or financial stability, has two primary components: The Debt Guarantee Program, by which the FDIC will guarantee the payment of certain newly-issued senior unsecured debt, and the Transaction Account Guarantee Program, by which the FDIC will guarantee certain noninterest-bearing transaction accounts.

DATES: *Effective Date:* The Final Rule becomes effective on November 21, 2008, except that § 370.5(h)(2), (h)(3), and (h)(4) are effective December 19, 2008.

FOR FURTHER INFORMATION CONTACT: Munsell W. St. Clair, Section Chief, Division of Insurance and Research, (202) 898–8967 or *mstclair@fdic.gov*; Lisa Ryu, Section Chief, Division of Insurance and Research, (202) 898–3538 or *LRyu@fdic.gov*; Richard Bogue, Counsel, Legal Division, (202) 898–3726 or *rbogue@fdic.gov*; Robert Fick, Counsel, Legal Division, (202) 898–8962 or *rfick@fdic.gov*; A. Ann Johnson, Counsel, Legal Division, (202) 898–3573 or *aajohnson@fdic.gov*; Gail Patelunas, Deputy Director, Division of Resolutions and Receiverships, (202) 898–6779 or *gpatelunas@fdic.gov*; John Corston, Associate Director, Large Bank Supervision, Division of Supervision and Consumer Protection, (202) 898–6548 or *jcorston@fdic.gov*; Serena L. Owens, Associate Director, Supervision and Applications Branch, Division of Supervision and Consumer Protection, (202) 898–8996 or *sowens@fdic.gov*; Donna Saulnier, Manager, Assessment Policy Section, Division of Finance, (703) 562–6167 or *dsaulnier@fdic.gov*; Michael L. Hetzner, Senior Assessment Specialist, Division of Finance, (703) 562–6405 or *mhetzner@fdic.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On November 21, 2008, the Board of Directors (Board) of the Federal Deposit Insurance Corporation (FDIC) adopted a Final Rule relating to the Temporary Liquidity Guarantee Program (TLG Program). The TLG Program was announced by the FDIC on October 14, 2008, as an initiative to counter the current system-wide crisis in the nation's financial sector. It provided two limited guarantee programs: One that guaranteed newly-issued senior unsecured debt of insured depository institutions and most U.S. holding companies (the Debt Guarantee Program), and another that guaranteed certain noninterest-bearing transaction accounts at insured depository institutions (the Transaction Account Guarantee Program).

The FDIC's establishment of the TLG Program was preceded by a determination of systemic risk by the Secretary of the Treasury (after consultation with the President), following receipt of the written recommendation of the Board on October 13, 2008, along with a similar written recommendation of the Board of Governors of the Federal Reserve System (FRB).

The recommendations and eventual determination of systemic risk were made in accordance with section 13(c)(4)(G) to the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1823(c)(4)(G). The determination of systemic risk allowed the FDIC to take certain actions to avoid or mitigate serious adverse effects on economic conditions and financial stability. The FDIC believes that the TLG Program promotes financial stability by preserving confidence in the banking system and encouraging liquidity in order to ease lending to creditworthy businesses and consumers. The FDIC anticipates that the TLG Program will favorably impact both the availability and the cost of credit. As a result, on October 23, 2008, the FDIC's Board authorized publication in the **Federal Register** and requested comment regarding an Interim Rule designed to implement the TLG Program. The Interim Rule with request for comments was published on October 29, 2008, and provided for a 15 day comment period.[1]

Later, the FDIC amended its Interim Rule. The Amended Interim Rule became effective on November 4, 2008, and was published in the **Federal Register** on November 7, 2008. It made three limited modifications to the Interim Rule. In the Amended Interim Rule, the FDIC extended the opt-out deadline for participation in the TLG Program from November 12, 2008 until December 5, 2008; extended the deadline for complying with specific disclosure requirements related to the TLG Program from December 1, 2008 until December 19, 2008; and established assessment procedures to accommodate the extended opt-out period. Additionally, in issuing the Amended Interim Rule, the FDIC requested comment on three additional questions relating to the TLG Program.

The FDIC received over 700 comments on the Interim Rule and the Amended Interim Rule and, after consideration of those comments, issues the Final Rule that follows.

II. The Interim Rule

The Interim Rule permitted the following eligible entities to participate in the TLG Program: FDIC-insured depository institutions, any U.S. bank holding company or financial holding company, and any U.S. savings and loan holding company that either engaged only in activities permissible for financial holding companies to conduct under section (4)(k) of the Bank Holding Company Act of 1956 (BHCA) or had at least one insured depository institution subsidiary that was the subject of an application that was pending on October 13, 2008, pursuant to section 4(c)(8) of the BHCA. To be considered an "eligible entity" under the Interim Rule, both bank holding companies and savings and loan holding companies were required to have at least one chartered and operating insured depository institution within their holding company structure The Interim Rule permitted other affiliates of insured depository institutions to participate in the program, with the permission of the FDIC, granted in its sole discretion and on a case-by-case basis, after written request and positive recommendation by the appropriate Federal banking agency. In making this determination, the FDIC would consider such factors as (1) the extent of the financial activity of the entities within the holding company structure; (2) the strength, from a ratings perspective, of the issuer of the obligations that will be guaranteed; and (3) the size and extent of the activities of the organization.

The TLG Program became effective on October 14, 2008. The Interim Rule provided that from October 14, 2008, all eligible entities would be covered under both components of the TLG Program for the first 30 days of the program unless they opted out of either component of the Program before then. Under the Interim Rule, the guarantees provided by the TLG Program under either the Debt Guarantee Program or the Transaction Account Guarantee Program would be offered at no cost to

[1] 73 FR 64179 (Oct. 29, 2008).

eligible entities until November 13, 2008. The Interim Rule provided that by 11:59 p.m., Eastern Standard Time (EST) on November 12, 2008, eligible entities were required to inform the FDIC whether they intended to opt-out of one or both components of the TLG Program. (The Interim Rule also permitted eligible entities to notify the FDIC before that date of their intent to participate in the program.) An eligible entity that did not opt-out of either or both programs became a participating entity in the program, according to the Interim Rule. Eligible entities that did not opt-out of the Debt Guarantee Program by the opt-out date of November 12, 2008, were not permitted to select which of their newly-issued senior unsecured debt would be guaranteed; the Interim Rule provided that all senior unsecured debt issued by a participating entity up to a limit of 125 percent of all senior unsecured debt outstanding on September 30, 2008, and maturing by June 30, 2009, would be considered guaranteed debt when issued. The Interim Rule allowed a participating entity to make a separate election and pay a nonrefundable fee to issue non-guaranteed senior unsecured debt with a maturity date after June 30, 2012, prior to reaching the 125 percent debt guarantee limit.

The Interim Rule permitted an eligible entity to opt-out of either the Debt Guarantee Program or the Transaction Account Guarantee Program or of both components of the TLG Program, but required all eligible entities within a U.S. Banking Holding Company or a U.S. Savings and Loan Holding Company structure to make the same decision regarding continued participation in each component of the TLG Program or none of the members of the holding company structure were considered eligible for participation in that component of the TLG Program.

The Interim Rule required an eligible entity's opt-out decision(s) to be made publicly available. In the Interim Rule, the FDIC committed to maintain and post on its website a list of entities that opted out of either or both components of the TLG Program. The Interim Rule required each eligible entity to make clear to relevant parties whether or not it chose to participate in either or both components of the TLG Program.

According to the Interim Rule, if an eligible entity remained in the Debt Guarantee Program of the TLG Program, it was required to clearly disclose to interested lenders and creditors, in writing and in a commercially reasonable manner, what debt it was offering and whether the debt was guaranteed under this program. Similarly, the Interim Rule provided that an eligible entity had to prominently post a notice in the lobby of its main office and at all of its branches disclosing its decision on whether to participate in, or opt-out of, the Transaction Account Guarantee Program. These disclosures were required to be provided in simple, readily understandable text, and, if the eligible entity decided to participate in the Transaction Account Guarantee Program, the Interim Rule required the notice to state that noninterest-bearing transaction accounts were fully guaranteed by the FDIC. The Interim Rule provided that if the institution used sweep arrangements or took other actions that resulted in funds in a noninterest-bearing transaction account being transferred to or reclassified as an interest-bearing account or a non-transaction account, the institution also must disclose those actions to the affected customers and clearly advise them in writing that such actions would void the transaction account guarantee. The Interim Rule required the described disclosures to be made by December 1, 2008.

A. The Debt Guarantee Program

The Debt Guarantee Program, as described in the Interim Rule, temporarily would guarantee all newly-issued senior unsecured debt up to prescribed limits issued by participating entities on or after October 14, 2008, through and including June 30, 2009. The guarantee would not extend beyond June 30, 2012. The Interim Rule explained that, as a result of this guarantee, the unpaid principal and contract interest of an entity's newly-issued senior unsecured debt would be paid by the FDIC if the issuing insured depository institution failed or if a bankruptcy petition were filed by the respective issuing holding company.

In the Interim Rule, senior unsecured debt included, without limitation, federal funds purchased, promissory notes, commercial paper, unsubordinated unsecured notes, certificates of deposit standing to the credit of a bank, bank deposits in an international banking facility (IBF) of an insured depository institution, and Eurodollar deposits standing to the credit of a bank. Senior unsecured debt was permitted to be denominated in foreign currency. For purposes of the Interim Rule, the term "bank" in the phrase "standing to the credit of a bank" meant an insured depository institution or a depository institution regulated by a foreign bank supervisory agency. To be eligible for the Debt Guarantee Program, senior unsecured debt was required to be noncontingent. Finally, the Interim Rule required senior unsecured debt to be evidenced by a written agreement, contain a specified and fixed principal amount to be paid on a date certain, and not be subordinated to another liability.

The preamble to the Interim Rule explained that the purpose of the Debt Guarantee Program was to provide liquidity to the inter-bank lending market and promote stability in the unsecured funding market and not to encourage innovative, exotic or complex funding structures or to protect lenders who make risky loans. Thus, as explained in the Interim Rule, for purposes of the Debt Guarantee Program, some instruments were excluded from the definition of senior unsecured debt. Some of these exclusions from that definition were, for example, obligations from guarantees or other contingent liabilities, derivatives, derivative-linked products, debt paired with any other security, convertible debt, capital notes, the unsecured portion of otherwise secured debt, negotiable certificates of deposit, and deposits in foreign currency and Eurodollar deposits that represent funds swept from individual, partnership or corporate accounts held at insured depository institutions. Also excluded from the definition of "senior unsecured debt" were loans from affiliates, including parents and subsidiaries, and institution-affiliated parties.

The Interim Rule explained that debt eligible for coverage under the Debt Guarantee Program had to be issued by participating entities on or before June 30, 2009. The FDIC agreed to guarantee such debt until the earlier of the maturity date of the debt or until June 30, 2012. The Interim Rule provided an absolute limit for coverage: coverage would expire at 11:59 p.m. EST on June 30, 2012, whether or not the liability had matured at that time. In order for the newly-issued senior unsecured debt to be guaranteed by the FDIC, the Interim Rule required the debt instrument to be clearly identified as "guaranteed by the FDIC."

As explained in the Interim Rule, absent additional action by the FDIC, the maximum amount of senior unsecured debt that could be issued pursuant to the Debt Guarantee Program was equal to 125 percent of the par or face value of senior unsecured debt outstanding as of September 30, 2008, that was scheduled to mature on or before June 30, 2009. The Interim Rule provided that the maximum guaranteed amount would be calculated for each individual participating entity within a holding company structure. In the

Interim Rule, the FDIC outlined procedures that required each participating entity to calculate its outstanding senior unsecured debt as of September 30, 2008, and to provide that information—even if the amount of the senior unsecured debt was zero—to the FDIC.

The 125 percent limit described in the Interim Rule could be adjusted for participating entities if the FDIC, in consultation with any appropriate Federal banking agency, determined it was necessary. Additionally, the Interim Rule provided that, after written request and positive recommendation by the appropriate Federal banking agency, the FDIC, in its sole discretion and on a case-by-case basis, may allow an affiliate of a participating entity to take part in the Debt Guarantee Program. Factors that would be relevant to this determination are (1) the extent of the financial activity of the entities within the holding company structure; (2) the strength, from a ratings perspective, of the issuer of the obligations that will be guaranteed; and (3) the size and extent of the activities of the organization.

The Interim Rule also stated that, again, on a case-by case basis, the FDIC could authorize a participating entity to exceed the 125 percent limitation or limit its participation to less than 125 percent.

A participating entity was prohibited by the Interim Rule from representing that its debt was guaranteed by the FDIC if it did not comply with the rules governing the Debt Guarantee Program. If the issuing entity opted out of the Debt Guarantee Program, the Interim Rule provided that it could no longer represent that its newly-issued debt was guaranteed by the FDIC. Similarly, once an entity has reached its 125 percent limit, it was prohibited from representing that any additional debt was guaranteed by the FDIC, and was required to specifically disclose that such debt was not guaranteed.

After consultation with a participating entity's appropriate Federal banking agency, the Interim Rule provided that the FDIC, in its discretion, could determine that a participating entity should not be permitted to continue to participate in the TLG Program. The FDIC explained that termination of an entity's participation in the Program would have only a prospective effect, and the FDIC required the entity to notify its customers and creditors that it was no longer issuing guaranteed debt.

Under the Interim Rule, entities that chose to participate in the Debt Guarantee Program and to issue guaranteed debt had to agree to supply information requested by the FDIC, as well as to be subject to periodic FDIC on-site reviews as needed after consultation with the appropriate federal banking agency to determine compliance with the terms and requirements of the TLG Program. Participating entities also would be bound by the FDIC's decisions, in consultation with the appropriate Federal banking agency, regarding the management of the TLG Program. If an entity participated in the Debt Guarantee Program, the Interim Rule provided that it was not exempt from complying with federal and state securities laws and with any other applicable laws.

B. The Transaction Account Guarantee Program

The Transaction Account Guarantee Program as described in the Interim Rule, provided for a temporary full guarantee by the FDIC for funds held at FDIC-insured depository institutions in noninterest-bearing transaction accounts above the existing deposit insurance limit. This coverage became effective on October 14, 2008, and would continue through December 31, 2009 (assuming that the insured depository institution does not opt-out of this component of the TLG Program).

Under the Interim Rule, a "noninterest-bearing transaction account" was defined as a transaction account with respect to which interest is neither accrued nor paid and on which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal. This definition was designed to encompass traditional demand deposit checking accounts that allowed for an unlimited number of deposits and withdrawals at any time and official checks issued by an insured depository institution. The definition contained in the Interim Rule specifically did not include negotiable order of withdrawal (NOW) accounts or money market deposit accounts (MMDAs).

The Interim Rule recognized that depository institutions sometimes waive fees or provide fee-reducing credits for customers with checking accounts and stated that such account features do not prevent an account from qualifying under the Transaction Account Guarantee Program, if the account otherwise satisfies the definition.

The Interim Rule clarified that the guarantee provided for noninterest-bearing transaction accounts is in addition to and separate from the general deposit insurance coverage provided for in 12 CFR Part 330. The FDIC stated that although the unlimited coverage for noninterest-bearing transaction accounts under the TLG Program is intended primarily to apply to transaction accounts held by businesses, it also applies to all such accounts held by any depositor.

The Interim Rule included a provision relating to sweep accounts. Under this provision, the FDIC stated that it would treat funds in sweep accounts in accordance with the usual rules and procedures for determining sweep balances at a failed depository institution. Under these procedures, funds may be swept or transferred from a noninterest-bearing transaction account to another type of deposit or nondeposit account, and the FDIC stated that it would treat the funds as being in the account to which the funds were transferred. The Interim Rule provided an exception for funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings account:[2] such swept funds would be treated as being in a noninterest-bearing transaction account. As a result of this treatment, the Interim Rule provided that funds swept into a noninterest-bearing savings account would be guaranteed under the Transaction Account Guarantee Program.

C. Fees for the TLG Program

The Interim Rule provided for fees related to both components of the TLG Program. It provided that, beginning on November 13, 2008, any eligible entity that had not opted out of the Debt Guarantee Program would be assessed fees for continued coverage. According to the Interim Rule, all eligible debt issued by such entities from October 14, 2008 (and still outstanding on November 13, 2008), through June 30, 2009, would be charged an annualized fee equal to 75 basis points multiplied by the amount of debt issued, and calculated for the maturity period of that debt or June 30, 2012, whichever was earlier. (The Interim Rule explained that a deduction from this calculation would be made for the first 30 days of the program, for which no fees would be charged.) The Interim Rule further provided that if any participating entity issued eligible debt guaranteed by the Debt Guarantee Program, the participating entity's assessment would be based on the total amount of debt issued and the maturity date at issuance and that if the guaranteed debt was ultimately retired before its scheduled

[2] For purposes of this rule, "savings account" is a type of "savings deposit" as defined in Regulation D issued by the Board of Governors of the Federal Reserve System, 12 CFR 204.2(d).

maturity, there would be no refund of pre-paid fees.

If an eligible entity did not opt-out, the Interim Rule indicated that all newly-issued senior unsecured debt up to the maximum amount would become guaranteed as and when issued. Participating entities were prohibited from issuing guaranteed debt in excess of the maximum amount for the institution and also were prohibited from issuing non-guaranteed debt until the maximum allowable amount of guaranteed debt had been issued.

The Interim Rule permitted one exception to the prohibition against issuing non-guaranteed debt until the maximum allowable amount of guaranteed debt had been issued. A participating entity could issue non-guaranteed debt with maturities beyond June 30, 2012, at any time, in any amount, and without regard to the guarantee limit only if the entity informed the FDIC of its election to do so. This election was required to be made through FDIC*connect* on or before11:59 pm EST on November 12, 2008, and any party exercising this option was required to pay a non-refundable fee. This non-refundable fee equaled 37.5 basis points times the amount of the entity's senior unsecured debt with a maturity date on or before June 30, 2009, outstanding as of September 30, 2008.

If a participating entity nonetheless issued debt identified as "guaranteed by the FDIC" in excess of the FDIC'S limit, according to the Interim Rule, the participating entity would have its assessment rate for guaranteed debt increased to 150 basis points on all outstanding guaranteed debt. For this violation (and for other violations of the TLG Program), a participating entity and its institution-affiliated parties will be subject to enforcement actions under section 8 of the FDI Act (12 U.S.C. 1818), including, for example, assessment of civil money penalties under section 8(i) of the FDI Act (12 U.S.C. 1818(i)), removal and prohibition orders under section 8(e) of the FDI Act (12 U.S.C. 1818(e)), and cease and desist orders under section 8(b) of the FDI Act (12 U.S.C. 1818(b)). The violation of any provision of the program by an insured depository institution also constitutes grounds for terminating the institution's deposit insurance under section 8(a)(2) of the FDI Act (12 U.S.C. 1818(a)(2)). The appropriate Federal banking agency for the participating entity will consult with the FDIC in enforcing the provisions of this part. The appropriate Federal banking agency and the FDIC also have enforcement authority under section 18(a)(4)(C) of the FDI Act (12 U.S.C. 1828(a)(4)(C)) to pursue an enforcement action if a person knowingly misrepresents that any deposit liability, obligation, certificate, or share is insured when it is not in fact insured. Moreover, a participating entity's default in the payment of any debt may be considered an unsafe or unsound practice and may result in enforcement action.

The Interim Rule recognized that much of the outstanding debt as of September 30, 2008, which was not guaranteed, would be rolled over into guaranteed debt only when the outstanding debt matured. The Interim Rule stated that the nonrefundable fee would be collected in six equal monthly installments. The Interim Rule provided that an entity electing the nonrefundable fee option also would be billed as it issued guaranteed debt under the Debt Guarantee Program, and that the amounts paid as a nonrefundable fee were to be applied to offset these bills until the nonrefundable fee was exhausted. Thereafter, according to the Interim Rule, the institution would be required to pay additional assessments on guaranteed debt as it issued the debt.

Under the Transaction Account Guarantee Program described in the Interim Rule, the FDIC committed to provide a full guarantee for deposits held at FDIC-insured institutions in noninterest-bearing transaction accounts. This coverage became effective on October 14, 2008, and would expire on December 31, 2009 (assuming the insured depository institution did not opt-out of the Transaction Account Guarantee Program). The Interim Rule provided that all insured depository institutions were automatically enrolled in the Transaction Account Guarantee Program for an initial thirty-day period (from October 14, 2008, through November 12, 2008) at no cost.

Beginning on November 13, 2008, if an insured depository institution did not opt-out of the Transaction Account Guarantee Program, it would be assessed on a quarterly basis an annualized 10 basis point assessment on balances in noninterest-bearing transaction accounts that exceed the existing deposit insurance limit of $250,000, according to the Interim Rule. In the Interim Rule, the FDIC stated its intent to collect such assessments at the same time and in the same manner as it collects an institution's quarterly deposit insurance assessments under existing part 327, although the assessments related to the Transaction Account Guarantee Program would be in addition to an institution's risk-based assessment imposed under that part.

The Interim Rule also required the FDIC to impose an emergency systemic risk assessment on insured depository institutions if the fees and assessments collected under the TLG Program proved insufficient to cover losses incurred as a result of the program. In addition, if at the conclusion of these programs there were any excess funds collected from the fees associated with the TLG Program, the Interim Rule provided that the funds would remain as part of the Deposit Insurance Fund.

D. Payment of Claims by the FDIC Pursuant to the Transaction Account Guarantee Program

The Interim Rule established a process for payment and recovery of FDIC guarantees of "noninterest-bearing transaction accounts." In the Interim Rule, the FDIC stated that its obligation to make payment, as guarantor of deposits held in noninterest-bearing transaction accounts, arose upon the failure of a participating federally insured depository institution. The Interim Rule also noted that the payment and claims process for satisfying claims under the Transaction Account Guarantee Program generally would follow the procedures prescribed for deposit insurance claims pursuant to section 11(f) of the FDI Act, 12 U.S.C. 1821(f), and that the FDIC would be subrogated to the rights of depositors against the institution pursuant to section 11(g) of the FDI Act, 12 U.S.C. 1821(g).

The FDIC stated that it would make payment to the depositor for the guaranteed amount under the Transaction Account Guarantee Program or would make such guaranteed amounts available in an account at another insured depository institution when it fulfilled its deposit insurance obligation under Part 330. The Interim Rule provided that the payment made pursuant to the Transaction Account Guarantee Program would be made as soon as possible after the FDIC, in its sole discretion, determined whether the deposit was eligible and what amount would be guaranteed. In the preamble to the Interim Rule, the FDIC stated its intent to make the entire amount of a qualifying transaction account available to the depositor on the next business day following the failure of an institution that participated in the Transaction Account Guarantee Program. If there is no acquiring institution for a transaction account guaranteed by the Transaction Account Guarantee Program, in the preamble to the Interim Rule, the FDIC also stated its intent to mail a check to the depositor for the full amount of the guaranteed

account within days of the insured depository institution's failure.

The Interim Rule provided that the FDIC would be subrogated to all rights of the depositor against the institution with respect to noninterest-bearing transaction accounts guaranteed by the Transaction Account Guarantee Program, and the preamble explained that this included the right of the FDIC to receive dividends from the proceeds of the receivership estate of the institution. The preamble to the Interim Rule also explained that the FDIC, as manager of the Deposit Insurance Fund, would be entitled to receive dividends in the deposit class for that portion of the account and that the FDIC would be entitled to receive dividends from the receiver for assuming its obligation with regard to the uninsured portion of the guaranteed transactional deposit accounts.

The Interim Rule provided that claims related to noninterest-bearing transaction accounts would be paid in accordance with 12 U.S.C. 1821(f) and 12 CFR 330. The preamble to that rule provided that in paying such claims, the FDIC would rely on the books and records of the insured depository institution to establish ownership and that the FDIC could require a claimant to file a proof of claim (POC) in accordance with section 11(f)(2) of the FDI Act, 12 U.S.C. 1821(f)(2). The Interim Rule provided that the FDIC's determination of the guaranteed amount would be final and would be considered a final administrative determination subject to judicial review in accordance with Chapter 7 of Title 5. The Interim Rule permitted a noninterest-bearing transaction account depositor to seek judicial review of the FDIC's determination on payment of the guaranteed amount in the United States district court for the federal judicial district where the principal place of business of the depository institution is located within 60 days of the date on which the FDIC's final determination is issued.

E. Payment of Claims by the FDIC Pursuant to the Debt Guarantee Program: Insured Depository Institution Debt

The Interim Rule indicated that, with respect to debt issued by an insured depository institution, the FDIC's obligation to make payment is triggered by the failure of a participating insured depository institution and that the FDIC would use its established receivership claims process to process guarantee requests. The Interim Rule required claimants under the Debt Guarantee Program to present their claims within 90 days of the publication of the claims notice by the receiver for the failed institution. In the preamble to the Interim Rule, the FDIC projected that many debtholders, particularly sellers of federal funds, would be paid on the next business day immediately following the failure of an insured depository institution, but that, in all instances, the FDIC would commit to pay claims expeditiously and strive to make payment on the business day following the establishment of the validity of the claim. The Interim Rule also provided that the FDIC would be subrogated to the rights of any creditor paid under this aspect of the Debt Guarantee Program.

F. Payment of Claims by the FDIC Pursuant to the Debt Guarantee Program: Holding Company Debt

Under the Interim Rule, for senior unsecured debt of holding companies eligible for payment based on the Debt Guarantee Program, the FDIC's obligation to make payment would be triggered on the date of the filing of a bankruptcy petition involving a participating holding company. The Interim Rule also provided that the FDIC would pay the debtholder the principal amount of the debt and contract interest to the date of the filing of the bankruptcy petition and that the FDIC would pay interest on a claim for debt until paid at the 90-day T-bill rate in effect when the bankruptcy petition was filed if payment for the claim were delayed beyond the next business day after the filing of the bankruptcy petition.

As with claims for debt issued by insured depository institutions, in the Interim Rule, the FDIC committed to expedite the claims payment process related to guaranteed debt, but the FDIC stated that it would not be required to make payment on the guaranteed amount for a debt asserted against a bankruptcy estate, unless and until the claim for the unsecured senior debt has been determined to be an allowed claim against the bankruptcy estate and such claim was not subject to reconsideration under 11 U.S.C. 502(j).

The Interim Rule required the holder of eligible debt to file a timely claim against a participating holding company's bankruptcy estate and to submit evidence of the timely filed bankruptcy POC to the FDIC within 90 days of the published bar date of the bankruptcy proceeding. In the preamble to the Interim Rule, the FDIC explained that it could also consider the books and records of the holding company and its affiliates to determine the holder of the unsecured senior debt and the amount eligible for payment under the Debt Guarantee Program.

The Interim Rule required the holder of the senior unsecured debt to assign its rights, title and interest in the unsecured senior debt to the FDIC and to transfer its allowed claim in bankruptcy to the FDIC to receive payment under the Debt Guarantee Program. The Interim Rule explained that this assignment included the right of the FDIC to receive principal and interest payments on the unsecured senior debt from the proceeds of the bankruptcy estate of the holding company. The assignment, as explained in the preamble to the Interim Rule, would entitle the FDIC to receive distributions from the liquidation or other resolution of the bankruptcy estate in accordance with 11 U.S.C. 726 or a confirmed plan of reorganization or liquidation in accordance with 11 U.S.C. 1129. The Interim Rule also provided that if the holder of the senior unsecured debt received any distribution from the bankruptcy estate prior to the FDIC's payment under the guarantee, the guaranteed amount paid by the FDIC would be reduced by the amount the holder received in the distribution from the bankruptcy estate.

III. The Amended Interim Rule

The Interim Rule established an opt-out deadline of November 12, 2008, and a deadline of November 13, 2008, for submitting comments to the FDIC relating to the Interim Rule. The FDIC intended to issue a final rule only after the expiration of the comment period and consideration of comments related to the Interim Rule. In order to provide eligible entities an opportunity to review the final rule before they were required to decide whether or not to opt-out of the TLG Program, the FDIC amended its Interim Rule. The Amended Interim Rule differs from the Interim Rule in three ways: It extended the opt-out date for participation in the TLG Program from November 12, 2008, until December 5, 2008; extended the deadline for complying with specific disclosure requirements related to the TLG Program from December 1, 2008 until December 19, 2008; and established some changes to the previously announced assessment procedures to accommodate the extended opt-out period. Apart from these and other related conforming technical modifications, as well as a few grammatical changes, the Amended Interim Rule made no other modifications to the text of the Interim Rule.

When establishing December 5, 2008, as the new opt-out deadline, the FDIC

amended the Interim Rule to make conforming modifications to part 370 that referred to or were based upon the previous opt-out deadline of November 12, 2008. These amendments were considered technical. As evidenced by the discussion that follows, other changes in the Amended Interim Rule that related to assessments under the Debt Guarantee Program and the Transaction Account Guarantee Program could be considered more substantive.

According to the Interim Rule, eligible entities were not required to pay any assessment associated with the Debt Guarantee Program for the period from October 14, 2008, through November 12, 2008. The Amended Interim Rule retained this provision. In addition, the Amended Interim Rule provided that if an eligible entity opted out of the Debt Guarantee Program by the extended deadline of December 5, 2008, the entity would not be required to pay any assessment under the program.

The Interim Rule also contained notice and certification requirements for eligible entities that issue guaranteed debt under the Debt Guarantee Program for the period from October 14, 2008 through November 12, 2008, and for the period after November 12, 2008, respectively. Although the notification and certification requirements did not change in the Amended Interim Rule, the references in those sections to the former opt-out deadline of November 12, 2008, were changed to reflect the new opt-out deadline of December 5, 2008.

Regarding the initiation of assessments related to the Debt Guarantee Program, the Interim Rule provided that beginning on November 13, 2008, any eligible entity that had chosen not to opt-out of this aspect of the TLG Program would be charged assessments as provided in part 370. The Interim Rule did not distinguish between overnight debt instruments and other types of newly-issued senior unsecured debt. Although the manner of calculating assessments did not change in the Amended Interim Rule, the revisions relating to the initiation of assessments reflected two modifications. The first change reflected the newly extended opt-out deadline, and the second change differentiated between overnight debt instruments and other newly-issued senior unsecured debt and explained how assessments would be treated for overnight debt instruments as compared with other newly-issued senior unsecured debt.

The Amended Interim Rule provided that assessments would accrue, with respect to each eligible entity that did not opt-out of the Debt Guarantee Program on or before December 5, 2008: (1) Beginning on November 13, 2008, on all senior unsecured debt, other than overnight debt instruments, issued by it on or after October 14, 2008, that was still outstanding on November 13, 2008; (2) beginning on November 13, 2008, on all senior unsecured debt, other than overnight debt instruments, issued by it on or after November 13, 2008, and before December 6, 2008; and (3) beginning on December 6, 2008, on all senior unsecured debt issued by it on or after December 6, 2008. According to the Amended Interim Rule, calculations related to both overnight debt instruments and other newly-issued unsecured debt continue to be made in accordance with the Interim Rule.

According to the Interim Rule, eligible entities were not required to pay an assessment associated with the Transaction Account Guarantee Program from the period from October 14, 2008, through November 12, 2008. To this, the Amended Interim Rule added that if an eligible entity opted out of the Transaction Account Guarantee Program by the extended opt-out deadline of December 5, 2008, then it would not be responsible for paying any assessment under the program.

Regarding the initiation of assessments for the Transaction Account Guarantee Program, the Interim Rule provided that for the period beginning on November 13, 2008, and continuing through December 31, 2009, any eligible entity that did not notify the FDIC that it had opted out of this component would be charged an assessment for its participation in the Transaction Account Guarantee Program. The Amended Interim Rule reflected the newly-extended opt-out date. The Amended Interim Rule provided that beginning on November 13, 2008, an eligible entity that had not opted out of the Transaction Account Guarantee Program on or before December 5, 2008, would be required to pay the FDIC assessments on all deposit amounts in noninterest-bearing transaction accounts. The Amended Interim Rule also indicated that calculations related to the amount of assessments for the Transaction Account Guarantee Program would continue to be made in accordance with the Interim Rule.

IV. Comments on the Interim Rule and the Amended Interim Rule

The FDIC received over [700] comments on the Interim Rule and the Amended Interim Rule

The FDIC invited general comments on all aspects of the Interim Rule and sought comments from the public for suggestions as to its implementation. In addition, the FDIC raised specific questions regarding the possibility of more expeditious processing of claims under the Debt Guarantee Program: Whether coverage for certain NOW accounts should be provided under the Transaction Account Guarantee Program; whether the disclosures required in the Interim Rule were beneficial in light of the potential costs in providing them; and the general administrative cost of the Interim Rule. In the Amended Interim Rule, the FDIC sought comment on three additional areas of interest: Suggested rates for short-term borrowings versus longer term borrowings; the possibility of combining holding company and bank debt (without exceeding their combined guaranteed debt limit); and suggestions for establishing a guaranteed debt limit for those institutions that had no senior unsecured debt outstanding as of September 30, 2008.

Some of the comments received by the FDIC were equally applicable to both components of the TLG Program; others related specifically to either the Transaction Account Guarantee Program or the Debt Guarantee Program. A summary of the collective comments received in response to the Interim Rule and the Amended Interim Rule (as well as the FDIC's response to those comments) follows.

General Comments Regarding the TLG Program

The FDIC received a number of comments that expressed general support of the FDIC's efforts to establish and implement the TLG Program. These commenters stated their belief that the TLG Program could help ease the strains in the credit markets, improve the access of financial institutions to liquidity, mitigate systemic risks in the financial system, and preserve public confidence in banks and other financial institutions.

However, the FDIC also received some comments from community bankers stating that, while they appreciate the efforts being made to strengthen confidence in the banking system, they have not been experiencing capital or liquidity problems and, therefore, do not see the need for the TLG Program and, in fact, consider the TLG Program's potential to raise their cost of funds detrimental. In particular, the commenters raised the possibility that if they choose to opt-out of the Debt Guarantee Program they may have to pay more for correspondent banking services and may be stigmatized. As discussed below, the Final Rule excludes short-term senior unsecured

debt with a maturity of thirty days or less from the Debt Guarantee Program, which should ease the concerns of these commenters, since the comments raised questions primarily about overnight funding.

One commenter observed that the Debt Guarantee Program may pose adverse selection risks where only weak institutions participate in the Debt Guarantee Program and strong institutions opt-out. While acknowledging the concerns raised by the commenter, the FDIC is confident that the benefits of the program, coupled with the revisions made to the Final Rule in response to industry comments will ensure that the majority of strong institutions will participate. In addition, working with the other primary federal regulators, the FDIC's supervisory staff will also closely monitor and limit, as appropriate, use by weaker institutions.

A banking trade association emphasized the FDIC's need to retain flexibility to adjust the program and quickly correct problems. In the commenter's view, this flexibility would include both the flexibility to change the elements of the guarantee (including debt covered, pricing, and terms) and the ability of banks to participate or not in the program. The FDIC believes that the changes it is making in the rule and the discretion it retains in implementing the rule are the most appropriate means of addressing these concerns.

