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

WHEN: Tuesday, September 15, 2009
9:00 a.m.–12:30 p.m.

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

RESERVATIONS: (202) 741-6008

Contents

Federal Register
Vol. 74, No. 144
Wednesday, July 29, 2009

Separate Parts In This Issue

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

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

CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR
Proclamations:
8398.....37923
8399.....37925

7 CFR
916.....37495
917.....37495
922.....37496
1470.....37499

11 CFR
8.....37519
9428.....37519

14 CFR
39 (3 documents).....37521, 37523, 37528
Proposed Rules:
39.....37657

15 CFR
902.....37530

18 CFR
35.....37776
Proposed Rules:
284.....37658

27 CFR
40.....37551
41.....37551
45.....37551

29 CFR
Proposed Rules:
4001.....37666
4022.....37666

39 CFR
3020.....37553

40 CFR
52.....37556
180 (10 documents).....37564, 37571, 37578, 37584, 37591, 37598, 37605, 37612, 37618, 37621

47 CFR
64.....37624

48 CFR
201.....37625
202 (2 documents).....37626, 37642
204 (3 documents).....37642, 37644, 37645
207 (2 documents).....37625, 37648
212.....37626
215.....37625
217 (2 documents).....37642, 37649
219.....37644
225 (2 documents).....37626, 37650
235.....37648
236.....37645
237 (2 documents).....37625, 37645
239.....37645
245.....37645
247.....37652
252 (7 documents).....37626, 37642, 37645, 37648, 37649, 37650, 37652
253.....37644
Proposed Rules:
215.....37669
217.....37669
243.....37669

49 CFR
390.....37653
512.....37878
599.....37878

50 CFR
679 (3 documents).....37654, 37655, 37656
697.....37530
Proposed Rules:
223.....37671
224 (2 documents).....37671, 37674

Rules and Regulations

Federal Register
Vol. 74, No. 144
Wednesday, July 29, 2009

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916 and 917

[Doc. No. AMS–FV–08–0108; FV09–916/917–1 FIR]

Nectarines and Peaches Grown in California; Changes in Handling Requirements for Fresh Nectarines and Peaches

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Affirmation of interim final rule as final rule.

SUMMARY: The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim final rule that changed the handling requirements applicable to well matured fruit covered under the nectarine and peach marketing orders (orders). The interim final rule updated the lists of commercially significant varieties subject to size regulations under the orders. The interim final rule was necessary to revise the regulations for the current marketing season, which began in April.

DATES: *Effective Date:* Effective July 30, 2009.

FOR FURTHER INFORMATION CONTACT: Jennifer Robinson, Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906; or E-mail: *Jen.Robinson@ams.usda.gov* or *Kurt.Kimmel@ams.usda.gov*.

Small businesses may obtain information on complying with this and other marketing order regulations by viewing a guide at the following Web site: *http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide;* or by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order Nos. 916 and 917, both as amended (7 CFR parts 916 and 917), regulating the handling of nectarines and peaches grown in California, respectively, hereinafter referred to as the "orders." The orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

The shipping of "well-matured" nectarines and peaches grown in California is regulated by 7 CFR parts 916 and 917, respectively. Among other things, certain varieties of fruit are subject to variety-specific size restrictions. The lists of commercially-significant varieties so regulated are updated regularly as the volume of new varieties increases and as older varieties become obsolete. The sizes of varieties not subject to variety-specific regulations are regulated under generic regulations contained in the orders.

In an interim final rule published in the **Federal Register** on February 20, 2009, and effective on February 21, 2009 (74 FR 7778, Doc. No AMS–FV–08–0108, FV09–916/917–1 IFR), §§ 916.356 and 917.459 were amended by adding ten nectarine varieties and seven peach varieties to the lists of commercially-significant varieties that are subject to variety-specific size regulations under the orders. Additionally, four nectarine varieties and five peach varieties were removed from the variety-specific size regulations. Finally, a reference to the regulation of other than "well-matured" peaches was removed from § 917.459(a)(6)(iii) to conform with previous changes to the order.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

Industry Information

There are approximately 120 California nectarine and peach handlers subject to regulation under the orders, and approximately 550 producers of these fruits in the production area. Small agricultural service firms, which include handlers, are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those whose annual receipts are less than $7,000,000. Small agricultural producers are defined as those having annual receipts of less than $750,000. A majority of these handlers and producers may be classified as small entities.

For the 2008 season, the committees' staff estimated that the average handler price received was $9.00 per container or container equivalent of nectarines or peaches. A handler would have to ship at least 777,778 containers to have annual receipts of $7,000,000. Given data on shipments maintained by the committees' staff and the average handler price received during the 2008 season, the committees' staff estimates that approximately 78 percent of all the handlers within the industry would be considered small handlers.

For the 2008 season, the committees estimated the average producer price received was $4.25 per container or container equivalent for nectarines and peaches. A producer would have to produce at least 176,471 containers of nectarines and peaches to have annual receipts of $750,000. Given data maintained by the committees' staff and the average producer price received during the 2008 season, the committees' staff estimates that more than 88 percent of the producers within the industry would be considered small producers.

With an average producer price of $4.25 per container or container equivalent, and a combined packout of

nectarines and peaches of 45,543,561 containers, the value of the 2008 packout is estimated to be $193,560,134. Dividing this total estimated grower revenue figure by the estimated number of producers (550) yields an estimated average revenue per producer of about $351,928 from the sales of peaches and nectarines.

Under authority provided in §§ 916.52 and 917.41 of the orders, grade, size, maturity, pack, and container marking requirements are established for fresh shipments of California nectarines and peaches, respectively. Such requirements are in effect on a continuing basis.

Sections 916.356 and 917.459 of the orders' rules and regulations establish minimum sizes for various varieties of nectarines and peaches. This rule continues in effect the action that adjusted the minimum fruit sizes authorized for certain varieties of each commodity for the 2009 season. Minimum size regulations are put in place to encourage producers to leave fruit on the trees for a longer period of time, increasing both maturity and fruit size. Increased fruit size increases the number of packed containers per acre and, coupled with heightened maturity levels, also provides greater consumer satisfaction, which in turn fosters repeat purchases that benefit producers and handlers alike.

Annual adjustments to minimum sizes of nectarines and peaches, such as these, are recommended by the committees based upon historical data, producer and handler information regarding sizes attained by different varieties, and trends in consumer purchases.

An alternative to such action would include not establishing minimum size regulations for these new varieties. Such an action, however, would be a significant departure from the committees' past practices and represent a significant change in the regulations as they currently exist. For these reasons, this alternative was not recommended.

The committees make recommendations regarding the revisions in handling requirements after considering all available information, including comments received by committee staff. At the meetings, the impact of and alternatives to these recommendations are deliberated. The committees consist of individual producers and handlers with many years of experience in the industry who are familiar with industry practices and trends. All committee meetings are open to the public and comments are widely solicited. In addition, minutes of all meetings are distributed to committee members and others who have requested them, and are also available on the committees' Web site, thereby increasing the availability of this critical information within the industry.

Regarding the impact of this action on the affected entities, both large and small entities are expected to benefit from the changes, and the costs of compliance are not expected to be significantly different between large and small entities.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large nectarine and peach handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

In addition, as noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

Further, the committees' meetings were widely publicized throughout the nectarine and peach industry and all interested parties were invited to attend the meetings and participate in committee deliberations. Like all committee meetings, the November 25, 2008, meetings were public meetings and all entities, both large and small, were able to express their views on this issue. Also, the committees have a number of appointed subcommittees to review certain issues and make recommendations to the committees. The committees' Tree Fruit Quality Subcommittee met on October 29, 2008, and discussed this issue in detail. That meeting was also a public meeting and both large and small entities were able to participate and express their views.

Comments on the interim final rule were required to be received on or before April 21, 2009. One comment, supporting the interim final rule, was received. Therefore, for the reasons given in the interim final rule, we are adopting the interim final rule as a final rule, without change.

To view the interim final rule and the comment received, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=AMS-FV-08-0108.*

This action also affirms information contained in the interim final rule concerning Executive Orders 12866 and 12988, the Paperwork Reduction Act (44 U.S.C. Chapter 35), and the E-Gov Act (44 U.S.C. 101).

After consideration of all relevant material presented, it is found that finalizing the interim final rule, without change, as published in the **Federal Register** (74 FR 7778, February 20, 2009) will tend to effectuate the declared policy of the Act.

List of Subjects

7 CFR Part 916

Marketing agreements, Nectarines, Reporting and recordkeeping requirements.

7 CFR Part 917

Marketing agreements, Peaches, Pears, Reporting and recordkeeping requirements.

PARTS 916 AND 917—[AMENDED]

■ Accordingly, the interim final rule that amended 7 CFR parts 916 and 917 and that was published at 74 FR 7778 on February 20, 2009, is adopted as final rule, without change.

Dated: July 24, 2009.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

[FR Doc. E9–18099 Filed 7–28–09; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 922

[Doc. No. AMS–FV–09–0038; FV09–922–1 IFR]

Apricots Grown in Designated Counties in Washington; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule decreases the assessment rate established for the Washington Apricot Marketing Committee (Committee) for the 2009–2010 and subsequent fiscal periods from $2.00 to $1.00 per ton of apricots handled. The Committee locally administers the marketing order, which regulates the handling of apricots grown in designated counties in Washington. Assessments upon apricot handlers are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal period begins April 1 and ends March 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective July 30, 2009. Comments received by September 28,

2009, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or Internet: *http://www.regulations.gov*. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov*. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Robert J. Curry or Gary D. Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW. Third Avenue, Suite 385, Portland, OR 97204; telephone: (503) 326–2724, Fax: (503) 326–7440; or e-mail: *Robert.Curry@ams.usda.gov* or *GaryD.Olson@ams.usda.gov*.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Ave., SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491; Fax: (202) 720–8938; or e-mail: *Jay.Guerber@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 922 (7 CFR 922), regulating the handling of apricots grown in designated counties in Washington, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, Washington apricot handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable apricots beginning April 1, 2009, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule decreases the assessment rate established for the Committee for the 2009–2010 and subsequent fiscal periods from $2.00 to $1.00 per ton of apricots handled.

The order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers in designated counties in Washington. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate was formulated and discussed at a public meeting, thus all directly affected persons had an opportunity to participate and provide input.

For the 2008–2009 and subsequent fiscal periods, the Committee recommended, and USDA approved, an assessment rate of $2.00 per ton of fresh apricots handled. This assessment rate continues in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on May 21, 2009, and unanimously recommended 2009–2010 expenditures of $7,843 and a decreased assessment rate of $1.00 per ton. In comparison, last year's budgeted expenditures were $7,093. The recommended assessment rate is $1.00 less than the $2.00 rate in effect since the 2008–2009 fiscal period. The Committee recommended the assessment rate decrease to help offset the increase in income that would have accompanied the much larger apricot crop projected for this summer. This assessment rate reduction will also have the effect of maintaining the Committee's monetary reserve at a level commensurate with program objectives and requirements.

The major expenditures recommended by the Committee for the 2009–2010 fiscal period are $4,800 for the management fee and $3,043 for operational expenses, which include travel expenses, financial audit, compliance, insurance and bonds, equipment maintenance and miscellaneous expenses. In comparison, budgeted expenses for the 2008–2009 seasons were $4,800 and $2,293, respectively.

The assessment rate recommended by the Committee was derived by dividing anticipated expenses by expected shipments of Washington apricots. Applying the $1.00 per ton assessment rate to the Committee's 7,600 ton crop estimate should provide $7,600 in assessment income. The assessment income, in addition to approximately $243 from the Committee's reserve would be adequate to cover the recommended $7,843 budget for the 2009–2010 fiscal period. Funds in the reserve ($8,609 as of March 31, 2009), would be kept within the maximum permitted by the order of approximately one fiscal period's operational expenses (§ 922.42.)

The assessment rate established with this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although the assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA would evaluate the Committee recommendations and other available information to determine whether modification of the assessment rate is

needed. Further rulemaking will be undertaken as necessary. The Committee's 2009–2010 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 300 producers of fresh apricots in the regulated production area and approximately 22 handlers subject to regulation under the order. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $7,000,000.

Based on information compiled by National Agricultural Statistics Service, the value of Washington's total apricot production in 2008 was $6,601,000. Since the Committee reports that there are 300 producers, the average annual farm-gate revenue from the sale of apricots last year was approximately $22,000 per producer. In addition, based on Committee records and 2008 f.o.b. prices ranging from $20.00 to $26.00 per 24-pound loose-pack carton as reported by AMS Market News Service, the average annual revenue per handler in 2008 was $357,197. In view of the foregoing, the majority of Washington apricot producers and handlers may be classified as small entities.

This rule decreases the assessment rate established for the Committee and collected from handlers for the 2009–2010 and subsequent fiscal periods from $2.00 to $1.00 per ton. The Committee unanimously recommended 2009–2010 expenditures of $7,843 and the decreased assessment rate at the May 21, 2009, meeting. The recommended assessment rate is $1.00 less than the rate in effect since the 2008–2009 fiscal period. With an estimated 2009–2010 apricot crop of 7,600 tons, assessment income combined with funds from the Committee's monetary reserve should be adequate to cover budgeted expenses. The Committee recommended decreasing the assessment rate by 50 percent due to the near doubling of the crop estimate this year compared to the crop actually harvested last year. With current crop and expense estimates, the Committee estimates that its reserve fund at the end of the 2009–2010 fiscal period will be about $8,300. This is approximately one fiscal period's operational expenses as authorized by the order (§ 922.42).

The major expenditures recommended by the Committee for the 2009–2010 fiscal period include $4,800 for the management fee and $3,043 for operational expenses. In comparison, budgeted expenses for the 2008–2009 seasons were $4,800 and $2,293, respectively.

The Committee discussed alternatives to this rule. With the potential for a much larger crop this season, assessment rates over $1.00 per ton were not seriously considered because of the potential of generating too much income and thus increasing the reserve fund to an amount higher than program requirements allow.

A review of historical information and preliminary information pertaining to the upcoming crop year indicates that the producer price for the 2009–2010 season could average about $1,000 per ton. Therefore, the estimated assessment revenue for the 2009–2010 fiscal period as a percentage of total producer revenue could approximate 0.1 percent.

This action decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers. In addition, the Committee's meeting was widely publicized throughout the Washington apricot industry and all interested persons were invited to attend and participate in the Committee's deliberations on all issues. Like all Committee meetings, the May 21, 2009, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

This action imposes no additional reporting or recordkeeping requirements on either small or large Washington apricot handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. Furthermore, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2009–2010 fiscal period began on April 1, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable Washington apricots handled during such fiscal period; (2) this action decreases the assessment rate for assessable apricots beginning with the 2009–2010 fiscal period; (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting; and (4) this interim final rule provides a 60-day comment period, and all comments timely received will be considered prior to finalization of this ruled.

List of Subjects in 7 CFR Part 922

Apricots, Marketing agreements, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 922 is amended as follows:

PART 922—APRICOTS GROWN IN DESIGNATED COUNTIES IN WASHINGTON

■ 1. The authority citation for 7 CFR part 922 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 922.235 is revised to read as follows:

§ 922.235 Assessment rate.

On or after April 1, 2009, an assessment rate of $1.00 per ton is established for the Washington Apricot Marketing Committee.

Dated: July 24, 2009.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

[FR Doc. E9–18108 Filed 7–28–09; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1470

RIN 0578–AA43

Conservation Stewardship Program

AGENCY: Commodity Credit Corporation, Natural Resources Conservation Service, United States Department of Agriculture.

ACTION: Interim final rule with request for comment.

SUMMARY: Section 2301 of the Food, Conservation, and Energy Act of 2008 (the 2008 Act) amended the Food Security Act of 1985 to establish the Conservation Stewardship Program. The purpose of the Conservation Stewardship Program is to encourage producers to address resource concerns in a comprehensive manner by undertaking additional conservation activities, and improving, maintaining and managing existing conservation activities. This interim final rule, with request for comment, sets forth the policies, procedures, and requirements necessary to implement the Conservation Stewardship Program as authorized by the 2008 Act amendments.

DATES: *Effective Date:* This interim final rule is effective July 29, 2009.

Comment Date: Submit comments on or before September 28, 2009.

ADDRESSES: You may send comments (identified by Docket Number NRCS–IFR–09004) using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://regulations.gov* and follow the instructions for sending comments electronically;
- *E-mail directly to NRCS: CSP2008@wdc.usda.gov;*
- *Mail:* Gregory Johnson, Director, Financial Assistance Programs Division, U.S. Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 5237–S, Washington, DC 20250–2890;
- *Fax:* (202) 720–4265;
- *Hand Delivery Room:* USDA South Building, 1400 Independence Avenue, SW., Room 5237–S, Washington, DC 20250, between 9 a.m. and 4 p.m., Monday through Friday, except Federal Holidays. Please ask the guard at the entrance to the South Building to call (202) 720–4527 in order to be escorted into the building;
- This interim final rule may be accessed via the Internet. Users can access the NRCS homepage at *http://www.nrcs.usda.gov;* select the Farm Bill link from the menu; select the Interim final link from beneath the Final and Interim Final Rules Index title. Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, *etc.*) should contact the USDA TARGET Center at: (202) 720–2600 (voice and TDD).