Competitive Issues and Potential Effects on Other Entities

A number of commenters indicated that differences between the FDIC's Debt Guarantee Program and the debt guarantee programs in other countries could create competitive disparities. These commenters specifically recommended that the FDIC emphasize that its guarantee is backed by the full faith and credit of the federal government and that the FDIC revise the program to guarantee timely payment of principal and interest. The FDIC agrees with these comments and has revised the nature of the guarantee to cover timely payment of principal and interest as discussed below. Also, the disclosure required by the Final Rule for debt issued under the Debt Guarantee Program includes the statement that the debt is backed by the full faith and credit of the United States.

A comment from one of the regulators of a Government Sponsored Enterprise (GSE) and an insurer of that GSE's bonds warned of potential disruptions, dislocations, and investor confusion in the debt markets due to the FDIC's debt guarantee that may disadvantage the GSEs. These two commenters neither supported nor opposed the Amended Interim Rule and noted that these potential unintended consequences are mitigated by the fact that the program is temporary. The FDIC agrees that this temporary program should not significantly affect the GSE debt markets. In addition, this program has the potential to lower the funding costs of most of the major mortgage originators, which may have a beneficial impact on mortgage availability and costs.

One commenter noted that the Debt Guarantee Program will reduce secured borrowing and harm the earnings of Federal Home Loan Banks, which are owned by insured institutions. In the FDIC's view, Federal Home Loan Banks function well under ordinary circumstances, when market failures have not prevented healthy institutions from borrowing on an unsecured basis. The Debt Guarantee Program is a time-limited program intended to restore normal functioning to the market; and, therefore, it should not materially affect the Federal Home Loan Banks.

Extending the Opt-Out Deadline

The FDIC also received several comments requesting that the opt-out deadline established in the Interim Rule be extended until the Final Rule was announced to permit eligible entities sufficient time to review the Final Rule and make a more informed decision regarding their participation in the TLG Program. Recognizing these concerns, in its Amended Interim Rule, the FDIC extended the opt-out deadline from November 12, 2008 until December 5, 2008, and made corresponding changes to other dates affected by the revised opt-out deadline.

Systemic Risk Assessment

A few commenters raised the issue of the systemic risk assessment. The Amended Interim Rule provides that, if the assessments for the TLG Program are insufficient to cover the expenses related to the program, an emergency special assessment will be made on all insured depository institutions. While acknowledging that section 13(c)(4)(G)(ii) of the FDI Act, 12 U.S.C. 1823(c)(4)(G)(ii), requires the FDIC to levy a systemic risk assessment against all insured depository institutions, the commenters suggested that such an assessment be levied against all entities that participate in the TLG Program, not against those insured depository institutions that opt-out. Another trade association commenter requested that the FDIC levy a special assessment to entities owned by holding companies with significant non-bank subsidiaries in proportion to program losses generated by such entities. Absent legislative changes, however, the FDIC has no authority to alter the statutory requirements of the systemic risk assessment provision and must levy the assessment on all insured depository institutions (and only insured depository institutions), in accordance with the statute.

The Board of Governors of the Federal Reserve System (Federal Reserve Board), as primary supervisor of bank holding companies (BHCs), strongly supports including BHCs in the TLG Program. Indeed, Federal Reserve Board staff has warned that not including BHCs "would pose significant risks to individual insured depository institutions (IDIs) and the banking system as a whole."[3] The rationale for guaranteeing holding company debt is to promote liquidity in the banking industry, since bank and thrift holding companies, rather than banks and thrifts themselves, issue most senior unsecured debt in many holding company structures. The holding companies, in turn, provide liquidity to their bank and thrift subsidiaries. The FDIC expects its Debt Guarantee Program to yield more revenue than costs. Further, the FDIC is modifying the fee structure for the Debt Guarantee Program to impose modestly higher fees on holding companies whose insured depository institutions present less than 50 percent of consolidated assets. Guaranteeing BHC debt is not without risks to the Deposit Insurance Fund (DIF), though the Federal Reserve Board has provided strong assurances that they will use all supervisory powers available to them to minimize these risks.[4] The Office of Comptroller of the Currency and the Office of Thrift Supervision have made similar assurances. For these reasons and based on its own analysis of the risks presented, the FDIC believes the risks are acceptable and anticipates that revenue collected for the guarantee under the Debt Guarantee Program will be sufficient to cover the costs. Any surplus funds will be put in the DIF to ease pressure on premiums paid by depository institutions.

Cost and Benefit

In the Interim Rule, the FDIC asked whether the collection of information was necessary for the proper performance of the FDIC's duties and

[3] Memorandum dated November 19, 2008, to FDIC Chairman Sheila C. Bair from Federal Reserve Board Staff at page 1.

[4] Letter dated November 19, 2008, to FDIC Chairman Sheila C. Bair from Chairman of the Board of Governors of the Federal Reserve System Ben S. Bernanke.

whether the information sought had practical utility. Further, the FDIC asked whether its burden estimates were accurate and whether the assumptions that supported its burden calculation were valid. Commenters were asked to address ways to enhance the quality and clarity of the information collected and to provide suggestions for minimizing the burden of affected parties in providing the requested information to the FDIC. Although the FDIC received no comments that were specifically responsive to these questions, the FDIC continues to believe that the TLG Program will enhance financial stability and will preserve confidence in the banking system without placing undue restrictions on participating entities or those who may someday seek payment under the Program's debt or transaction account guarantees, particularly in light of the changes made to the claims and payment processes in the Final Rule.

Comments Related to the Scope of the Debt Guarantee Program

In the Amended Interim Rule, the FDIC sought comment as to whether the FDIC should charge different guarantee fees for federal funds or other short-term borrowings as compared to longer term debt instruments. In addition, the FDIC sought suggestions for establishing the differentiating criteria for the types of borrowings and for the actual rates that should be paid for each type. The FDIC received a substantial number of comments regarding these issues and regarding definitions applicable to the Debt Guarantee Program.

Federal Funds and Other Short-Term Instruments

The FDIC received a large number of comments urging either the exclusion of federal funds and similar overnight instruments from the Debt Guarantee Program or the reduction in the annualized 75 basis point guarantee fee for overnight borrowings from annualized 75 basis points to 10 or 25 basis points. Several commenters suggested that the Debt Guarantee Program should cover federal funds on an unlimited basis, but at a significantly lower fee.

The commenters indicated that the level of fees called for in the Amended Interim Rule is prohibitively expensive for short-term maturity instruments, such as federal funds, given the low prevailing effective rate for federal funds. These commenters felt that the proposed fee structure could lead many eligible institutions that would otherwise participate in the program to opt-out of the Debt Guarantee Program altogether or to shift from federal funds to secured short-term borrowings from sources such as the Federal Reserve discount window, the Federal Reserve's Term Auction Facility (TAF), or Federal Home Loan Banks. Other commenters and market participants have also expressed the view that various federal programs have contributed to improved liquidity in the short-term funding market and, therefore, the FDIC's guarantee of debt with very short-term maturities, such as overnight federal funds, is no longer necessary or desirable in light of the costs that would be associated with such guarantees.

Based on these comments, in the Final Rule, the FDIC has revised the definition of guaranteed senior unsecured debt to exclude debt with a stated maturity of thirty days or less. The FDIC acknowledges that the 75 basis point guarantee fee may be too high for short-term money market instruments such as overnight federal funds or Eurodollars in relation to prevailing overnight interest rates. Furthermore, recent market data from the Federal Reserve Board and market participants suggest less significant disruption in short-term money markets, particularly as the Federal Reserve Board lowers short-term interest rates and actively provides liquidity. Many entities that are eligible to participate in the TLG Program have, in fact, shortened their funding maturities considerably as they continue to experience difficulties obtaining longer-term unsecured debt, with much of the recently issued debt either being secured or having a maturity of 30 days or less. The FDIC believes that the Debt Guarantee Program should help institutions to obtain stable, longer-term sources of funding where liquidity is currently most lacking.

Fees

As discussed above, several commenters stated that fees for short-term instruments were too high. One trade association urged the FDIC to adopt a risk-based pricing model for the Debt Guarantee Program with guarantee fees ranging from under 10 basis points to no more than 50 basis points depending on a bank's CAMELS rating and the term of the borrowings and that small bank and thrift holding companies should be assessed a fee based on the CAMELS ratings for the companies' financial institution subsidiaries. Other commenters suggested that the FDIC develop a sliding scale for fees based on the maturity of the instruments, especially for very short-term instruments like federal funds. As discussed in more detail below, the Final Rule adopts a sliding rate scale based on an instrument's maturity. Rates for shorter term debt (180 days or less, excluding overnight debt) are less than 75 basis points; rates for longer term debt (365 days or greater) are slightly higher.

A banking trade association urged the FDIC to exclude holding companies with significant non-bank subsidiaries from the Debt Guarantee Program on the grounds that community banks and other insured depository institutions would be forced to pay for losses on these guarantees through a special assessment on FDIC-insured institutions only. In the alternative, the association asked the FDIC to develop a methodology for these entities to pay a special assessment for their proportional share of any Program losses. The FDIC believes that it is essential to allow some holding companies to participate in the Debt Guarantee Program to provide liquidity to the inter-bank lending market and promote stability in the unsecured funding market. As discussed earlier, the FDIC does not have the statutory authority to levy a special assessment on non-depository institutions. However, the FDIC has decided to increase the Debt Guarantee Program fees by 10 basis points for holding companies where affiliated insured depository institutions constitute less than half of holding company consolidated assets.

The Interim Rule required each participating entity in the Debt Guarantee Program to take necessary action to allow the FDIC to debit its assessments from the entity's designated deposit account as provided for in section 327(a)(2). The Interim Rule required funds to be available in the designated account for direct debit by the FDIC on the first business day after the invoice is posted on FDIC*connect*. One commenter asked how a holding company could minimize the risk of violating section 23A of the Federal Reserve Act, assuming that the holding company intended to deposit funds in its affiliated insured depository institution's ACH account for the FDIC's direct debit of both the holding company's assessment and the bank's assessment. To avoid violations of 23A of the Federal Reserve Act, the FDIC expects participating holding companies to fund its affiliated insured depository institution's ACH account in advance of the FDIC's direct debit of the assessments.

Requirement of a Written Agreement

The Amended Interim Rule defines senior unsecured debt in part as unsecured borrowing that is evidenced by a written agreement. The FDIC

received several comments that urged the FDIC to make an exception for this requirement for federal funds. Several commenters also noted that certain types of short-term debt, such as overnight transactions or transactions with maturities of one week or less, typically are not evidenced by a written agreement. As noted above, in the Final Rule the FDIC has excluded obligations with a stated maturity of thirty days or less from the definition of senior unsecured debt. The FDIC anticipates that this action will satisfy those with concerns regarding written agreements applicable to federal funds and other short-term debt. Also, the FDIC has clarified in the Final Rule that trade confirmations are a sufficient form of written agreement to establish eligibility as a senior unsecured debt for purposes of the Debt Guarantee Program.

Full Faith and Credit

Several commenters sought confirmation that the guarantees provided by the FDIC under the Debt Guarantee Program were backed by the full faith and credit of the United States. The FDIC has concluded that the FDIC's guarantee of qualifying debt under the Debt Guarantee Program is subject to the full faith and credit of the United States pursuant to section 15(d) of the FDI Act, 12 U.S.C. 1825(d). Under both the Amended Interim Rule and the Final Rule adopted by the FDIC, the principal amount and term to or date of maturity of conforming debt instruments—citing the FDIC guarantee on their face—will effectively be incorporated by reference into the FDIC's debt guarantee, and the provisions of section 15(d) are therefore satisfied.

Establishing Guarantee Cap for Institutions With No or Limited Senior Unsecured Debt

The Amended Interim Rule established September 30, 2008, as the threshold date by which the limit for eligible debt coverage for a participating entity is calculated. On that date, if a participating entity has no senior unsecured debt, it can still seek to have some amount of debt covered by the Debt Guarantee Program in an amount to be determined by the FDIC on a case-by-case basis following discussion with the appropriate Federal banking agency. In the Amended Interim Rule, the FDIC asked whether it should establish an alternative method for establishing a guarantee cap for such institutions and, if so, what the alternative method should be.

A number of commenters expressed concern that the Debt Guarantee Program could have an unintended negative impact on eligible institutions with little or no federal funds purchased and outstanding on the threshold date of September 30, 2008. In particular, these commenters expressed concern that liquidity available on an unsecured basis prior to establishment of the Debt Guarantee Program would no longer be available to them as lenders and would give preference to guaranteed borrowers. Several commenters recommended that the FDIC remedy these concerns by defining the cap as the greater of (1) 125% of senior unsecured debt outstanding on September 30, 2008 and maturing on or before June 30, 2009, or (2) either 100% of the federal funds accommodations lines available to the institution as of September 30, 2008, or a percentage of total assets or total liabilities outstanding on September 30, 2008. Others suggested that the guarantee cap should be calculated based on the highest amount of senior unsecured debt outstanding during 2008, the average amount of senior unsecured debt outstanding during 2008, the average amount of senior unsecured debt outstanding during the third quarter of 2008, varying percentages of total assets and total liabilities as of September 30, 2008, and fixed dollar amounts.

The FDIC has established an alternative method for establishing a guarantee cap for insured depository institutions that either had no senior unsecured debt outstanding or only had federal funds purchased as of September 30, 2008, but that would like to participate in the Debt Guarantee Program. The FDIC has determined that the debt guarantee limit for such an eligible insured depository institution will be two percent of the participating entity's consolidated total liabilities as of September 30, 2008, as set forth in the Final Rule.

For institutions that had senior unsecured debt other than federal funds outstanding as of the threshold date of September 30, 2008, the debt guarantee limit is determined using a definition of senior unsecured debt inclusive of debt obligations with maturities of thirty days or less that also meet the remaining requirements of § 370.2(e). Such obligations are excluded from the definition of senior unsecured debt after December 5, 2008 in the Final Rule.

Clarification of Eligible Instruments

Several commenters asked the FDIC to clarify whether certain instruments are covered within the definition of senior unsecured debt contained in the Amended Interim Rule. Specifically, these commenters asked whether senior unsecured debt includes inflation-linked securities with a fixed principal amount, index-linked principal protected securities, putable bonds, callable bonds, zero-coupon bonds, extendible securities, step-up coupons and retail debt securities. A trade association urged the FDIC to include principal-protected structured notes in the definition of eligible senior unsecured debt. This commenter argues that such products are analogous to indexed certificates of deposit that qualify for deposit insurance coverage.

The purpose of the Debt Guarantee Program is not to promote innovative, exotic or complex funding structures, but to provide liquidity to the inter-bank lending market. According to the Amended Interim Rule, senior unsecured debt specifically excludes any debt instruments that are either derivatives or derivative-linked products. Most of the instruments mentioned by the commenters are derivative-linked products, structured notes[5], or instruments with embedded options. The FDIC continues to believe that such instruments expose the FDIC to undue risk without materially enhancing liquidity in the inter-bank lending market. The Final Rule further clarifies the definition of senior unsecured debt to exclude any debts that are paired or bundled with other securities, regardless of whether the target investor is institutional or retail, structured notes, securities with embedded options, retail debt securities, and obligations used for trade credit (*e.g.*, letters of credit or banker's acceptances).

One commenter asked for clarification regarding whether preferred debt issued under the TARP CPP would be subject to guarantee fees under the TLG Program. Another commenter suggested that the FDIC should guarantee structured products or convertible debt securities used to redeem preferred stock issued under the TARP CPP. Senior preferred stock issued under the TARP CPP is considered equity, and does not meet the definition of senior unsecured debt under the Final Rule. Furthermore, as noted in the TARP CCP's term sheet, senior preferred stock issued under the TARP CPP can only be redeemed with the proceeds from the sale of Tier 1 qualifying perpetual

[5] As defined in the Call Report instructions for schedule RC–B, "structured notes" includes, but are not limited to (1) floating rate debt securities whose payment of interest is based upon a single variable index of a Constant Maturity Treasury (CMT) rate or a Cost of Funds Index (COFI) or changes in the Consumer Price Index (CPI), (2) step-up bonds, (3) index amortizing notes, (4) dual index notes, (5) deleveraged bonds, (6) range bonds, and (7) inverse floaters.

preferred stock or common stock for cash.[6]

Negotiable Certificates of Deposit (CDs), Term Eurodollars, Brokered Deposits

Several commenters suggested including all negotiable (wholesale) certificates of deposit and term Eurodollars owed to corporate lenders as eligible guaranteed instruments under the Debt Guarantee Program. The commenters argue that such instruments, whether they are sold to a bank or a non-bank, are vital sources of liquidity to the industry. Another commenter suggested including brokered deposits as an essential eligible instrument. The FDIC believes that extending the guarantee to inter-bank certificates of deposits, Eurodollar deposits and international banking facility (IBF) deposits owed to a bank are consistent with the objective of promoting liquidity in the inter-bank lending market. The FDIC does not believe it is necessary to extend the guarantee further to deposit instruments sold to non-bank entities since negotiable certificates of deposit and brokered deposits are currently insured up to $250,000.

Revolving Credit Agreements

One commenter argues that the guarantee should cover 364-day revolving credit agreements that are entered into and fully drawn down at least once before June 30, 2009, should be included in the definition of senior unsecured debt under the Debt Guarantee Program and that the FDIC's guarantee of such agreements should remain in place through June 30, 2012. The commenter stated that lending banks have recently been unwilling to enter into credit agreements on an unsecured basis for longer than 364 days and that an FDIC guarantee of such agreements would alleviate this issue.

Although the FDIC understands the concerns raised by the commenter, the FDIC does not believe that extending the guarantee to cover revolving credit lines, where the line is often drawn on infrequently and often on a short-term basis, is the most effective way to encourage inter-bank lending, which is the primary objective of the Debt Guarantee Program. The FDIC also believes that revolving credit lines are not consistent with certain eligibility requirements applied to other types of eligible senior unsecured debts as defined in § 370.2(e). Specifically, since the total outstanding amount of such lines can fluctuate on a daily basis, revolving credit agreements are not consistent with the requirement in § 370.2(e) that senior unsecured debts have a fixed principal amount. Also, the inclusion of 364-day revolving credit agreements appears inconsistent with the FDIC decision to exclude short-term funding instruments from the definition of senior unsecured debt, since amounts drawn under such credit facilities may be outstanding for significantly shorter periods of time than the stated 364-day maturity of the credit facilities (that is, thirty days or less). The FDIC believes that the Final Rule provides sufficient support to bank lending markets across a broad spectrum of instruments and maturity structures and affords eligible institutions with a large range of funding alternatives.

The FDIC has also received several comments that suggest that the FDIC guarantee under the Debt Guarantee Program should cover lines of credit extended to bank holding companies, either unsecured or secured by bank stock, to provide additional liquidity and capital to the subsidiary bank. One commenter argued that at the time of default, such debts, even if secured by bank stock, are effectively unsecured since, generally, no market would exist for the collateral or the collateral would have no value, making lines of credit secured by bank stock essentially unsecured. The FDIC guarantee does not cover any portion of secured debt issuances.

Under the Amended Interim Rule and the Final Rule, the guarantee does not extend to debts issued to affiliates, which includes an insured depository institution's parent company, or any secured debt. The FDIC does not believe that providing guarantees to debts issued to affiliates is an effective means of promoting inter-bank lending. The FDIC notes that many other types of collateral, in addition to bank stock, may have limited marketability or little to no value upon default.

Long-Term Debt Instruments

Some commenters asked the FDIC to consider guaranteeing senior unsecured debt for up to five, seven, or ten years. The commenters noted that the typical investor base of debt with maturities up to three years are not actively purchasing term notes issued from financial institutions and that "real money investors" such as pension funds, insurance companies and traditional money managers are more active in the longer-term debt market. However, a comment from a GSE warned that the Debt Guarantee Program may have the unintended effect of eroding confidence in senior unsecured debt of financial institutions, including Farm Credit System banks that do not qualify for the guarantee. The commenter urged the FDIC not to extend either the issuance deadline beyond June 30, 2009 or the guarantee termination date beyond June 30, 2012. The commenter also asked that the FDIC monitor the effects of the TLG Program on financial institutions that are not covered by the program.

Under the Final Rule, as under the Amended Interim Rule, the FDIC will guarantee all senior unsecured debt issued by a participating institution that meets the definition in § 370.2(e) until the maturity date or June 30, 2012, whichever comes first. The FDIC believes that various federal programs, including the TLG program, should help improve liquidity in the inter-bank lending market and the unsecured term debt market prior to the expiration of the guarantee program. The intent of the Debt Guarantee Program is to establish a temporary guarantee of senior unsecured debt to help improve liquidity to inter-bank and unsecured term debt markets. The FDIC does not believe it is generally necessary to extend guarantees to longer term debts to achieve this objective.

Coverage of Sweeps

Several comments urged the FDIC to modify the definition of senior unsecured debt to exclude all sweep products, regardless of form, e.g., federal funds, commercial paper or inter-bank deposits. Another commenter also urged the FDIC to modify the definition to exclude funds swept from accounts of public sector clients, banks, and other financial institutions. In addition, the commenter urged the FDIC to exclude similar sweeps into IBF accounts. The commenters argued that sweep products, regardless of form or type of originating account, are passive investments used for cash management and that the FDIC guarantee of these products would not increase liquidity. Rather, the commenters argued that the effect of the annualized 75 basis point guarantee fee would encourage investors to migrate to other products.

The FDIC agrees that the guarantee fee described in the Amended Interim Rule would be onerous for such products. In addition, the FDIC does not believe the guarantee of such products serves the intended purpose of improving liquidity in the inter-bank lending market. The Final Rule revises the definition of senior unsecured debt to exclude any obligation with a maturity of 30 days or less, including all overnight sweep products. This revised definition would

[6] *http://www.ustreas.gov/press/releases/reports/termsheet.pdf.*

exclude all (or almost all) sweep products.

Debt Denominated in Foreign Currency

Under the Amended Interim Rule, senior unsecured debt eligible for the guarantee may be denominated in foreign currency. A commenter asked whether the debt denominated in foreign currency includes foreign denominated debt issuances which are settled in U.S. dollars. The Final Rule clarifies that, except for deposits, senior unsecured debt may be denominated in a foreign currency as long as the other eligibility requirements set forth in the definition are met. Debt issued in foreign currency, but settled in U.S dollars, may have embedded foreign exchange forwards or swap contracts that create an added dimension of risk similar to structured notes. Accordingly, the Final Rule requires debt to be settled in the same currency in which it is denominated at issuance to be considered an eligible senior unsecured debt under the Debt Guarantee Program.

Deposits at a Foreign Branch of the Bank

The definition of senior unsecured debt contained in the Amended Interim Rule includes Eurodollar deposits standing to the credit of a bank. A commenter asked for clarification as to whether the guarantee extends to a deposit account of another bank at any foreign branch [7] of the bank, including accounts denominated in currencies other than U.S. dollars since the Amended Interim Rule did not expressly address those deposits.

The Final Rule clarifies that senior unsecured debt includes U.S. dollar denominated inter-bank deposits with a stated maturity of greater than 30 days, certificates of deposit (other than negotiable certificates of deposit) owed to an insured depository institution or a foreign bank, U.S. dollar denominated deposits in an IBF of an insured depository institution that are owed to an insured depository institution or a foreign bank, and U.S. dollar denominated deposits on the books and records of foreign branches of U.S. depository institutions that are owed to an insured depository institution or a foreign bank. The term "foreign bank" does not include a foreign central bank or other similar non-U.S. government entity that performs central bank functions or a quasi-governmental international financial institution, such as the International Monetary Fund (IMF) or the World Bank. Under the Final Rule, senior unsecured debt does not include deposits denominated in a foreign currency and deposits at foreign branches of U.S. depository institutions other than inter-bank deposits that are denominated in U.S. dollars. Also, under the Final Rule, the phrase "owed to an insured depository institution or a foreign bank" means owed to an insured depository institution or a foreign bank solely in its own capacity and not as agent.

Definition of a Foreign Bank

A commenter also asked whether a "depository institution regulated by a foreign bank agency" includes central banks, other similar non-U.S. government entities that perform central bank functions, and international financial institutions such as the IMF. For the purposes of both the Amended Interim Rule and the Final Rule, the term "foreign bank" in the phrase "owed to an insured depository institution, an insured credit union or a foreign bank" means a depository institution, whether insured by the FDIC in the U.S. or regulated by a foreign bank supervisory agency. Central banks or international financial institutions such as IMF do not meet that definition.

One commenter questioned why under § 370.2(e) of the Amended Interim Rule "senior unsecured debt" is defined as including U.S. dollar denominated certificates of deposit standing to the credit of (owed to) an insured institution or a foreign bank but that a certificate of deposit owed to a credit union was not covered. The commenter argued that credit unions should be given the same consideration as that given to foreign banks. The FDIC agrees that credit unions insured by the National Credit Union Administration (NCUA) should be treated similarly and has provided for this in the Final Rule.

Definition of an Insured Depository Institution

A commenter requested explanation for the exclusion of an insured branch of a foreign bank from the definition of Insured Depository Institution for the purposes of the Debt Guarantee Program. The commenter expressed concern that excluding insured branches placed them at a potentially serious competitive disadvantage relative to other insured institutions. The FDIC intended for the Debt Guarantee Program to be available to insured depository institutions and other eligible entities that are headquartered in the United States. The FDIC did not intend to guarantee debt issued by foreign entities, including domestic branches of foreign banks or foreign subsidiaries of eligible U.S. entities. Foreign entities may be eligible for similar debt guarantee programs available in the countries in which they are domiciled.

Eligibility of a Debt Without a CUSIP Identifier

One commenter recommended that only debt that can be issued with an identifier from the Committee on Uniform Security Identification Procedures (CUSIP) should be eligible under the Debt Guarantee Program. This commenter argued that such a requirement would reduce potential market confusion about when an institution has exceeded the debt guarantee limit.

With the modifications made by the Final Rule, the FDIC believes that its action in excluding short-term maturity funding, such as overnight federal funds, from eligibility will substantially reduce the volume of transactions covered by the Debt Guarantee Program that are not issued with CUSIP identifiers. Nevertheless, the FDIC does not desire to discourage issuance of other types of eligible unsecured debt that may not be issued with CUSIP identifiers. The FDIC believes that the disclosures required under § 370.5(h)(2) of the Final Rule will offset any potential for market confusion about which debt issuances are guaranteed.

Calculating Debt Limits

A few commenters requested that the FDIC clarify whether the maximum amount of debt that can be issued under the Debt Guarantee Program is based on the aggregate amount issued or on the amount outstanding at a particular time. The FDIC calculates the maximum amount of debt based on the amount of debt outstanding at a given time, as defined in § 370.3(b)(1), not on the cumulative amount of debt issued under the Debt Guarantee Program.

Several commenters requested clarification about the calculation of the 125 percent debt guarantee limit. In particular, commenters asked whether the baseline measure was senior unsecured debt outstanding at the close of business on September 30, 2008, or the highest amount outstanding throughout September 30, 2008. The Final Rule clarifies that the measure is based on senior unsecured debt outstanding at the close of business on September 30, 2008.

The FDIC has the authority to increase or decrease the cap on a case-by-case basis. In considering requests to increase the cap, the FDIC will evaluate

[7] Section 3(o) of the FDI Act defines "foreign bank" as "any office or place of business located outside the United States, its territories, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, or the Virgin Islands, at which banking operations are conducted."

the extent to which the applicant demonstrates the funding will be used to provide or reduce the costs of safe and sound lending in areas currently showing credit contraction (e.g., mortgage lending, consumer credit and small business lending).

As discussed earlier, senior unsecured debt, except for deposits, may be denominated in a foreign currency as long as the other eligibility requirements are met. For purposes of determining compliance with an institution's guarantee limit, the Final Rule provides that debt issued in a foreign currency will be converted into U.S. dollars using the exchange rate in effect on the settlement date (that is, the date that the debt is funded).

Issuance of Non-Guaranteed Debt

Under the Amended Interim Rule, a participating entity may only issue non-guaranteed debt under one of two circumstances: (1) Once an entity has reached the debt guarantee limit, it can issue debt that is not guaranteed by the FDIC, but the entity must specifically disclose that the debt is not guaranteed; and (2) if a participating entity elects the option and pays the required fee, it may issue non-guaranteed senior unsecured debt with a maturity date beyond June 30, 2012, without regard to the debt guarantee limit. Several commenters recommended that the FDIC allow participating entities the flexibility to issue senior unsecured debt (excepting, in the view of some commenters, non-swept federal funds) that is not guaranteed by the FDIC, regardless of maturity or whether the entity has reached the debt guarantee limit. Commenters argued, among other things, that: (1) The market will understand that the decision whether to issue guaranteed or non-guaranteed debt will depend on costs and an investor's yield requirements and not necessarily on the perceived strength or weakness of the issuer; (2) the debt guarantee program in the United Kingdom (U.K.) allows institutions the flexibility to choose whether to issue guaranteed or non-guaranteed debt; (3) the market will continue to differentiate the debt of participating entities through prices and credit spreads on debt issued before October 14, 2008, debt guaranteed by participating entities and non-guaranteed debt of affiliates of participating entities, and debt issued in excess of the debt guarantee limit; (4) allowing institutions the flexibility to choose whether to issue guaranteed or non-guaranteed debt will keep an institution's overall cost of funds down while weaker institutions will have to pay more for unsecured funding, thereby maintaining market discipline; (5) institutions will likely reach their debt guarantee limit quickly and will find themselves in the same position that they were in before implementation of the Debt Guarantee Program, since they will then have to issue non-guaranteed debt, while the FDIC's risk will have increased by the amount of the guaranteed debt; (6) systemic risk will increase because healthy banks will effectively be guaranteeing, not only insured deposits at weak banks, but their unsecured debt as well; (7) the restriction on issuing non-guaranteed debt may force healthy banks out of the Debt Guarantee Program, weakening the program itself and putting the banks that opt-out of the program at a competitive disadvantage compared to weaker banks that have guaranteed debt; (8) allowing institutions the flexibility to choose whether to issue guaranteed or non-guaranteed debt would act as a mechanism both to check the pricing of the guarantee as well as to provide for an exit strategy as the financial crisis abates and the value of the guarantee disappears; and (9) capital injections under the Troubled Asset Relief Program (TARP) and improvements in market conditions have made the Debt Guarantee Program as originally contemplated unnecessary unless more flexibility is allowed to issue non-guaranteed debt. In particular, some short-term debt instruments, such as fed funds or commercial paper, may not need a guarantee given their shorter maturity and current degree of market functioning.

Despite these arguments, the FDIC has decided, for several reasons, not to alter the rules governing an entity's authority to issue non-guaranteed senior unsecured debt. First, and most importantly, limiting a participating entity's ability to issue non-guaranteed debt reduces the risk of adverse selection—the risk that the participating entity will issue only the riskiest debt with the guarantee. Second, on balance, the Debt Guarantee Program should reduce systemic risk by restoring liquidity to otherwise healthy institutions. Third, particularly with the revised fee schedule, the FDIC believes that the benefits of the Debt Guarantee Program are such that most healthy institutions will elect to remain in the program. Fourth, the TLG Program was created as a complement to the TARP. These two programs are partly responsible for any improvements that have occurred in the market. However, it is the FDIC's observation that many insured institutions' ability to borrow for a longer term is still impaired. Fifth, the Debt Guarantee Program will allow more institutions to borrow when they could not otherwise. Sixth, limiting a participating entity's ability to issue non-guaranteed debt reduces the possibility of confusion over whether debt is, or is not, guaranteed. Seventh, the U.K. debt guarantee program is different in many of its essential features from the TLG Program, including its scope, its pricing, and the number of entities whose debt is covered (i.e., eight versus roughly 15,000); therefore, its features are useful to understand, but do not necessarily provide a compelling analogy. Eighth, while the FDIC acknowledges that the Debt Guarantee Program may give some benefits to weaker institutions—an inevitable result of any guarantee program—it will give benefits to many stronger institutions, as well, that have been unable to borrow longer term because of market dislocations. Moreover, bank supervision should ensure that weaker institutions are not able to issue unwarranted amounts of guaranteed senior unsecured debt.

While the FDIC has not altered the rules governing an entity's authority to issue non-guaranteed senior unsecured debt, the Final Rule revises the definition of senior unsecured debt to exclude any obligation with a stated maturity of thirty days or less, as discussed above.

Risk Weights for Capital Purposes

Several commenters suggested lowering risk weights on FDIC-guaranteed investments for risk-weighted asset and capital purposes. Some indicated that, since the guarantee is presumed to be backed by the full faith and credit of the United States, a zero risk weight should be considered as is the case with other full U.S. government guarantees and similar to practices in other jurisdictions—the U.K., Canada, Denmark, Ireland, France, Sweden and Australia. This being the case, the commenter indicated that a risk weighting of 20 percent could pose competitive disadvantages in terms of attracting capital.

Taking into account the arguments noted, consistent with the current risk-based capital treatment for FDIC-insured deposits, the federal banking agencies (the FDIC, the Office of Thrift Supervision, the Office of the Comptroller of the Currency and the Board of Governors of the Federal Reserve System) have decided to apply a 20 percent risk weight to debt that is

guaranteed by the FDIC.[8] This risk-based capital treatment will apply to FDIC-guaranteed debt that is issued either by participating insured depository institutions or by other participating entities, including bank and thrift holding companies. The 20 percent weight will continue to apply to certificate of deposits (CD) investments owed to a bank that are included in the definition of senior unsecured debt contained in the Final Rule. The FDIC considers the 20 percent risk weighting to be appropriate given its consistency with the risk-based capital treatment for FDIC-insured deposits. Furthermore, reducing the risk weighting for FDIC-guaranteed debt would be inconsistent with the need for insured depository institutions to maintain strong capital bases. In addition, given the temporary nature of the TLG Program, the 20 percent risk weighting is not anticipated to have a significant long-term effect. In short, the Debt Guarantee Program is intended to minimize the foreseen risks of these instruments from a credit perspective, thereby encouraging their use and acceptance and promoting liquidity in the markets. FDIC-guaranteed debt is not intended to lower capital standards or free capital in the banking system.

Combining Holding Company and Bank Guaranteed Debt

The FDIC asked whether banks should be allowed to issue guaranteed debt in an amount equal to the bank's cap plus its holding company's(ies') cap as long as the total amount of guaranteed debt payable by the FDIC did not exceed the entities' combined cap. The FDIC sought comment on what procedures should be put into place to manage this process. (Although the question originally posed concerned banks and their holding companies, the question raised and the comments received apply equally to all insured depository institutions.) Several commenters responded to this question; all strongly supported allowing an insured depository institution to combine its debt guarantee limit with its parent holding company(ies) and to issue guaranteed debt up to their combined debt guarantee limit.

In part as a result of these comments, the FDIC has made some changes in the Final Rule with respect to aggregating the debt limits for an insured depository institution and its parent holding company(ies). The Final Rule permits a participating insured depository institution to issue debt under its debt guarantee limit, as well as its holding company's debt guarantee limit or holding companies' combined debt limit, if appropriate. A participating insured depository institution may issue guaranteed debt in an amount equal to the institution's limit plus its holding company's(ies') limit, so long as the total guaranteed debt issued by the insured depository institution and its holding company(ies) does not exceed their combined debt guarantee limits. The holding company's(ies') debt guarantee limit will be reduced to the extent that its subsidiary insured depository institution increases its limit. Allowing consolidated entities to decide whether an insured depository institution should issue debt rather than its parent does not increase the FDIC's liability for the debt and provides participating entities additional flexibility to obtain funding.

Use of Guaranteed Debt Proceeds

Several comments stated that the FDIC should provide specific guidance on whether participating entities may exchange guaranteed debt for outstanding non-guaranteed senior unsecured debt. Both the Amended Interim Rule and the Final Rule state that an issuer cannot issue and identify debt as guaranteed by the FDIC if the proceeds are used to prepay debt that is not FDIC-guaranteed.

Treatment of Debt Guarantee Limits and Opt-Out Status in the Event of a Merger

One commenter noted that, due to the current turmoil in the financial system, a number of financial institutions are in the process of acquiring other financial institutions. The commenter further asked for clarification of how such a merger during the guarantee period would affect the surviving entity's debt guarantee limit. The FDIC intends to treat the debt guarantee limit of the surviving entity of a merger between eligible entities as equal to the combined debt guarantee limits of both entities calculated on a pro forma basis as of the close of business September 30, 2008, absent action by the FDIC after consultation with the surviving entity and its appropriate federal banking agency. If the acquiring entity previously opted-out of the Debt Guarantee Program, it will have a one-time option to opt-in by filing an application with the FDIC.

Comments Related to the Scope of the Transaction Account Guarantee Program

Noting that negotiable order of withdrawal (NOW) accounts were excepted from the scope of the definition of "noninterest-bearing transaction accounts" in the Interim Rule, the FDIC specifically sought comment as to whether that definition should be broadened to include coverage for NOW accounts held by sole proprietorships, non-profit religious, philanthropic, charitable organizations and the like, or governmental units for the deposit of public funds, assuming that the interest paid for such modifications would be de minimis. The public offered comments on these and other topics related to the scope of the Transaction Account Guarantee Program, as discussed below.

The FDIC received approximately 500 comments on the Transaction Account Guarantee Program, including a large number of form letters. One commenter felt that the Transaction Account Guarantee Program simply was unwarranted because depositors were not interested in unlimited deposit insurance coverage and would be unwilling to pay for expanded coverage for transaction accounts. Most of the commenters argued that the full guarantee should be extended to certain interest-bearing accounts, including the following: (1) Interest on Lawyers Trust Accounts (IOLTAs); (2) accounts owned by the government or accounts with public funds; and (3) negotiable order of withdrawal accounts (NOW accounts). Each of these types of accounts is discussed in turn below.

IOLTAs

An IOLTA is an interest-bearing account maintained by a lawyer or law firm for clients. The interest from these accounts is not paid to the law firm or its clients, but rather is used to support law-related public service programs, such as providing legal aid to the poor.

Over 500 of the comments received by the FDIC objected to the exclusion of IOLTAs from the Transaction Account Guarantee Program. Those who commented on IOLTAs included the American Bar Association, state bar associations, industry groups, and law firms. According to commenters, IOLTAs are clearing accounts serving the transactional needs of attorneys and are used for payment of court filing fees, escrow funds, retainers, and the like. Generally, commenters recommended that the FDIC either construe IOLTAs as noninterest-bearing transaction accounts eligible for coverage under the Transaction Account Guarantee Program, or that the FDIC grant an exception to explicitly provide coverage to IOLTAs under the program.

Some parties argued that the exclusion of IOLTAs from the program creates an unintended dilemma for

[8] Appendix A to 12 CFR 325, "Statement of Policy on Risk-Based Capital."

lawyers. Either a lawyer can keep the clients' funds in the IOLTA (with limited insurance coverage), or the lawyer can transfer these funds to a noninterest-hearing transaction account in order to take advantage of the full protection provided by the Transaction Account Guarantee Program. Some lawyers might decide that their fiduciary responsibility with respect to their clients' funds mandates the transfer of the funds to a fully protected noninterest-hearing transaction account. Such a transfer would adversely affect funding for law-related public service programs that rely heavily on the interest from IOLTAs and could result in the loss of legal services to low-income populations.

Also, some of these commenters argued that an IOLTA should not he viewed as an interest-bearing account because the interest does not inure to the benefit of either the lawyer or the client. In addition, some commenters argued that IOLTAs are similar to noninterest-bearing transaction accounts such as corporate payroll accounts, one of the types of accounts that the Transaction Account Guarantee Program is designed to guarantee. They mentioned that IOLTAs are exempt from the prohibition on the payment of interest on demand accounts, and but for this exemption, IOLTAs would he similar to noninterest-bearing accounts covered by the Transaction Account Guarantee Program. *See* 12 CFR Part 204.

Public Fund Accounts

A number of commenters recommended that full protection under the Transaction Account Guarantee Program be extended to interest-bearing accounts owned hy the government or accounts that contained public funds. In support of this position, the commenters argued that full protection for such accounts would enable insured depository institutions not to pledge collateral for the uninsured portion of the account inasmuch as no portion would be uninsured. If the hank were not required to pledge collateral, the bank's liquidity would be increased.

NOW Accounts

The law provides that certain depositors are eligihle to hold "negotiable order of withdrawal" or NOW accounts. Though these accounts may be interest-bearing, the account is similar to a demand deposit account in that the depositor is permitted to make withdrawals by negotiable or transferable instruments. *See* 12 U.S.C. 1832. In fact, a NOW account is defined as a type of "transaction account" for reserve requirement purposes. *See* 12 CFR 204.2(e)(2). One commenter argued that a NOW account, being a transaction account and also being an account with limited interest, should be protected under the Transaction Account Guarantee Program.

In all of the comments summarized ahove (involving IOLTAs, public fund accounts, and NOW accounts), the argument was made that the FDIC should extend the full protection under the Transaction Account Guarantee Program to certain types of interest-bearing accounts. Other commenters recommended that the Transaction Account Guarantee Program be expanded to cover all NOW accounts, regardless of the class of owner or the amount of interest paid.

In general, for purposes of the Transaction Account Guarantee Program, the FDIC wishes to maintain the distinction between (1) noninterest-bearing accounts and (2) interest-bearing accounts. As discussed helow, however, the FDIC has decided to create certain exceptions.

First, the FDIC has decided to create an exception for IOLTAs. As noted by the commenters, the interest on IOLTAs does not inure to the benefit of either the law firm or the clients. Thus, from the perspective of the law firm and the clients, the account produces the same economic result as a noninterest-bearing transaction account. For this reason, the FDIC has amended the definition of "noninterest-bearing transaction account" to include IOLTAs. In providing protection to IOLTAs, the FDIC also includes attorney trust accounts designated as "IOLAs" or "IOTAs" (as such accounts are designated in some states). The FDIC will treat all such accounts as IOLTAs for purposes of the Transaction Account Guarantee Program.

Second, the FDIC has decided to create an exception for NOW accounts with interest rates no higher than 0.50 percent. With such a rate, the NOW account will be similar to a noninterest-bearing transaction account. Therefore, the account will be protected under the Transaction Account Guarantee Program. This change should provide stability to payment processing accounts structured as NOW accounts, without creating risks of destabilizing money market mutual funds or allowing weaker institutions to attract deposits in these ownership categories through higher interest rates.

Another exception was created through the Interim Rule. This exception, applicable to certain types of sweep accounts, is discussed below.

Sweep Accounts

Several commenters addressed the FDIC's treatment of sweep accounts in the Transaction Account Guarantee Program. Several commenters supported the FDIC's decision to provide a temporary full guarantee of balances resulting from certain deposit reclassification programs. These commenters also pointed out that some sweep programs involve time deposits, rather than savings accounts. Accordingly, several of the commenters recommended that the FDIC extend the temporary full guarantee under the Transaction Account Guarantee Program to include other types of deposit reclassification programs, such as those that involve time deposits. A few commenters further suggested that instead of expanding coverage to include transfers to time deposits as well as savings deposits, the FDIC should instead provide unlimited deposit guarantees of all noninterest-bearing deposits. A few commenters also requested that the FDIC provide temporary full guarantees of all noninterest-bearing transaction accounts regardless of the type of deposit reclassification program used. One commenter suggested that the exception for funds swept to noninterest-bearing savings accounts be extended to include funds swept from noninterest-bearing transaction accounts to noninterest-bearing money market deposit accounts.

The Final Rule provides that the FDIC will treat funds in sweep accounts in accordance with the usual rules and procedures for determining sweep balances at a failed depository institution. Under these rules, and for purposes of the Transaction Account Guarantee Program, the FDIC will treat funds swept or transferred from a noninterest-bearing transaction account to another type of deposit or nondeposit account as being in the account to which the funds were transferred. Under the Transaction Account Guarantee Program, an exception will exist for deposit reclassification programs where funds are swept from a noninterest-bearing transaction account to a noninterest-bearing savings account. Such swept funds will be treated as being in a noninterest-bearing transaction account. As a result of this treatment, funds swept into a noninterest-bearing savings account as part of a bank's reclassification program will be guaranteed by the Transaction Account Guarantee Program. Some commenters requested guidance as to the meaning of "savings account." The FDIC does not intend to create a special definition of "savings account" for

purposes of the Transaction Account Guarantee Program. For purposes of the Final Rule, a "savings account" is considered a type of "savings deposit" as defined in Regulation D issued by the Board of Governors of the Federal Reserve System, 12 CFR 204.2(d), and the sweep programs at issue typically are established for purposes of Regulation D.

Some commenters requested guidance as to the meaning of the word "sweep" or the meaning of "swept funds." These commenters argue that these terms do not clearly capture all of the technical meanings under which some programs operate. As such, they argue, requiring banks to suspend such programs in order to ensure coverage by the Transaction Account Guarantee Program could introduce unnecessary operational challenges. For purposes of this rule, funds are "swept" from a noninterest-bearing transaction account to a noninterest-bearing savings account if the funds are transferred from one account to another. Also, a "sweep" occurs if the noninterest-bearing transaction account is reclassified as a noninterest-bearing savings account. In the latter case, the "sweep" is the reclassification of the account.

Assessments

In regard to the 10 basis point assessment that will be imposed on participating entities that do not opt-out of the Transaction Account Guarantee Program, one commenter requested clarification as to how this assessment would be calculated. Consistent with the Amended Interim Rule, the Final Rule provides that the 10 basis points will be imposed on any deposit amounts in noninterest-bearing transaction accounts, as defined in the Final Rule, that exceed the existing deposit insurance limit of $250,000. Another commenter mistakenly thought that the FDIC would be requiring all participating institutions to perform an insurance determination at the depositor level in order to calculate its supplemental insurance premium due. The commenters concerns are unfounded; institutions only will be required to report separately the amount of noninterest-bearing transaction accounts over $250,000, but they will have the option to exclude certain amounts as determined and documented by the institution.

One commenter also suggested that the premiums assessed for the Transaction Account Guarantee Program should be based on the quarterly average balances of such accounts rather than on the quarter-end balances. While it is true that these deposit products typically have more volatile daily balances, the additional cost and reporting burden associated with such a requirement do not seem appropriate given the temporary nature of the guarantee program.

Finally, with regard to the Transaction Account Guarantee Program, the Final Rule contains a technical change from the provisions of the Amended Interim Rule. Where the Amended Interim Rule provided that funds in noninterest-bearing transaction accounts would be "insured in full," the Final Rule indicates that funds in such accounts are "guaranteed in full."

Disclosures

The Interim Rule provided for a number of disclosures relative to both the Debt Guarantee Program and the Transaction Account Guarantee Program. The FDIC sought comments specific to the disclosures related to the Debt Guarantee Program. The FDIC's goal in requiring disclosures was to foster creditor confidence in the Program; the FDIC asked whether there were alternative, less burdensome means to achieve this goal and whether the creditor confidence provided by the disclosures outweighed the burden on participating entities in providing them.

Although the FDIC specifically requested comment on the disclosure requirements of the Debt Guarantee Program, the FDIC received comments on disclosures relating to both components of the TLG Program, with specific comments on disclosures for sweep accounts. Comments were also provided on the FDIC's stated intent to publish a list of entities that have opted out of either or both components of the program. Several commenters requested that the FDIC provide more standardized language for the required disclosures.

Some commenters requested that the deadline for compliance with the disclosure requirements be extended from December 1, 2008, to a later date. As provided in the Amended Interim Rule, the deadline for compliance with the disclosure requirements has been extended until December 19, 2008, a date that the FDIC continues to believe is reasonable.

FDIC's Publication of Participation in the TLG Program

A number of bankers who commented on the Amended Interim Rule expressed the view that the FDIC's Web site publication of institutions that are not participating in the TLG Program will, as one banker put it, "cast a shadow" on such institutions as not having full FDIC insurance and will result in a marketing disadvantage for those institutions. One of the bankers noted that this result would be unfair to institutions that had no liquidity issues. The FDIC continues to believe it is important that both lenders and depositors be able to ascertain, from one central source (the FDIC's Web site), whether entities eligible to participate in the TLG Program are participating in either or both components of the Program. The FDIC further believes that any customer confusion that might otherwise disadvantage some institutions could be addressed in customer disclosures provided by the institutions.

Disclosure Requirements for Debt Guarantee Program

The FDIC received several comments on the Interim Rule and the Amended Interim Rule that strongly encouraged the FDIC to impose standard, uniform disclosures for all applicable debt issuance announcements and disclosure documents. One commenter maintained that such standard disclosures are critical for the "uniformity of the product" affecting the "universal access of banks and equality of pricing among banks." Several commenters also asked the FDIC to state affirmatively that the TLG Program is backed by the "full faith and credit" of the United States.

The FDIC has responded to the concerns raised by the commenters seeking uniform disclosures in the Final Rule by prescribing specific disclosure statements to be used in written materials underlying debt issued on or after December 19, 2008, through June 30, 2009, that is covered by the Debt Guarantee Program. Similarly, the FDIC has prescribed a written statement to be used on all senior unsecured debt issued by participating entities during that time period that is not covered under the Debt Guarantee Program.

Disclosure Requirements for Transaction Account Guarantee Program

A number of commenters, including financial institutions and trade associations, objected to the requirement that a depository institution post a notice in the lobby of its main office and in each branch indicating whether it has chosen to participate in the Transaction Account Guarantee Program. In general, the financial institutions that commented on this matter felt that disclosing such a matter would be counterproductive to the intent of stabilizing the economy. In addition, some financial institutions believe that as a result of the required notice, an institution that declined to participate in the program would likely see depositors redirect their funds to an

institution that has chosen to participate. Accordingly, commenters believe that the notice requirement would negatively affect those institutions that chose not to participate in the Transaction Account Guarantee Program. Community banks argued that, due to the notice requirement, small, healthy, community institutions would feel pressured into participating in the Transaction Account Guarantee Program, and could end up financing the costs of the economic crisis, which they viewed as having been created primarily by large institutions that undertook risky business plans.

The Massachusetts Bankers Association also objected to the provision in the Interim Rule that stated that the FDIC would make publicly available the list of institutions that choose to opt-out of the Transaction Account Guarantee Program. Currently, all excess deposits of Massachusetts state-chartered savings and cooperative banks are fully insured by one of two State funds. Such banks with excess coverage have already paid assessments to one of the two Massachusetts deposit insurance funds, and may not believe it is worth the financial cost to remain in the Transaction Account Guarantee Program. The commenter believes that the disclosure requirements will put banks in Massachusetts that choose to opt-out at a significant disadvantage for the reasons stated above. The commenter suggests that the FDIC include an explanatory statement on any opt-out list published by the FDIC that certain institutions, identified on the list, have their deposits fully insured by state funds. In addition, requiring institutions to post notices at each branch could lead to consumer confusion and uncertainty regarding the safety of their deposits.

One bank noted that it does not offer noninterest-bearing transaction accounts; thus, it would be meaningless and potentially confusing to customers for the bank to provide a notice that the bank is not participating in the Transaction Account Guarantee Program. The FDIC agrees with this comment and has thus modified the transaction account guarantee disclosure requirement to indicate that it applies only to insured depository institutions that offer noninterest-bearing transaction accounts, as that term is defined in the Final Rule.

The FDIC believes it is essential for all insured depository institutions that offer noninterest-bearing transaction accounts to comply with the disclosure requirements in the Final Rule to ensure that all depositors of FDIC-insured depository institutions are aware of the federal protection afforded in connection with their deposits. The Final Rule, however, does not prohibit an institution from supplementing the FDIC's disclosure requirements by providing additional information to its customers, including an explanation as to why the institution has opted out of the Transaction Account Guarantee Program. For example, Massachusetts banks that opt-out may wish to remind consumers of the additional coverage already available to them.

One commenter asked if the requirement to post a notice in an insured depository institution's lobby and branches extended to loan production offices. The key criteria for a proposed facility to qualify as a branch is accepting deposits, paying checks, or lending money pursuant to section 3(o) of the FDI Act. In most instances, loan production offices are involved with authorized loan origination, loan approval, and loan closing activities. If this is the case, the loan production office would not be considered a branch, and the lobby notice requirement related to the Transaction Account Guarantee Program would not apply.

Several commenters suggested that the FDIC provide a sample disclosure notice to serve as a safe harbor for complying with the disclosure requirements for the Transaction Account Guarantee Program. In response to those comments, the Final Rule includes safe harbor sample notices for institutions participating in the Transaction Account Guarantee Program and for those that choose not to.

A group of bankers who commented on the Interim Rule suggested that online disclosure requirements should be required for institutions that offer Internet deposit services. They noted that, because an increasing number of depositors interact with their depository institutions only through on-line banking services, in order to provide effective notice to depositors about whether an institution is participating in the Transaction Account Guarantee Program, the FDIC should require website disclosure. The FDIC agrees with that observation, as reflected in the Final Rule.

The FDIC received several comments regarding disclosure requirements related to sweep accounts. The Amended Interim Rule required that, if an institution used sweep arrangements or took other actions that resulted in funds being transferred or reclassified to an interest-bearing account or nontransaction account, the institution was required to disclose those actions to the affected customers and clearly advise them, in writing, that such actions would void the FDIC's guarantee. Commenters requested that the FDIC clarify how this requirement applies when an institution offers a product where funds are swept from a noninterest-bearing transaction account to a noninterest-bearing savings account. Since funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings account are guaranteed under the Transaction Account Guarantee Program, the FDIC has modified the sweep-account disclosure requirement to clarify that the disclosure requirement applies only when funds in a noninterest-bearing transaction account are swept, transferred or reclassified so that they no longer are eligible for the guarantee provided under the Transaction Account Guarantee Program.

A law firm commenting on behalf of several large banks and other financial organizations suggested that the FDIC provide a standard disclosure statement for the sweep account disclosure requirement. Although requiring standard disclosure language might be helpful to the industry, the FDIC notes that sweep products differ significantly throughout the industry. Sweep products include other deposit accounts, repurchase agreements, Eurodollar accounts at affiliated foreign branches, international banking facilities, and money market funds. Given the complexity and diversity of these and other sweep products, the FDIC believes it is preferable for institutions to fashion their own disclosure statement to fit the applicable sweep product, as long as the disclosure statement complies with the requirements in the Final Rule that the disclosures be accurate, clear, and in writing.

The same law firm also requested that the effective date for the sweep-account disclosure requirement be postponed until January 1, 2009, to provide sufficient time for institutions to implement the notice requirement in their regular monthly statement cycle. The FDIC notes that the disclosure requirements in the Amended Interim Rule have been in effect since October 23, 2008. Also, the FDIC has extended the effective date of the disclosure requirements in the Final Rule until December 19, 2008. Accordingly, especially in light of the exigencies that have triggered the need for the TLG Program, the FDIC believes the industry has sufficient time to prepare to implement by December 19 2008, the sweep account (and the other)

disclosure requirements in the Final Rule.

Payment of Claims

In the Interim Rule, the FDIC sought suggestions for modifying the claims process associated with the Debt Guarantee Program so that claimants could be paid more quickly without exposing the FDIC to undue risk. In response, the FDIC received comments from a number of commenters who advocated changing the Debt Guarantee Program to provide for an unconditional guarantee by the FDIC that payment be made as principal and interest becomes due and payable. At least two of these commenters suggested that, for debt maturing after June 30, 2012, guarantee payments made according to the contracted schedule might have to cease as of June 30, 2012, and a final guarantee payment would need to be made because the Debt Guarantee Program expires at that time. According to many of the commenters, if the FDIC fails to make payment to a holder of debt as soon as its issuer defaults on a payment, the demand for debt under the FDIC's Debt Guarantee Program could be severely curtailed. The investors most likely to purchase FDIC-guaranteed debt, such as fund managers and central banks, are particularly focused on ensuring timely receipt of scheduled payments of principal and interest, with minimal credit risk exposure. By and large, the commenters believe that the Debt Guarantee Program, as structured under the Amended Interim Rule, does not sufficiently meet the investment criteria of these investors.

Some of the commenters stated that the Amended Interim Rule, as currently structured, will only benefit the largest and most creditworthy financial institutions, namely those with an established investment grade credit rating. One commenter suggested that amending the regulation in a manner that provides for a standard credit rating will allow many more financial institutions to readily access the debt markets and, in so doing, will enhance the flow of capital from investors to financial institutions without bias to the size of the issuing institution.

Several commenters suggested that the Debt Guarantee Program should mirror the Credit Guarantee Scheme established in the U.K., which unconditionally and irrevocably guarantees timely payment as principal and interest become due and payable, without delay other than any applicable grace period. Some commenters recommended that the FDIC consider adopting the U.K. program's feature that the guarantee be effective immediately upon a payment default. They also pointed out that a relatively attractive aspect of this program is the continued payment at the contract rate of interest. Three of these commenters cautioned that disparity between the Debt Guarantee Program and the U.K.'s scheme could result in the guaranteed obligations of U.S. banks being less liquid and more costly, and therefore less attractive to investors. This would put U.S. banks at a competitive disadvantage compared to financial institutions issuing debt under the U.K.'s Credit Guarantee Scheme.

The FDIC recognizes the commenters' concerns with the Debt Guarantee Program as currently drafted and has determined to substantially enhance the timeliness of payment under the guarantee. By these revisions, the FDIC intends to increase the likelihood that FDIC-guaranteed debt issuances by participating institutions attain the highest ratings for that class of investment which will help ensure that FDIC-guaranteed debt instruments are widely accepted within the investment community. The FDIC also acknowledges the efficacy of certain elements of the structure of the guarantee program implemented in the U.K. Although the FDIC is declining to adopt the U.K. scheme, certain of the changes provided for in the Final Rule parallel aspects of the U.K. program, and the FDIC expects that the Final Rule will enable U.S. financial institution debt guaranteed by the FDIC to maintain a sufficient level of competitiveness in the international markets.

V. The Final Rule

After considering the comments submitted on various aspects of the Interim Rule and the Amended Interim Rule, the FDIC has adopted a Final Rule. While there are a number of limited or technical changes that cause the Final Rule to differ from the Amended Interim Rule, the Final Rule differs substantively from the Amended Interim Rule by:

- Revising the definition of senior unsecured debt;
- Providing an alternative means for establishing a guarantee cap for insured depository institutions that either had no senior unsecured debt outstanding or only had federal funds purchased as of September 30, 2008;
- Combining debt guarantee limits of a participating insured depository institution and its parent holding company(ies);
- Approving trade confirmations as a sufficient form of written agreement for senior unsecured debt;
- Recognizing IOLTAs as a type of noninterest-bearing transaction account for purposes of the Transaction Account Guarantee Program;
- Recognizing NOW accounts with low interest rates as a type of noninterest-bearing transaction account for purposes of the Transaction Account Guarantee Program;
- Prescribing more specific disclosures for both components of the TLG Program;
- Guaranteeing the timely payment of principal and interest following payment default; and
- Revising the fee structure for the Debt Guarantee Program.

A discussion of these revisions follows.

Senior unsecured debt.

Debt With Maturity of Thirty Days or Less

The FDIC received a large number of comments that requested that the FDIC remove federal funds and other short-term debt from the definition of senior unsecured debt. The commenters questioned the fees charged by the Debt Guarantee Program in light of similar market costs and noted that other recently announced or implemented federal programs had contributed to improved conditions in the markets. The FDIC responded to those comments by revising the definition of senior unsecured debt to exclude any obligation with a stated maturity of thirty days or less. The FDIC believes that the Debt Guarantee Program should help institutions to obtain stable, longer term sources of funding where liquidity is most lacking.

The guarantee on any guaranteed senior unsecured debt instrument issued prior to December 6, 2008, with a stated maturity of thirty days or less will expire on the earlier of: (1) The date the issuer opts out (if it does), or (2) the maturity date of the instrument.

Specific Debt Instruments Included or Excluded From Coverage

The FDIC continues to receive questions regarding whether certain specific instruments would be eligible for coverage under the Debt Guarantee Program. In the Final Rule the FDIC provides additional clarification through a modified list of non-inclusive examples of instruments that would be (or would not be) considered senior unsecured debt for purposes of the Debt Guarantee Program. The revisions reinforce the FDIC's previous statements that the Debt Guarantee Program is not designed to encourage the development of or to promote innovative or complex sources of funding, but to enhance the

liquidity of the inter-bank lending market and senior unsecured bank debt funding.

The Final Rule provides, in order to differentiate common floating-rate debt from structured notes, that senior unsecured debt may pay either a fixed or floating interest rate based on a commonly-used reference rate with a fixed amount of scheduled principal payments. The Final Rule further provides that the term "commonly-used reference rate" includes a single index of a Treasury bill rate, the prime rate, and LIBOR.

The Final Rule also provides that, if the debt meets the other qualifying factors contained in the rule, senior unsecured debt may include, for example, the following debt: Federal funds; promissory notes; commercial paper; unsubordinated unsecured notes, including zero-coupon bonds; U.S. dollar denominated certificates of deposit owed to an insured depository institution, an insured credit union as defined in the Federal Credit Union Act, or a foreign bank; U.S. dollar denominated deposits in an IBF of an insured depository institution owed to an insured depository institution or a foreign bank; and U.S. dollar denominated deposits on the books and records of foreign branches of U.S. insured depository institutions that are owed to an insured depository institution or a foreign bank. The term "foreign bank" does not include a foreign central bank or other similar foreign government entity that performs central bank functions or a quasi-governmental international financial institution such as the IMF or the World Bank. The phrase "owed to an insured depository institution, an insured credit union as defined in the Federal Credit Union Act or a foreign bank" means owed to an insured depository institution, an insured credit union, or a foreign bank in its own capacity and not as agent.

The Final Rule states that senior unsecured debt excludes, for example, any obligation with a stated maturity of "one month";[9] obligations from guarantees or other contingent liabilities; derivatives; derivative-linked products; debts that are paired or bundled with other securities; convertible debt; capital notes; the unsecured portion of otherwise secured debt; negotiable certificates of deposit; deposits denominated in a foreign currency or other foreign deposits (except those otherwise permitted in the rule, as explained in the preceding paragraph); revolving credit agreements; structured notes; instruments that are used for trade credit; retail debt securities; and any funds regardless of form that are swept from individual, partnership, or corporate accounts held at depository institutions. Also excluded are loans from affiliates, including parents and subsidiaries, and institution affiliated parties.

Alternative Method for Establishing Debt Cap for Entities With No Unsecured Debt

In the Amended Interim Rule, the FDIC asked whether it should provide a means for an eligible entity to participate in the Debt Guarantee Program even if the entity had no senior unsecured debt as of the threshold date of September 30, 2008. Previously, this determination and the extent of the entity's guaranteed debt limit were made by the FDIC on a case-by-case basis. The FDIC sought suggestions for alternative means of making this determination. The Final Rule provides that if a participating entity that is an insured depository institution had either no senior unsecured debt as of September 30, 2008, or only federal funds purchased, its debt guarantee limit is two percent of its consolidated total liabilities as of September 30, 2008. In specifying the amount of guaranteed debt that may be issued by an insured depository institution, the FDIC anticipates that the large number of insured depository institutions that reported no senior unsecured debt (as that term has been redefined in the Final Rule) as of September 30, 2008, will be able to make their opt-out decisions with more certainty and begin to issue debt without delay. If a participating entity other than an insured depository institution had no senior unsecured debt as of September 30, 2008, it may make a request to the FDIC to have some amount of debt covered by the Debt Guarantee Program. The FDIC, after consultation with the appropriate Federal banking agency, will decide whether, and to what extent, such requests will be granted on a case-by-case basis.

Combining Debt Guarantee Limits of a Participating Insured Depository Institution and Its Parent Holding Company

The Final Rule provides additional flexibility to some participating entities by permitting a participating insured depository institution to issue debt under its debt guarantee limit as well as its holding company's(ies') debt guarantee limit(s). With proper written notice both to the FDIC and to its parent holding company(ies), a participating insured depository institution may issue guaranteed debt in an amount equal to the institution's limit plus its holding company's(ies') limit(s), so long as the total guaranteed debt issued by the insured depository institution and its holding company(ies) does not exceed their combined debt guarantee limit.

Trade Confirmations as a Sufficient Written Agreement

The Amended Interim Rule required senior unsecured debt to be evidenced by a written agreement. Commenters raised concerns that written agreements were uncommon in transactions involving debt such as federal funds or other short-term borrowings. Although the decision of the FDIC to exclude borrowings of thirty days or less from the definition of senior unsecured debt in the Final Rule should largely eliminate this concern, the Final Rule provides that senior unsecured debt (that otherwise meets the requirements of the rule) can be evidenced by either a written agreement or an industry-accepted trade confirmation. This clarification was made in an effort to encompass all relevant forms of unsecured debt without placing unnecessary burdens on the issuing parties.

IOLTAs as a Type of Noninterest-Bearing Transaction Account for Purposes of the Transaction Account Guarantee Program

For purposes of the Transaction Account Guarantee Program, in the Amended Interim Rule, the FDIC had defined a "noninterest-bearing transaction account" as a transaction account as defined in 12 CFR 204.2 that is (i) maintained at an insured depository institution; (ii) with respect to which interest is neither accrued nor paid; and (iii) on which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal. 12 CFR 370.2(h)(1). In the Amended Interim Rule, a noninterest-bearing transaction account did not include, for example, a negotiable order of withdrawal account (NOW account) or a money market deposit account (MMDA), as those accounts are defined in 12 CFR 204.2.

Many of the comments received by the FDIC regarding the Transaction Account Guarantee Program sought to have the FDIC's transaction account guarantee extend to cover Interest on Lawyers Trust Accounts (IOLTAs). As explained previously, IOLTAs are interest-bearing accounts maintained by

[9] This recognizes that certain instruments have stated maturities of "one month," but have a term of up to 35 days because of weekends, holidays, and calendar issues.

an attorney or a law firm for its clients. The interest from IOLTAs typically funds law-related public service programs. The interest does not inure to the benefit of the law firm or the clients; for this reason, from the perspective of the law firm and the clients, the account is the economic equivalent of a noninterest-bearing transaction account. Accordingly, in the Final Rule the FDIC has provided that the term "noninterest-bearing transaction account" shall include IOLTAs (or IOLAs, or IOTAs). As a result, assuming that the other requirements of the Transaction Account Guarantee Program are met by a participating entity and irrespective of the standard maximum deposit insurance amount defined in 12 CFR Part 330, IOLTAs will be guaranteed by the FDIC in full as noninterest-bearing transaction accounts.

NOW Accounts With Low Interest Rates as a Type of Noninterest-Bearing Transaction Account for Purposes of the Transaction Account Guarantee Program

As discussed above, some commenters argued that the Transaction Account Guarantee Program should be extended to protect funds in NOW accounts. They noted that when the interest rate is low, such an account is similar to a noninterest-bearing transaction account. Accordingly, in the Final Rule, the FDIC has provided that NOW accounts with interest rates no higher than 0.50% are considered noninterest-bearing transaction accounts. The interest rate must not exceed 0.50% at any time prior to the expiration date of the program. If an insured depository institution that currently offers NOW accounts at interest rates above 0.50% readjusts the interest rate on such accounts to a rate no higher than 0.50% before January 1, 2009, and commits to maintain the adjusted rate until December 31, 2009, the affected NOW accounts will be considered noninterest-bearing transaction accounts for purposes of the Final Rule.

Disclosures

In General

As explained in detail below, the Final Rule imposes disclosure requirements in connection with each of the components of the TLG Program. The purpose of the required disclosures is to ensure that depositors and applicable lenders and creditors are informed of the participation of eligible entities in the Debt Guarantee Program and/or the Transaction Account Guarantee Program. To this same end, the FDIC will maintain and post on its Web site a list of entities that have opted out of either or both components of the TLG Program.

Publication of Participation in the TLG Program on the FDIC's Web Site

As under the Amended Interim Rule, under the Final Rule, the FDIC will publish:

(1) A list of the eligible entities that have opted out of the Debt Guarantee Program, and

(2) A list of the eligible entities that have opted out of the Transaction Account Guarantee Program. (In Financial Institution Letter 125–2008, dated November 3, 2008, the FDIC provided details of the opt-out and opt-in procedures of the TLG Program.)

Disclosures Under the Debt Guarantee Program

Under the Final Rule, if an eligible institution is participating in the Debt Guarantee Program, it must include the following disclosure statement in all written materials underlying any senior unsecured debt it issues on or after December 19, 2008, through June 30, 2009, that is covered under the Debt Guarantee Program:

This debt is guaranteed under the Federal Deposit Insurance Corporation's Temporary Liquidity Guarantee Program and is backed by the full faith and credit of the United States. The details of the FDIC guarantee are provided in the FDIC's regulations, 12 CFR Part 370, and at the FDIC's Web site, http://www.fdic.gov/tlgp. The expiration date of the FDIC's guarantee is the earlier of the maturity date of the debt or June 30, 2012.

Similarly, if an eligible institution is participating in the Debt Guarantee Program, it must include the following disclosure statement in all written materials underlying any senior unsecured debt it issues on or after December 19, 2008, through June 30, 2009, that is *not* covered under the Debt Guarantee Program:

This debt is not guaranteed under the Federal Deposit Insurance Corporation's Temporary Liquidity Guarantee Program.

These specific disclosure requirements differ from the general requirements imposed under the Amended Interim Rule.

Disclosures Under the Transaction Account Guarantee Program

Under the Final Rule, each insured depository institution that offers noninterest-bearing transaction accounts must post a prominent notice in the lobby of its main office, each domestic branch, and, if it offers Internet deposit services, on its Web site clearly indicating whether or not the entity is participating in the Transaction Account Guarantee Program. Because IOLTAs and low-interest NOW accounts are considered noninterest-bearing transaction accounts under the Final Rule, institutions that offer these accounts must comply with this notice requirement. If the institution is participating in the Transaction Account Guarantee Program, the notice must also state that funds held in noninterest-bearing transaction accounts at the institution are guaranteed in full by the FDIC. These disclosures are the same as those required under the Amended Interim Rule, except that they include a Web site notice requirement for institutions that offer Internet deposit services and clarify that the guarantee provided by the Transaction Account Guarantee program is separate from the FDIC's general deposit insurance rules.