FOR FURTHER INFORMATION CONTACT: Gregory Johnson, Director, Financial Assistance Programs Division, U.S. Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 5237–S, Washington, DC 20250; Phone: (202) 720–1845; Fax: (202) 720–4265; or e-mail *CSP2008@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Regulatory Certifications

Executive Order 12866

Pursuant to Executive Order 12866 (FR Doc. 93–24523, September 30, 1993), this interim final rule with request for comment is an economically significant regulatory action since it results in an annual effect on the economy of $100 million or more. The administrative record is available for public inspection in Room 5831 of the South Building, USDA, 1400 Independence Avenue, SW., Washington, DC. Pursuant to Executive Order 12866, NRCS conducted an economic analysis of the potential impacts associated with this program. A summary of the economic analysis can be found at the end of this preamble and a copy of the analysis is available upon request from Gregory Johnson, Director, Financial Assistance Programs Division, Natural Resources Conservation Service, Room 5237–S, Washington, DC 20250–2890 or electronically at: *http://www.nrcs.usda.gov/programs/csp/* under the *CSP Rules and Notices with Supporting Documents* title.

Regulatory Flexibility Act

NRCS has determined that the Regulatory Flexibility Act is not applicable to this interim final rule because NRCS is not required by 5 U.S.C. 553, or any other provision of law, to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Environmental Analysis

Availability of the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI). A programmatic environmental assessment has been prepared in association with this rulemaking. The analysis has determined that there will not be a significant impact to the human environment and as a result an Environmental Impact Statement is not required to be prepared (40 CFR part 1508.13). The EA and FONSI are available for review and comment for 30 days from the date of publication of this interim final rule in the **Federal Register.** A copy of the EA and FONSI may be obtained from the following Web site: *http://www.nrcs.usda.gov/programs/Env_Assess/.* A hard copy may also be requested from the following address and contact: Matt Harrington, National Environmental Coordinator. Ecological Sciences Division, NRCS, 1400 Independence Ave., SW., Washington, DC 20250. Comments from the public should be specific and reference that comments provided are on the EA and FONSI. Public comment may be submitted by any of the following means: (1) E-mail comments to *NEPA2008@wdc.usda.gov;* (2) e-mail to e-gov Web site at *http://www.regulations.gov;* or (3) written comments to: Matt Harrington, National Environmental Coordinator, Ecological Sciences Division, NRCS, 1400 Independence Ave., SW., Washington, DC 20250.

Civil Rights Impact Analysis

NRCS has determined through a Civil Rights Impact Analysis that the interim final rule discloses no disproportionately adverse impacts for minorities, women, or persons with disabilities. The data presented indicates producers who are members of the protected groups have participated in NRCS conservation programs at parity with other producers. Extrapolating from historical participation data, it is reasonable to conclude that NRCS programs, including CSP, will continue to be

administered in a non-discriminatory manner. Outreach and communication strategies are in place to ensure all producers will be provided the same information to allow them to make informed compliance decisions regarding the use of their lands that will affect their participation in USDA programs. CSP applies to all persons equally regardless of their race, color, national origin, gender, sex, or disability status. Therefore, the CSP rule portends no adverse civil rights implications for women, minorities and persons with disabilities.

Paperwork Reduction Act

Section 2904 of the 2008 Act provides that the promulgation of regulations and the administration of Title II of the 2008 Act, which contain the amendments that authorize CSP, shall be made without regard to chapter 35 of Title 44 of the United States Code, also known as the Paperwork Reduction Act. Therefore, NRCS is not reporting recordkeeping or estimated paperwork burden associated with this interim final rule.

Government Paperwork Elimination Act

NRCS is committed to compliance with the Government Paperwork Elimination Act, which requires Government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. To better accommodate public access, NRCS has developed an online application and information system for public use.

Executive Order 12988

This interim final rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. The provisions of this interim final rule are not retroactive. The provisions of this interim final rule preempt State and local laws to the extent that such laws are inconsistent with this interim final rule. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR parts 614, 780, and 11 must be exhausted.

Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994

Section 304 of the Department of Agriculture Reorganization Act of 1994, Public Law 103–354, requires that a risk assessment be prepared in conjunction with any notice of proposed rulemaking for a major regulation. Pursuant to Section 2904 of the 2008 Act, NRCS is promulgating this interim final rule, and therefore, a risk assessment is not required. However, risks associated with the interim final rule have been assessed pursuant to the analysis prepared in compliance with Executive Order 12866.

Unfunded Mandates Reform Act of 1995

NRCS assessed the effects of this rulemaking action on State, local, and tribal governments, and the public. This action does not compel the expenditure of $100 million or more by any State, local, or tribal governments, or anyone in the private sector; therefore, a statement under section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

Economic Analysis—Executive Summary

Pursuant to Executive Order 12866, Regulatory Planning and Review, the Natural Resources Conservation Service (NRCS) conducted a cost-effectiveness analysis (CEA) of the Conservation Stewardship Program (CSP) as formulated for the interim final rule. This CEA describes how financial assistance (FA) and technical assistance (TA) are made available through CSP with the program objective being to have producers adopt additional conservation activities. The CEA attempts to compare the impact of these activities in generating environmental benefits with program costs. Many of these improvements can produce beneficial impacts concerning on-site resource conditions (such as the maintenance of the long-term productivity of their land), and can potentially produce significant off-site environmental benefits, such as reduced non-point source pollution, improved air quality due to lower carbon dioxide emissions, and enhanced wildlife habitat.

In considering alternatives for implementing CSP, the United States Department of Agriculture (USDA) followed the legislative intent to establish a clear and transparent method and determine in an open participatory process, potential participants' current level of conservation stewardship attainment levels in order to gauge their environmental impact and compare them. The CSP is a voluntary program, and therefore, the program is not expected to impose any obligation or burden upon agricultural producers and non-industrial private forestland owners who choose not to participate.[1] Congress authorized the enrollment of 12,769,000 acres for each fiscal year (FY) for the period beginning October 1, 2008, and ending on September 30, 2017. For fiscal years 2009 through 2012, CSP has been authorized 51,076,000 acres (four years multiplied by a 12,769,000 acre program cap per year).

This analysis builds on the former Conservation Security Program introduced in 2004 with its foundation set in the Farm Security and Rural Investment Act of 2002, Public Law 107–171 (2002 Farm Bill). While the spirit of both programs is similar, the main focus of the 2008 Act CSP is to assist landowners with adopting additional conservation enhancements. This focus is characterized by the emphasis placed on new enhancement activities selected by participants in the application ranking process. However, basic eligibility criteria and ranking will also consider the benchmark level of stewardship and planned conservation activities to be adopted (if needed in those cases where participants do not meet the stewardship threshold requirements). The environmental benefits expected to be generated by enhancement and maintenance activities are based on extrapolations of the environmental benefits generated from many traditional NRCS conservation practices (these are described in detail in Appendix B). However, while environmental impacts from many traditional NRCS conservation practices have been assessed, the impacts generated from enhancement and maintenance activities are not well understood. In conducting economic analyses where benefits are not well understood or difficult to measure, but costs are available, economists often turn to a cost-effectiveness analysis (CEA) framework over the more traditional benefit-cost analysis approach. The environmental impacts from enhancement and maintenance activities are not well understood, and therefore, NRCS is adopting the CEA approach for this CSP economic analysis.

Methodology Employed in This Study

As stated above, many conservation practices have been extensively studied, but similar studies pertaining to enhancement activities have not been conducted. As a result, estimation of a true baseline of environmental conditions before and after CSP implementation is not possible. The methodology employed in this study involves the modeling of baseline environmental conditions through Microsoft Access. The model is complex

[1] An impact could be expected in cases where CSP funds activities that lead to large increases of certain environmental services and goods where those markets are beginning to get started.

because it is based on the major decision rules in the Conservation Measurement Tool (CMT). The CMT refers to the procedures developed by NRCS to estimate the existing and proposed conservation performance to be achieved by a producer. This model has a high degree of uncertainty because CSP is a new program and it is difficult to project the potential pool of applicants without historical enrollment data. This study's model distills the basic rules of the CMT and couples it with a historical data on producer characteristics. These data include internal NRCS program data, past studies on conservation stewardship, other USDA data and information as well as expert opinion from agency technology and program specialists. This expert opinion was needed in making several key assumptions about expected producer response to CSP and in turn likely participation as well as resource response to conservation activities. The model applies questions, similar to those in the CMT, to a representative set of farms constructed with the historical data. Using simulated responses for the representative farms to the questions in the CMT regarding the applicant's agriculture operation, the model predicts expected participation by land-use type and farm type along with expected program costs and conservation performance points.