Like the Amended Interim Rule, the Final Rule requires that the disclosures be provided in simple, readily understandable text. In response to the request of commenters, the Final Rule includes the following sample notices for: (1) Institutions participating in the Transaction Account Guarantee Program and (2) those not participating in it:

For Participating Institutions

[Institution Name] is participating in the FDIC's Transaction Account Guarantee Program. Under that program, through December 31, 2009, all noninterest-bearing transaction accounts are fully guaranteed by the FDIC for the entire amount in the account. Coverage under the Transaction Account Guarantee Program is in addition to and separate from the coverage available under the FDIC's general deposit insurance rules.

For Non-Participating Institutions

[Institution Name] has chosen not to participate in the FDIC's Transaction Account Guarantee Program. Customers of [Institution Name] with noninterest-bearing transaction accounts will continue to be insured through December 31, 2009 for up to $250,000 under the FDIC's general deposit insurance rules.

In order to alert depositors to the federal protection offered their deposits, the FDIC requires disclosures to be made by all insured depository institutions that offer noninterest-bearing transaction accounts, as provided in the Final Rule. If an institution chooses to supplement information contained in the FDIC's sample disclosures with an explanation as to why it may have opted out of the Transaction Account Guarantee Program, for example, the Final Rule does not prohibit such disclosures.

Similarly, a participating institution should disclose to depositors special

situations where the coverage provided under the Transaction Account Guarantee Program may or may not be available. An example is where an institution issues official checks drawn on another insured depository institution. If that other institution is participating in the Transaction Account Guarantee Program, then the payee of the official check would be fully covered. If the other institution is not a participating institution, then whether the payee is insured for the amount of the official check would be based on the FDIC's general deposit insurance rules. The institution that provides such official checks to its customers must disclose this information to those customers.

The Amended Interim Rule required that, if an institution uses sweep arrangements or takes other actions that result in funds being transferred or reclassified to an interest-bearing account or nontransaction account, the institution must disclose those actions to the affected customers and clearly advise them, in writing, that such actions will void the FDIC's guarantee. In the Final Rule, the FDIC clarifies its previous sweep disclosure requirement by specifying that the disclosure requirement applies only when funds in a noninterest-bearing transaction account are swept, transferred or reclassified so that they no longer are eligible for the full guarantee provided under the Transaction Account Guarantee Program. Because of the diverse and complex nature of sweep instruments, the FDIC does not adopt a standard sweep disclosure in the Final Rule. Nevertheless, in fashioning its disclosure statement applicable to a specific sweep product, the Final Rule obliges participating entities to make the disclosures applicable to their sweep products accurately, clearly, and in writing.

Payment of Claims Following Payment Default

The Final Rule makes no changes to the Amended Interim Rule regarding the payment of claims under the Transaction Account Guarantee Program. However, after considering the comments relevant to the payment of claims under the Debt Guarantee Program, the FDIC has significantly altered the Amended Interim Rule with respect to the method by which the FDIC will satisfy its guarantee obligation on debt issued by institutions and holding companies. These changes are designed to provide assurances to the holders of guaranteed debt that they will continue to receive timely payments following payment default, as defined in section 370.12(b)(1). The changes nonetheless allow FDIC to continue to obtain sufficient information necessary to make payment to the appropriate party in the proper amount. The fundamental changes made in the claims section of the Final Rule (12 CFR 370.12) relate to: (1) The trigger for the payment obligation; (2) the methods by which the guarantee obligation may be satisfied; and (3) a requirement for participating entities to agree to certain initial undertakings in order to participate in the Debt Guarantee Program.

The FDIC's payment obligation under the Debt Guarantee Program for eligible senior unsecured debt will be triggered by a payment default. The Amended Interim Rule envisioned a different claims period for bank debt and holding company debt because the guarantee was to be triggered by the different insolvency events for the different types of entities: Receivership for an insured depository institution and bankruptcy for a holding company. By adopting a guarantee obligation triggered by a payment default, there is now no reason to provide distinct processes for insured depository institutions and holding companies.

The second major change regarding payment of claims in the Final Rule concerns the methodology by which the FDIC will satisfy the guarantee obligation. The Final Rule now provides that the FDIC will continue to make scheduled interest and principal payments under the terms of the debt instrument through its maturity. The FDIC will become subrogated to the rights of any debtholder against the issuer, including in respect of any insolvency proceeding, to the extent of the payments made under the guarantee.

For debt issuances whose final maturities extend beyond June 30, 2012, at any time thereafter, the FDIC may elect to make a payment in full of all the outstanding principal and interest under the debt issuance. The Final Regulation indicates that the FDIC generally will consider the failure of an insured depository institution to make a payment on its outstanding debt such that the FDIC is required to make payment under the guarantee as grounds for the appointment of the FDIC as conservator or receiver of such insured depository institution.

As a result of the comments received on the Amended Interim Rule, the FDIC has established new claims filing procedures. The Final Rule provides for a process under which a claim may be filed with the FDIC by an authorized representative, as established by the issuer, of all the debtholders under a particular issuance. The Final Rule requires the participating entities to file with the FDIC a form which allows the issuer to establish a designated representative as part of its election under Part 370. The representative must demonstrate its capacity to act on behalf of the debtholders, and must submit the information set forth in the rule. The FDIC expects that by working through an authorized representative of a class of bondholders it can significantly expedite its response to a claim for payment and reduce its administrative costs.

Alternatively, an individual claimant under an issuance for which an authorized representative has not been designated, or who chooses not to be represented by the designated authorized representative, may also file with the FDIC and submit a proof of claim with the required information. Under both procedures, the FDIC undertakes to make the required payment upon receipt of a conforming proof of claim.

The FDIC will require specific information to be filed with any claim under the program. Such specific information must include evidence that a payment default has occurred under the terms of the debt instrument and that the claimant is the actual owner of the FDIC-guaranteed debt obligation or is authorized to act on behalf of the owner. In addition, the FDIC must receive an assignment of the debtholders' rights in the debt, as well as any claims in any insolvency proceeding arising in connection with ownership of FDIC-guaranteed debt. This assignment must cover all distributions on the debt from the proceeds of the receivership or bankruptcy estate of the issuer, as appropriate.

The Final Rule also varies from the Amended Interim Rule in that it addresses certain specific legal implications of an entity's participation in the Debt Guarantee Program. The Final Rule provides that any participating entity acknowledges by its participation in this program that it will become indebted to the FDIC for any payments the FDIC may make in satisfaction of its guarantee obligation or the satisfaction of the guarantee obligations of any affiliate. The issuer of guaranteed debt will be unconditionally liable to the FDIC for repayment of amounts expended under the guarantee. Further, in the event that a participating entity is placed into receivership or bankruptcy after the FDIC has made payment on its guarantee, the FDIC will be a bona fide creditor in those proceedings. Finally, the Final Rule

requires participating entities to execute and file with the FDIC as part of its notification of participation in the Debt Guarantee Program a "Master Agreement." Under this document, the participating entity: (1) Acknowledges and agrees to the establishment of a debt owed to the FDIC for any payment made in satisfaction of the FDIC's guarantee of a debt issuance by the participating entity and agrees to honor immediately the FDIC's demand for payment on that debt; (2) arranges for the assignment to the FDIC by the holder of any guaranteed debt issued by the participating entity of all rights and interests in respect of that debt upon payment to the holder by the FDIC under the guarantee and for the debtholders to release the FDIC of any further liability under the Debt Guarantee Program with respect to the particular issuance of debt; and (3) provides for the issuer to elect to designate an authorized representative of the bondholders for purposes of making a claim on the guarantee.

Fee Structure for the Debt Guarantee Program

As discussed earlier, the Final Rule revises the definition of senior unsecured debt to exclude debt with a stated maturity of 30 days or less and guarantees the timely payment of principal and interest, rather than guaranteeing payment following the bankruptcy or receivership of the issuer. These changes and a recognition of the effect of the guarantee on an entity's cost of issuing debt necessitate revision of the assessment rate for the Debt Guarantee Program. Assessment rates under the Debt Guarantee Program are as follows:

For debt with a maturity of:	The annualized assessment rate (in basis points) is:
180 days or less (excluding overnight debt)	50
181–364 days	75
365 days or greater	100

The assessment rates for shorter term debt are lower than the 75 basis point rate under the Interim Rule and those for longer term debt are somewhat higher. The rates in the Final Rule recognize that a 75 basis point rate generally makes the guarantee uneconomical for shorter term debt and significantly understates its value for longer term debt. (Charges under the U.K.'s debt guarantee program for longer term debt have thus far ranged from approximately 110 basis points to 160 basis points.) The FDIC believes that the rates provided for in the Final Rule appropriately reflect the value of the guarantee and the market value of guaranteed debt.

Initiation of Assessments

No assessments will be imposed on those eligible entities that opt out of the Debt Guarantee Program on or before December 5, 2008. Assessments accrue beginning on November 13, 2008, with respect to each eligible entity that does not opt out of the Debt Guarantee Program on or before December 5, 2008, on all senior unsecured debt (except for overnight debt) issued by it on or after October 14, 2008, and on or before December 5, 2008, that is still outstanding on that date. Beginning on December 6, 2008, assessments accrue on all senior unsecured debt with a maturity of greater than 30 days issued by it on or after December 6, 2008.

Special Rate for Certain Holding Companies and Other Non-Insured Depository Institution Affiliates

As discussed earlier, the rates set forth above will be increased by 10 basis points for senior unsecured debt issued by a holding company or another non-insured depository institution affiliate that becomes an eligible and participating entity, where, as of September 30, 2008, or as of the date of eligibility, the assets of the holding company's combined insured depository institution subsidiaries constitute less than 50 percent of consolidated holding company assets.

Consequences of Exceeding the Debt Guarantee Limit

Finally, the Interim Rule provided that if a participating entity issued debt identified as "guaranteed by the FDIC" in excess of the FDIC's limit, the participating entity would have its assessment rate guaranteed debt increased to 150 basis points on all outstanding guaranteed debt. The 150 basis points referenced in the Interim Rule represented an amount double the annualized 75 basis point assessment rate provided for in the Interim Rule. In the Final Rule, the FDIC removed the flat rate of an annualized 75 basis points, and replaced it with variable annualized assessment rates reflecting the length of the maturity of the debt. In the Final Rule, the FDIC made corresponding changes to the rates that will be charged in the event that the participating entity exceeds its debt guarantee limit. If that happens, the assessment rate charged to the participating entity for all of its guaranteed debt will be an amount that is double the annualized assessment rate otherwise applicable to the maturity of the debt issued, unless the FDIC, for good cause shown, imposes a smaller increase.

In addition, if an entity represents that the debt that it issues is guaranteed by the FDIC when it is not, or otherwise violates any provision of the TLG Program, the entity may be subject to any of the enforcement mechanisms set forth in the Final Rule.

VI. Regulatory Analysis and Procedure

A. Administrative Procedure Act

Pursuant to section 553(b)(B) of the Administrative Procedure Act (APA), notice and comment are not required prior to the issuance of a substantive rule if an agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. In addition, section 553(d)(3) of the APA provides that an agency, for good cause found and published with the rule, does not have to comply with the requirement that a substantive rule be published not less than 30 days before its effective date. When it issued both the Interim Rule and the Amended Interim Rule related to the TLG Program, the FDIC invoked these good cause exceptions based on the severe financial conditions that threatened the stability of the nation's economy generally and the banking system in particular; the serious adverse effects on economic conditions and financial stability that would have resulted from any delay of the effective date of the Interim Rule; and the fact that the TLG became effective on October 14, 2008.

For these same reasons, the FDIC invokes the APA's good cause exceptions with respect to the Final Rule.

B. Community Development and Regulatory Improvement Act

The Riegle Community Development and Regulatory Improvement Act requires that any new regulations and amendments to regulation prescribed by a Federal banking agency that imposes additional reporting, disclosures, or other new requirements on insured depository institutions take effect on the first day of a calendar quarter which begins on or after the day the regulations are published in final form, unless the agency determines, for good cause published with the regulations, that the regulation should become effective before such time. 12 U.S.C. 4802(b)(1)(A). The FDIC invoked this good cause exception in issuing both the Interim Rule and the Amended Interim Rule related to the TLG Program due to

the severe financial conditions that threatened the stability of the nation's economy generally and the banking system in particular; the serious adverse effects on economic conditions and financial stability that would have resulted from any delay of the effective date of the Interim Rule; and the fact that the TLG Program had been in effect since October 14, 2008. For the same reasons, the FDIC invokes the good cause exception of 12 U.S.C. 4802(b)(1)(A) with respect to the Final Rule.

C. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the Final Rule is not a "major rule" within the meaning of the relevant sections of the Small Business Regulatory Enforcement Act of 1996 (SBREFA) Public Law No. 110–28 (1996). As required by law, the FDIC will file the appropriate reports with Congress and the General Accounting Office so that the Final Rule may be reviewed.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires an agency to prepare a final regulatory flexibility analysis when an agency promulgates a final rule under section 553 of the APA, after being required by that section to publish a general notice of proposed rulemaking. Because the FDIC has invoked the good cause exception provided for in section 553(b)(B) of the APA, with respect to the Final Rule, the RFA's requirement to prepare a final regulatory flexibility analysis does not apply.

E. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the information collections contained in the Interim Rule issued by the Board on October 23, 2008, were submitted to and approved by the Office of Management and Budget (OMB) under emergency clearance procedures and assigned OMB Control No. 3064–0166 (expiring on April 30, 2009), entitled "Temporary Liquidity Guarantee Program."

The Final Rule makes some changes that add burden to the existing collection. Specifically, sections 370.3(h)(1)(A), (B), (C), and (D) address various applications for exceptions and eligibility with respect to the Debt Guarantee component of the TLG Program. The FDIC will submit a request for review and approval of this revision to its TLG Program information collection under the emergency processing procedures in OMB regulation, 5 CFR 1320.13. The proposed burden estimate for the applications is as follows:

Title: Temporary Liquidity Guarantee Program.

OMB Number: N3064–0166.

Estimated Number of Respondents:

Request for increase in debt guarantee limit—1,000.

Request for increase in presumptive debt guarantee limit—100.

Request to opt-in to debt guarantee program—100.

Request by affiliate to participate in debt guarantee program—50.

Affected Public: FDIC-insured depository institutions, thrift holding companies, bank and financial holding companies.

Frequency of Response:

Request for increase in debt guarantee limit—1.

Request for increase in presumptive debt guarantee limit—once.

Request to opt-in to debt guarantee program—once.

Request by affiliate to participate in debt guarantee program—once.

Affected Public: FDIC-insured depository institutions, thrift holding companies, bank and financial holding companies.

Average Time per Response:

Request for increase in debt guarantee limit—2 hours.

Request for increase in presumptive debt guarantee limit—2 hours.

Request to opt-in to debt guarantee program—1 hour.

Request by affiliate to participate in debt guarantee program—2 hours.

Estimated Annual Burden:

Request for increase in debt guarantee limit—2,000 hours.

Request for increase in presumptive debt guarantee limit—200 hours.

Request to opt-in to debt guarantee program—100 hours.

Request by affiliate to participate in debt guarantee program—100 hours.

Previous annual burden—2,199,100.

Total additional annual burden—2,400.

Total annual burden—2,201,500 hours.

The FDIC expects to request approval by December 2, 2008. The FDIC and the other banking agencies are also submitting to OMB under emergency clearance procedures certain revisions to be made in response to the TLG Program to the following currently approved information collections: Consolidated Reports of Condition and Income (Call Report) [OMB No. 3064–0052 (FDIC), OMB No. 7100–0036 (Board of Governors of the Federal Reserve System), OMB No. 1557–0081 (Office of the Comptroller of the Currency)], Thrift Financial Report (TFR) [OMB No. 1550–0023 (Office of Thrift Supervision), and Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks [OMB No, 7100–0032 (Board of Governors of the Federal Reserve System)]. The Final Rule makes some changes that affect the collections of information outlined in the Interim Rule and may affect the estimated burden set forth in the request for emergency clearance request for OMB No. 3064–0166. However, the FDIC plans, within the next 30 days, to follow its emergency request with a request under normal clearance procedures in accordance with the provisions of OMB regulation 5 CFR 1320.10. Similarly, if the agencies obtain OMB approval of their emergency request pertaining to revisions to the currently approved information collections identified above, the FDIC and the other banking agencies plan to proceed with a request under normal clearance procedures. In accordance with normal clearance procedures, public comment will be invited for an initial 60-day comment period and a subsequent 30-day comment period on: (1) Whether this collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (2) the accuracy of the estimates of the burden of the information collection, including the validity of the methodologies and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and (5) estimates of capital or start up costs, and costs of operation, maintenance and purchase of services to provide the information. In the interim, interested parties are invited to submit written comments by any of the following methods. All comments should refer to the name and number of the collection:

- *http://www.FDIC.gov/regulations/laws/federal/propose.html.*
- *E-mail: comments@fdic.gov.* Include the name and number of the collection in the subject line of the message.
- *Mail:* Leneta Gregorie (202–898–3719), Counsel, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the 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.

A copy of the comments may also be submitted to the OMB Desk Officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

List of Subjects in 12 CFR Part 370

Banks, Banking, Bank deposit insurance, Holding companies, National banks, Reporting and recordkeeping requirements, Savings associations.

■ For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation revises part 370 of title 12 of the Code of Federal Regulations to read as follows:

PART 370—TEMPORARY LIQUIDITY GUARANTEE PROGRAM

Sec.

Authority: 12 U.S.C. U.S.C. 1813(l), 1813(m), 1817(i),1818, 1819(a)(Tenth); 1820(f), 1821(a); 1821(c); 1821(d); 1823(c)(4).

§ 370.1 Scope.

This part sets forth the eligibility criteria, limitations, procedures, requirements, and other provisions related to participation in the FDIC's temporary liquidity guarantee program.

§ 370.2 Definitions.

As used in this part, the terms listed in this section are defined as indicated below. Other terms used in this part that are defined in the Federal Deposit Insurance Act (FDI Act) have the meanings given them in the FDI Act except as otherwise provided herein.

(a) *Eligible entity.*

(1) The term "eligible entity" means any of the following:

(i) An insured depository institution;

(ii) A U.S. bank holding company, provided that it controls, directly or indirectly, at least one subsidiary that is a chartered and operating insured depository institution;

(iii) A U.S. savings and loan holding company, provided that it controls, directly or indirectly, at least one subsidiary that is a chartered and operating insured depository institution; or

(iv) Any other affiliates of an insured depository institution that the FDIC, in its sole discretion and on a case-by-case basis, after written request and positive recommendation by the appropriate Federal banking agency, designates as an eligible entity; such affiliate, by seeking and obtaining such designation, also becomes a participating entity in the debt guarantee program.

(b) *Insured Depository Institution.* The term "insured depository institution" means an insured depository institution as defined in section 3(c)(2) of the FDI Act, 12 U.S.C. 1813(c)(2), except that it does not include an "insured branch" of a foreign bank as defined in section 3(s)(3) of the FDI Act, 12 U.S.C. 1813(s)(3), for purposes of the debt guarantee program.

(c) *U.S. Bank Holding Company.* The term "U.S. Bank Holding Company" means a "bank holding company" as defined in section 2(a) of the Bank Holding Company Act of 1956 ("BHCA"), 12 U.S.C. 1841(a), that is organized under the laws of any State or the District of Columbia.

(d) *U.S. Savings and Loan Holding Company.* The term "U.S. Savings and Loan Holding Company" means a "savings and loan holding company" as defined in section 10(a)(1)(D) of the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. 1467a(a)(1)(D), that is organized under the laws of any State or the District of Columbia and either:

(1) Engages only in activities that are permissible for financial holding companies under section 4(k) of the BHCA, 12 U.S.C. 1843(k), or

(2) Has at least one insured depository institution subsidiary that is the subject of an application under section 4(c)(8) of the BHCA, 12 U.S.C. 1843(c)(8), that was pending on October 13, 2008.

(e) *Senior Unsecured Debt.*

(1) The term "senior unsecured debt" means

(i) For the period from October 13, 2008 through December 5, 2008, unsecured borrowing that:

(A) Is evidenced by a written agreement or trade confirmation;

(B) Has a specified and fixed principal amount;

(C) Is noncontingent and contains no embedded options, forwards, swaps, or other derivatives; and

(D) Is not, by its terms, subordinated to any other liability; and

(ii) After December 5, 2008, unsecured borrowing that satisfies the criteria listed in paragraphs (e)(1)(i)(A) through (e)(1)(i)(D) of this section and that has a stated maturity of more than 30 days.

(2) Senior unsecured debt may pay either a fixed or floating interest rate based on a commonly-used reference rate with a fixed amount of scheduled principal payments. The term "commonly-used reference rate" includes a single index of a Treasury bill rate, the prime rate, and LIBOR.

(3) Senior unsecured debt may include, for example, the following debt, provided it meets the requirements of paragraph (e)(1) of this section: Federal funds purchased, promissory notes, commercial paper, unsubordinated unsecured notes, including zero-coupon bonds, U.S. dollar denominated certificates of deposit owed to an insured depository institution, an insured credit union as defined in the Federal Credit Union Act, or a foreign bank, U.S. dollar denominated deposits in an international banking facility (IBF) of an insured depository institution owed to an insured depository institution or a foreign bank, and U.S. dollar denominated deposits on the books and records of foreign branches of U.S. insured depository institutions that are owed to an insured depository institution or a foreign bank. The term "foreign bank" does not include a foreign central bank or other similar foreign government entity that performs central bank functions or a quasi-governmental international financial institution such as the International Monetary Fund or the World Bank. References to debt owed to an insured depository institution, an insured credit union, or a foreign bank mean owed to the institution solely in its own capacity and not as agent.

(4) Senior unsecured debt, except deposits, may be denominated in foreign currency.

(5) Senior unsecured debt excludes, for example, any obligation that has a stated maturity of "one month" [1], obligations from guarantees or other contingent liabilities, derivatives, derivative-linked products, debts that are paired or bundled with other securities, convertible debt, capital notes, the unsecured portion of otherwise secured debt, negotiable certificates of deposit, deposits denominated in a foreign currency or other foreign deposits (except as allowed under paragraph (e)(3) of this section), revolving credit agreements, structured notes, instruments that are used for trade credit, retail debt securities, and any funds regardless of

[1] This recognizes that certain instruments have stated maturities of "one month," but have a term of up to 35 days because of weekends, holidays, and calendar issues.

form that are swept from individual, partnership, or corporate accounts held at depository institutions. Also excluded are loans from affiliates, including parents and subsidiaries, and institution-affiliated parties.

(f) *Newly issued senior unsecured debt.* (1) The term "newly issued senior unsecured debt" means senior unsecured debt issued by a participating entity on or after October 14, 2008, and on or before:

(i) The date the entity opts out, for an eligible entity that opts out of the debt guarantee program; or

(ii) June 30, 2009, for an entity that does not opt out of the debt guarantee program.

(2) The term "newly issued senior unsecured debt" includes, without limitation, senior unsecured debt

(i) That matures on or after October 13, 2008 and on or before June 30, 2009, and is renewed during that period, or

(ii) That is issued during that period pursuant to a shelf registration, regardless of the date of creation of the shelf registration.

(g) *Participating entity.* The term "participating entity" means with respect to each of the debt guarantee program and the transaction account guarantee program,

(1) An eligible entity that became an eligible entity on or before December 5, 2008 and that has not opted out, or

(2) An entity that becomes an eligible entity after December 5, 2008, and that the FDIC has allowed to participate in the program.

(h) *Noninterest-bearing transaction account.* (1) The term "noninterest-bearing transaction account" means a transaction account as defined in 12 CFR 204.2 that is

(i) Maintained at an insured depository institution;

(ii) With respect to which interest is neither accrued nor paid; and

(iii) On which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal.

(2) A noninterest-bearing transaction account does not include, for example, an interest-bearing money market deposit account (MMDA) as those accounts are defined in 12 CFR 204.2.

(3) Notwithstanding paragraphs (h)(1) and (h)(2) of this section, for purposes of the transaction account guarantee program, a noninterest-bearing transaction account includes:

(i) Accounts commonly known as Interest on Lawyers Trust Accounts (IOLTAs) (or functionally equivalent accounts); and

(ii) Negotiable order of withdrawal accounts (NOW accounts) with interest rates no higher than 0.50 percent if the insured depository institution at which the account is held has committed to maintain the interest rate at or below 0.50 percent.

(4) Notwithstanding paragraph (h)(3) of this section, a NOW account with an interest rate above 0.50 percent as of November 21, 2008, may be treated as a noninterest-bearing transaction account for purposes of this part, if the insured depository institution at which the account is held reduces the interest rate on that account to 0.50 percent or lower before January 1, 2009, and commits to maintain that interest rate at no more than 0.50 percent at all times through December 31, 2009.

(i) *FDIC-guaranteed debt.* The term "FDIC-guaranteed debt" means newly issued senior unsecured debt issued by a participating entity that meets the requirements of this part for debt that is guaranteed under the debt guarantee program, and is identified pursuant to § 370.5(h) as guaranteed by the FDIC.

(j) *Debt guarantee program.* The term "debt guarantee program" refers to the FDIC's guarantee program for newly issued senior unsecured debt as described in this part.

(k) *Transaction account guarantee program.* The term "transaction account guarantee program" refers to the FDIC's guarantee program for funds in noninterest-bearing transaction accounts as described in this part.

(l) *Temporary liquidity guarantee program.* The term "temporary liquidity guarantee program" includes both the debt guarantee program and the transaction account guarantee program.

§ 370.3 Debt Guarantee Program.

(a) Upon the uncured failure of a participating entity to make a timely payment of principal or interest as required under an FDIC-guaranteed debt instrument, the FDIC will pay the unpaid principal and/or interest, in accordance with § 370.12 and subject to the other provisions of this part.

(b) *Debt guarantee limit.*

(1) Except as provided in paragraphs (b)(2) through (b)(6) of this section, the maximum amount of outstanding debt that is guaranteed under the debt guarantee program for each participating entity at any time is limited to 125 percent of the par value of the participating entity's senior unsecured debt, as that term is defined in § 370.2(e)(1)(i), that was outstanding as of the close of business September 30, 2008, and that was scheduled to mature on or before June 30, 2009.

(2) If a participating entity that is an insured depository institution had either no senior unsecured debt as that term is defined in § 370.2(e)(1)(i), or only had federal funds purchased, outstanding on September 30, 2008, its debt guarantee limit is two percent of its consolidated total liabilities as of September 30, 2008. For the purposes of this paragraph (b)(2) of this section, the term "federal funds purchased" means:

(i) For insured depository institutions that file Reports of Condition and Income, unsecured "federal funds purchased" as that term is used in defining "Federal Funds Transactions" in the Glossary of the FFIEC Reports of Condition and Income Instructions, and

(ii) For insured depository institutions that file Thrift Financial Reports, "Federal Funds" as that term is defined in the Glossary of the 2008 Thrift Financial Report Instruction Manual.

(3) If a participating entity, other than an insured depository institution, had no senior unsecured debt as that term is defined in § 370.2(e)(1)(i) outstanding on September 30, 2008, the entity may seek to have some amount of debt covered by the debt guarantee program. The FDIC, after consultation with the appropriate Federal banking agency, will decide, on a case-by-case basis, whether such a request will be granted and, if granted, what the entity's debt guarantee limit will be.

(4) If an entity becomes an eligible entity after October 13, 2008, the FDIC will establish the entity's debt guarantee limit at the time of such designation.

(5) If an affiliate of a participating entity is designated as an eligible entity by the FDIC after a written request and positive recommendation by the appropriate Federal banking agency (or if the affiliate has no appropriate Federal banking agency, a written request and positive recommendation by the appropriate Federal banking agency of the affiliated insured depository institution), the FDIC will establish the entity's debt guarantee limit at the time of such designation.

(6) The FDIC may make exceptions to an entity's debt guarantee limit. For example, the FDIC may allow a participating entity to exceed the limit determined in paragraph (b)(1) or (b)(2) of this section, reduce the limit below the amount determined in paragraph (b)(1) or (b)(2) of this section, and/or impose other limits or requirements after consultation with the entity's appropriate Federal banking agency.

(7) If a participating entity issues debt identified as guaranteed under the debt guarantee program that exceeds its debt guarantee limit, it will be subject to assessment increases and enforcement action as provided in § 370.6(e).

(8) A participating entity that is both an insured depository institution and a

direct or indirect subsidiary of a parent participating entity may, absent direction by the FDIC to the contrary, increase its debt guarantee limit above the limit determined in accordance with paragraphs (b)(1) through (b)(6) of this section, provided that:

(i) The amount of the increase does not exceed the debt guarantee limit(s) of one or more of its parent participating entities;

(ii) The insured depository institution provides prior written notice to the FDIC and to each such parent participating entity of the amount of the increase, the name of each contributing parent participating entity, and the starting and ending dates of the increase; and

(iii) For so long as the institution's debt guarantee limit is increased by such amount, the debt guarantee limit of each contributing parent participating entity is reduced by an amount corresponding to the amount of its contribution to the amount of the increase.

(9) The debt guarantee limit of the surviving entity of a merger between or among eligible entities is equal to the sum of the debt guarantee limits of the merging eligible entities calculated on a pro forma basis as of the close of business September 30, 2008, absent action by the FDIC after consultation with the surviving entity and its appropriate Federal banking agency.

(10) For purposes of determining the amount of guaranteed debt outstanding under paragraph (b)(1) of this section, debt issued in a foreign currency will be converted into U.S. dollars using the exchange rate in effect on the date that the debt is funded.

(c) *Calculation and reporting responsibility.* Participating entities are responsible for calculating and reporting to the FDIC the amount of senior unsecured as defined in § 370.2(e)(1)(i) as of September 30, 2008.

(1) Each participating entity shall calculate the amount of its senior unsecured debt outstanding as of the close of business September 30, 2008, that was scheduled to mature on or before June 30, 2009.

(2) Each participating entity shall report the calculated amount to the FDIC, even if such amount is zero, in an approved format via FDICconnect no later than December 5, 2008.

(3) In each subsequent report to the FDIC concerning debt issuances or balances outstanding, each participating entity shall state whether it has issued debt identified as FDIC-guaranteed debt that exceeded its debt guarantee limit at any time since the previous reporting period.

(4) The Chief Financial Officer (CFO) or equivalent of each participating entity shall certify the accuracy of the information reported in each report submitted pursuant to this section.

(d) *Duration of Guarantee.* For guaranteed debt issued on or before June 30, 2009, the guarantee expires on the earliest of the date of the entity's opt-out, if any, the maturity of the debt, or June 30, 2012.

(e) Debt cannot be issued and identified as guaranteed by the FDIC if:

(1) The proceeds are used to prepay debt that is not FDIC-guaranteed;

(2) The issuing entity has previously opted out of the debt guarantee program, except as provided in § 370.5(d);

(3) The issuing entity has had its participation in the debt guarantee program terminated by the FDIC;

(4) The issuing entity has exceeded its debt guarantee limit for issuing guaranteed debt as specified in paragraph (b) of this section,

(5) The debt is owed to an affiliate, an institution-affiliated party, insider of the participating entity, or an insider of an affiliate or

(6) The debt does not otherwise meet the requirements of this part for FDIC guaranteed debt.

(f) The FDIC's agreement to include a participating entity's senior unsecured debt in the debt guarantee program does not exempt the entity from complying with any applicable law including, without limitation, Securities and Exchange Commission registration or disclosure requirements.

(g) *Long term non-guaranteed debt option.* On or before 11:59 p.m., Eastern Standard Time, December 5, 2008, a participating entity may also notify the FDIC that it has elected to issue senior unsecured non-guaranteed debt with maturities beyond June 30, 2012, at any time, in any amount, and without regard to the guarantee limit. By making this election the participating entity agrees to pay to the FDIC the nonrefundable fee as provided in § 370.6(f).

(h) *Applications for exceptions and eligibility.*

(1) The following requests require written application to the FDIC and the appropriate Federal banking agency of the entity or the entity's lead affiliated insured depository institution:

(i) A request by a participating entity to establish or increase its debt guarantee limit,

(ii) A request by an entity that becomes an eligible entity after October 13, 2008, for an increase in its presumptive debt guarantee limit of zero,

(iii) A request by a non-participating surviving entity in a merger transaction to opt in to either the debt guarantee program or the transaction account guarantee program, and

(iv) A request by an affiliate of an insured depository institution to participate in the debt guarantee program.

(2) The letter application should describe the details of the request, provide a summary of the applicant's strategic operating plan, and describe the proposed use of the debt proceeds.

(3) The factors to be considered by the FDIC in evaluating applications filed pursuant to paragraphs (h)(1)(i) through (h)(1)(iii) of this section include: The financial condition and supervisory history of the eligible/surviving entity. The factors to be considered by the FDIC in evaluating applications filed pursuant to paragraph (h)(1)(iv) of this section include: The extent of the financial activity of the entities within the holding company structure; the strength, from a ratings perspective of the issuer of the obligations that will be guaranteed; and the size and extent of the activities of the organization. The FDIC may consider any other relevant factors and may impose any conditions it deems appropriate in granting approval of applications filed pursuant to this paragraph.

(4) Applications required under this paragraph must be in letter form and addressed to the Director, Division of Supervision and Consumer Protection, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. Applications made pursuant to paragraph (h)(1)(iii) of this section should be filed with the FDIC at the time the merger application is filed with the appropriate Federal banking agency and should incorporate a copy of the merger application therein.

(5) The effective date of approvals granted by the FDIC under this paragraph will be the date of the FDIC's approval letter or, in the case of requests filed pursuant to paragraph (h)(1)(iii) of this section, the effective date of the merger.

(i) The ability of a participating entity to issue guaranteed debt under the debt guarantee program expires on the earlier of the date of the entity's opt-out, if any, or June 30, 2009.

§ 370.4 Transaction Account Guarantee Program.

(a) In addition to the coverage afforded to depositors under 12 CFR Part 330, a depositor's funds in a noninterest-bearing transaction account maintained at a participating entity that is an insured depository institution are guaranteed in full (irrespective of the standard maximum deposit insurance

amount defined in 12 CFR 330.1(n)) from October 14, 2008, through the earlier of:

(1) The date of opt-out, if the entity opts out, or

(2) December 31, 2009.

(b) In determining whether funds are in a noninterest-bearing transaction account for purposes of this section, the FDIC will apply its normal rules and procedures under § 360.8 (12 CFR 360.8) for determining account balances at a failed insured depository institution. Under these procedures, funds may be swept or transferred from a noninterest-bearing transaction account to another type of deposit or nondeposit account. Unless the funds are in a noninterest-bearing transaction account after the completion of a sweep under § 360.8, the funds will not be guaranteed under the transaction account guarantee program.