The responses can be grouped by CSP's ranking factors. The first ranking factor, RF–1, is the level of conservation treatment on priority resource concerns at the time of application. RF–1 is used to establish an initial or baseline "hypothetical" index of environmental conditions for each applicant's operation. The total level of conservation performance points reflects the number of existing and planned conservation activities multiplied by a range of points from −5 to +5 for each activity; producers are assigned a point estimate based on their response on the CMT. Individual applicant's conservation performance points are aggregated to create a "hypothetical" baseline of environmental conditions for the Nation (in this case, the Nation is that sub-set of all farmers and ranchers by farm type and land-use type expected to apply for CSP).

Based on responses to the remaining three ranking factors [2] in the CMT, the model then produces an index of environmental benefits reflecting the total level of additional enhancement activities selected by participants to be addressed (the "additionality" point total). Given this basic data on potential participants' stewardship benchmarks and willingness to adopt new activities, the model compares expected producer activity costs with their expected CSP annual payments. The major producer decision to participate in CSP in the model is if expected CSP payments offset at least 50 percent of the costs of adopting the associated conservation activities.

The baseline in this analysis represents a pre-statute scenario. Due to the fact that each policy scenario selects applicants from different pools, no "generic" baseline scenario could be determined. Instead the analysis adjusts the level of benchmark conservation performance points in each scenario to account for what would have been generated without CSP (pre-statute).

The model allows USDA to verify if the national CSP average per acre annual payment rate has been met under a number of different program designs. More importantly, it can also estimate the trade-off between different policy designs and expected conservation performance outcomes in a cost-effectiveness framework. Such program design choices include varying the relative weights across ranking factors used in the participant ranking process and the expected results from varying other program parameters, such as relative weights on different priority resource concerns and stewardship threshold levels. The main policy options studied in this analysis involve the first item listed above; that is, the impact on acreage, conservation performance points, and program costs from associated options varying the relative weights across ranking factors used in the participant ranking process.

Conclusions and Recommendations

Results of alternative policy options suggest that there may be a set of general conclusions that policy makers should consider. These include:

- The policy constraints on the statutory requirements for the program posed serious challenges for the model developers. It is obvious that these constraints will pose similar challenges in implementing this program. In particular, achieving the national annual acreage enrollment goal at the designated average costs per acre mandated in legislation will be a challenge given the heterogeneity of producers' baseline resource conditions and demand for enhancements.
- When large operations enter into the program and reach their annual contract limit ($40,000), CSP gains program acreage, but pushes per acre program costs down. By effectively lowering total program costs on a per acre basis, the additions of large operations enable the program to offer higher payment rates for other farm types and sizes, holding all else constant. For example, a 10,000 acre wheat farm in Montana that "hits" its payment limitation would be recorded as having a $4 per acre program cost ($40,000 divided by 10,000 acres).

Conservation activity costs were adjusted to account for economies of scale on the part of large operations. Without such adjustments, larger farms tended not to enter into CSP contracts because their per-acre costs would remain constant as their per-acre payments were effectively lowered (as their payment cap was "hit" as explained above). Thus without such adjustments, their large size increased their farm-level costs while at the same time restricted their ability to accrue additional CSP payments beyond the payment cap. This finding shows the importance that farm size will play in an applicants' decision to participate in CSP. It also shows how sensitive actual enrollment and program costs are to the types and sizes of farms expected to enroll in CSP.

The ability to place different weights on ranking factors in a predictive model provides insights into expected changes in program and conservation performance outcomes. Program design is critical in satisfying the statutory requirements of this program. In comparing several alternative policy options, model results showed that the cost-based conservation performance point payment levels used in this analysis were not capable of achieving the legislated national $18 average per acre program cost in all options. This is due to the changing land-use compositions and conservation performance outcomes which resulted under each alternative policy option. They also highlight the trade-offs that exist between alternative policy options with respect to attaining as close an acreage goal as is mandated; program costs; cost-effectiveness; and conservation performance.

[2] These remaining three ranking factors are: RF–2 is the degree to which treatment on priority resource concerns increases conservation performance by the end of the CSP contract; RF–3 is the number of priority resource concerns to be treated to meet or exceed threshold by the end of the CSP contract; and, RF–4 is the extent to which other resource concerns will be addressed to meet or exceed the stewardship threshold by the end of the CSP contract. These three ranking factors determine the level of "additionality" created through the new enhancement activities associated with the CSP contract, whereas the previous ranking factor establishes the benchmark level of conservation stewardship.

Comparisons of alternative policy options (see Table 1) indicate that enrolled program acreage is maximized by adopting policy option 4 (PO–4). However, PO–4 violates the national program per acre cost constraint. All other alternative policy options produced lower program acreage totals as compared with PO–1.

Comparisons showed that program costs were lowest in PO–2, which also showed good cost-effectiveness, but whose program acreage, as compared to PO–1 and all other alternative policy options, was the lowest. Total program costs were highest with PO–4, which provided strong evidence of luring strong participation and production of conservation performance points from new enhancements, but violated the national program per acre cost constraint.

Cost-effectiveness estimates suggest that all alternative policy options and the baseline produce about the same cost-effectiveness (about $0.37 to $0.39 per point on a total point basis). PO–2 and PO–5 produced the most favorable cost-effectiveness estimates on a total point basis, but results are different when benchmark conservation performance points are adjusted. Making these adjustments puts PO–3 and PO–4 in strong contention for policy consideration.

Both PO–2 and PO–5 satisfied the national program per acre cost constraint. However, both options produced much lower totals of conservation performance points than other policy alternatives. In addition PO–5 produced a more equitable distribution of program acreage across land-use types than any other policy option.

These comparisons showed that the total conservation performance points generated would be maximized in PO–4 and at the least cost-effectiveness rate on an adjusted point basis. However, PO–4 violates the $18 average per acre program cost constraint. In its favor, PO–4 produces the highest level of conservation performance points emanating from new conservation activities. PO–3 attained the next highest conservation performance point total, but PO–3 violated the $18 average per acre program cost constraint to a greater extent than did PO–4.

The analysis assumes full participation each year that the program is made available. Only Government costs are included in this cost estimate given the wide set of possible initial resource conditions and enhancement practices likely to be adopted. Because of this diversity in initial resource conditions, it was not possible to ascertain whether (or to what extent) CSP payments off-set expected costs to adopt enhancement and other conservation stewardship activities by producers or past costs incurred to attain stewardship thresholds. Given this caveat, cumulative program costs for four program sign-ups are estimated to be $3.27 billion in constant 2007 dollars, discounted at 7 percent. At a 3 percent discount rate, this estimation increases to $3.86 billion. These costs assume that the duration of each contract is five years and the program duration is offered for four years (FY 2009 to FY 2012). In the case where program duration is offered for nine years (FY 2009 to FY 2017), cumulative program costs for nine program sign-ups are estimated to be $6.3 billion using constant 2007 dollars discounted at 7 percent. At a 3 percent discount rate, this estimate increases to $8.1 billion.

TABLE 1—SUMMARY OF SIMULATION RESULTS OF PROGRAM ACREAGE AND ASSOCIATED PROGRAM COSTS, BY LAND-USE TYPE FOR CSP POLICY OPTIONS

Cost per acre	Policy option [1]	Acres funded in program (in millions of acres)				Total program cost (in millions of dollars)			
		Cropland	Pasture	Range-land	Total [2]	Cropland	Pasture	Range-land	Total
N/A	No Program [3]	0	0	0	0	$0	$0	$0	$0
17.78	PO–1	8.3	2.2	1.1	11.6	182.7	18.3	4.5	205.5
15.74	PO–2	8.6	1.9	0.9	11.3	160.0	14.6	3.8	178.3
19.25	PO–3	9.0	1.6	0.8	11.5	204.2	13.8	3.3	221.3
18.96	PO–4	9.0	1.8	0.9	11.8	203.4	15.8	3.7	222.9
16.93	PO–5	8.0	2.4	1.2	11.5	170.6	19.5	4.9	195.0

[1] PO–1 assumes an equal weight on each ranking factor.
PO–2 assumes a 62.5 percent weight on RF–1 and a 12.5 percent weight on RF–2, RF–3, and RF–4.
PO–3 assumes a 62.5 percent weight on RF–2 and a 12.5 percent weight on RF–1, RF–3, and RF–4.
PO–4 assumes a 62.5 percent weight on RF–3 and a 12.5 percent weight on RF–1, RF–2, and RF–4.
PO–5 assumes a 62.5 percent weight on RF–4 and a 12.5 percent weight on RF–1, RF–2, and RF–3.

[2] Annual CSP acreage cap is 12.769 million acres with 10 percent allocated to non-industrial private forestland (NIPF) leaving roughly 11.5 million acres for cropland, pasture, and rangeland acreage.

[3] No program scenario assumes that CSP is not available to landowners. As discussed in the text, some level of benchmark conservation performance points are assumed to be generated in the absence of CSP. The exact amount is difficult to determine because maintenance of existing conservation measures vary due to several factors, such as fluctuations in personal economic conditions and preferences, advancing age, and changing resource priorities. In addition, the applicant pool in each alternative policy scenario is made up of different farm types and land-use types. These conditions preclude the estimation of a "generic" baseline applied to all alternative policy options. As a result, maintenance on existing conservation measures is assumed to generate 90 percent of the benchmark conservation performance points estimated in each scenario.

TABLE 2—SUMMARY OF SIMULATION RESULTS OF THE CONSERVATION PERFORMANCE POINTS AND COST EFFECTIVENESS INDICATORS FOR CSP POLICY OPTIONS

Policy Option [1]	Benchmark (in millions of conservation performance points)			Total points	Dollars per point	
	Baseline [2]	Incremental	Enhancement		Incremental plus enhancement	Total points
No Program [2]	Indeterminate	None	N/A	N/A	N/A	N/A
PO–1	124.47	13.83	329.8	468.1	$0.51	$0.38

TABLE 2—SUMMARY OF SIMULATION RESULTS OF THE CONSERVATION PERFORMANCE POINTS AND COST EFFECTIVENESS INDICATORS FOR CSP POLICY OPTIONS—Continued

Policy Option [1]	Benchmark (in millions of conservation performance points)			Total points	Dollars per point	
	Baseline [2]	Incremental	Enhancement		Incremental plus enhancement	Total points
PO–2	135.36	15.04	251.8	402.2	0.56	0.37
PO–3	106.2	11.8	377.2	495.2	0.50	0.39
PO–4	107.46	11.94	385.6	505.0	0.49	0.38
PO–5	126.99	14.11	309.0	450.0	0.51	0.37

[1] PO–1 assumes an equal weight on each ranking factor.
PO–2 assumes a 62.5 percent weight on RF–1 and a 12.5 percent weight on RF–2, RF–3, and RF–4.
PO–3 assumes a 62.5 percent weight on RF–2 and a 12.5 percent weight on RF–1, RF–3, and RF–4.
PO–4 assumes a 62.5 percent weight on RF–3 and a 12.5 percent weight on RF–1, RF–2, and RF–4.
PO–5 assumes a 62.5 percent weight on RF–4 and a 12.5 percent weight on RF–1, RF–2, and RF–3.
[2] Baseline (pre-statute) assumes that CSP is not offered.
[3] No program scenario assumes that CSP is not available to landowners. As discussed in the text, some level of benchmark conservation performance points are assumed to be generated in the absence of CSP. The exact amount is difficult to determine because maintenance of existing conservation measures vary due to several factors, such as fluctuations in personal economic conditions and preferences, advancing age, and changing resource priorities. In addition, the applicant pool in each alternative policy scenario is made up of different farm types and land-use types. These conditions preclude the estimation of a "generic" baseline applied to all alternative policy options. As a result, maintenance on existing conservation measures is assumed to generate 90 percent of the benchmark conservation performance points estimated in each scenario.

NRCS analysis indicates that policy options PO–3 and PO–4 demonstrated the highest degree of cost-effectiveness and environmental performance improvement. As a result, NRCS is giving strong consideration to policy options PO–3 and PO–4 for subsequent signup periods.

For the initial signup period, NRCS recommends that the CSP program design place equal weight on the considered program ranking factors until program performance is established. Given that program performance has not been established, NRCS seeks public comment on which option best enables NRCS to meet program objectives. In addition, NRCS is requesting public comment on the appropriate weighting of the five ranking factors to maximize cost-effectively environmental benefits while maintaining consistency with the statutory purposes of the program. NRCS will consider these public comments when revising the weighting of these ranking factors prior to the next subsequent ranking period. The CSP rule will be finalized in FY 2010.

Section 2708 of the 2008 Act

Section 2708, "Compliance and Performance," of the 2008 Act added a paragraph to Section 1244(g) of the 1985 Act entitled, "Administrative Requirements for Conservation Programs," which states the following:

"(g) Compliance and performance.—For each conservation program under Subtitle D, the Secretary shall develop procedures—

(1) To monitor compliance with program requirements;

(2) To measure program performance;

(3) To demonstrate whether long-term conservation benefits of the program are being achieved;

(4) To track participation by crop and livestock type; and

(5) To coordinate activities described in this subsection with the national conservation program authorized under section 5 of the Soil and Water Resources Conservation Act of 1977 (16 U.S.C. 2004)."

This new provision presents in one place the accountability requirements placed on the Agency as it implements conservation programs and reports on program results. The requirements apply to all programs under Subtitle D, including the Wetlands Reserve program, the Conservation Security Program, the Conservation Stewardship Program, the Farm and Ranch Lands Protection Program, the Grassland Reserve Program, the Environmental Quality Incentives Program (including the Agricultural Water Enhancement Program), the Wildlife Habitat Incentive Program, and the Chesapeake Bay Watershed initiative. These requirements are not directly incorporated into these regulations, which set out requirements for program participants. However, certain provisions within these regulations relate to elements of Section 1244(g) of the 1985 Act and the Agency's accountability responsibilities regarding program performance. NRCS is taking this opportunity to describe existing procedures that relate to meeting the requirements of Section 1244(g) of the 1985 Act, and Agency expectations for improving its ability to report on each program's performance and achievement of long-term conservation benefits. Also included is reference to the sections of these regulations that apply to program participants and that relate to the Agency accountability requirements as outlined in Section 1244(g) of the 1985 Act.

Monitor compliance with program requirements. NRCS has established application procedures to ensure that participants meet eligibility requirements, and follow-up procedures to ensure that participants are complying with the terms and conditions of their contractual arrangement with the government and that the installed conservation measures are operating as intended. These and related program compliance evaluation policies are set forth in Agency guidance (Conservation Programs Manual_440_Part 512 and Conservation Programs Manual _440_Part 508) (*http://directives.sc.egov.usda.gov/*). The program requirements applicable to participants that relate to compliance are set forth in these regulations in § 1470.6, "Eligibility requirements," § 1470.21, "Contract requirements," § 1470.22 "Conservation stewardship plan," and § 1470.23, "Conservation activity operation and maintenance." These sections make clear the general program eligibility requirements, participant obligations for implementing a conservation stewardship plan, contract obligations, and requirements for operating and maintaining CSP-funded conservation activities.

Measure program performance. Pursuant to the requirements of the Government Performance and Results Act of 1993 (Pub. L. 103–62, Sec. 1116) and guidance provided by OMB Circular A–11, NRCS has established performance measures for its

conservation programs. Program-funded conservation activity is captured through automated field-level business tools and the information is made publicly available at: *http://ias.sc.egov.usda.gov/PRSHOME/*. Program performance also is reported annually to Congress and the public through the annual performance budget, annual accomplishments report, and the USDA Performance Accountability Report. Related performance measurement and reporting policies are set forth in Agency guidance (GM_340_401 and GM_340_403 (*http://directives.sc.egov.usda.gov/*)).

The conservation actions undertaken by participants are the basis for measuring program performance—specific actions are tracked and reported annually, while the effects of those actions relate to whether the long-term benefits of the program are being achieved. The program requirements applicable to participants that relate to undertaking conservation actions are set forth in these regulations in § 1470.21, "Contract requirements," § 1470.22 "Conservation stewardship plan," and § 1470.23, "Conservation activity operation and maintenance." These sections make clear participant obligations for implementing, operating, and maintaining conservation stewardship activities, which in aggregate result in the program performance that is reflected in Agency performance reports.