(c) Notwithstanding paragraph (b) of this section, in the case of funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings deposit account, the FDIC will treat the swept funds as being in a noninterest-bearing transaction account. As a result of this treatment, the funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings account, as defined in 12 CFR 204.2(d), will be guaranteed under the transaction account guarantee program.

§ 370.5 Participation.

(a) *Initial period.* All eligible entities are covered under the temporary liquidity guarantee program for the period from October 14, 2008, through December 5, 2008, unless they opt out on or before 11:59 p.m., Eastern Standard Time, December 5, 2008, in which case the coverage ends on the date of the opt-out.

(b) The issuance of FDIC-guaranteed debt subject to the protections of the debt guarantee program is an affirmative action by a participating entity that constitutes its agreement to be:

(1) Bound by the terms and conditions of the program, including without limitation, assessments and the terms of Master Agreement as required herein;

(2) Subject to, and to comply with, any FDIC request to provide information relevant to participation in the debt guarantee program and to be subject to FDIC on-site reviews as needed, after consultation with the appropriate Federal banking agency, to determine compliance with the terms and requirements of the debt guarantee program; and

(3) Bound by the FDIC's decisions, in consultation with the appropriate Federal banking agency, regarding the management of the temporary liquidity guarantee program.

(c) *Opt-out and opt-in options.* From October 14, 2008, through December 5, 2008, each eligible entity is a participating entity in both the debt guarantee program and the transaction account guarantee program, unless the entity opts out. No later than 11:59 p.m., Eastern Standard Time, December 5, 2008, each eligible entity must inform the FDIC if it desires to opt out of the debt guarantee program or the transaction account guarantee program, or both. Failure to opt out by 11:59 p.m., Eastern Standard Time, December 5, 2008, constitutes a decision to continue in the program after that date. Prior to December 5, 2008, an eligible entity may opt in to either or both programs by informing the FDIC that it will not opt out of either or both programs.

(d) An eligible entity may elect to opt out of either the debt guarantee program or the transaction account guarantee program or both. The choice to opt out, once made, is irrevocable, except that, in the case of a merger between two eligible entities, the resulting institution will have a one-time option to revoke a prior decision to opt-out. This option must be requested by application to the FDIC in accordance with § 370.3(h). Similarly, the choice to affirmatively opt in, as provided in paragraph (c) of this section, once made, is irrevocable.

(e) All eligible entities that are affiliates of a U.S. bank holding company or that are affiliates of an eligible entity that is a U.S. savings and loan holding company must make the same decision regarding continued participation in each guarantee program; failure to do so constitutes an opt out by all members of the group.

(f) Except as provided in § 370.3(g), participating entities are not permitted to select which newly issued senior unsecured debt is guaranteed debt; all senior unsecured debt issued by a participating entity up to its debt guarantee limit must be issued and identified as FDIC-guaranteed debt as and when issued.

(g) *Procedures for opting out.* The FDIC will provide procedures for opting out and for making an affirmative decision to opt in using FDIC's secure e-business Web site, FDIC*connect*. Entities that are not insured depository institutions will select and solely use an affiliated insured depository institution to submit their opt-out election or their affirmative decision to opt in.

(h) *Disclosures regarding participation in the temporary liquidity guarantee program.*

(1) The FDIC will publish on its Web site:

(i) A list of the eligible entities that have opted out of the debt guarantee program, and

(ii) A list of the eligible entities that have opted out of the transaction account guarantee program.

(2) Each eligible entity that does not opt out of the debt guarantee program must include the following disclosure statement in all written materials provided to lenders or creditors regarding any senior unsecured debt issued by it on or after December 19, 2008 through June 30, 2009 that is guaranteed under the debt guarantee program:

This debt is guaranteed under the Federal Deposit Insurance Corporation's Temporary Liquidity Guarantee Program and is backed by the full faith and credit of the United States. The details of the FDIC guarantee are provided in the FDIC's regulations, 12 CFR Part 370, and at the FDIC's Web site, http://www.fdic.gov/tlgp. The expiration date of the FDIC's guarantee is the earlier of the maturity date of the debt or June 30, 2012.

(3) Each eligible entity that does not opt out of the debt guarantee program must include the following disclosure statement in all written materials provided to lenders or creditors regarding any senior unsecured debt issued by it on or after December 19, 2008 through June 30, 2009 that is *not* guaranteed under the debt guarantee program:

This debt is not guaranteed under the Federal Deposit Insurance Corporation's Temporary Liquidity Guarantee Program.

(4) Each insured depository institution that offers noninterest-bearing transaction accounts must post a prominent notice in the lobby of its main office, each domestic branch and, if it offers Internet deposit services, on its website clearly indicating whether the institution is participating in the transaction account guarantee program. If the institution is participating in the transaction account guarantee program, the notice must state that funds held in noninterest-bearing transactions accounts at the entity are guaranteed in full by the FDIC.

(i) These disclosures must be provided in simple, readily understandable text. Sample disclosures are as follows:

For Participating Institutions

[Institution Name] is participating in the FDIC's Transaction Account Guarantee Program. Under that program, through December 31, 2009, all noninterest-bearing transaction accounts are fully guaranteed by the FDIC for the entire amount in the

account. Coverage under the Transaction Account Guarantee Program is in addition to and separate from the coverage available under the FDIC's general deposit insurance rules.

For Non-Participating Institutions

[Institution Name] has chosen not to participate in the FDIC's Transaction Account Guarantee Program. Customers of [Institution Name] with noninterest-bearing transaction accounts will continue to be insured through December 31, 2009 for up to $250,000 under the FDIC's general deposit insurance rules.

(ii) If the institution uses sweep arrangements or takes other actions that result in funds being transferred or reclassified to an account that is not guaranteed under the transaction account guarantee program, for example, an interest-bearing account, the institution must disclose those actions to the affected customers and clearly advise them, in writing, that such actions will void the FDIC's guarantee with respect to the swept, transferred, or reclassified funds.

(5) *Effective date for paragraphs (h)(2), (h)(3) and (h)(4) of this section.* Paragraphs (h)(2), (h)(3) and (h)(4) of this section are effective December 19, 2008. Prior to that date, eligible entities should provide adequate disclosures of the substance of paragraphs (h)(2), (h)(3) and (h)(4) of this section in a commercially reasonable manner.

(i) *Participation By New Eligible Entities And Continued Eligibility.* The FDIC will determine eligibility in consultation with the eligible entity's appropriate Federal banking agency.

(1) Participation by an entity that is organized after October 13, 2008 or that becomes an entity described § 370.2(a) after October 13, 2008 will be: with respect to the transaction account guarantee program, effective on the date of the entity's opt-in as described in § 370.2(g)(2), and with respect to the debt guarantee program, considered by the FDIC on a case-by-case basis in consultation with the entity's appropriate Federal banking agency.

(2) An eligible entity that is not an insured depository institution will cease to be eligible to participate in the debt guarantee program once it is no longer affiliated with a chartered and operating insured depository institution.

§ 370.6 Assessments under the Debt Guarantee Program.

(a) *Waiver of assessment for certain initial periods.* No eligible entity shall pay any assessment associated with the debt guarantee program for the period from October 14, 2008 through November 12, 2008. An eligible entity that opts out of the program on or before December 5, 2008 will not pay any assessment under the program.

(b) *Notice to the FDIC.* No guaranteed debt shall be issued by a participating entity under the FDIC's debt guarantee program unless notice of the issuance of such debt and payment of associated assessments is provided to the FDIC as required by this section and, for guaranteed debt issued after November 21, 2008, the participating entity agrees to be bound by the terms of the Master Agreement, as set forth on the FDIC's Web site.

(1) Any eligible entity that does not opt out of the debt guarantee program on or before December 5, 2008, as provided in § 370.5, and that issues any guaranteed debt during the period from October 14, 2008 through December 5, 2008 which is still outstanding on December 5, 2008, shall notify the FDIC of that issuance via the FDIC's e-business Web site FDIC*connect* on or before December 19, 2008, and the entity's Chief Financial Officer or equivalent shall certify that the issuances identified as FDIC-guaranteed debt outstanding at each point of time did not exceed the debt guarantee limit as set forth in § 370.3

(2) Each participating entity that issues guaranteed debt after December 5, 2008, shall notify the FDIC of that issuance via the FDIC's e-business Web site FDIC*connect* within the time period specified by the FDIC. The eligible entity's Chief Financial Officer or equivalent shall certify that the issuance of guaranteed debt does not exceed the debt guarantee limit as set forth in § 370.3.

(3) The FDIC will provide procedures governing notice to the FDIC and certification of guaranteed amount limits for purposes of this section.

(c) *Initiation of assessments.* Assessments, calculated in accordance with paragraph (d) of this section, will accrue, with respect to each eligible entity that does not opt out of the debt guarantee program on or before December 5, 2008:

(1) Beginning on November 13, 2008, on all senior unsecured debt, as defined in § 370.2(e)(1)(i) (except for overnight debt), issued by it on or after October 14, 2008, and on or before December 5, 2008, that is still outstanding on December 5, 2008; and

(2) Beginning on December 6, 2008, on all senior unsecured debt, as defined in § 370.2(e)(1)(ii), issued by it on or after December 6, 2008.

(d) *Amount of assessments for debt within the debt guarantee limit.*

(1) *Calculation of assessment.* Except as provided in paragraph (d)(3) of this section, the amount of assessment will be determined by multiplying the amount of FDIC-guaranteed debt times the term of the debt (expressed in years) times an annualized assessment rate determined in accordance with the following table.

For debt with a maturity of	The annualized assessment rate (in basis points) is
180 days or less (excluding overnight debt)	50
181–364 days	75
365 days or greater	100

(2) If the debt matures after June 30, 2012, June 30, 2012 will be used as the maturity date.

(3) The amount of assessment for an eligible entity, other than an insured depository institution, that controls, directly or indirectly, or is otherwise affiliated with, at least one insured depository institution will be determined by multiplying the amount of FDIC-guaranteed debt times the term of the debt (expressed in years) times an annualized assessment rate determined in accordance with the rates set forth in the table in paragraph (d)(1) of this section, except that each such rate shall be increased by 10 basis points, if the combined assets of all insured depository institutions affiliated with such entity constitute less than 50 percent of consolidated holding company assets. The comparison of assets for purposes of this paragraph shall be determined as of September 30, 2008, except that in the case of an entity that becomes an eligible entity after October 13, 2008, the comparison of assets shall be determined as of the date that it becomes an eligible entity

(4) *Assessment invoicing.* Once the participating entity provides notice as required in paragraphs (b)(1) and (b)(2) of this section, the invoice for the appropriate fee will be automatically generated and posted on FDIC*connect* for the account associated with the participating entity, and the time limits for providing payment in paragraph (g) of this section will apply.

(5) *No assessment reduction for early retirement of guaranteed debt.* A participating entity's assessment shall not be reduced if guaranteed debt is retired prior to its scheduled maturity date.

(e) *Increased assessments for debt exceeding the debt guarantee limit.* Any participating entity that issues guaranteed debt represented as being guaranteed by the FDIC exceeding its debt guarantee limit as set forth in § 370.3(b) shall have its applicable

assessment rate(s) for all outstanding guaranteed debt increased by 100 percent for purposes of the calculations in paragraph (d)(1) of this section. The FDIC may reduce the assessments under this paragraph upon a showing of good cause by the entity. In addition, any entity making such a misrepresentation may also be subject to enforcement action under 12 U.S.C. 1818, as further described in § 370.11.

(f) *Long term non-guaranteed debt fee.* Each participating entity that elects to issue long term non-guaranteed debt pursuant to § 370.3(g) must pay the FDIC a nonrefundable fee equal to 37.5 basis points times the amount of the entity's senior unsecured debt, as defined in § 370.2(e)(1)(i), that had a maturity date on or before June 30, 2009, and was outstanding as of September 30, 2008. If the entity had no such debt outstanding as of September 30, 2008, the fee will equal 37.5 basis points times the amount of the entity's debt guarantee limit established under § 370.3(b).

(1) The nonrefundable fee will be collected in six equal monthly installments.

(2) An entity electing the nonrefundable fee option will also be billed as it issues guaranteed debt under the debt guarantee program, and the amounts paid as a nonrefundable fee under this paragraph will be applied to offset these bills until the nonrefundable fee is exhausted.

(3) Thereafter, the institution will have to pay additional assessments on guaranteed debt as it issues the debt, as otherwise required by this section.

(g) *Collection of assessments—ACH Debit.*

(1) Each participating entity shall take all actions necessary to allow the Corporation to debit assessments from the participating entity's designated deposit account as provided for in § 327.3(a)(2). The assessment payments of a participating entity that is not an insured depository institution shall be debited from the designated account of the affiliated insured depository institution it selected for FDIC*connect* access under § 370.5(g).

(2) Each participating entity shall ensure that funds in an amount at least equal to the amount of the assessment are available in the designated account for direct debit by the Corporation on the first business day after posting of the invoice on FDIC*connect*. A participating entity that is not an insured depository institution shall provide the necessary funds for payment of its assessments.

(3) Failure to take all necessary action or to provide funding to allow the Corporation to debit assessments shall be deemed to constitute nonpayment of the assessment, and such failure by any participating entity will be subject to the penalties for failure to timely pay assessments as provided for at § 308.132(c)(3)(v).

§ 370.7 Assessment for the Transaction Account Guarantee program.

(a) *Waiver of assessment for certain initial periods.* No eligible entity shall pay any assessment associated with the transaction account guarantee program for the period from October 14, 2008, through November 12, 2008. An eligible entity that opts out of the program on or before December 5, 2008 will not pay any assessment under the program.

(b) *Initiation of assessments.* Beginning on November 13, 2008 each eligible entity that does not opt out of the transaction account guarantee program on or before December 5, 2008 will be required to pay the FDIC assessments on all deposit amounts in noninterest-bearing transaction accounts calculated in accordance with paragraph (c) of this section

(c) *Amount of assessment.* Any eligible entity that does not opt out of the transaction account guarantee program shall pay quarterly an annualized 10 basis point assessment on any deposit amounts exceeding the existing deposit insurance limit of $250,000, as reported on its quarterly Consolidated Reports of Condition and Income, Thrift Financial Report, or Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks in any noninterest-bearing transaction accounts (as defined in § 370.2(h)), including any such amounts swept from a noninterest bearing transaction account into an noninterest bearing savings deposit account as provided in § 370.4(c). This assessment shall be in addition to an institution's risk-based assessment imposed under Part 327.

(d) *Collection of assessment.* Assessments for the transaction account guarantee program shall be collected along with a participating entity's quarterly deposit insurance payment as provided in § 327.3, and subject to penalties for failure to timely pay assessments as referenced in § 308.132(c)(3)(v).

§ 370.8 Systemic risk emergency special assessment to recover loss.

To the extent that the assessments provided under § 370.6 or § 370.7 are insufficient to cover any loss or expenses arising from the temporary liquidity guarantee program, the Corporation shall impose an emergency special assessment on insured depository institutions as provided under 12 U.S.C. 1823(c)(4)(G)(ii) of the FDI Act.

§ 370.9 Recordkeeping requirements.

The FDIC will establish procedures, require reports, and require participating entities to provide and preserve any information needed for the operation of this program.

§ 370.10 Oversight.

(a) Participating entities are subject to the FDIC's oversight regarding compliance with the terms of the temporary liquidity guarantee program.

(b) A participating entity's default in the payment of any debt may be considered an unsafe or unsound practice and may result in enforcement action as described in § 370.11.

(c) In general, with respect to a participating entity that is an insured depository institution, the FDIC shall consider the existence of conditions which rise to an obligation to pay on its guarantee as providing grounds for the appointment of the FDIC as conservator or receiver under Section 11(c)(5)(C) and (F) of the Federal Deposit Insurance Act, 12 U.S.C 1821(c)(5)(C) and (F).

(d) By issuing guaranteed debt, all participating entities agree, for the duration of the temporary liquidity guarantee program, to be subject to the FDIC's authority to determine compliance with the provisions and requirements of the program.

§ 370.11 Enforcement mechanisms.

(a) *Termination of Participation.* If the FDIC, in its discretion, after consultation with the participating entity's appropriate Federal banking agency, determines that the participating entity should no longer be permitted to continue to participate in the temporary liquidity guarantee program, the FDIC will inform the entity that it will no longer be provided the protections of the temporary liquidity guarantee program.

(1) Termination of participation in the temporary liquidity guarantee program will solely have prospective effect. All previously issued guaranteed debt will continue to be guaranteed as set forth in this part.

(2) The FDIC will work with the participating entity and its appropriate Federal banking agency to assure that the entity notifies its counterparties or creditors that subsequent debt issuances are not covered by the temporary liquidity guarantee program.

(b) *Enforcement Actions.* Violating any provision of the temporary liquidity guarantee program constitutes a violation of a regulation and may subject the participating entity and its

institution-affiliated parties to enforcement actions under Section 8 of the FDI Act (12 U.S.C. 1818), including, for example, assessment of civil money penalties under section 8(i) of the FDI Act (12 U.S.C. 1818(i)), removal and prohibition orders under section 8(e) of the FDI Act (12 U.S.C. 1818(e)), and cease and desist orders under section 8(b) of the FDI Act (12 U.S.C. 1818(b)). The violation of any provision of the program by an insured depository institution also constitutes grounds for terminating the institution's deposit insurance under section 8(a)(2) of the FDI Act (12 U.S.C. 1818(a)(2)). The appropriate Federal banking agency for the participating entity will consult with the FDIC in enforcing the provisions of this part The appropriate Federal banking agency and the FDIC also have enforcement authority under section 18(a)(4)(C) of the FDI Act (12 U.S.C. 1828(a)(4)(C)) to pursue an enforcement action if a person knowingly misrepresents that any deposit liability, obligation, certificate, or share is insured when it is not in fact insured.

§ 370.12 Payment on the guarantee.

(a) *Claims for Deposits in Noninterest-bearing Transaction Accounts.* (1) *In general.* The FDIC will pay the guaranteed claims of depositors for funds in a noninterest-bearing transaction account in an insured depository institution that is a participating entity as soon as possible upon the failure of the entity. Unless otherwise provided for in this paragraph (a), the guaranteed claims of depositors who hold noninterest-bearing transaction deposit accounts in such entities will be paid in accordance with 12 U.S.C. 1821(f) and 12 CFR parts 330 and 370.

(2) *Subrogation rights of FDIC.* Upon payment of such claims, the FDIC will he subrogated to the claims of depositors in accordance with 12 U.S.C. 1821(g).

(3) *Review of final determination.* The final determination of the amount guaranteed shall be considered a final agency action of the FDIC reviewable in accordance with Chapter 7 of Title 5, by the United States district court for the federal judicial district where the principal place of business of the depository institution is located. Any request for review of the final determination shall be filed with the appropriate district court not later than sixty (60) days of the date on which the final determination is issued.

(b) *Payments on Guaranteed Debt of participating entities in default.* (1) *In general.* The FDIC's obligation to pay holders of FDIC-guaranteed debt issued by a participating entity shall arise upon the uncured failure of such entity to make a timely payment of principal or interest as required under the debt instrument (a "payment default").

(2) *Method of payment.* Upon the occurrence of a payment default, the FDIC shall satisfy its guarantee obligation by making scheduled payments of principal and interest pursuant to the terms of the debt instrument through maturity (without regard to default or penalty provisions). The FDIC may in its discretion, at any time after June 30, 2012, elect to make a final payment of all outstanding principal and interest due under a guaranteed debt instrument whose maturity extends beyond that date. In such case, the FDIC shall not be liable for any prepayment penalty.

(3) *Demand for payment; proofs of claim.* (i) *Payment through authorized representative.* Except as provided in paragraph (b)(3)(ii) of this section, a demand for payment on the guaranteed amount shall be made on behalf of all holders of debt subject to a payment default that is made by a duly authorized representative of such debtholders if the issuer shall have elected to provide for one in the Master Agreement submitted pursuant § 370.6(b). Such demand must be accompanied by a proof of claim, which shall include evidence, to the extent not previously provided in the Master Agreement, in form and content satisfactory to the FDIC, of : the representative's financial and organizational capacity to act as representative; the representative's exclusive authority to act on behalf each and every debtholder and its fiduciary responsibility to the debtholder when acting as such, as established by the terms of the debt instrument; the occurrence of a payment default; and the authority to make an assignment of each debtholder's right, title, and interest in the FDIC-guaranteed debt to the FDIC and to effect the transfer to the FDIC of each debtholder's claim in any insolvency proceeding. This assignment shall include the right of the FDIC to receive any and all distributions on the debt from the proceeds of the receivership or bankruptcy estate. If any holder of the FDIC-guaranteed debt has received any distribution from the receivership or bankruptcy estate prior to the FDIC's payment under the guarantee, the guaranteed amount paid by the FDIC shall be reduced by the amount the holder has received in the distribution from the receivership or bankruptcy estate. All such demands must be made within 60 days of the occurrence of the payment default upon which the demand is based. Upon receipt of a conforming proof of claim, if timely filed, the FDIC will make a payment of the amount guaranteed.

(ii) *Individual debtholders:* Individual debtholders who are not represented by an authorized representative provided for in a Master Agreement submitted pursuant to § 370.6(b), or who elect not to be represented by such authorized representative, may make demand for payment of the guaranteed amount upon the FDIC. The FDIC may reject a demand made by a person who the FDIC determines has not opted out of representation by an authorized representative. In order to be considered for payment, such demand must be accompanied by a proof of claim, which shall include evidence in form and content satisfactory to the FDIC of: the occurrence of a payment default; and the claimant's ownership of the FDIC-guaranteed debt obligation. The demand also must be accompanied by an assignment, in form and content satisfactory to the FDIC, of the debtholder's rights, title, and interest in the FDIC-guaranteed debt to the FDIC and the transfer to the FDIC of the debtholder's claim in any insolvency proceeding. This assignment shall include the right of the FDIC to receive any and all distributions on the debt from the proceeds of the receivership or bankruptcy estate. If any holder of the FDIC-guaranteed debt has received any distribution from the receivership or bankruptcy estate prior to the FDIC's payment under the guarantee, the guaranteed amount paid by the FDIC shall be reduced by the amount the holder has received in the distribution from the receivership or bankruptcy estate. All such demands must be made within 60 days of the occurrence of the payment default upon which the demand is based. Upon receipt of a conforming proof of claim, if timely filed, the FDIC will make a payment of the amount guaranteed.

(iii) Any demand under this subsection shall be made in writing and directed to the Director, Division of Resolutions and Receiverships, Federal Deposit Insurance Corporation, Washington, DC., and must include all supporting evidence as set forth in the previous subsections, and shall certify to the accuracy thereof

(iv) *Demand period.* Failure of the holder of the FDIC-guaranteed debt or an authorized representative to make demand for payment within sixty (60) days of the occurrence of payment default will deprive the holder of the FDIC-guaranteed debt of all further

rights and remedies with respect to the guarantee claim.

(4) *Subrogation.* Upon payment under either method under paragraph (b)(2) of this section, the FDIC will be subrogated to the rights of any debtholder against the issuer, including in respect of any insolvency proceeding, to the extent of the payments made under the guarantee.

(5) *Release and satisfaction.* Payment under paragraph (b)(2) of this section shall constitute, to the extent of payments made, satisfaction of all FDIC obligations under the debt guarantee program with respect to that debtholder or holders. Acceptance of any such payments shall constitute a release of any liability of the FDIC under the debt guarantee program with respect to those payments. Each participating entity agrees and acknowledges that it shall be indebted to the FDIC for any payments made under these provisions (including amounts paid to a participating entity in return for its assumption of a guaranteed debt issuance) and shall honor immediately a demand by the FDIC for reimbursement therefore. A participating entity's undertakings in this regard shall be evidenced and governed by the "Master Agreement" it shall execute and submit, in connection with its election pursuant to § 370.6(b) to participate in the Debt Guarantee Program.

(6) *Final determination; review of final determination.* The FDIC's determination under this paragraph shall be a final administrative determination subject to judicial review. The holder of FDIC-guaranteed debt shall have the right to seek judicial review of the FDIC's final determination in the United States District Court for the District of Columbia or the United States District Court for the federal district where the issuer's principal place of business was located. Failure of the holder of the FDIC-guaranteed debt to seek such judicial review within sixty (60) days of the date of the rendering of the final determination will deprive the holder of the FDIC-guaranteed debt of all further rights and remedies with respect to the guarantee claim.

By order of the Board of Directors.

Dated at Washington, DC, this 21st day of November 2008.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E8–28184 Filed 11–21–08; 4:15 pm]

BILLING CODE 6714–01–P

Federal Register

Wednesday,
November 26, 2008

Part VIII

Department of Homeland Security

U.S. Citizenship and Immigration Services

8 CFR Parts 204, 214 and 299
Special Immigrant and Nonimmigrant Religious Workers; Special Immigrant Nonminister Religious Worker Program Act; Final Rule and Notice

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

8 CFR Parts 204, 214 and 299

[CIS No. 2302–05; DHS Docket No. USCIS–2005–0030]

RIN 1615–AA16

Special Immigrant and Nonimmigrant Religious Workers

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Final rule.

SUMMARY: This final rule amends U.S. Citizenship and Immigration Services (USCIS) regulations to improve the Department of Homeland Security's (DHS's) ability to detect and deter fraud and other abuses in the religious worker program. This rule addresses concerns about the integrity of the religious worker program by requiring religious organizations seeking the admission to the United States of nonimmigrant religious workers to file formal petitions with USCIS on behalf of such workers. This rule also implements the Special Immigrant Nonminister Religious Worker Program Act requiring DHS to issue this final rule to eliminate or reduce fraud in regard to the granting of special immigrant status to nonminister religious workers. The rule emphasizes that USCIS will conduct inspections, evaluations, verifications, and compliance reviews of religious organizations to ensure the legitimacy of the petitioner and statements made in the petitions. This rule adds and amends definitions and evidentiary requirements for both religious organizations and religious workers. Finally, this rule amends how USCIS regulations reference the sunset date by which special immigrant religious workers, other than ministers, must immigrate or adjust status to permanent residence.

DATES: *Effective date:* This rule is effective November 26, 2008.

FOR FURTHER INFORMATION CONTACT: Emisa Tamanaha, Adjudications Officer, Business and Trade Services, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529, telephone (202) 272–1505.

SUPPLEMENTARY INFORMATION:

List of Acronyms and Abbreviations

BFA—Benefit Fraud Assessment
DHS—Department of Homeland Security
FDNS—Fraud Detection and National Security
GAO—Government Accountability Office
ICE—U.S. Immigration and Customs Enforcement
INA—Immigration and Nationality Act
IRC—Internal Revenue Code of 1986
IRS—Internal Revenue Service
RFRA—Religious Freedom Restoration Act of 1993
USCIS—U.S. Citizenship and Immigration Services

I. Background

The United States has a long history of allowing aliens into the United States for the purpose of performing religious work. Significant evidence indicates, however, that the current rules governing the immigration of religious workers do not adequately prevent individuals from seeking admission to the United States through fraud. USCIS is implementing requirements under this final rule to allow the Federal government, as well as religious organizations, to better detect and deter fraud or other abuses of the religious worker program without compromising the many contributions made by nonimmigrant and immigrant religious workers to religious organizations in the United States.

Aliens may apply for religious worker status in the United States as either nonimmigrants or special immigrants under sections 101(a)(15)(R) and (27)(C) of the Immigration and Naturalization Act (INA) and USCIS regulations. *See* 8 U.S.C. 1101(a)(15)(R) and (27)(C); 8 CFR 204.5(m), 214.2(r). A nonimmigrant religious worker (R–1) may only be admitted to the United States for a period not to exceed five years. The spouse and any unmarried children under the age of 21 of a nonimmigrant granted R–1 status can be admitted to the United States as R–2 nonimmigrants in order to accompany, or follow to join, the principal R–1 alien. R–2 nonimmigrants, however, may not accept employment while in the United States under R–2 nonimmigrant status. 8 CFR 214.2(r)(8).

Aliens classified as special immigrant religious workers are eligible for admission to the United States as permanent residents. The spouse and any unmarried children under the age of 21 of a special immigrant religious worker also are eligible to apply for permanent residence by virtue of the worker's acquisition of permanent residence. INA section 101(a)(27)(C), 8 U.S.C. 1101(27)(C). However, to immigrate under the special immigrant religious worker category, aliens who are not ministers must have a petition approved on their behalf and either enter the United States as an immigrant or adjust their status to permanent residence while in the United States by no later than September 30, 2008. Section 101(a)(27)(C)(ii)(II) and (III) of the Act, 8 U.S.C. 1101(a)(27)(C)(ii)(II) and (III). The sunset date, the final date by which special immigrant religious workers, other than ministers, must immigrate or adjust status to permanent residence only applies to special immigrant workers in a religious vocation or occupation; it does not apply to the nonimmigrant religious worker category or to special immigrant ministers.[1]

To qualify for religious worker status, the alien, whether a special immigrant or nonimmigrant, must have been a member of a religious denomination having a bona fide, non-profit religious organization in the United States. The applicant must have been a member of the religious denomination for at least two years preceding application for religious worker status. The alien also must plan to work as a minister of the denomination or in a religious occupation or vocation for a bona fide, non-profit religious organization (or a tax-exempt affiliate of such an organization). Examples of persons working in religious occupations or vocations that may be eligible for religious worker visas currently include, but are not limited to, workers in religious hospitals or healthcare facilities, religious counselors, cantors, or missionaries. This group does not include maintenance workers, clerical workers or persons solely involved in fundraising.

Under current USCIS regulations, special immigrants seeking religious-worker status must be sponsored by an employer who submits a petition on behalf of the alien. 8 CFR 214.2(r)(3). USCIS must approve the petition before the alien is granted special immigrant status.

USCIS does not currently require, however, that a nonimmigrant living outside of the United States file a petition to obtain a religious worker visa (R–1). At present, an alien can initiate an R–1 classification at a consular office overseas through application for an R–1 visa (without any prior approval of a petition by USCIS). In addition, aliens from Visa Waiver Program countries do

[1] This sunset date, for special immigrant nonminister religious workers was initially implemented in 1990, has been extended four times. This provision expired on October 1, 2008. The Special Immigrant Nonminister Religious Worker Program Act, S. 3606, Public Law No. 110–391 (October 10, 2008) extends the program to March 6, 2009 contingent, in part, upon promulgation of this rule to "eliminate or reduce fraud related to the granting of special immigrant status" to nonminister religious workers.

not have to obtain a visa to travel within the United States under § 217 of the INA. Those visa-exempt aliens are admitted (assuming eligibility and admissibility) into the United States when they present themselves at a port of entry.

In March 1999, the Government Accountability Office (GAO) identified incidents of fraud in the religious worker program. GAO, ISSUES CONCERNING THE RELIGIOUS WORKER VISA PROGRAM, Report GAO/NSIAD–99–67 (March 26, 1999). The report stated that the fraud often involved false statements by petitioners about the length of time that the applicants were members of the religious organizations, the petitioners' qualifying work experience and the positions being filled. The report also noted problems with applicants making false statements about their qualifications and exact plans in the United States. In 2005, USCIS's Office of Fraud Detection and National Security (FDNS) estimated that approximately one-third of applications and petitions filed for religious worker admission were fraudulent. FDNS found that a significant number of the fraudulent petitions identified had been filed on behalf of non-existent organizations. FDNS also found a significant number of petitions that contained material misrepresentations in the documentation submitted to establish eligibility.[2]

To address these concerns and minimize, if not eliminate, the potential for fraud and abuse in the religious worker program, USCIS issued a notice of proposed rulemaking on April 25, 2007 (NPRM or proposed rule), proposing amendments to the religious worker program. 72 FR 20442. Some of the changes proposed under the NPRM included:

- Requiring sponsoring employers to submit all petitions for religious worker status, rather than allowing the aliens to submit these petitions. Under the proposed petitioning process, USCIS would have the opportunity to verify the sponsoring employer and terms of employment before approving the petition.
- Providing notice of USCIS's intent to conduct on-site inspections as part of the petition approval process. This would allow USCIS to verify the legitimacy of the sponsoring employer and the terms of employment.
- Requiring that a religious worker (unless the alien has taken a vow of poverty or similar commitment) be compensated by the employer in the form of a salary or stipend, room and board or other support that can be reflected in verifiable Internal Revenue Service (IRS) documents.
- Adding or amending regulatory definitions to describe more clearly the regulatory requirements.
- Establishing additional evidentiary requirements for the petitioning employers and prospective religious workers.
- Adjusting the date by which special immigrant religious workers, other than ministers, must immigrate or adjust status to permanent residence. Congress extended this date to October 1, 2008, and the NPRM proposed to recognize this new date by referring to the relevant statutory provision.

USCIS received 167 comments during the public comment period for this rulemaking action. USCIS considered the comments received in the development of this final rule.

II. Summary of the Final Rule

The final rule adopts many of the requirements set forth in the proposed rule. The rationale for the proposed rule and the reasoning provided in the preamble to the proposed rule remain valid and USCIS adopts the reasoning in the preamble of the proposed rule in support of the promulgation of this final rule.

USCIS made several changes based on the comments received. The significant provisions of the final rule and changes from the NPRM are summarized below and discussed in Section III "Responses to Public Comments on the Proposed Rule."

In addition, for ease of reference, USCIS duplicated definitions where both the immigrant worker and nonimmigrant worker provisions used the same words or phrases. Therefore, definitions such as "bona fide non-profit religious organization in the United States," "religious denomination," and "minister" are identical in both 8 CFR 204.5(m)(5) and 8 CFR 214.2(r)(3).

A. Petitioning and Attestation Requirements

The NPRM proposed to require that all aliens seeking religious worker status—whether as special immigrants or nonimmigrants—must have a sponsoring employer or organization submit a petition on the aliens' behalf. This final rule retains the petitioning requirement, but continues to allow an alien seeking special immigrant religious worker status to submit a petition (Form I–360) on his or her behalf. New 8 CFR 204.5(m)(6). A nonimmigrant alien seeking R–1 status cannot self-petition, but must have an employer submit a petition (Form I–129) on his or her behalf. 8 CFR 214.2(r)(7). By implementing the petition requirement, USCIS seeks to preserve the integrity of the program at the outset by denying the petition for fraud or other ineligibility factors. It also allows both USCIS and the petitioning religious employer to respond to derogatory information revealed by on-site inspections before the petition is denied.

In addition to filing the required form and associated petitioning fee, under this final rule, an authorized official of the petitioning employer must attest to a number of factors; including, but not limited to: (i) That the prospective employer is a bona fide non-profit religious organization or a religious organization which is affiliated with the religious denomination and is exempt from taxation; (ii) the number of members of the prospective employer's organization, the number of aliens holding religious worker status (both special immigrant and nonimmigrant) and the number of petitions filed by the employer for such status within the preceding five years; (iii) the complete package of salaried or non-salaried compensation being offered and a detailed description of the alien's proposed daily duties; and (iv) that an alien seeking special immigrant religious worker status will be employed at least 35 hours per week and an alien seeking nonimmigrant religious worker status will be employed for at least 20 hours per week. *See e.g.*, new 8 CFR 204.5(m)(7); 214.2(r)(8).