Demonstrating the long-term natural resource benefits achieved through conservation programs is subject to the availability of needed data, the capacity and capability of modeling approaches, and the external influences that affect actual natural resource condition. While NRCS captures many measures of "output" data, such as acres of conservation practices, it is still in the process of developing methods to quantify the contribution of those outputs to environmental outcomes

NRCS currently uses a mix of approaches to evaluate whether long-term conservation benefits are being achieved through its programs. Since 1982, NRCS has reported on certain natural resource status and trends through the National Resources Inventory (NRI), which provides statistically reliable, nationally consistent land cover/use and related natural resource data. However, lacking has been a connection between these data and specific conservation programs.[3] In the future, the interagency Conservation Effects Assessment Project (CEAP), which has been underway since 2003, will provide nationally consistent estimates of environmental effects resulting from conservation practices and systems applied. CEAP results will be used in conjunction with performance data gathered through Agency field-level business tools to help produce estimates of environmental effects accomplished through Agency programs, such as CSP. In 2006 a Blue Ribbon panel evaluation of CEAP[4] strongly endorsed the project's purpose, but concluded "CEAP must change direction" to achieve its purposes. In response, CEAP has focused on priorities identified by the Panel and clarified that its purpose is to quantify the effects of conservation practices applied on the landscape. Information regarding CEAP, including reviews and current status, is available at *http://www.nrcs.usda.gov/technical/NRI/ceap/*. Since 2004 and the initial establishment of long-term performance measures by program, NRCS has been estimating and reporting progress toward long-term program goals. Natural resource inventory and assessment, and performance measurement and reporting policies are set forth in Agency guidance (GM_290_400; GM_340_401; GM_340_403) (*http://directives.sc.egov.usda.gov/*).

Demonstrating the long-term conservation benefits of conservation programs is an Agency responsibility. Through CEAP, NRCS is in the process of evaluating how these long-term benefits can be achieved through the conservation practices and systems applied by participants under each of its programs. The CSP program requirements applicable to participants that relate to producing long-term conservation benefits are located in § 1470.21, "Contract requirements," § 1470.22 "Conservation stewardship plan," and § 1470.23, "Conservation activity operation and maintenance." These requirements and related program management procedures supporting program implementation are set forth in Agency guidance (Conservation Programs Manual 440_Part 512 and Conservation Programs Manual _440_Part 508).

Coordinate these actions with the national conservation program authorized under the Soil and Water Resources Conservation Act (RCA). The 2008 Act reauthorized and expanded on a number of elements of the RCA related to evaluating program performance and conservation benefits. Specifically, the 2008 Act added a provision stating,

> Appraisal and inventory of resources, assessment and inventory of conservation needs, evaluation of the effects of conservation practices, and analyses of alternative approaches to existing conservation programs are basic to effective soil, water, and related natural resources conservation.

The program, performance, and natural resource and effects data described previously will serve as a foundation for the next RCA, which will also identify and fill, to the extent possible, data and information gaps. Policy and procedures related to the RCA are set forth in Agency guidance (GM_290_400 and GM_130_402) (*http://directives.sc.egov.usda.gov/*).

The coordination of the previously described components with the RCA is an Agency responsibility and is not reflected in these regulations. However, it is likely that results from the RCA process will result in modifications to the program and performance data collected, to the systems used to acquire data and information, and potentially to the program itself. Thus, as the Secretary proceeds to implement the RCA in accordance with the statute, the approaches and processes developed will improve existing program performance measurement and outcome reporting capability and provide the foundation for improved implementation of the program performance requirements of Section 1244(g) of the 1985 Act.

Discussion of Program

The Food, Conservation, and Energy Act of 2008 (2008 Act) amended the Food Security Act of 1985 (1985 Act) to establish the Conservation Stewardship Program (CSP) and authorize the program in fiscal years 2009 through 2012. The purpose of CSP is to encourage producers to address resource concerns in a comprehensive manner by: (1) Undertaking additional conservation activities; and (2) improving, maintaining, and managing existing conservation activities. The Secretary of the United States Department of Agriculture (USDA) has delegated authority to the Natural Resources Conservation Service (NRCS) to administer CSP.

Through CSP, NRCS will provide financial and technical assistance to eligible producers to conserve and enhance soil, water, air, and related natural resources on their land. Eligible lands include cropland, grassland,

[3] The exception to this is the Conservation Reserve Program; since 1987 the NRI has reported acreage enrolled in CRP.

[4] Soil and Water Conservation Society. 2006. Final Report from the Blue Ribbon Panel Conducting an External Review of the US Department of Agriculture Conservation Effects Assessment Project. Ankeny, IA: Soil and Water Conservation Society. This review is available *at* (*http://www.nrcs.usda.gov/technical/NRI/ceap/*).

prairie land, improved pastureland, rangeland, nonindustrial private forest lands, agricultural land under the jurisdiction of an Indian tribe, and other private agricultural land (including cropped woodland, marshes, and agricultural land used for the production of livestock) on which resource concerns related to agricultural production could be addressed. Participation in the program is voluntary.

CSP encourages land stewards to improve their conservation performance by installing and adopting additional activities, and improving, maintaining, and managing existing activities on agricultural land and nonindustrial private forest land. NRCS will make funding for CSP available nationwide on a continuous application basis.

The State Conservationist, in consultation with the State Technical Committee and local work groups, will focus program impacts on natural resources that are of specific concern for a State, or the specific geographic areas within a State. Applications will be evaluated relative to other applications addressing similar priority resource concerns to facilitate a competitive ranking process among applicants who face similar resource challenges.

The 2008 Act requires NRCS to manage CSP to achieve a national average rate of $18 per acre, which includes the costs of all financial and technical assistance, and any other expenses associated with program enrollment and participation. NRCS will use a producer self-screening checklist to help potential applicants decide for themselves whether CSP is the right program for them and their operation. The process focuses on basic information about CSP eligibility requirements and contract obligations.

When examining applicant eligibility, CSP bases determinations on how applicants delineate their operation for other USDA programs. Specifically, any potential participant must be the operator in the Farm Service Agency (FSA) farm records management system. This requirement is needed because the FSA record system provides applicant eligibility information for Adjusted Gross Income and highly erodible land and wetland conservation provisions. Potential applicants who are not in the FSA farm records management system, or whose records are not current, must establish or update their records prior to making a CSP application. The 2008 Act also requires that the agricultural operation must include all agricultural land under the effective control of the applicant for the term of the proposed contract that is operated substantially separate from other operations.

The 2008 Act directed the development of the conservation measurement tool (CMT) to estimate the level of environmental benefit to be achieved by a producer in implementing conservation activities. The term "environmental benefit" used in the context of the CMT is misleading. The CMT considers the relative physical effects of existing and proposed conservation activities to estimate improvements in conservation performance. It does not measure true environmental benefits, *e.g.*, tons of carbon sequestered, or tons of soil saved.

The CMT combines functions of existing NRCS tools for soil and water, grazing lands, and wildlife habitat; considers the physical effects of conservation activities, such as establishing permanent vegetative cover, across natural resource concerns and energy; and integrates and supports the processes of inventorying resources, determining eligibility, and ranking applications.

NRCS will assist applicants with completing the inventory of resource conditions in the CMT. The inventory will enable the CMT to calculate a conservation performance score that will assist in ranking applications within State-identified geographic area ranking pools. For approved applicants, NRCS will request records of the applicants' conservation activity and production system information and conduct on-site field verification to substantiate, prior to contract approval, that the resource inventory information provided for the CMT was accurate.

CSP provides participants with two possible types of payments:

(1) Annual payment for installing and adopting additional activities, and improving, maintaining, and managing existing activities. Compensation for on-farm research and demonstration activities, or pilot testing will be made through the annual payment.

(2) Supplemental payment for the adoption of resource-conserving crop rotations.

Setting the annual payment rates will be a significant challenge for NRCS. In addition to managing the program within the national average rate of $18 per acre, the 2008 Act also provides an acreage enrollment limit of 12,769,000 acres for each fiscal year. To address these constraints, NRCS intends to use the first ranking period as a payment discovery period to arrive at a uniform payment rate per conservation performance point by eligible land use type. NRCS requests public comment on ways to address program acreage and payment constraints, refine their payment approach, and make annual payments more consistent and predictable.

Additionally NRCS seeks public comment on the proper distribution of CSP annual payment between payment for additional activities and payment for existing activities.

Section 1470.26 of this interim final rule provides that NRCS will permit contract renewals to foster participant commitment to increased conservation performance. NRCS seeks public comment on the contract renewal criteria in the interim final rule.

NRCS can broaden CSP's impact by offering participants the opportunity to install innovative conservation activities that appeal to all levels of land stewards, and increase conservation performance across all land uses, operation sizes and types, and production systems, including specialty crops and organic production. NRCS specifically requests through the comment process information on innovative enhancements NRCS should offer under CSP to improve participant's conservation performance.

A step-by-step explanation of how CSP works from sign-up to fulfillment of the conservation stewardship contract is as follows:

(1) CSP is available nationwide and sign-up will be continuous with announced ranking period cutoff dates.

(2) A producer self-screening checklist will be available at local NRCS field offices and on the NRCS Web site. Producers will complete the checklist independently to help them decide if they meet CSP eligibility requirements.

(3) Potential applicants who decide to apply for CSP complete a Contract Program Application Form, NRCS–CPA–1200, and submit information on their operation. The extent of an applicant's agricultural operation will be based on how the applicant represents their operation for other USDA programs.

(4) Once applicant and land eligibility are determined, the NRCS field office will assist the producer with completing the CMT resource inventory.

(5) CMT will estimate the level of environmental benefit to be achieved by the applicant. The CMT conservation performance scoring will enable NRCS to determine if the stewardship threshold requirement is met, rank applications, and establish payments.

(6) Applicants will be ranked relative to other applicants who face similar resource challenges in State-established ranking pools using conservation performance ranking scores.

(7) For approved applicants, NRCS will conduct on-site field verification to substantiate that conservation activity and production system information represented by the applicant was accurate.

(8) After the conservation system information is verified, NRCS and the applicant proceed to develop the conservation stewardship plan and contract.

(9) Upon approval, the contract will obligate the participant to achieve a higher level of conservation performance by installing additional activities scheduled in their conservation stewardship plan and to maintain the level of existing conservation performance identified at the time of application. For the initial sign-up, NRCS will consider a participant "enrolled" based on the fiscal year the application is submitted, once NRCS approves an applicant's contract. For subsequent ranking cut-off periods, NRCS will consider a participant enrolled in CSP based on the fiscal year the contract is approved.

(10) NRCS will make payments as soon as practical after October 1 of each fiscal year for activities carried out in the previous fiscal year. A participant's annual payment is determined using the conservation performance estimated by the CMT, and computed by land-use type for enrolled eligible land. A supplemental payment is also available to a participant receiving annual payments who also agrees to adopt a resource-conserving crop rotation.

Summary of Provisions

The regulation is organized into three subparts: Subpart A—General Provisions; Subpart B—Contracts; and Subpart C—General Administration. Below is a summary of each section.

Subpart A—General Provisions

Section 1470.1 Applicability

Section 1470.1, "Applicability," sets forth the purpose, procedures, and requirements of CSP. In paragraph (b), NRCS defines that the program's purpose is to encourage producers to address resource concerns in a comprehensive manner by undertaking additional conservation activities; and improving, maintaining, and managing existing conservation activities.

NRCS included paragraph (c) to specify where CSP assistance is available. CSP is available to eligible persons, legal entities, or Indian tribes in all 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Paragraph (d) identifies that NRCS will provide CSP participants financial and technical assistance for the conservation, protection, and improvement of soil, water, and other related natural resources.

Section 1470.2 Administration

Section 1470.2, "Administration," describes the roles of NRCS at the National and State levels. NRCS will make CSP available nationwide on a continuous application basis. NRCS will operate the program to achieve a national average rate of $18 per acre, which includes the costs of all financial and technical assistance, and any other expenses associated with program enrollment and participation. As directed by the 2008 Act, NRCS will establish a national target to set aside five percent of CSP acres for socially disadvantaged farmers or ranchers and an additional five percent of CSP acres for beginning farmers or ranchers. State conservationists will obtain advice from State Technical Committees and local working groups on State program technical policies, outreach efforts, and program issues.

Section 1470.3 Definitions

Section 1470.3, "Definitions," sets forth definitions for terms used throughout this regulation. These definitions include: "agricultural land," "animal waste storage or treatment facility," "applicant," "beginning farmer or rancher," "Chief," "conservation district," "conservation practice," "Designated Conservationist," "enrollment," "field office technical guide," "Indian tribe," "Indian lands," "joint operation," "legal entity," "liquidated damages," "local working group," "National Organic Program," "Natural Resources Conservation Service," "nonindustrial private forest land," "operation and maintenance," "participant," "person," "producer," "Secretary," "socially disadvantaged farmer or rancher," "State Conservationist," "State Technical Committee," "technical assistance," and "Technical Service Provider (TSP)." Other definitions, such as: "agricultural operation," "conservation activities," "conservation measurement tool," "conservation stewardship plan," "contract," "enhancement," "management measure," "payment," "priority resource concern," "resource concern," "resource-conserving crop rotation," and "stewardship threshold" are definitions established to implement CSP's authorizing legislation.

A number of these definitions are shared with other conservation programs administered by NRCS. The following definitions are unique or have special relevance to CSP implementation, or have been modified from how the term is defined in other NRCS conservation program rules:

The definition of "*agricultural land*" describes those areas identified by CSP's authorizing legislation—working agricultural land being actively managed for agricultural production purposes upon which CSP will be focused, including cropland, grassland, improved prairieland, and land used for agro-forestry. NRCS does not intend to exclude working lands such as cropped woodlands and marshes, but will consider those as cropland.

NRCS includes the definition of "*agricultural operation*" to specify an agricultural operation's parameters. An "agricultural operation" is defined as "all agricultural land and other land as determined by NRCS, whether contiguous or noncontiguous: (1) Which is under the effective control of the applicant for the term of the proposed contract; and (2) which is operated by the applicant with equipment, labor, management, and production or cultivation practices that are substantially separate from other operations." The term "other land" in this definition includes ineligible land identified in § 1470.6, incidental areas that are not in agricultural production, and developed areas on the farm or ranch such as farm headquarters, ranch sites, barnyards, feedlots, manure storage facilities, machinery storage areas, and material handling facilities.

The term "*applicant*" is defined as "a person, legal entity, joint operation, or Indian tribe that has an interest in an agricultural operation, as defined in 7 CFR part 1400, who has requested in writing to participate in CSP." All applicants must establish records in the Farm Service Agency (FSA) farm records management system prior to submitting an application.

The term, "*beginning farmer and rancher,*" is the same as the definition used by other NRCS conservation programs, which adopt the definition established by 7 U.S.C. 1991(a), except that the definition incorporates the term nonindustrial private forest land to ensure policies pertaining to beginning farmers and ranchers include those producers having nonindustrial private forest land.

A definition for "*conservation activity*" is included to describe in a more comprehensive fashion the conservation systems, practices, or management measures needed to

address a resource concern or improve conservation performance.

A definition for "*conservation measurement tool*" refers to the procedures that NRCS will use to estimate the level of environmental benefit to be achieved by a producer using the proxy of conservation performance improvement.

The term "*conservation stewardship plan*" is defined as a record of the participant's decisions that describes the schedule of conservation activities to be implemented, managed, or improved by the participant. The definition clarifies that associated supporting information inventories the agricultural operation's resource concerns and existing conservation activities, establishes benchmark data, and identifies the participant's conservation objectives and will be maintained with the plan.

The term "*enhancement*" means a type of activity installed and adopted to treat natural resources and improve conservation performance. Enhancements are installed at a level of management intensity that exceeds the sustainable level for a given resource concern, and those directly related to a practice standard are applied in a manner that exceeds the minimum treatment requirements of the standard. An example of an enhancement includes a grass-type cover crop used to scavenge nitrogen left in the soil after the harvest of a previous crop.

The term "*enrollment*" means for the initial sign-up for FY 2009, NRCS will consider a participant "enrolled" in CSP based on the fiscal year the application is submitted, once NRCS approves the participant's contract. For subsequent ranking cut-off periods, NRCS will consider a participant enrolled in CSP based on the fiscal year the contract is approved. The acres enrolled for each fiscal year count against each year's annual 12.8 million acre enrollment limit.

The terms, "*Indian Tribe*" and "*Indian lands*" reflect the terms used by other NRCS conservation programs. An Indian Tribe is any "Indian Tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village or regional corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." NRCS adopts terminology "Indian lands" in an effort to be more inclusive of all lands held in trust by the United States for individual Indians or Indian Tribes, all land, the title to which is held by an individual Indian, Indian family, or Indian Tribe.

The term, "*management measure,*" is defined as one or more specific actions that is not a conservation practice, but has the effect of alleviating problems or the treatment of natural resources.

The term "*National Organic Program*" has been inserted to refer to a program administered by the Agricultural Marketing Service. The rule contains provisions related to conservation activities associated with organic production. The National Organic Program is a national program which regulates the standards for any farm, wild crop harvesting, or handling operation that wants to sell an agricultural product as organically grown.

The term, "*nonindustrial private forest land*" is based on the definition in the 2008 Act. Nonindustrial private forest land is rural land that has existing tree cover or is suitable for growing trees; and is owned by an individual, group, association, corporation, Indian Tribe, or other private legal entity that has definitive decision-making authority over the land.

NRCS includes the definition of "*operation and maintenance*" to identify that participants are expected to maintain existing conservation activities and additional conservation activities installed and adopted over the contract period.