B. Denial, Revocation and Appeals Processes

This final rule adds a provision for a petitioner to appeal the denial of a nonimmigrant petition. New 8 CFR 214.2(r)(17). This final rule also adds a process for USCIS to revoke a nonimmigrant religious worker petition at any time, and a process for the petitioner to appeal a determination by USCIS to revoke the petition. New 8 CFR 214.2(r)(18) and (19). These appeal and revocation procedures have been added to the final rule, although they were not published for public comment in the proposed rule, to ensure consistency among the employment-based nonimmigrant visas. The nonimmigrant visa classifications at 8 CFR 214.2(h), (l), (o), (p), and (q) provide appeal and revocation

[2] A summary of the USCIS FDNS Religious Worker Benefit Fraud Assessment was posted out the docket for this rulemaking action and can be found at *http://www.regulations.gov* or *http://www.cis.gov*.

procedures similar to those added by this rule. Using the same standards for all employment-based nonimmigrant visas will ensure a fair and uniform process. Furthermore, adding revocation procedures to the final rule will enable USCIS to take immediate action against nonimmigrants who submit fraudulent petitions or engage in fraudulent activities while in the United States. Implementation of these revocation procedures will safeguard the interests of petitioners as there is an appeal process for petitions revoked on notice and an appeal process for petitions that are denied.

C. IRS Determination Letter

USCIS also is retaining the requirement proposed in the NPRM that a petitioner must file a determination letter from the Internal Revenue Service (IRS) of the tax-exempt status of the petitioning religious organization under Internal Revenue Code (IRC) 501(c)(3), 26 U.S.C. 501(c)(3). USCIS acknowledges that obtaining a determination letter from the IRS will require the organization to pay a user fee to IRS. If, however, the organization has already obtained a determination letter, those letters do not expire and the organization does not need to obtain a separate letter for purposes of this rule. An organization, therefore, will only need to pay a fee once to obtain the required determination letter.

D. USCIS On-Site Inspections

USCIS is retaining in this final rule the provision that USCIS may verify supporting evidence provided by a petitioner through any appropriate means, including an on-site inspection of the petitioning organization. 8 CFR 204.5(m)(1); 214.2(r)(12). Such inspections may include a tour of the organization's facilities, an interview with organization officials, review of selected organization records relating to the organization's compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that USCIS considers pertinent to the integrity of the organization.

E. Period of Initial Admission and Extension of Status for R–1 Workers

Under the INA, nonimmigrant religious workers may be admitted to the United States for a period not to exceed five years. INA section 101(a)(15)(R), 8 U.S.C. 1101(a)(15)(R). USCIS's current regulations provide for an initial period of admission of three years for nonimmigrant religious workers, with the opportunity to petition for an extension of stay for two additional years. In the NPRM, USCIS proposed to change this to a one-year initial period of admission and the opportunity to petition for two extensions of two years each. USCIS has changed this provision. Under this final rule, nonimmigrant religious workers may obtain an initial period of admission of up to 30 months and then may obtain one extension of religious worker status for up to 30 months, for a total of no more than 60 months (the five-year statutory maximum) lawful status in the United States as nonimmigrant religious workers. *See* 8 CFR 214.2(r)(4) as amended. As with the initial petition for nonimmigrant religious worker status, however, the employer must submit the petition for an extension of stay (Form I–129).

F. Compensation Requirements

USCIS also clarified in this final rule the compensation requirements for nonimmigrant and special immigrant petitions. With limited exceptions, the beneficiary of an initial petition for R–1 nonimmigrant status must be compensated either by salaried or non-salaried compensation, and the petitioner must provide verifiable evidence of such compensation. If there is to be no compensation, the petitioner must provide verifiable evidence that such non-compensated religious workers will be participating in an established, traditionally non-compensated, missionary program within the denomination, which is part of a broader international program of missionary work sponsored by the denomination. The petitioner must also provide verifiable evidence of how the aliens will be supported while participating in that program. Petitioners must submit verifiable evidence of past compensation or support for nonimmigrants with any extension of status request for such nonimmigrants. Special immigrant petitioners must submit verifiable evidence of: (1) How the petitioner intends to compensate the alien and (2) past compensation or support to demonstrate the required previous two years of religious work. *See e.g.*, 8 CFR 204.5(m)(7)(xi), (xii) and (10), 214.2(r)(11).

G. Self-Supporting Nonimmigrant Aliens

The final rule places limits on the ability of uncompensated, self-supporting nonimmigrant aliens to obtain status as nonimmigrant religious workers. USCIS regulations currently do not expressly prohibit the admission of uncompensated employees as R–1 religious workers. In the NPRM, USCIS proposed to require that a nonimmigrant alien obtain a form of demonstrable compensation—either in salary or such in-kind support as room and board—and proposed to prohibit R–1 status for aliens who were not compensated by the organization or were self-supporting. 72 FR at 20453. This final rule departs from the NPRM by continuing to allow the admission of some uncompensated nonimmigrant alien workers under the R–1 visa classification, but restricts such admission to those workers who are part of an established program for temporary, uncompensated missionary work which is part of a broader international program of missionary work sponsored by the denomination. Given the great potential for fraud and abuse of the R–1 program that arises from allowing the petitioning entity to be exempted from the general requirement that it compensate its R–1 workers, it is reasonable to restrict sponsorship of self-supporting R–1 workers to the narrowest possible class of religious entities that might traditionally rely on such workers. Based on the comments received from the public, USCIS has determined that class to be the class of religious entities directing international missionary programs.

This final rule defines an established program for temporary, uncompensated missionary work to be a missionary program in which: (1) Foreign workers, whether compensated or uncompensated, have previously participated in R–1 status; (2) missionary workers are traditionally uncompensated; (3) the organization provides formal training for missionaries; and (4) participation in such missionary work is an established element of religious development in that denomination. *See* new 8 CFR 214.2(r)(11)(ii). The purpose of the rule is to detect and deter fraud and other abuses in this program. Allowing new missionary entities, who have never undergone a site visit and the other protections the R–1 program affords DHS, to petition for self-supporting R–1 workers poses an unacceptable risk. Significantly, as discussed below, self-supporting missionary workers who are not beneficiaries of a petition filed by an entity with an established missionary program, and thus are not eligible for admission to the United States as R–1 nonimmigrant religious workers, may still pursue admission in the B–1 classification. 8 CFR 214.2(b)(1). *See also* 9 FAM 41.31 N9.1.

In such cases, the petitioner must submit evidence, such as books, articles, brochures or similar documents, demonstrating that the organization has an established program for

uncompensated missionary work and that the denomination maintains missionary programs both in the United States and abroad. Furthermore, the books, articles, brochures or other documents must describe the religious duties associated with the traditionally uncompensated missionary work. The evidence must include specific documentation of the alien's acceptance into the program and set forth any responsibilities the alien will assume while participating in the program. The evidence should also include copies of the alien's foreign and/or U.S. bank records with English translations, as appropriate, for the two-year period preceding the filing of the petition, alien's bank records, budgets documenting the sources of self-support (e.g. personal or family savings, room and board with host families in the United States, donations from the denomination's churches), or other verifiable evidence acceptable to USCIS. All evidence submitted to USCIS is handled in accordance with the Privacy Act and FOIA. To deter fraud, USCIS may refer determinations of whether such a program is self-supporting or taxable income to the Internal Revenue Service.

H. Definition of "Religious Occupation"

The final rule also removes the examples of employment positions from the proposed definition of "religious occupation." The listed employment positions were only examples, but commenters appeared to believe that the examples represented an exhaustive or biased list of employment positions that were eligible for religious worker status and that the list was tailored only to Judeo-Christian organizations. USCIS has removed those examples to eliminate confusion.[3] The final rule, however, clarifies that religious organizations must submit evidence identifying religious occupations that are specific to that denomination. Additionally, the petitioning organization must submit evidence demonstrating that an alien's proposed duties meet the religious occupation's requirements.

USCIS also has made changes in the final rule to improve its clarity and readability. For example, all definitions are included in both 8 CFR 204.5(m) and 214.2(r).

[3] The examples provided for "religious vocation" however remain in 8 CFR 204.5(m)(5) and 214.2(r)(3).

III. Public Comments on the Proposed Rule

USCIS provided a 60-day comment period for the proposed rule that ended on June 25, 2007. USCIS subsequently re-opened the comment period for an additional 15 days, from November 1, 2007, to November 16, 2007. *See* 72 FR 61821 (Nov. 1, 2007). In drafting the final rule, USCIS considered all comments received during the entire comment period.

USCIS received 167 comments during the comment period. USCIS received comments from a broad spectrum of individuals and organizations, including religion-based refugee and immigrant services and advocacy organizations, religious groups of varying denominations, public policy and advocacy groups with religious affiliations, and individuals. Many commenters addressed multiple issues. Many comments provided variations on the same substantive issues or were identical in content to others.

USCIS considered the comments received during the comment period and all other materials contained in the docket in preparing this final rule. All comments may be reviewed at the Federal Docket Management System (FDMS) at *http://www.regulations.gov*, docket number USCIS–2005–0030.

A. General Comments

Commenters strongly supported the increased efforts to combat fraud in the religious worker categories. Many commenters, however, disagreed with the proposed methods to combat such fraud. Some comments criticized the USCIS Benefit Fraud Assessment's (BFA) methodology and findings of fraud in the religious worker category. Many commenters supported on-site inspections as a way of eliminating fraud; however, commenters were concerned that on-site inspections might be too intrusive or might be required for each petition.

A substantial number of commenters addressed the definitions in the proposed regulation, including the definitions of "religious occupation," "religious vocation," "minister," and "religious denomination." Some of these commenters suggested that a number of definitions were too narrow, because, in the opinion of the commenters, they only contemplated workers who are members of Judeo-Christian denominations. Many commenters argued that the initial evidence, attestation, compensation, and tax documentation requirements were too stringent. Commenters objected to the new requirement that petitions be filed on behalf of all nonimmigrant as well as special immigrant religious workers. The commenters frequently disagreed with the proposal to change the lengths of the initial period of stay and renewal periods for nonimmigrant religious worker visas. Several commenters suggested that elements of the proposed rule violated constitutional principles. The specific substantive comments organized by subject area are summarized below.

B. Definitions

The applicable definitions for applicants and petitioners for religious worker classification are set forth in 8 CFR 204.5(m)(5) and 214.2(r)(3). The final rule adds several definitions, and expands or clarifies others. The amendments and additions discussed below, unless otherwise noted, apply to both nonimmigrants and immigrants. In the proposed rule, the definitions were found in the immigrant section, with only a cross reference in the nonimmigrant section. However for ease of reference, the entire set of definitions is now included in both 8 CFR 204.5(m)(5) and 8 CFR 214.2(r)(3).

1. Bona Fide Non-Profit Religious Organization

Several commenters objected to the proposed requirement that petitioners must file a determination letter from the IRS of tax-exempt status under IRC section 501(c)(3), 26 U.S.C. 501(c)(3), with every petition. Commenters pointed out that the IRS does not require churches to request a determination letter to qualify for tax-exempt status. A designation that an organization is a "church" is sufficient to qualify for tax-exempt status. Although some churches choose to request a formal IRC section 501(c)(3) determination, they are not required to do so. In addition, several comments stated that many churches cannot afford to pay the fees associated with requesting an IRC section 501(c)(3) determination letter.

Many commenters requested clarification of the proposed rule's requirement that a petitioner submit a currently valid IRS determination letter, pointing out that an exemption letter does not expire. One denomination asked that the final regulation specifically state that organizations classified as tax-exempt under IRC section 501(d), 26 U.S.C. 501(d), may qualify as bona fide organizations.

USCIS recognizes that the IRS does not require all churches to apply for a tax-exempt status determination letter, but has nevertheless retained that

requirement in this final rule. *See* Internal Revenue Service, *Tax Guide for Churches and Religious Organizations: Benefits and Responsibilities under the Federal Tax Law* (IRS pub. no. 1828, Rev. Sept. 2006). A requirement that petitioning churches submit a tax determination letter is a valuable fraud deterrent. An IRS determination letter represents verifiable documentation that the petitioner is a bona fide tax-exempt organization or part of a group exemption. Whether an organization qualifies for exemption from federal income taxation provides a simplified test of that organization's non-profit status.

Requiring submission of a determination letter will also benefit petitioning religious organizations. A determination letter provides a petitioning organization with the opportunity to submit exceptionally clear evidence that it is a bona fide organization.

USCIS recognizes that some religious groups and churches may be classified as tax-exempt under IRC section 501(d), 26 U.S.C. 501(d). Unlike an IRC section 501(c)(3), 26 U.S.C. 501(c)(3), tax determination letter, however, an IRC section 501(d) tax-exempt determination does not establish the non-profit status of a religious organization or church. The INA requires that the petitioning religious organization be a bona fide non-profit organization. INA sections 101(a)(15)(R) and (27)(C)(ii)(III), 8 U.S.C. 1101(a)(15)(R) and (27)(C)(ii)(III). USCIS further understands that some churches could "engage in business for the common benefit of the members," and their members obtain pro rata shares of these funds, which may render the church ineligible for IRC section 501(c)(3) tax-exempt status. As discussed elsewhere, the R–1 status is not exclusive and religious workers may be admitted under other provisions of the INA. However, given the high incidence of fraud found in the religious worker program, which was found to be tied to the validity of the organization itself, an organization must apply for and receive an IRC section 501(c)(3) determination letter to demonstrate non-profit status if that organization wishes to utilize either the R–1 nonimmigrant or the special immigrant religious worker program. If an IRC section 501(d) exempt organization cannot qualify for IRC section 501(c)(3) status, and is thus unable to petition on behalf of nonimmigrant religious workers under the R–1 classification, other nonimmigrant visa categories may be appropriate for that organization's purposes, such as the nonimmigrant B–1 category.

USCIS acknowledges that obtaining a determination letter from the IRS will require the payment of a user fee to the IRS, as discussed in the proposed rule, if the organization does not possess its original determination letter. 72 FR at 20449. USCIS has, however, confirmed with the IRS that determination letters do not expire. Therefore, an organization will need to pay a fee only once to obtain a determination letter. Although USCIS will accept determination letters of any date, USCIS may request evidence or confirm that the exemption is still valid. For example, if the address on the letter differs from the address given in the petition, an explanation should be provided. USCIS has retained the reference to "currently valid" determination letters in the rule text to emphasize that a letter revoked by the IRS cannot be used to meet the definition of tax-exempt organization under the INA. USCIS will routinely examine the publicly available tax documentation for the petitioning organization to determine the ability of the organization to provide support, will consult with the IRS on whether any petitioning organization is validly exempt from taxation under IRC section 501(c)(3), 26 U.S.C. 501(c)(3), and may refer to IRS Publication 78, *Cumulative List of Organizations*, to verify whether the determination letter is current.

USCIS will routinely consult with the IRS on whether any petitioning organization is validly exempt from taxation under IRC section 501(c)(3), 26 U.S.C. 501(c)(3), and may refer to IRS Publication 78, *Cumulative List of Organizations*, to verify whether the determination letter is current. Although existing regulations permit applicants to submit material to USCIS regarding an applicant's non-profit status, the Department of Homeland Security (DHS) has determined that anti-fraud efforts, economy, and efficiency warrant the use of the formal IRS determinations, rather than an independent determination by USCIS. The IRS routinely makes decisions concerning the non-profit nature of organizations seeking tax-exempt status. Furthermore, INA sections 101(a)(15)(R) and (27)(C)(ii)(III), 8 U.S.C. 1101(a)(15)(R) and (27)(C)(ii)(III) use specific terminology that indicates the IRS is an appropriate agency to make determinations as to whether an organization is qualified to apply for religious worker visa benefits.

2. Ministers

The proposed regulation defined a "minister" as "an individual duly authorized by a religious denomination, and fully trained according to the denomination's standards, to conduct religious worship and to perform other duties usually performed by authorized members of the clergy of that denomination." Several commenters asserted that the proposed definition of "minister" was too narrow. The proposed rule also required specific evidence of ordination and training the minister had received. Several commenters interpreted the new definition as requiring ministers to have completed their training at a seminary or similar institution. Additionally, those commenters stated that not all religions require a formal theological education at an accredited theological institution. Other comments suggested that the concept of "fully trained" when referring to a minister's training is too vague in the context of a religion that has many levels of training for its ministers.

USCIS did not intend the definition of "minister" to require a uniform type of training that all denominations would have to provide their ministers. In the preamble to the proposed rule, USCIS acknowledged that some denominations do not require a particular level of formal academic training or experience. *See* 72 FR at 20445. Additionally, the proposed rule recognized that training varies among denominations and, for that reason, the question of whether a minister has met the denomination's training standards is resolved by reference to that denomination's own standards. The rule permits a petitioning organization to submit evidence of the individual denomination's requirements for ordination to minister, the duties allowed to be performed by virtue of ordination, and the denomination's levels of ordination, if any. The definition of "minister" set forth in the proposed rule is retained in the final rule.

3. Religious Denomination

Many commenters criticized the proposed definition of "religious denomination" because it required a denomination to have an "ecclesiastical government." Commenters interpreted this definition as potentially excluding denominations whose member religious organizations share a common creed but lack a common organizational structure or governing hierarchy. The commenters feared that, as a result, religious organizations without a central government would be unable to hire workers from abroad. However, as explained in the preamble to the proposed rule, the definition of "religious denomination" does not

require a hierarchical governing structure. 72 FR at 20445. USCIS is aware that some denominations officially shun such structures. The focus of the regulation is, instead, on the commonality of the faith and internal organization of the denomination. Thus, an individual church that shares a common creed with other churches, but which does not share a common organizational structure or governing hierarchy with such other churches, can satisfy the "ecclesiastical government" requirement of the "religious denomination" definition by submitting a description of its own internal governing or organizational structure. Minor changes were made to the definition as set forth in the proposed rule for clarity and the provision regarding group tax-exemptions was moved to the definition of tax-exempt organization where it is more germane.

4. Religious Occupation

The proposed rule provided examples of qualifying religious occupations. Many commenters stated that the list of example occupations was too narrow and that the examples applied only to Judeo-Christian religions. Those commenters suggested broadening the examples to account for religions other than Judeo-Christian faiths.

USCIS acknowledges the commenters' concerns regarding the examples. The list was neither exhaustive nor more than exemplary. USCIS has, however, removed the list of examples because it created confusion about the scope of the definition of "religious occupation." The list was only illustrative and not necessary to the rule. As discussed in the original rules implementing the religious worker categories, and in the proposed rule, the list was derived from the legislative history. *See* 72 FR at 20446.

When adjudicating petitions, USCIS will rely on the general definition of a "religious occupation." Petitioners must demonstrate that the occupation relates primarily to a traditional religious function that is recognized as a religious occupation within the denomination.

A significant number of commenters opposed the inclusion of all administrative positions in the list of positions that may not be found to be religious occupations. The comments stated that, unlike secular administrators, religious administrators exercise religious leadership and policymaking duties that may directly affect the practices of the denomination. USCIS generally agrees with the commenters; thus, this rule does not disqualify all administrative positions, but only those positions that are primarily administrative. Under the rule, a position including limited administrative duties may qualify as a religious occupation, provided such duties are incidental to substantive, traditionally religious functions.

One commenter was concerned that the proposed regulation excludes "those who sell literature" as a qualifying religious occupation because distribution of literature can be an inherently religious activity. The notion of canvassing, including selling literature, has a long history in the United States and USCIS acknowledges that history. USCIS does not agree, however, that selling literature alone is a basis for admission of an alien to the United States as a religious worker, but has removed "those who sell literature" from the list of excluded occupations as well as the other non-qualifying examples. Fundraising is prohibited from qualifying as a religious occupation, but whether a position that involves selling literature may qualify as a religious occupation will depend on the evidence submitted.

USCIS does not intend to limit legitimate religious vocations under this final rule, and USCIS will consider all of the relevant law in making such determinations. In this final rule, USCIS is establishing requirements for determining whether any religious organization may seek the admission of an alien into the United States for religious vocation and other related purposes under a specific visa classification. These regulations are designed to establish the bona fide nature of the organization and the occupation under the statute, and the petitioning organization is responsible for establishing facts supporting its application. Moreover, the petitioning organization is responsible for establishing that the specific occupation requires specific actions as a part of the beliefs of that organization, and that those evidentiary elements must lead USCIS to conclude that any limitation in the regulation could not be applied to the applicant in light of constitutional or statutory limitations.

5. Religious Vocation

The proposed regulation defined "religious vocation" as "a formal lifetime commitment to a religious way of life." Several commenters objected to the lifetime requirement, stating that religious vocations in many religious denominations do not require a lifetime commitment. Thus, some commenters concluded that employees who will practice a religious way of life during their proposed period of stay in the United States, but who do not necessarily make a lifetime commitment to such a life, such as missionaries or novitiates, could not qualify as religious workers. Additionally, the commenters interpreted the proposed definition of "religious occupation" as requiring employees to receive traditional salaries, thus excluding employees who receive non-salaried compensation such as room and board. The commenters also interpreted the "religious occupation" and "vocation" definitions as excluding nonimmigrants who rely on self-support. Due to the confusion over the proposed definitions of both "religious vocation" and "religious occupation," some commenters concluded that certain types of religious workers would not be able to qualify for visas as they would not be covered by either of the proposed definitions.

USCIS will retain the definition of "religious vocation" as stated in the proposed rule; however, as explained in detail below, clarifications in the compensation requirements for all nonimmigrant religious workers were made in response to commenters' concerns. USCIS clarifies that, under certain circumstances, non-salaried support may qualify as compensation. Additionally, USCIS clarifies that under certain circumstances, as explained in detail below, nonimmigrant beneficiaries who will be self-supporting may qualify for admission under the "occupation" or "religious vocation" definitions.

Missionaries and novitiates who cannot be classified as religious workers coming to the United States to perform a religious vocation because vocations in their denomination do not require a lifetime commitment should nevertheless be able to qualify as religious workers under the "religious occupation" definition.

C. Compensation Requirements

USCIS proposed to add a requirement that the alien's work, under both the immigrant and nonimmigrant programs, be compensated by the employer. Specifically, the rule proposed amending the definition of "religious occupation" to require that an occupation be "traditionally recognized as a compensated occupation within the denomination." Commenters were concerned that the proposed rule would exclude many religious workers who do not receive salaried compensation, but may receive stipends, room, board, or medical care, or who may rely on other resources such as personal savings, rather than salaried or non-salaried compensation.

In response to the commenters' concerns, USCIS is clarifying that

compensation can include either salaried or non-salaried compensation. Under the Internal Revenue Code, non-salaried support, such as stipends, room, board, or medical care, qualifies as taxable compensation unless specifically excluded. *See* IRC section 119, 26 U.S.C. 119; 26 CFR 1.119–1 (exclusion for lodging provided for convenience of employer). The IRS applies special rules for housing, for example, to members of the clergy. Under these rules, clergy do not include in income the rental value of a home (including utilities) or a designated housing allowance provided to clergy as part of their pay. The home or allowance must be provided as compensation for services as an ordained, licensed, or commissioned minister. The rental value of the home or the housing allowance must be included as earnings from self-employment on Schedule SE (Form 1040) if the clergy is subject to the self-employment tax. *See generally* Internal Revenue Service, *Social Security and Other Information for Members of the Clergy and Religious Workers*, Publication 517.

Commenters objected to being required to submit tax documents to demonstrate non-salaried compensation.

USCIS intends to apply the documentation and determinations made by the IRS and the basis for making those determinations as closely as possible. USCIS does not possess the expertise to make determinations of tax-exempt status or the fine points of gross and adjusted income. The comments have not provided a basis for USCIS to make these determinations without a record based on the application of the existing tax laws to both organizations and individuals.

Several commenters stated that the proposed compensation requirement would exclude programs that traditionally utilized only self-supporting religious workers from participating in the R–1 visa program. The comments noted that religious workers who are self-supporting receive neither salaried nor non-salaried compensation; instead, they may rely on a combination of resources such as personal or family savings, room and board with host families in the United States, and donations from the denomination's local churches. Additionally, the comments noted that self-supporting religious workers are currently admitted under the R–1 visa program. In response, the final rule will continue to allow these aliens to be admitted under the R–1 visa classification. USCIS will, however, to preserve its ability to prevent fraud, permit self-supporting religious workers only under very limited circumstances, and, consistent with other provisions of the final rule, require specific types of documentation.

The change provides that if the nonimmigrant alien will be self-supporting, the petitioner must submit documentation establishing that the position the alien will hold is part of an established program for temporary, uncompensated missionary work within the organization, which is part of a broader, international program of missionary work sponsored by the denomination.

USCIS again notes that the religious worker visas are not the exclusive means by which an alien may be admitted to the United States to perform self-supported religious work, including missionary work. Current regulations specifically provide for the admission of missionaries under the general visitor for business visa:

> Any B–1 visitor for business or B–2 visitor for pleasure may be admitted for not more than one year and may be granted extensions of temporary stay in increments of not more than six months each, except that alien members of a religious denomination coming temporarily and solely to do missionary work in behalf of a religious denomination may be granted extensions of not more than one year each, provided that such work does not involve the selling of articles or the solicitation or acceptance of donations.

8 CFR 214.2(b)(1). *See also* 9 FAM 41.31 N9.1. Therefore, self-supporting religious workers who are not eligible for admission to the United States as R–1 nonimmigrant religious workers may pursue admission in the B–1 classification.

D. Petitioning Requirements

The proposed rule introduced the new requirement that a petitioner must file a petition on the alien's behalf with USCIS before the Department of State (DOS) will issue a nonimmigrant visa to the alien. Previously, aliens seeking nonimmigrant religious worker status could apply directly to USCIS or, from out of the country, through the DOS. Many commenters questioned whether USCIS has the statutory authority to require religious organizations to file petitions for nonimmigrants. While nothing in the INA specifically states that a petition is required for nonimmigrant religious workers, nothing prohibits it. In addition, the Secretary of Homeland Security has the general authority to promulgate regulations to implement the immigration laws, INA section 103(a)(1), 8 U.S.C. 1103(a)(1), and must specifically, under INA section 214(a), 8 U.S.C. 1184(a), prescribe by regulation the time and under what conditions a nonimmigrant may be admitted to the United States. Congress has found it reasonable to implement a petition requirement in other nonimmigrant programs. USCIS is implementing the petition requirement for nonimmigrant religious workers as a way to determine that a minister will be admitted to the United States to work for a specific denomination and that other religious workers will be admitted to work for a specific religious organization at the request of that organization. Requiring a petition for every nonimmigrant will also deter fraud and allow USCIS to detect fraud earlier in the process. Therefore, the final rule retains the nonimmigrant petition requirement.

This final rule also includes a provision for a petitioner to appeal a determination by USCIS to deny a petition. *See* 8 CFR 214.2(r)(17). USCIS also is establishing a process for USCIS to revoke a petition once granted, and for the petitioner to appeal a revocation decision. 8 CFR 214.2(r)(18) and (19).

Numerous commenters stated that, for various reasons, the new petitioning requirement would delay nonimmigrant visa approvals. Commenters also said that the Department of State (DOS) has substantial expertise adjudicating religious worker visas; consequently, religious worker visas are promptly processed (a result lauded by the commenters), while still identifying potential fraud. Some commenters suggested that, if petitions are required for all religious workers, the final rule should limit the amount of time that USCIS takes to process the petitions. Additionally, several commenters recommended that to speed processing of petitions, USCIS should pre-certify religious organizations as valid employers.

USCIS acknowledges the concerns of commenters that requiring a petition for all religious workers could delay issuing a visa. However, the petition requirement is essential to preventing fraud in the religious worker program. While DOS consular officers do have experience with nonimmigrant religious workers, they are not in a position to determine the bona fides of a religious organization located in the United States. Requiring an approved petition will assist consular officers in making a decision on religious worker nonimmigrant visa applications. Furthermore, at this time, the USCIS California Service Center is processing all religious nonimmigrant and immigrant religious worker petitions. This specialization promotes expertise

that leads to prompt processing of religious worker petitions.

Several commenters asked USCIS to establish a blanket approval or pre-certification program for religious organizations. USCIS understands the commenters' concerns. A pre-certification process could benefit religious organizations and USCIS, by reducing the petitioning burden on bona fide non-profit religious organizations. However, the proposed rule did not include a blanket approval or pre-certification program. USCIS must carefully evaluate how such a process would work, establish criteria that a religious organization would have to meet, determine a pre-certification validity period, and promulgate regulations governing requirements to be pre-certified. An agency is not required to adopt a final rule that is identical to the proposed rule and in fact agencies are encouraged to modify proposed rules as a result of the comments they receive. However, final rules ultimately adopted can only include those changes that the interested public could view as logical based on what was proposed. In this case, USCIS does not believe that the proposed rule provided sufficient notice that the final rule may contain pre-certification requirements and will thus not adopt the commenters' suggestion. USCIS will consider approaches to addressing the issues presented by the comments, including a possible future rulemaking to provide for a pre-certification process. The final rule does not preclude USCIS from considering the history of an organization's petitions in determining whether to grant a specific petition, and USCIS may consider that history in each individualized consideration.

E. On-Site Inspections

Several commenters supported on-site inspections that are tailored to detect fraud, but do not intrude on religious organizations' privacy. However, a number of commenters questioned on-site inspection procedures, requirements, and potential consequences. The comments stated that the regulations should establish deadlines for USCIS to complete on-site inspections; otherwise, petition processing backlogs could result. Other comments said the results of site inspections should be reviewable. Some argued that the proposed rule provided no guidelines regarding the scope of on-site inspections. The undefined scope, according to some comments, might encourage overzealousness by USCIS or lead to denials solely based on the results of an on-site inspection. Commenters objected to the prospect of unannounced site inspections.

USCIS, like all Federal agencies, must carry out administrative activities that ensure the integrity of the benefit programs it administers. On-site inspections are a useful tool to verify the legitimacy of information contained in applications and petitions, the continued eligibility for a benefit, and the legitimacy of petitioners. Therefore, this rule does not modify the proposed regulations pertaining to on-site inspections. If an on-site inspection yields derogatory information not known to the petitioner, USCIS will issue a Notice of Intent to Deny (NOID) the petition. *See* 8 CFR 103.2(b)(16). The petitioner may then submit additional documentation that may rebut the derogatory evidence. In addition, a denial of a petition may be appealed to the USCIS Administrative Appeals Office. *See* 8 CFR 204.5(n)(2) and 214.2(r)(13).

USCIS acknowledges that processing delays occurred when USCIS inaugurated the on-site inspection program. As USCIS has gained experience with the program, however, delays have decreased. Additional resources, including personnel, have been dedicated to the program and process improvements. USCIS intends to commit more resources and personnel to the program in the near future. To determine the status of a petition, petitioners may consult the USCIS Web site or contact the National Customer Service Center to obtain the status of petitions. If the National Customer Service Center cannot provide an answer, the inquiry will be referred to the California Service Center customer service division.

The proposed rule and the final rule use a list of different terms to describe the on-site inspections. The list was revised in the final rule to include more commonly used terms such as compliance review. The intent is not to assign one specific name, but to give notice to petitioners that such reviews may be part of the religious worker program.

To allay commenters' concerns about possible abuse of the on-site inspection process, USCIS will establish additional communications processes for petitioners to report alleged abuses. Information regarding this will be posted on the USCIS Web site. Waste, fraud, and abuse should also be reported to the DHS Inspector General.

F. Religious Freedom Restoration Act of 1993 (RFRA)

Commenters asserted that the proposed regulation would violate the First Amendment, Const. of the United States, Amdt. I (1791), and the Religious Freedom Restoration Act of 1993, Public Law 103–141, sec. 3, 107 Stat. 1488 (Nov. 16, 1993) (RFRA), found at 42 U.S.C. 2000bb–1, by placing a substantial burden on a religion that is not in the furtherance of a compelling government interest, or at least not furthered by the least restrictive means. Some commenters stated that preventing fraud was commendable but that a compelling government interest has not been established. Several commenters said that filing petitions for nonimmigrants or having to request an extension of status after only one year would place undue financial and paperwork burdens on religions. Additionally, the commenters stated that the proposed definitions of religious occupation and religious vocation prohibited their denominations from utilizing the program.

USCIS disagrees with the specific notion that the final rule violates the RFRA. The RFRA provides:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except * * * if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

Public Law 103–141, sec. 3, 42 U.S.C. 2000bb–1. The final rule is intended to permit religious organizations to petition for admission of religious workers under restrictions that have less than a substantial impact on the individual's or an organization's exercise of religion. A petitioner's rights under RFRA are not impaired unless the organization can establish that a specific provision of the rule imposes a significant burden on the organization's religious beliefs or exercise. Further, this rule is not the sole means by which an organization or individual may obtain admission to the United States for religious purposes, and DHS believes that the regulation, and other provisions of the INA and implementing regulations, can be administered within the confines of the RFRA. An organization or individual who believes that the RFRA may require specific relief from any provision of this regulation may assert such a claim at the time they petition for benefits under the regulation.

Nor does this final rule impose a "categorical bar" to any religious organization's petition for a visa or alien's application for admission.

Instead, the rule sets forth the evidentiary standards by which USCIS will adjudicate nonimmigrant and immigrant petitions.

USCIS also does not believe that the new requirements will reduce the diversity or types of religious organizations that practice in the United States or the types of religious workers whom religious organizations could hire. Changes have been made so that the final definitions of "religious occupation," "religious vocation," "minister," and "denomination" will not prevent religious organizations from using the religious worker program as some commenters claimed. Additionally, rather than the proposed one year initial period of admission and two extensions of two years each, the final rule permits up to 30 months for the initial period of admission and one extension of up 30 months. Therefore, the final rule imposes a much smaller financial and paperwork burden on petitioners than the proposed rule.

Eradicating fraud where fraud has been determined to exist in one-third of nonimmigrant visa petitions, as discussed in the proposed rule, is a compelling government interest to ensure the integrity of the immigration process as well as for the protection of national security. *See* 72 FR at 20442. Therefore, the final rule retains the requirements that a religious organization file a petition for each religious worker and submit an IRS determination letter establishing the organization's tax-exempt status. Additionally, USCIS will maintain the discretion to conduct on-site inspections as USCIS believes they are the most effective and least restrictive means of combating fraud in the religious worker program.

USCIS will consider all of the factual evidence presented in support of a petition for a religious worker under the provisions of the rule. After reviewing the comments and the applicable law, however, USCIS does not believe that the evidentiary requirements of the rule constitute a violation of the RFRA.

G. Concurrent Filing

Some commenters suggested that the final regulation provide an option for special immigrant religious workers to concurrently file Form I–360, Petition for Amerasian, Widow(er) or Special Immigrant, and Form I–485, Application to Register Permanent Residence or Adjust Status. The commenters asserted that concurrent filing would speed up the process of granting permanent residence to religious workers. One commenter requested that concurrent filing not be permitted.

The comments seeking to allow concurrent filing have not been adopted. The Department is under a statutory mandate pursuant to the Special Immigrant Nonminister Religious Worker Program Act, S. 3606, Public Law No. 110–391 (October 10, 2008), to issue this final rule "to eliminate or reduce fraud" in regard to the granting of special immigrant status to nonminister religious workers. The bar to concurrent filing is a valuable fraud deterrent in the entire special immigrant religious worker program. Prohibiting concurrent filing of the visa petition and adjustment of status application for special immigrant religious workers dissuades the filing of fraudulent petitions by or for ineligible and/or inadmissible aliens who might otherwise gain valuable benefits such as employment authorization while an immigrant petition is pending. For this reason, the Department believes that not allowing concurrent filing in this arena is necessary to protect the integrity of the religious worker program for eligible, bona fide religious organizations and their eligible employees.

Concurrent filing was implemented as an accommodation for business petitioners and to add efficiency to processing large backlogs for Form I–140, Immigrant Petition for Alien Worker, that adversely impacted, among others, aliens wishing to adjust their status in the United States who could not file Form I–485 until the Form I–140 was approved. 67 FR 49561 (July 31, 2002). The policy decision to allow concurrent filing for Forms I–140 was based on research into business employment-based visa programs of the United States. The research showed that recruiters found that many talented employees worldwide were increasingly unwilling to tolerate the long waits and uncertainty entailed in immigrating to the United States. When professional workers encounter long delays, United States employers are at a disadvantage because foreign job candidates may decide to accept employment in countries with more expeditious employment-based immigration programs. Concurrent filing has also been allowed if there is a current priority date in family-based preference categories or if an alien qualifies as an immediate relative. An underlying goal of the family-based visa program is the unification of families and concurrent filing supports this goal.

These rationales for allowing concurrent filing are not present in the religious worker context. Additionally, USCIS is not allowing concurrent filing given the high incidence of fraud in the program. USCIS did not propose to allow concurrent filing and has not added provisions in the final rule to provide for it. The United States is defending its previous decision not to allow concurrent filing of Forms I–360 and I–485, and has considered the litigation challenging that decision in reiterating that decision in this rulemaking.

H. Nonimmigrant Intent

The proposed rule would have clarified that an alien may come legitimately to the United States for a temporary period as an R nonimmigrant, depart voluntarily at the end of the period of authorized stay, and at the same time, lawfully seek to become a permanent resident of the United States. Several comments were received that generally supported this proposed provision. The final rule retains a provision on nonimmigrant intent that states that an R classification may not be denied solely because a labor certification or preference petition, including a Form I–360, has been filed by or on behalf of the alien. However, the provision has been rewritten for clarity and readability.

I. Changes Unique to the Special Immigrant Religious Worker Classification

The proposed rule recognized that a break in the continuity of religious work during the two years immediately preceding the filing of the petition would not affect eligibility if the alien had been employed as a religious worker, the break did not exceed two years, and the nature of the break was for further religious training or for sabbatical and did not involve unauthorized work in the United States. Several commenters questioned whether the break in continuity would also apply to sick leave, pregnancy leave, spousal care, or vacations. As these events, for example sick leave and vacation, are typical in the normal course of any employment, they will not be seen as a break of the two-year requirement as long as the alien is still considered employed during that time.

J. Changes Unique to the Nonimmigrant Religious Worker Classification

Currently, the initial admission period for nonimmigrant petitioners is up to three years, with a single extension of up to two years. USCIS proposed to reduce the initial admission to no more than one year with two potential extensions of up to two years each, not to exceed five years total. Commenters strongly objected to the proposed reduced period of admission

and shortened periods for extensions. The commenters expressed numerous reasons why this change would be burdensome. For example, filing three petitions would markedly increase costs to petitioners, such as USCIS form filing fees and legal fees, and the initial one-year admission and the two-year extensions would make it difficult to plan hiring needs and training programs.

Commenters made a variety of recommendations: Retain the current admission and extension scheme; provide an initial admission of up two years with one potential extension of up to three years; or, regardless of the lengths of the initial admission and potential extension, adopt a pre-certification program. In response to the comments, this final rule allows an initial admission of up to 30 months with one extension of up to 30 months. Allowing for a maximum period of admission of 30 months addresses the concerns of the commenters for a longer time period and simplifies program administration, as the maximum period will be the same whether it is an initial admission or an extension. The periods of admission and extension will be granted as determined by both the organization's need for the religious worker's services and the regulatory limitations. As limited by statute, the maximum total period of admission will continue to be five years. *See* INA section 101(a)(15)(R)(i), 8 U.S.C. 1101(a)(15)(R)(i).

K. Fraud Findings

Some commenters stated that when writing this rule, USCIS should not have relied on the GAO Report, *Issues Concerning the Religious Worker Visa Program*, GAO/NSIAD–99–67 (March 26, 1999), and the 2005 USCIS Fraud Detection and National Security (FDNS) benefit fraud assessment report (BFA). Commenters stated that the two reports used invalid methodologies, relied on anecdotal evidence, and overstated the amount of fraud. Although many commenters criticized the GAO and BFA reports, none of the commenters provided alternative statistical analyses to demonstrate that fraud is less extensive than what USCIS has stated. The BFA conducted by USCIS FDNS used a valid methodology and did not rely on anecdotal evidence; instead, the BFA utilized a random sample formula provided by the DHS Office of Immigration Statistics to establish a statistically valid sampling of cases that allowed USCIS to estimate the level of fraud in the religious worker program. The BFA sampling consisted of a rate of occurrence of not more than 20%, a confidence level of 95%, and a reliability factor of plus or minus five percent. The established fraud rate of 33% for the I–360 Religious Worker program represents a statistically valid figure based on generally accepted statistical reporting guidelines. These comments also do not suggest specific changes to the rule. The two referenced reports support promulgation of this rule and the comments provide no evidence and raise no issues that cause USCIS to reconsider these conclusions. USCIS did not make any changes to the final regulation as a result of these comments.

L. Miscellaneous

Several commenters stated that requiring petitioning organizations to report the number of members of the prospective employer's organization and the number and positions, with brief descriptions, of employees in the prospective employer's organization would excessively burden large organizations. USCIS acknowledges the commenters' concerns. However, documenting the number and positions of employees is a useful tool for verifying the existence and validity of a prospective employer; thus, the reporting requirement has been retained but modified to require only the number and a summary of the responsibilities of the employees who work at the same location where the beneficiary will work. USCIS may still request a detailed list of employees and a brief description of their duties if it determines in its discretion that such information is needed.

Several commenters suggested that USCIS reinstate Premium Processing for R–1 nonimmigrant religious workers. The Premium Processing Service provides faster processing of certain employment-based petitions and guarantees a 15-calendar day processing time. Due to the complexities with adjudicating R–1 visa petitions, USCIS cannot reasonably ensure a level of processing service within 15 calendar days. Given that USCIS is conducting on-site inspections, USCIS cannot, at this time, reasonably guarantee 15 day processing. USCIS continues to assess whether it is possible to provide this level of service for nonimmigrant religious worker petitions.

III. Regulatory Requirements

A. Administrative Procedure Act

The Administrative Procedure Act, 5 U.S.C. 553(d), requires that an agency publish a final rule no later than 30 days before its effective date. The APA, however, provides an exception to the delayed-effective date requirement where the agency has good cause to make the rule effective upon the date of publication. As discussed above, the special immigrant religious worker provisions of section 274A of the INA, expired on September 30, 2008. Under section 101(a)(27)(C)(ii)(II) and (III) of the Act, 8 U.S.C. 1101(a)(27)(C)(ii)(II) and (III), to immigrate under the special immigrant religious worker category, aliens who are not ministers must have a petition approved on their behalf and either enter the United States as an immigrant or adjust their status to permanent resident while in the United States by no later than September 30, 2008. Beginning on October 1, 2008, all new nonminister petitions and applications have been rejected without prejudice to the filing of a new petition or application upon the effective date of this rule.

On October 10, 2008, the President signed into law Public Law 110–391 "Special Immigrant Nonminister Religious Worker Program Act." This Act extends the sunset date for special immigrant nonminister religious workers until March 6, 2009. However, the amendment will not take effect until the Secretary of Homeland Security certifies to Congress, and publishes a notice in the **Federal Register**, within 30 days of enactment of the Act, that this final rule has been issued and is effective.

DHS had determined that it would be contrary to the public interest to delay the re-authorization of the special immigrant nonminister religious worker program to allow for a 30-day effective date for this rule. Accordingly, DHS is making this rule effective immediately upon publication in the **Federal Register**. All cases pending on the rule's effective date and all new filings will be adjudicated under the standards of this rule. If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information.

B. Regulatory Flexibility Act

For the proposed rule, USCIS estimated that it would receive approximately 22,338 petitions annually from "small entities" as defined under 5 U.S.C. 601. USCIS determined that the cost to a religious or affiliated bona fide organization for a religious worker petition of $190 represented a small percentage of the organization's total annual wage cost for the beneficiary and an even smaller percentage of the petitioning organization's overall operating budget. Also, the additional

burden in terms of time needed to complete attestation and certification requirements was estimated to be insignificant. Additionally, USCIS did not determine the effect on organizations that would have to pay application fees to the IRS but invited comments on the scope of these costs and more accurate means for defining these costs. Therefore, in the proposed rule USCIS stated that any impact on religious or affiliated organizations or individuals to comply with these requirements is minimal and this rule will not have a significant economic impact on a substantial number of small entities.

USCIS does not foresee the rule having a significant economic impact on small entities. Thus, this rule does not put forth alternatives to minimize impacts. The rule benefits the United States by reducing the risk of fraud in the religious worker program. Cost increases, if any, due to the revised requirements are not expected to significantly affect entities and thus will not have a measurable impact on their ability to carry out religious activities.

USCIS invited the public to comment on the extent of any potential economic impact of this rule on small entities, the scope of these costs, more accurate means for defining these costs, ways that a religious organization could demonstrate that it meets the rule's requirements without providing an IRC section 501(c)(3), 26 U.S.C. 501(c)(3), letter and without USCIS having to analyze sizeable paperwork, and the estimated cost to petitioning religious organizations and bona fide organizations affiliated with a religious denomination to comply with the new religious worker petition requirements and prepare for the on-site inspections. In response to those requests, USCIS received a comment on the cost of hiring outside parties to prepare petitions. However, USCIS believes that this rule imposes no requirements that should increase the need to hire parties to prepare and file religious worker petitions. No additional cost estimates were provided and USCIS received no additional information or data in response to the request for data on the economic impact of this rule on small entities, the scope of these costs, or more accurate means for defining these costs. USCIS also received several comments on the requirement that petitioners submit a copy of the IRC section 501(c)(3) status determination letter from the IRS, and has responded to those and other comments in another section of the preamble to this final rule. The significance of the impact of the compliance costs that requiring the IRC section 501(c)(3) determination letter adds to regulated entities under this rule is discussed below. Several changes were made to the final rule as a result of comments received as discussed in that section.

Size of affected entities. This rule affects religious organizations under NAICS code 813.110. 13 CFR 121.201 (NAICS code 813.110—Religious Organizations). The size considered small in that grouping is those entities having average annual revenue of under $6.5 million per annum. While data on the actual average annual revenue of the participants in the religious immigrant and nonimmigrant worker program is lacking, most of the affected organizations are thought to be small entities as defined under the RFA.

Number of affected entities. USCIS records from the past three years indicate that an average of 6.4 workers have been approved per organization per year. The total estimated volume of petitions to be received by USCIS after this rule is projected at 23,200. Thus, an estimated 3,625 affected religious entities will be affected by this rule.

Economic impact per entity. USCIS determined that this rule will result in USCIS fee collections increasing by about $4.5 million per year and information collection costs increasing by about $1.3 million per year, for a total of $5.8 million in added costs. The average cost per entity imposed by this rule will be $1,600. Also, this analysis assumes that a new IRC section 501(c)(3), 26 U.S.C. 501(c)(3), status determination letter from the IRS, with a fee of $750, will be paid by each entity each year, bringing total costs per entity resulting from this rule to $2,320.[4]

Determination of no significant impact. The RFA does not define "significant" or "substantial" and Small Business Administration (SBA) guidance provides that what is "significant" or "substantial" depends on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's impact. Guidelines provided by the SBA Office of Advocacy suggest that an added cost of more than one percent of the gross revenues of the affected entities in a particular sector may be a significant impact. The total added cost per firm of this rule of $2,320 is 0.04% of the $6.5 million threshold for a religious organization to be considered small.

Guidelines suggested by the SBA Office of Advocacy also indicate that the impact of a rule could be significant if the cost of the regulation exceeds five percent of the labor costs of the entities in the sector. Since the religious worker program is an employment based visa program, DHS analyzed the additional costs imposed by this rule on the petitioning organizations relative to the costs of the typical employee. According to the Bureau of Labor Statistics, the mean annual salary of clergy is $43,060, for Directors of Religious Activity it is $37,570, and for other religious workers it is $29,350.[5] Based on an average of 6.4 religious workers petitioned-for per organization, the average annual cost per religious worker petitioned-for by the entity will be $363 per worker. Thus, the costs per worker imposed by this rule represent only 0.84% of a minister's average salary, 0.97% of a Director of Religious of Activity's annual salary, 1.24% of the salary for other religious workers, and only 3.1% of the employee's annual salary expense if the religious worker is compensated at the Federal minimum wage of $5.85 per hour for 2,000 hours per year. Therefore, using both average annual labor costs and the percentage of the affected religious entities' annual revenue stream as guidelines, the additional regulatory compliance costs imposed by this rule are not significant. For these reasons, DHS certifies that this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, no regulatory flexibility analysis is required.

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100

[4] Assuming a 100% requirement for this cost will ensure a liberal costs calculation for ascertaining the significance of this rule's impacts on small entities. Nonetheless, while USCIS has no way to estimate how many petitioners will have to obtain IRC section 501(c)(3), 26 U.S.C. 501(c)(3), determination letters, the actual number will be lower than 100% of all petitioners.

[5] U.S. Department of Labor Bureau of Labor Statistics, May 2006 National Occupational Employment and Wage Estimates. Available online at *http://www.bls.gov/oes/current/oes_nat.htm#b00-0000*.

million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

E. Executive Order 12866 (Regulatory Planning and Review)

This rule has been designated as a "significant regulatory action" by the Office of Management and Budget (OMB) under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, an analysis of the costs and benefits of this rule has been prepared and submitted to the Office of Management and Budget (OMB) for review. That analysis is as follows.

1. Background

The religious worker program is rooted in the regulation of labor markets. The specific market failure addressed by this rule is the inability of current program participants to self-police their behavior and avoid engaging in acts of fraud and misrepresentation.

The impacts of having a sufficient or insufficient supply of religious workers tend to be more qualitative for the ability of the particular religion and its members to carry on its functions, rituals, and traditions in the United States. Aside from the need for workers, many religions believe it is important for their members in the United States to intermingle with their members from outside the United States in order for an exchange of ideas to take place and for their United States members to receive the intangible benefits that are felt to inure from exposure to diverse cultures. The benefits of such a program tend to be intangible from an economic standpoint but very concrete to devout followers of a particular religion who may be harmed by the lack of availability of, or benefit from having, a qualified worker to carry out a defined function in their particular faith. This analysis deals, however, with only the changes made by this rule, not the benefits and costs of the program as a whole. DHS has assessed both the costs and benefits of this rule as follows:

2. Recent Figures

Form I–360. A religious organization seeking a permanent religious worker or an alien seeking to perform religious work permanently in the United States files Form I–360, Petition for Amerasian, Widow(er), or Special Immigrant, with USCIS. Table 1 shows the number of Form I–360 filings with USCIS for a religious worker in the most recent three fiscal years.

TABLE 1—FORM I–360 FILINGS FOR IMMIGRANT RELIGIOUS WORKERS[6]

Fiscal year	2005	2006	2007	Average[7]
Petitioning Organizations	308	182	88	193
Petitions Received	4,466	5,242	4,382	4,697
Petitions Approved	3,816	2,828	1,086	2,577

Form I–129. For an alien currently in the United States to work as a nonimmigrant religious worker, the religious organization and alien may file a Form I–129, Petition for Nonimmigrant Worker. Table 2 shows the number of Form I–129 filings with USCIS for a religious worker in the most recent three fiscal years.

TABLE 2—FORM I–129 FILINGS FOR NONIMMIGRANT RELIGIOUS WORKERS[8]

Fiscal year	2005	2006	2007[9]	Average
Petitioning Organizations	562	493	416	490
Petitions Received by USCIS	5,918	5,749	4,370	5,346
Petitions Approved by USCIS	4,866	3,685	882	3,144
Average Number of Workers Approved for Each Organization	8.7	8.9	2.1	6.4

Consular or Port of Entry Processing. Aliens outside the United States may seek an R–1 visa directly from the United States consulate or embassy abroad or, if visa exempt, be admitted to the United States as a nonimmigrant religious worker by the United States at a United States port of entry. Table 3 shows the number of religious worker visas requested and approved by DOS without a petition being filed with USCIS in the three most recent fiscal years.

TABLE 3—RELIGIOUS WORKER VISAS PROCESSED BY DOS

Fiscal year	2005	2006	2007	Average
Petitions Received by DOS	12,473	12,944	16,487	13,968
Petitions Approved by DOS	8,538	8,716	10,372	9,209

R–2 Visas for Religious Worker Family Members. Table 4 shows the aliens granted admission into the United States by DOS as derivative family members of religious workers in the three most recent fiscal years.

[6] A religious organization may file petitions for several potential religious workers; however, the organization must file a separate petition for each worker.

[7] USCIS does not know why there has been a precipitous drop in the number of Form I–360 petitioning organizations, petitions received, and petitions approved in the past three fiscal years.

[8] Includes Form I–129 filings for extensions of current R–1 status.

[9] Petitions approved in 2007 lagged as a result of uncompleted site inspections.

TABLE 4—DERIVATIVE FAMILY MEMBERS (R–2) VISAS

Fiscal year	2005	2006	2007	Average
Petitions Received by DOS	5,118	5,017	4,931	5,022
Petitions Approved by DOS	3,267	3,234	3,216	3,239

For relatives of non-immigrant religious workers currently in the United States to receive R–2 status, a USCIS Form I–539, Application To Extend/Change Nonimmigrant Status, must be filed. In 2005, 42 Religious Workers filed an I–539 requesting a change of status for family members and eight were approved. In 2006, 41 Form I–539 filings were received and five were approved; and in 2007, 43 were requested, and four approved. Thus, an average of 42 R–2 visas through Form I–539 were requested and six approved per year in the three most recent fiscal years.

Totals. In 2005, 16,679 aliens were approved to enter into or stay in the United States as Religious Workers (R–1) and family members (R–2). In 2006, 15,640 were approved, and in 2007, 14,474 entered legally, for an average of 15,598 religious worker visas per year.

TABLE 5—TOTAL RELIGIOUS WORKERS AND RELATIVES

Fiscal year	2005	2006	2007	Average
Petitions Received by DOS and USCIS	23,551	23,748	25,831	24,376
Petitions Approved by DOS and USCIS	16,679	15,640	14,474	15,598

3. Projected Petition Volume and Total Fee Collections

USCIS assumes that the demand for religious workers will remain constant. Although this rule imposes a new petitioning requirement, nothing in this rule is expected to reduce or decrease the attractiveness of the program from a petitioner's standpoint. Therefore, the future number of petitions filed annually and the number of religious or affiliated organizations seeking workers should be consistent with recent trends. The predicted future volumes of petitions and application following the implementation of the changes in this rule are as follows:

Form I–360.

In the three most recent fiscal years USCIS has received an average of 4,697 petitions (Form I–360) either from religious organizations seeking permanent religious workers or from aliens seeking to perform religious work permanently in the United States.

Filing volume for Form I–360 remained fairly constant from 2005 through 2007. USCIS does not believe that this rule will result in any additional decreases in volume from that seen in recent years. As stated in the proposed rule, the level of fraud in the immigrant religious worker program was found to be 33% of cases reviewed. This final rule institutes requirements and procedures to reduce fraud in the program. 72 FR at 20444. Ultimately, as this rule's anti-fraud measures take full effect, the filing of fraudulent petitions may be discouraged to the point that there is a noticeable reduction in the volume of petitions filed with USCIS. However, USCIS started conducting discretionary site inspections for religious worker petitions in 2006 and there have been recent publicized arrests associated with criminal activities and fraud in the religious worker program. Filing volume has not decreased. This rule was drafted to avoid overburdening legitimate petitioners and the changes in this rule are not expected to reduce or decrease the attractiveness of the program to eligible petitioners. Furthermore, DHS estimates that profession-wide demand for religious workers will remain constant. Therefore, USCIS estimates that filing volume for I–360s in the next few years will be close to the average received in the three most recent fiscal years.

Projected annual Form I–360 Volume: 4,700.

Total Fee Receipts: $1,762,500.

Change in Form I–360 Fee Collections Resulting from the Final Rule: $0.

Form I–129 for a Nonimmigrant in the United States. This rule requires that a petition be submitted to and approved by USCIS before a beneficiary who is currently in the United States in another type of non-immigrant status can change his or her status to that of a religious worker, or if here as a religious worker, extend that status. This is not a change from the previous practice. Thus, the future volume of Forms I–129 filed for individuals already in the United States will be the historic number of I–129 filings. As shown in Table 2 above, USCIS has received an average of 5,346 form I–129s requesting nonimmigrant religious workers per year over the past three fiscal years. However, filing volume decreased by 3% percent from 2005 to 2006, and by another 24% from 2006 to 2007. USCIS does not believe that this rule will affect this trend and that the number received in 2007 most likely reflects future volumes. Thus, approximately 4,500 petitions for nonimmigrants in the United States are expected per year following this rule.

Form I–129 for a Nonimmigrant Abroad. This rule now requires that a Form I–129 be submitted to and approved by USCIS before an individual who lives abroad may come to the United States as a nonimmigrant religious worker. The number of Form I–129 filings for a nonimmigrant religious worker living abroad can be estimated based on the number of aliens recently applying for admission to the United States as a nonimmigrant religious worker with DOS. In 2005, 12,473 persons applied for R–1 visas, in 2006, 12,944 applied, and for 2007, 16,487 applied. That represents a 4% percent increase in 2006 over 2005, and a 27% increase in 2007. USCIS believes that the petition requirement will reduce the number of petitions received slightly from 2007 numbers to approximately what they have averaged over the previous three years, or around 14,000 R–1 petitions per year. Thus, based on historic I–129 filing volume plus those who now must file, total Form I–129 filings projected per year in this analysis are as follows:

Projected annual Form I–129 volume: 18,500.

Total Fee Income: $5,920,000.

Change in I–129 Fee Collections Resulting from the Final Rule: $4,480,000.

Relatives—Nonimmigrant. An average of 42 Form I–539 filings per year were received by USCIS in the three most recent fiscal years for immediate

relatives of the alien in the United States with no notable trend upward or downward in volume. DOS received an average of 5,022 requests to bring a family member of a religious worker into the United States in the three most recent fiscal years, with a two percent per year downward trend over that period. These trends are expected to remain consistent with the recent past. Thus, average annual Form I–539 volumes [10] for this rule are expected to be as follows:

Projected annual Form I–539 volume: 50.

Total Fee Income: $15,000.

Increase in I–539 Fee Collections Resulting from the Final Rule: $0.

Relatives—Immigrant.

Special Immigrant Religious Workers may include a dependent spouse or child on the same Form I–360 as the worker. However, if the child is over 21 or the relationship or marriage occurred after the beneficiary of the approved I–360 becomes a lawful permanent resident, then the lawful permanent resident can petition for their relative on a separate USCIS Form I–130, Petition for Alien Relative, plus a $355 fee per form. USCIS projects an average annual filing volume for Form I–360 of 500 petitions. USCIS has no records on the average number of people who enter the United States as relatives of special immigrant religious workers either via the I–360 or I–130 process. Regardless, USCIS knows no reason why the number of those who do would not remain about the same as it has been recently. Accordingly, this rule is not expected to have much of an impact on the number of such immigrants.

4. Costs

Fees. USCIS fee collections associated with the religious worker program will increase substantially because of the new petitioning requirement for nonimmigrant religious workers and their relatives. As shown in B. above, the number of filings of Forms I–129 is expected to increase by about 14,000, resulting in an estimated $4,480,000 in additional fee collections from this rule per year.

Paperwork Burden.

Increased volume. This rule will result in approximately 14,000 more Form I–129 filings than if this rule were not promulgated. This rule will result in no additional Form I–360, Form I–130, or Form I–539 filings. The approved public reporting burden for Form I–129 is estimated at 2 hours and 45 minutes, including the time for reviewing instructions, completing and submitting the form. Therefore, this rule will result in an additional burden to prepare religious worker petitions of 38,500 hours for Form I–129. According to the United States Department of Labor Bureau of Labor Statistics estimates, employer costs for employee compensation averaged $27.82 per hour worked in March 2007.[11] Valuing the effort expended per hour at that rate, this added time per form will cost the public $1,176,647 in information collection costs as a result of requiring a petition from a nonimmigrant religious worker.

Increased time. This rule requires USCIS to revise the approved information collection packages for Form I–129, Petition for Nonimmigrant Worker, and Form I–360, Petition for Amerasian, Widow(er), or Special Immigrant—OMB 1615–0009, and 0020, respectively. Petitioning organizations are required to submit proof of their tax-exempt status and an attestation regarding the potential religious worker's qualifications and duties. Organizations will have an additional burden in terms of time needed to complete the attestation and certification requirements. These requirements will increase the existing information collection burden by roughly 15 minutes per petition for the new attestation for both the Form I–129 and the Form I–360. For the projected 23,200 combined total of I–360 and I–129 filings to be submitted each year, this new attestation requirement results in 5,800 hours of additional paperwork burden. Valuing the effort expended per hour at $27.82, this added time per form will cost the public $161,356 in information collection costs.

Legal and professional fees. USCIS specifically requested public comment on the estimated cost to petitioning religious organizations and bona fide organizations affiliated with a religious denomination to comply with the new religious worker petition requirements. As a result, USCIS received some public comments on the costs incurred to hire legal counsel or another party to prepare religious worker petitions. For example, one commenting organization stated that it incurs a cost of $1,500 per petition for either its internal staff or a hired professional to prepare its petitions. An Internet search quickly finds several law firms advertising religious worker program services. One Web site, for example, advertises a fee of $1,000 for preparing petitions for R–1 cases and an additional $200 for the family (R–2s), $1,500 for immigrant religious worker petitions and $800 for the consular processing or adjustment of status applications in the United States. Additional family members are $400 for a spouse and $200 per child. USCIS regulations, including this rule, do not require petitioners to hire legal or professional help to complete religious worker petitions. Regulations, forms, and instructions are written in plain language intended for the public to read and follow. Thus, the only costs imposed by USCIS for the burden of application preparation are based on estimated completion times and are included in the increased volume costs calculated in the paperwork burden cost estimates above.

IRS application fees. USCIS recognizes that many religious organizations will not have a currently valid determination letter of their IRC section 501(c)(3), 26 U.S.C. 501(c)(3), status and may be required to pay a user fee to the IRS to acquire one.[12] Very small organizations with gross revenues of not more than $10,000 may be charged a fee of $300 by the IRS to determine their current IRC section 501(c)(3) status. Organizations with gross receipts in excess of $10,000 during the previous four years or anticipating gross receipts averaging more than $10,000 during the first four years, may be charged a fee of $750 by the IRS to determine their current IRC section 501(c)(3) status. USCIS does not possess sufficient information to determine how many organizations that will be filing petitions with USCIS for religious workers will fall into each category or otherwise be required to pay such a fee. In addition, several organizations are expected to have lost or destroyed their tax-exempt under IRC section 501(c)(3) determination letter, requiring a fee of $750 to obtain a new letter from the IRS. However, in such cases, the organization's incurrence of the fee for obtaining a replacement letter, while unfortunate, is attributable to the faulty record keeping of the organization, which caused the organization's letter to be lost, rather than to this rule.

5. Qualitative Benefits

Fraud Prevention. Considering the importance of preventing fraud in the religious worker program and of

[10] Form I–539 has many uses. For purposes of this analysis, Form I–539 is used only in relation to religious workers.

[11] See Employer Costs for Employee Compensation, at *http://data.bls.gov/PDQ/servlet/SurveyOutputServlet;jsessionid=f03023a343e11t$02$3F$.*

[12] *See* United States Department of the Treasury, Internal Revenue Service, *Frequently Asked Questions about Form 1023*, at *http://www.irs.gov/charities/article/0,id=139504,00.html.*

ensuring that only legitimate religious organizations and bona fide affiliated organizations participate in the process, DHS believes that this proposed rule will have a positive impact overall. As stated in the proposed rule, USCIS found a high level of fraud in the religious worker program, petitions filed on behalf of religious workers by nonexistent organizations, and material misrepresentations in petitions. Recently, there have been several arrests associated with criminal activities and fraud in the religious worker program.[13] Decreased fraud and increased national security will ensure that the benefits of the religious worker visa program go to those who were intended to benefit and the eligible aliens maintain proper status during their stay in this country.

6. Summary and Conclusions

This rule will not significantly change the number of persons who immigrate to the United States based on employment-based petitions or temporarily visit based on a nonimmigrant visa petition. This rule is intended to benefit the public by clarifying definitions associated with the religious worker classifications, acceptable evidence, and specific religious worker qualification requirements. Balanced against the costs and the requirements to collect information, the burden imposed by the proposed rule appears to USCIS to be justified by the benefits.

This rule will result in approximately 14,000 more Form I–129 filings than if this rule were not promulgated. This rule will result in no additional Form I–539, I–360 or Form I–130 filings. The added time per form resulting from this rule will cost the public $161,356 in information collection costs. The added volume of filings will cost the public $1,176,647 in information collection costs as a result of requiring a petition from a nonimmigrant religious worker.

The cost of this rule's increased information collection is outweighed by the overall benefit to the public of an improved system for processing religious workers. The proposed rule is a vital tool in furthering the protection of the public by: (1) More clearly defining the requirements and process by which religious workers may gain admission to the United States and (2) increasing the ability of DHS to deter or detect fraudulent petitions and to investigate and refer matters for prosecution.

F. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

H. Paperwork Reduction Act

1. USCIS Forms I–129 and I–360

Any prospective employer must file a Form I–129, Petition for Nonimmigrant Worker, or Form I–360, Petition for Amerasian, Widow(er), or Special Immigrant, seeking to classify an alien as a religious worker under sections 101(a)(15)(R) and (27)(C) of the Act. Individual aliens may also file Form I–360 on their own behalf. The Forms I–129 and I–360 are considered information collections under the Paperwork Reduction Act (PRA). The Office of Management and Budget (OMB) has previously approved both the Forms I–129 and I–360 for use. The OMB control numbers for these collections for the Form I–129 is OMB 1615–0009 and for the Form I–360 is OMB 1615–0020.

As discussed in the proposed rule, the number of respondents filing Form I–129 will increase. In addition, Forms I–129 and I–360 will be revised with respect to evidentiary attestations. Accordingly, these requirements are considered information collections subject to review by OMB under the Paperwork Reduction Act of 1995. DHS requested comments on the revision to the forms during a 60-day period until June 25, 2007. DHS did not receive any comments on the revision to these two forms. Accordingly, under the PRA, DHS is requesting comments during an additional 30-day period until December 26, 2008. When submitting comments on the information collection, your comments should address one or more of the following four points.

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of the information on those who are to respond, including through the use of any and all appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of Information Collection for the Form I–129

(1) *Type of information collection:* Revision of currently approved collection.

(2) *Title of Form/Collection:* I–129, Petition for a Nonimmigrant Worker.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–129, U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals. This form is necessary for an employer to petition for an alien to come to the U.S. temporarily to perform services or labor.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond to the new requirements:* 364,048 respondents at 2.75 hours per response, and 18,500 respondents at 3 hours per response.

(6) *An estimate of the total of public burden (in hours) associated with the collection:* Total reporting burden hours is 1,056,632.

All comments and suggestions or questions regarding additional information should be directed to the Department of Homeland Security, U.S. Citizenship and Immigration Services, Chief, Regulatory Management Division, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529; telephone 202–272–8377.

Overview of Information Collection for Form I–360

(1) *Type of information collection:* Revision of currently approved collections.

(2) *Title of Form/Collection:* Form I–360 Petition for Amerasian, Widow(er), or Special Immigrant.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–360, U.S. Citizenship and Immigration Services.

[13] *See, e.g., supra*, note 2.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals. The Form I–360 may be used by several prospective classes of aliens who intend to establish their eligibility to immigrate to the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond to the new requirements:* 8,984 respondents at 2 hours per response, 5,000 respondents at 3 hours per response, and 4,700 respondents at 2.25 hours per response.

(6) *An estimate of the total of public burden (in hours) associated with the collection:* Total reporting burden hours is 43,543.

All comments and suggestions or questions regarding additional information should be directed to the Department of Homeland Security, U.S. Citizenship and Immigration Services, Chief, Regulatory Management Division, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529; telephone 202–272–8377.

2. U.S. Internal Revenue Service Form 1023

This rule defines "bona fide non-profit religious organization in the United States" as an organization possessing a currently valid determination letter from the IRS confirming such exemption. If a religious organization wishes to petition USCIS for a religious worker and it does not have such a letter from the IRS, this rule requires it to obtain one. The regulations at 8 CFR 204.5(m)(2) existing prior to this rule provided that a religious organization could document that it was bona fide either by showing it is "an organization exempt from taxation as described in IRC section 501(c)(3), 26 U.S.C. 501(c)(3), as it relates to religious organizations, or one that has never sought such exemption but establishes to the satisfaction of the Service that it would be eligible therefore if it had applied for tax-exempt status " In practice, for an organization to establish that it would be tax-exempt, USCIS required the same information to be submitted to it that the organization would have had to submit to the IRS on IRS Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, and its schedules. Thus, by requiring the religious organization to provide a determination letter from the IRS, this rule does not change the paperwork burden from the previous regulations.

As stated above, a little over 3,000 religious entities are expected to petition for religious workers each year. According to the supporting statement submitted to OMB under the Paperwork Reduction Act for Form 1023 and approved under OMB control number 1545–0056, the IRS expects to receive over 29,000 Forms 1023 per year, with each requiring an average of 101.68 hours to complete, plus supporting schedules which may require an additional 7 to 15 hours each, for a total of 3,138,550 hours of burden and 33,378 respondents. USCIS has determined that the burden approved under OMB control number 1545–0056 is sufficiently large to encompass any increase in applications for IRC section 501(c)(3), 26 U.S.C. 501(c)(3), status caused by this rule.

List of Subjects

8 CFR Part 204

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

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 299

Immigration, Reporting and recordkeeping requirements.

■ Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 204—IMMIGRANT PETITIONS

■ 1. The authority citation for part 204 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1186a, 1255, 1641; 8 CFR part 2.

■ 2. Section 204.5 is amended by revising paragraph (m) to read as follows:

§ 204.5 Petitions for employment-based immigrants.

* * * * *

(m) *Religious workers.* This paragraph governs classification of an alien as a special immigrant religious worker as defined in section 101(a)(27)(C) of the Act and under section 203(b)(4) of the Act. To be eligible for classification as a special immigrant religious worker, the alien (either abroad or in the United States) must:

(1) For at least the two years immediately preceding the filing of the petition have been a member of a religious denomination that has a bona fide non-profit religious organization in the United States.

(2) Be coming to the United States to work in a full time (average of at least 35 hours per week) compensated position in one of the following occupations as they are defined in paragraph (m)(5) of this section:

(i) Solely in the vocation of a minister of that religious denomination;

(ii) A religious vocation either in a professional or nonprofessional capacity; or

(iii) A religious occupation either in a professional or nonprofessional capacity.

(3) Be coming to work for a bona fide non-profit religious organization in the United States, or a bona fide organization which is affiliated with the religious denomination in the United States.

(4) Have been working in one of the positions described in paragraph (m)(2) of this section, either abroad or in lawful immigration status in the United States, and after the age of 14 years continuously for at least the two-year period immediately preceding the filing of the petition. The prior religious work need not correspond precisely to the type of work to be performed. A break in the continuity of the work during the preceding two years will not affect eligibility so long as:

(i) The alien was still employed as a religious worker;

(ii) The break did not exceed two years; and

(iii) The nature of the break was for further religious training or for sabbatical that did not involve unauthorized work in the United States. However, the alien must have been a member of the petitioner's denomination throughout the two years of qualifying employment.

(5) *Definitions.* As used in paragraph (m) of this section, the term:

Bona fide non-profit religious organization in the United States means a religious organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, and possessing a currently valid determination letter from the IRS confirming such exemption.

Bona fide organization which is affiliated with the religious denomination means an organization which is closely associated with the religious denomination and which is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code and possessing a currently valid

determination letter from the IRS confirming such exemption.

Denominational membership means membership during at least the two-year period immediately preceding the filing date of the petition, in the same type of religious denomination as the United States religious organization where the alien will work.

Minister means an individual who:

(A) Is fully authorized by a religious denomination, and fully trained according to the denomination's standards, to conduct such religious worship and perform other duties usually performed by authorized members of the clergy of that denomination;

(B) Is not a lay preacher or a person not authorized to perform duties usually performed by clergy;

(C) Performs activities with a rational relationship to the religious calling of the minister; and

(D) Works solely as a minister in the United States, which may include administrative duties incidental to the duties of a minister.

Petition means USCIS Form I–360, Petition for Amerasian, Widow(er), or Special Immigrant, a successor form, or other form as may be prescribed by USCIS, along with a supplement containing attestations required by this section, the fee specified in 8 CFR 103.7(b)(1), and supporting evidence filed as provided by this part.

Religious denomination means a religious group or community of believers that is governed or administered under a common type of ecclesiastical government and includes one or more of the following:

(A) A recognized common creed or statement of faith shared among the denomination's members;

(B) A common form of worship;

(C) A common formal code of doctrine and discipline;

(D) Common religious services and ceremonies;

(E) Common established places of religious worship or religious congregations; or

(F) Comparable indicia of a bona fide religious denomination.

Religious occupation means an occupation that meets all of the following requirements:

(A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination.

(B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination.

(C) The duties do not include positions that are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible.

(D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

Religious vocation means a formal lifetime commitment, through vows, investitures, ceremonies, or similar indicia, to a religious way of life. The religious denomination must have a class of individuals whose lives are dedicated to religious practices and functions, as distinguished from the secular members of the religion. Examples of individuals practicing religious vocations include nuns, monks, and religious brothers and sisters.

Religious worker means an individual engaged in and, according to the denomination's standards, qualified for a religious occupation or vocation, whether or not in a professional capacity, or as a minister.

Tax-exempt organization means an organization that has received a determination letter from the IRS establishing that it, or a group that it belongs to, is exempt from taxation in accordance with sections 501(c)(3) of the Internal Revenue Code of 1986 or subsequent amendments or equivalent sections of prior enactments of the Internal Revenue Code.

(6) *Filing requirements.* A petition must be filed as provided in the petition form instructions either by the alien or by his or her prospective United States employer. After the date stated in section 101(a)(27)(C) of the Act, immigration or adjustment of status on the basis of this section is limited solely to ministers.

(7) *Attestation.* An authorized official of the prospective employer of an alien seeking religious worker status must complete, sign and date an attestation prescribed by USCIS and submit it along with the petition. If the alien is a self-petitioner and is also an authorized official of the prospective employer, the self-petitioner may sign the attestation. The prospective employer must specifically attest to all of the following:

(i) That the prospective employer is a bona fide non-profit religious organization or a bona fide organization which is affiliated with the religious denomination and is exempt from taxation;

(ii) The number of members of the prospective employer's organization;

(iii) The number of employees who work at the same location where the beneficiary will be employed and a summary of the type of responsibilities of those employees. USCIS may request a list of all employees, their titles, and a brief description of their duties at its discretion;

(iv) The number of aliens holding special immigrant or nonimmigrant religious worker status currently employed or employed within the past five years by the prospective employer's organization;

(v) The number of special immigrant religious worker and nonimmigrant religious worker petitions and applications filed by or on behalf of any aliens for employment by the prospective employer in the past five years;

(vi) The title of the position offered to the alien, the complete package of salaried or non-salaried compensation being offered, and a detailed description of the alien's proposed daily duties;

(vii) That the alien will be employed at least 35 hours per week;

(viii) The specific location(s) of the proposed employment;

(ix) That the alien has worked as a religious worker for the two years immediately preceding the filing of the application and is otherwise qualified for the position offered;

(x) That the alien has been a member of the denomination for at least two years immediately preceding the filing of the application;

(xi) That the alien will not be engaged in secular employment, and any salaried or non-salaried compensation for the work will be paid to the alien by the attesting employer; and

(xii) That the prospective employer has the ability and intention to compensate the alien at a level at which the alien and accompanying family members will not become public charges, and that funds to pay the alien's compensation do not include any monies obtained from the alien, excluding reasonable donations or tithing to the religious organization.

(8) *Evidence relating to the petitioning organization.* A petition shall include the following initial evidence relating to the petitioning organization:

(i) A currently valid determination letter from the Internal Revenue Service (IRS) establishing that the organization is a tax-exempt organization; or

(ii) For a religious organization that is recognized as tax-exempt under a group tax-exemption, a currently valid determination letter from the IRS

establishing that the group is tax-exempt; or

(iii) For a bona fide organization that is affiliated with the religious denomination, if the organization was granted tax-exempt status under section 501(c)(3) of the Internal Revenue Code of 1986, or subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, as something other than a religious organization:

(A) A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;

(B) Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;

(C) Organizational literature, such as books, articles, brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization; and

(D) A religious denomination certification. The religious organization must complete, sign and date a religious denomination certification certifying that the petitioning organization is affiliated with the religious denomination. The certification is to be submitted by the petitioner along with the petition.

(9) *Evidence relating to the qualifications of a minister.* If the alien is a minister, the petitioner must submit the following:

(i) A copy of the alien's certificate of ordination or similar documents reflecting acceptance of the alien's qualifications as a minister in the religious denomination; and

(ii) Documents reflecting acceptance of the alien's qualifications as a minister in the religious denomination, as well as evidence that the alien has completed any course of prescribed theological education at an accredited theological institution normally required or recognized by that religious denomination, including transcripts, curriculum, and documentation that establishes that the theological institution is accredited by the denomination, or

(iii) For denominations that do not require a prescribed theological education, evidence of:

(A) The denomination's requirements for ordination to minister;

(B) The duties allowed to be performed by virtue of ordination;

(C) The denomination's levels of ordination, if any; and

(D) The alien's completion of the denomination's requirements for ordination.

(10) *Evidence relating to compensation.* Initial evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS. If IRS documentation, such as IRS Form W–2 or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

(11) *Evidence relating to the alien's prior employment.* Qualifying prior experience during the two years immediately preceding the petition or preceding any acceptable break in the continuity of the religious work, must have occurred after the age of 14, and if acquired in the United States, must have been authorized under United States immigration law. If the alien was employed in the United States during the two years immediately preceding the filing of the application and:

(i) Received salaried compensation, the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W–2 or certified copies of income tax returns.

(ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.

(iii) Received no salary but provided for his or her own support, and provided support for any dependents, the petitioner must show how support was maintained by submitting with the petition additional documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other verifiable evidence acceptable to USCIS.

If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

(12) *Inspections, evaluations, verifications, and compliance reviews.* The supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, up to and including an on-site inspection of the petitioning organization. The inspection may include a tour of the organization's facilities, an interview with the organization's officials, a review of selected organization records relating to compliance with immigration laws and regulations, and an interview with any other individuals or review of any other records that the USCIS considers pertinent to the integrity of the organization. An inspection may include the organization headquarters, satellite locations, or the work locations planned for the applicable employee. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition.

* * * * *

PART 214—NONIMMIGRANT CLASSES

■ 3. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1185 (pursuant to E.O. 13323, 69 FR 241, 3 CFR, 2003 Comp., p. 278), 1186a, 1187, 1221, 1281, 1282, 1301–1305, 1372, 1379, 1731–32; section 643, Pub. L. 104–208, 110 Stat. 3009–708; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively, 8 CFR part 2.

■ 4. Section 214.2 is amended by revising paragraph (r) to read as follows:

§ 214.2 Special Requirements for admission, extension, and maintenance of status.

* * * * *

(r) *Religious workers.* This paragraph governs classification of an alien as a nonimmigrant religious worker (R–1).

(1) To be approved for temporary admission to the United States, or extension and maintenance of status, for the purpose of conducting the activities of a religious worker for a period not to exceed five years, an alien must:

(i) Be a member of a religious denomination having a bona fide non-profit religious organization in the United States for at least two years immediately preceding the time of application for admission;

(ii) Be coming to the United States to work at least in a part time position (average of at least 20 hours per week);

(iii) Be coming solely as a minister or to perform a religious vocation or occupation as defined in paragraph (r)(3) of this section (in either a professional or nonprofessional capacity);

(iv) Be coming to or remaining in the United States at the request of the petitioner to work for the petitioner; and

(v) Not work in the United States in any other capacity, except as provided in paragraph (r)(2) of this section.

(2) An alien may work for more than one qualifying employer as long as each qualifying employer submits a petition plus all additional required documentation as prescribed by USCIS regulations.

(3) *Definitions.* As used in this section, the term:

Bona fide non-profit religious organization in the United States means a religious organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, and possessing a currently valid determination letter from the Internal Revenue Service (IRS) confirming such exemption.

Bona fide organization which is affiliated with the religious denomination means an organization which is closely associated with the religious denomination and which is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, or subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, and possessing a currently valid determination letter from the IRS confirming such exemption.

Denominational membership means membership during at least the two-year period immediately preceding the filing date of the petition, in the same type of religious denomination as the United States religious organization where the alien will work.

Minister means an individual who:

(A) Is fully authorized by a religious denomination, and fully trained according to the denomination's standards, to conduct religious worship and perform other duties usually performed by authorized members of the clergy of that denomination;

(B) Is not a lay preacher or a person not authorized to perform duties usually performed by clergy;

(C) Performs activities with a rational relationship to the religious calling of the minister; and

(D) Works solely as a minister in the United States which may include administrative duties incidental to the duties of a minister.

Petition means USCIS Form I–129, Petition for a Nonimmigrant Worker, a successor form, or any other form as may be prescribed by USCIS, along with a supplement containing attestations required by this section, the fee specified in 8 CFR 103.7(b)(1), and supporting evidence required by this part.

Religious denomination means a religious group or community of believers that is governed or administered under a common type of ecclesiastical government and includes one or more of the following:

(A) A recognized common creed or statement of faith shared among the denomination's members;

(B) A common form of worship;

(C) A common formal code of doctrine and discipline;

(D) Common religious services and ceremonies;

(E) Common established places of religious worship or religious congregations; or

(F) Comparable indicia of a bona fide religious denomination.

Religious occupation means an occupation that meets all of the following requirements:

(A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination;

(B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination;

(C) The duties do not include positions which are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible; and

(D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

Religious vocation means a formal lifetime commitment, through vows, investitures, ceremonies, or similar indicia, to a religious way of life. The religious denomination must have a class of individuals whose lives are dedicated to religious practices and functions, as distinguished from the secular members of the religion. Examples of vocations include nuns, monks, and religious brothers and sisters.

Religious worker means an individual engaged in and, according to the denomination's standards, qualified for a religious occupation or vocation, whether or not in a professional capacity, or as a minister.

Tax-exempt organization means an organization that has received a determination letter from the IRS establishing that it, or a group it belongs to, is exempt from taxation in accordance with sections 501(c)(3) of the Internal Revenue Code of 1986, or subsequent amendments or equivalent sections of prior enactments of the Internal Revenue Code.

(4) *Requirements for admission/change of status; time limits*—(i) *Principal applicant (R–1 nonimmigrant).* If otherwise admissible, an alien who meets the requirements of section 101(a)(15)(R) of the Act may be admitted as an R–1 alien or changed to R–1 status for an initial period of up to 30 months from date of initial admission. If visa-exempt, the alien must present original documentation of the petition approval.

(ii) *Spouse and children (R–2 status).* The spouse and unmarried children under the age of 21 of an R–1 alien may be accompanying or following to join the R–1 alien, subject to the following conditions:

(A) R–2 status is granted for the same period of time and subject to the same limits as the principal, regardless of the time such spouse and children may have spent in the United States in R–2 status;

(B) Neither the spouse nor children may accept employment while in the United States in R–2 status; and

(C) The primary purpose of the spouse or children coming to the United States must be to join or accompany the principal R–1 alien.

(5) *Extension of stay or readmission.* An R–1 alien who is maintaining status or is seeking readmission and who satisfies the eligibility requirements of this section may be granted an extension of R–1 stay or readmission in R–1 status for the validity period of the petition, up to 30 months, provided the total period of time spent in R–1 status does not exceed a maximum of five years. A Petition for a Nonimmigrant Worker to request an extension of R–1 status must be filed by the employer with a supplement prescribed by USCIS containing attestations required by this section, the fee specified in 8 CFR 103.7(b)(1), and the supporting evidence, in accordance with the applicable form instructions.

(6) *Limitation on total stay.* An alien who has spent five years in the United States in R–1 status may not be readmitted to or receive an extension of stay in the United States under the R visa classification unless the alien has resided abroad and has been physically present outside the United States for the immediate prior year. The limitations in this paragraph shall not apply to R–1 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of six months or less per year. In addition, the limitations shall not apply to aliens who reside abroad and

regularly commute to the United States to engage in part-time employment. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception. Such proof shall consist of evidence such as arrival and departure records, transcripts of processed income tax returns, and records of employment abroad.

(7) *Jurisdiction and procedures for obtaining R–1 status.* An employer in the United States seeking to employ a religious worker, by initial petition or by change of status, shall file a petition in accordance with the applicable form instructions.

(8) *Attestation.* An authorized official of the prospective employer of an R–1 alien must complete, sign and date an attestation prescribed by USCIS and submit it along with the petition. The prospective employer must specifically attest to all of the following:

(i) That the prospective employer is a bona fide non-profit religious organization or a bona fide organization which is affiliated with the religious denomination and is exempt from taxation;

(ii) That the alien has been a member of the denomination for at least two years and that the alien is otherwise qualified for the position offered;

(iii) The number of members of the prospective employer's organization;

(iv) The number of employees who work at the same location where the beneficiary will be employed and a summary of the type of responsibilities of those employees. USCIS may request a list of all employees, their titles, and a brief description of their duties at its discretion;

(v) The number of aliens holding special immigrant or nonimmigrant religious worker status currently employed or employed within the past five years by the prospective employer's organization;

(vi) The number of special immigrant religious worker and nonimmigrant religious worker petitions and applications filed by or on behalf of any aliens for employment by the prospective employer in the past five years;

(vii) The title of the position offered to the alien and a detailed description of the alien's proposed daily duties;

(viii) Whether the alien will receive salaried or non-salaried compensation and the details of such compensation;

(ix) That the alien will be employed at least 20 hours per week;

(x) The specific location(s) of the proposed employment; and

(xi) That the alien will not be engaged in secular employment.

(9) *Evidence relating to the petitioning organization.* A petition shall include the following initial evidence relating to the petitioning organization:

(i) A currently valid determination letter from the IRS showing that the organization is a tax-exempt organization; or

(ii) For a religious organization that is recognized as tax-exempt under a group tax-exemption, a currently valid determination letter from the IRS establishing that the group is tax-exempt; or

(iii) For a bona fide organization that is affiliated with the religious denomination, if the organization was granted tax-exempt status under section 501(c)(3), or subsequent amendment or equivalent sections of prior enactments, of the Internal Revenue Code, as something other than a religious organization:

(A) A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;

(B) Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;

(C) Organizational literature, such as books, articles, brochures, calendars, flyers, and other literature describing the religious purpose and nature of the activities of the organization; and

(D) A religious denomination certification. The religious organization must complete, sign and date a statement certifying that the petitioning organization is affiliated with the religious denomination. The statement must be submitted by the petitioner along with the petition.

(10) *Evidence relating to the qualifications of a minister.* If the alien is a minister, the petitioner must submit the following:

(i) A copy of the alien's certificate of ordination or similar documents reflecting acceptance of the alien's qualifications as a minister in the religious denomination; and

(ii) Documents reflecting acceptance of the alien's qualifications as a minister in the religious denomination, as well as evidence that the alien has completed any course of prescribed theological education at an accredited theological institution normally required or recognized by that religious denomination, including transcripts, curriculum, and documentation that establishes that the theological education is accredited by the denomination, or

(iii) For denominations that do not require a prescribed theological education, evidence of:

(A) The denomination's requirements for ordination to minister;

(B) The duties allowed to be performed by virtue of ordination;

(C) The denomination's levels of ordination, if any; and

(D) The alien's completion of the denomination's requirements for ordination.

(11) *Evidence relating to compensation.* Initial evidence must state how the petitioner intends to compensate the alien, including specific monetary or in-kind compensation, or whether the alien intends to be self-supporting. In either case, the petitioner must submit verifiable evidence explaining how the petitioner will compensate the alien or how the alien will be self-supporting. Compensation may include:

(i) *Salaried or non-salaried compensation.* Evidence of compensation may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS. IRS documentation, such as IRS Form W–2 or certified tax returns, must be submitted, if available. If IRS documentation is unavailable, the petitioner must submit an explanation for the absence of IRS documentation, along with comparable, verifiable documentation.

(ii) *Self support.* (A) If the alien will be self-supporting, the petitioner must submit documentation establishing that the position the alien will hold is part of an established program for temporary, uncompensated missionary work, which is part of a broader international program of missionary work sponsored by the denomination.

(B) An established program for temporary, uncompensated work is defined to be a missionary program in which:

(*1*) Foreign workers, whether compensated or uncompensated, have previously participated in R–1 status;

(*2*) Missionary workers are traditionally uncompensated;

(*3*) The organization provides formal training for missionaries; and

(*4*) Participation in such missionary work is an established element of religious development in that denomination.

(C) The petitioner must submit evidence demonstrating:

(*1*) That the organization has an established program for temporary, uncompensated missionary work;

(*2*) That the denomination maintains missionary programs both in the United states and abroad;

(*3*) The religious worker's acceptance into the missionary program;

(*4*) The religious duties and responsibilities associated with the traditionally uncompensated missionary work; and

(*5*) Copies of the alien's bank records, budgets documenting the sources of self-support (including personal or family savings, room and board with host families in the United States, donations from the denomination's churches), or other verifiable evidence acceptable to USCIS.

(12) *Evidence of previous R–1 employment.* Any request for an extension of stay as an R–1 must include initial evidence of the previous R–1 employment. If the beneficiary:

(i) Received salaried compensation, the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W–2 or certified copies of filed income tax returns, reflecting such work and compensation for the preceding two years.

(ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available. If IRS documentation is unavailable, an explanation for the absence of IRS documentation must be provided, and the petitioner must provide verifiable evidence of all financial support, including stipends, room and board, or other support for the beneficiary by submitting a description of the location where the beneficiary lived, a lease to establish where the beneficiary lived, or other evidence acceptable to USCIS.

(iii) Received no salary but provided for his or her own support, and that of any dependents, the petitioner must show how support was maintained by submitting with the petition verifiable documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other evidence acceptable to USCIS.

(13) *Change or addition of employers.* An R–1 alien may not be compensated for work for any religious organization other than the one for which a petition has been approved or the alien will be out of status. A different or additional employer seeking to employ the alien may obtain prior approval of such employment through the filing of a separate petition and appropriate supplement, supporting documents, and fee prescribed in 8 CFR 103.7(b)(1).

(14) *Employer obligations.* When an R–1 alien is working less than the required number of hours or has been released from or has otherwise terminated employment before the expiration of a period of authorized R–1 stay, the R–1 alien's approved employer must notify DHS within 14 days using procedures set forth in the instructions to the petition or otherwise prescribed by USCIS on the USCIS Internet Web site at *www.uscis.gov.*

(15) *Nonimmigrant intent.* An alien classified under section 101(a)(15)(R) of the Act shall maintain an intention to depart the United States upon the expiration or termination of R–1 or R–2 status. However, a nonimmigrant petition, application for initial admission, change of status, or extension of stay in R classification may not be denied solely on the basis of a filed or an approved request for permanent labor certification or a filed or approved immigrant visa preference petition.

(16) *Inspections, evaluations, verifications, and compliance reviews.* The supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, up to and including an on-site inspection of the petitioning organization. The inspection may include a tour of the organization's facilities, an interview with the organization's officials, a review of selected organization records relating to compliance with immigration laws and regulations, and an interview with any other individuals or review of any other records that the USCIS considers pertinent to the integrity of the organization. An inspection may include the organization headquarters, or satellite locations, or the work locations planned for the applicable employee. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition.

(17) *Denial and appeal of petition.* USCIS will provide written notification of the reasons for the denial under 8 CFR 103.3(a)(1). The petitioner may appeal the denial under 8 CFR 103.3.

(18) *Revocation of approved petitions*—(i) *Director discretion.* The director may revoke a petition at any time, even after the expiration of the petition.

(ii) *Automatic revocation.* The approval of any petition is automatically revoked if the petitioner ceases to exist or files a written withdrawal of the petition.

(iii) *Revocation on notice*—(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

(*1*) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition;

(*2*) The statement of facts contained in the petition was not true and correct;

(*3*) The petitioner violated terms and conditions of the approved petition;

(*4*) The petitioner violated requirements of section 101(a)(15)(R) of the Act or paragraph (r) of this section; or

(*5*) The approval of the petition violated paragraph (r) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition.

(19) *Appeal of a revocation of a petition.* A petition that has been revoked on notice in whole or in part may be appealed under 8 CFR 103.3. Automatic revocations may not be appealed.

* * * * *

PART 299—IMMIGRATION FORMS

■ 5. The authority citation for part 299 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103; 8 CFR part 2.

■ 6. Section 299.1 is amended in the table by revising the entries for Forms "I–129" and "I–360," to read as follows:

§ 299.1 Prescribed forms.

* * * * *

Form No.	Edition date	Title and description
*	*	* * * * *
I–129	XX–XX–XX	Petition for a Nonimmigrant Worker.
*	*	* * * * *
I–360	XX–XX–XX	Petition for Amerasian, Widow(er) or Special Immigrant.
*	*	* * * * *

■ 7. Section 299.5 is amended in the table, by revising the entries for Forms "I–129" and "I–360," to read as follows:

§ 299.5 Display of control numbers.

* * * * *

Form No.	Form title	Currently assigned OMB control No.
*	* * * * *	*
I–129	Petition for a Nonimmigrant Worker	1615–0009
*	* * * * *	*
I–360	Petition for Amerasian, Widow(er) or Special Immigrant	1615–0020
*	* * * * *	*

Michael Chertoff,

Secretary.

[FR Doc. E8–28225 Filed 11–25–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2465–08; DHS Docket No. USCIS–2008–0074]

Special Immigrant Nonminister Religious Worker Program Act

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice.

SUMMARY: As required by the Special Immigrant Nonminister Religious Worker Program Act, Public Law 110–391, this notice announces that the Secretary of Homeland Security has issued final regulations to eliminate or reduce fraud related to the granting of special immigrant status for nonminister religious workers. Those regulations became effective upon publication in today's issue of the **Federal Register**.

DATES: This notice is effective November 26, 2008.

FOR FURTHER INFORMATION CONTACT: Emisa Tamanaha, Adjudications Officer, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529, telephone (202) 272–1505.

SUPPLEMENTARY INFORMATION: Section 203(b)(4) of the Immigration and Nationality Act (Act), 8 U.S.C. 1153(b)(4), provides for the admission as special immigrants of individuals who qualify as professional or other religious workers in a religious vocation or occupation as defined at sections 101(a)(27)(C)(ii)(II) and (III) of the Act, 8 U.S.C. 1101(a)(27)(C)(ii)(II) and (III). These provisions, originally enacted in 1990, have been extended multiple times and last expired on October 1, 2008.

On October 10, 2008, President Bush signed the Special Immigrant Nonminister Religious Worker Program Act, Public Law 110–391. Section (2)(a) of Public Law 110–391 amended subclauses (II) and (III) of section 101(a)(27)(C)(ii) of the Act, by extending the October 1, 2008, expiration date to March 6, 2009. Section (2)(b) of Public Law 110–391 requires the Secretary of Homeland Security to (1) Issue final regulations to eliminate or reduce fraud related to the granting of special immigrant status to nonminister religious workers; (2) submit a certification to Congress that such regulations have been issued and are in effect; (3) publish a notice in the **Federal Register** announcing that the regulations have been issued and are in effect. Section (2)(d) of Public Law 110–391 prescribes that the statutory extension of the nonminister classifications is not effective until the certification to Congress is submitted.

On November 26, 2008, the Secretary of Homeland Security published final regulations to eliminate or reduce fraud in the entire religious worker program. These regulations address both the nonimmigrant religious worker classification and the special immigrant religious worker classification, including nonministers as defined at section 101(a)(27)(C)(ii)(II) and (III) of the Act. The regulations are effective on November 26, 2008.

This notice is issued in compliance with section (2)(b)(2) of Public Law 110–391 to certify that the regulations have been published and are in effect.

Dated: November 21, 2008.

Michael Chertoff,

Secretary.

[FR Doc. E8–28224 Filed 11–25–08; 8:45 am]

BILLING CODE 9111–97–P

Federal Register

Wednesday,
November 26, 2008

Part IX

The President

Proclamation 8322—Thanksgiving Day, 2008

Federal Register
Vol. 73, No. 229
Wednesday, November 26, 2008

Presidential Documents

Title 3—

The President

Proclamation 8322 of November 21, 2008

Thanksgiving Day, 2008

By the President of the United States of America

A Proclamation

Thanksgiving is a time for families and friends to gather together and express gratitude for all that we have been given, the freedoms we enjoy, and the loved ones who enrich our lives. We recognize that all of these blessings, and life itself, come not from the hand of man but from Almighty God.

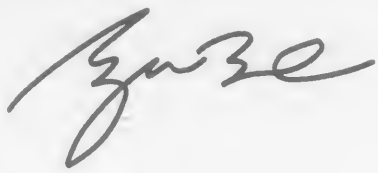
Every Thanksgiving, we remember the story of the Pilgrims who came to America in search of religious freedom and a better life. Having arrived in the New World, these early settlers gave thanks to the Author of Life for granting them safe passage to this abundant land and protecting them through a bitter winter. Our Nation's first President, George Washington, stated in the first Thanksgiving proclamation that "It is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor." While in the midst of the Civil War, President Abraham Lincoln revived the tradition of proclaiming a day of thanksgiving, asking God to heal our wounds and restore our country.

Today, as we look back on the beginnings of our democracy, Americans recall that we live in a land of many blessings where every person has the right to live, work, and worship in freedom. Our Nation is especially thankful for the brave men and women of our Armed Forces who protect these rights while setting aside their own comfort and safety. Their courage keeps us free, their sacrifice makes us grateful, and their character makes us proud. Especially during the holidays, our whole country keeps them and their families in our thoughts and prayers. Americans are also mindful of the need to share our gifts with others, and our Nation is moved to compassionate action. We pay tribute to all caring citizens who reach out a helping hand and serve a cause larger than themselves.

On this day, let us all give thanks to God who blessed our Nation's first days and who blesses us today. May He continue to guide and watch over our families and our country always.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim November 27, 2008, as a National Day of Thanksgiving. I encourage all Americans to gather together in their homes and places of worship with family, friends, and loved ones to strengthen the ties that bind us and give thanks for the freedoms and many blessings we enjoy.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-first day of November, in the year of our Lord two thousand eight, and of the Independence of the United States of America the two hundred and thirty-third.



[FR Doc. E8–28415
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ENERGY DEPARTMENT

Federal Energy Regulatory Commission

Mandatory Reliability Standard for Nuclear Plant Interface Coordination; published 10-27-08

Standards of Conduct for Transmission Providers; published 10-27-08

ENVIRONMENTAL PROTECTION AGENCY

Fort Peck Assiniboine and Sioux Tribes in Montana:

Underground Injection Control (UIC) Program, etc.; published 10-27-08

Fuels and Fuel Additives:

Renewable Fuel Standard Program Requirements; Modifications; published 11-26-08

Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure Rule; Revisions to the Regulatory Definition of Navigable Waters; published 11-26-08

Pesticide Tolerances:

Diazinon; published 11-26-08

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

New Animal Drugs; Cephalosporin Drugs; Extralabel Animal Drug Use; Revocation of Order of Prohibition; Withdrawal; published 11-26-08

HOMELAND SECURITY DEPARTMENT

U.S. Citizenship and Immigration Services

Special Immigrant and Nonimmigrant Religious Workers; published 11-26-08

HOUSING AND URBAN DEVELOPMENT DEPARTMENT

Pet Ownership for the Elderly and Persons with Disabilities; published 10-27-08

POSTAL REGULATORY COMMISSION

Administrative Practices and Procedures:

Postal Service; published 11-26-08

SECURITIES AND EXCHANGE COMMISSION

Temporary Exemption for Liquidation of Certain Money Market Funds; published 11-26-08

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness Directives:

DG Flugzeugbau GmbH Models DG-1000S and DG 1000T Gliders; published 11-6-08

Stemme GmbH & Co. KG Models S10 and S10 V Gliders; published 11-6-08

Various Transport Category Airplanes Equipped with Auxiliary Fuel Tanks Installed in Accordance with Certain Supplemental Type Certificates; published 10-22-08

TRANSPORTATION DEPARTMENT

Federal Railroad Administration

Railroad Safety Enforcement Procedures; Enforcement, Appeal and Hearing Procedures for Rail Routing Decisions; published 11-26-08

VETERANS AFFAIRS DEPARTMENT

Servicemembers' Group Life Insurance Traumatic Injury Protection Program; published 11-26-08

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AGRICULTURE DEPARTMENT

Farm Service Agency

Maximum Interest Rates on Guaranteed Farm Loans; comments due by 12-1-08; published 9-30-08 [FR E8-22871]

AGRICULTURE DEPARTMENT

Rural Utilities Service

General Policies, Types of Loans, Loan Requirements-Telecommunications; comments due by 12-5-08; published 11-5-08 [FR E8-26318]

Telecommunications; General Policies, Types of Loans, Loan Requirements; comments due by 12-5-08; published 11-5-08 [FR E8-26317]

COMMERCE DEPARTMENT

Industry and Security Bureau

De Minimis U.S. Content in Foreign Made Items; comments due by 12-1-08; published 10-1-08 [FR E8-23142]

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Endangered and Threatened Species:

Proposed Endangered Status for the Gulf of Maine Distinct Population Segment of Atlantic Salmon; comments due by 12-2-08; published 9-3-08 [FR E8-20412]

Proposed Endangered Status for the Gulf of Maine Distinct Population Segment of Atlantic Salmon, etc.; comments due by 12-2-08; published 10-21-08 [FR E8-25076]

Fisheries of the Exclusive Economic Zone Off Alaska:

Northern Rockfish in the Gulf of Alaska; comments due by 12-3-08; published 11-21-08 [FR E8-27743]

Trawl Gear in the Gulf of Alaska; comments due by 12-4-08; published 11-19-08 [FR E8-27480]

Listing Endangered and Threatened Wildlife and Designating Critical Habitat:

90-day Finding for a Petition to Revise the Critical Habitat Designation for the Hawaiian Monk Seal; comments due by 12-2-08; published 10-3-08 [FR E8-23467]

COMMERCE DEPARTMENT

National Telecommunications and Information Administration

E-911 Grant Program; comments due by 12-2-08; published 10-3-08 [FR E8-23266]

DEFENSE DEPARTMENT

Army Department

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Approval and Promulgation of Air Quality Implementation Plans:

West Virginia; Revised Motor Vehicle Emission Budgets for the Parkersburg 8-Hour Ozone Maintenance Area; comments due by 12-1-08; published 10-30-08 [FR E8-25660]

Environmental Statements; Notice of Intent:

Coastal Nonpoint Pollution Control Programs; States and Territories—

Florida and South Carolina; Open for comments until further notice; published 2-11-08 [FR 08-00596]

National Emission Standards:

Halogenated Solvent Cleaning; comments due by 12-4-08; published 10-20-08 [FR E8-24013]

Outer Continental Shelf Air Regulations Consistency Update for North Carolina; comments due by 12-5-08; published 11-5-08 [FR E8-26360]

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Requirements for Transboundary Shipments of Wastes Between OECD Countries, Requirements for Export Shipments of Spent Lead-Acid Batteries, etc.; comments due by 12-5-08; published 10-6-08 [FR E8-22536]

Significant New Use Rules on Certain Chemical Substances; comments due by 12-5-08; published 11-5-08 [FR E8-26409]

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Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers; Petition for Rulemaking; comments due by 12-2-08; published 10-23-08 [FR E8-25058]

Petition for Rulemaking to Impose a Spectrum Aggregation Limit on All Commercial Terrestrial Wireless Spectrum Below 2.3 GHz; comments due by 12-2-08; published 10-23-08 [FR E8-25056]

Radio Broadcasting Services:

Beatty and Goldfield, NV; comments due by 12-1-08; published 10-23-08 [FR E8-25347]

Crandon, WI; comments due by 12-1-08; published 10-23-08 [FR E8-25323]

Crowell, Knox City, Quanah, and Rule, TX; comments

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.*

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available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 6867/P.L. 110–449

Unemployment Compensation Extension Act of 2008 (Nov. 21, 2008; 122 Stat. 5014)

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