The definition of "*participant*" reflects the 2008 Act's definition of "person" and "legal entity" and the definition used by other NRCS conservation programs. A participant is a "person, legal entity, joint operation, or Indian Tribe that is receiving payment or is responsible for implementing the terms and conditions of a CSP contract."

NRCS defines the term "*payment*" to mean the financial assistance provided under the terms of the CSP contract.

NRCS includes the term, "*person*" to reflect the requirements of 7 CFR part 1400, the regulation which details CCC's payment limitation policies.

NRCS includes the term "*priority resource concern,*" which reflects the definition in the 2008 Act. A priority resource concern is a resource concern that is identified by the State Conservationist, in consultation with the State Technical Committee and local work groups, as a priority for a State, or the specific geographic areas within a State.

The term "*producer*" means a person or legal entity or joint operation who has an interest in the agricultural operation, according to part 1400 of this chapter, or is engaged in agricultural production or forest management.

The term "*resource concern,*" reflects the 2008 Act's "resource concern" definition. A resource concern "means a specific natural resource problem that is likely to be addressed successfully through the implementation of conservation activities by producers."

The term, "*resource-conserving crop rotation*" means a crop rotation that includes at least one resource-conserving crop that reduces soil erosion, improves soil fertility and tilth, interrupts pest cycles, retains soil moisture, and reduces the need for irrigation in applicable areas.

NRCS includes the term "*socially disadvantaged farmer or rancher*" that is based on the definition used by other NRCS conservation programs.

The term "*stewardship threshold*" means the level of natural resource conservation and environmental management required, as determined by NRCS using conservation measurement tools, to conserve and improve the quality and condition of a natural resource. The stewardship threshold is used to determine if an applicant meets the minimum treatment requirements to be eligible for CSP. NRCS guided its efforts to set stewardship thresholds by sustainable levels of natural resource treatment. For example, for the soil erosion resource concern, this criterion is met when the erosion rate from wind and water does not exceed the Soil Loss Tolerance (T).

NRCS includes the definition, "*technical service provider (TSP),*" to clarify that TSPs are used to provide technical services to program participants, in lieu of or on behalf of NRCS. A TSP is "an individual, private-sector entity, or public agency certified by NRCS to provide technical services to program participants, in lieu of or on behalf of NRCS." The regulations governing TSPs are found in 7 CFR part 652.

Section 1470.4 Allocation and Management

Section 1470.4, "Allocation and management," addresses national allocations and how the proportion of eligible land will be used as the primary means to distribute CSP acres and associated funds among States. The Chief will also consider the extent and magnitude of conservation needs associated with agricultural production in each State, the degree to which CSP can help producers address these needs; and other considerations determined by the Chief to achieve equitable geographic distribution of program participation. NRCS is in the process of

developing State allocations according to the provisions in this section. After allocations are finalized NRCS will make information related to the allocation decisions available to the public. NRCS also seeks public comment on the use of these factors to distribute allocations among States.

Section 1470.5 Outreach Activities

Section 1470.5, "Outreach activities," describes how NRCS will establish special program outreach activities at the National, State, and local levels. NRCS will undertake special outreach effort to the historically underserved producers which includes socially disadvantaged, beginning and limited resource farmers or ranchers. In addition, NRCS will continue to ensure that producers are not disadvantaged based on the size or type of their operation or production system. Special outreach efforts will be made to small-scale farms, specialty crop operations, and organic farms.

Section 1470.6 Eligibility Requirements

Section 1470.6, "Eligibility requirements," sets forth the criteria for determining applicant and land eligibility.

Paragraph (a) details applicant eligibility criteria. To be eligible, at the time of application, an applicant must: Be the operator in the FSA farm records management system for the agricultural operation; have documented control of the land for the term of the proposed contract; and be in compliance with highly erodible land and wetland conservation provisions, and the Adjusted Gross Income provisions. It is the applicant's responsibility to supply needed information to assist NRCS in determining program eligibility and in ranking the application. NRCS may request from the applicant: conservation and production system records, tax documentation, evidence documenting control of the land, and information to verify an applicant's status as a beginning farmer or rancher or socially disadvantaged farmer or rancher, if applicable.

Paragraphs (b) and (c) set forth land eligibility criteria. Under CSP, a participant must enroll their entire agricultural operation. Eligible land for CSP includes private agricultural land, and agricultural Indian lands.

Nonindustrial private forest land is also eligible by special rule, but no more than 10 percent of the annual acres enrolled may be nonindustrial private forest land. An applicant designates by submitting a separate application if they want to offer the nonindustrial private forest land for funding consideration.

Land enrolled in the Conservation Reserve Program (7 CFR part 1410), Wetlands Reserve Program (7 CFR part 1467), Grasslands Reserve Program (7 CFR part 1415), and Conservation Security Program (7 CFR part 1469) are ineligible for CSP. The 2008 Act limits eligibility to "private" agricultural land; as such, land that is owned by a Federal, State, or local unit of government, with the exception of agricultural land under the jurisdiction of an Indian Tribe, is ineligible, regardless of the status of the operator. Additionally, a participant may not receive payment for land used for crop production after June 18, 2008, that had not been planted, considered to be planted, or devoted to crop production for at least four of the six years preceding that date, unless the land was: previously enrolled in the Conservation Reserve Program; maintained using long-term rotations, such as hayland in rotation; or incidental to the operation but needed for the efficient management of the operation. An example of land considered "incidental to the operation" that may be eligible for payment is land that had once been used for buildings and is now being used for crop production to square up a cropland field.

Section 1470.7 Enhancements and Conservation Practices

Section 1470.7, "Enhancements and conservation practices," identifies that a participant's decisions describing the additional enhancements and conservation practices to be implemented under the CSP contract will be recorded in the conservation stewardship plan. NRCS will make public the enhancements and conservation practices that may be installed, adopted, maintained, and managed through CSP.

Section 1470.8 Technical Assistance

Section 1470.8, "Technical assistance," explains that NRCS or other technical service providers (TSP) not directly affiliated with NRCS could provide the technical consultation for installing conservation activities under CSP. NRCS will ensure that technical assistance is available and program specifications are appropriate so as not to limit producer participation because of size or type of operation, or production system, including specialty crop and organic production. NRCS will assist potential applicants dealing with the requirements of certification under the National Organic Program and CSP requirements concerning how to coordinate and simultaneously meet eligibility standards under each program.

Subpart B—Contracts and Payments

Section 1470.20 Application for Contracts and Selecting Offers From Applicants

Section 1470.20, "Application for contracts and selecting offers from applicants," identifies procedures associated with application acceptance, contract application requirements, and the application evaluation process. Paragraph (a) clarifies that CSP applications will be accepted throughout the year, while paragraph (c) identifies that the State Conservationist or Designated Conservationist will rank applications at selected times of the year, as described more fully below.

Paragraph (b) defines contract application requirements. To be considered for funding, a contract application must meet the stewardship threshold for at least one resource concern and would, at a minimum, achieve or exceed the stewardship threshold for at least one priority resource concern by the end of the contract. The conservation measurement tool (CMT) is used to determine if the stewardship threshold has been met for one or more resource concerns. NRCS seeks public comment on whether meeting the stewardship threshold on one resource concern and one priority resource concern is adequate, or if that number should be greater than one. The contract application must also include a map, aerial photograph, or overlay that identifies the applicant's agricultural operation and delineates the eligible land offered for payment and associated acreage amounts.

The 2008 Act was prescriptive about application ranking factors and paragraph (c) identifies how contract applications will be evaluated. NRCS will conduct one or more ranking periods per year. It is intended that, to the extent practicable, at least one ranking period will occur in the first quarter of the fiscal year.

In evaluating CSP applications, the State Conservationist or Designated Conservationist will use the CMT to estimate existing and proposed conservation performance and rank accordingly. Applications will be ranked based on: The level of conservation treatment proposed on all priority resource concerns; the degree to which the proposed conservation treatment on all applicable priority resource concerns effectively increases conservation performance based to the maximum extent practicable on the

CMT; the number of applicable priority resource concerns proposed to be treated to meet or exceed the stewardship threshold level by the end of the contract; the extent to which other resource concerns in addition to priority resource concerns may will be addressed to meet or exceed the stewardship threshold by the end of the contract period; and the extent to which the actual and anticipated environmental benefits from the contract are provided at the least cost relative to other similarly beneficial contract offers. NRCS requests public comment on the appropriate weighting of these five ranking factors that will maximize environmental benefits while maintaining consistency with the statutory purposes of the program. NRCS will consider these public comments when revising the weighting of these ranking factors when the CSP rule is finalized.

Paragraph (d) provides the Chief may develop additional criteria for evaluating applications to ensure National, State, and local conservation priorities are addressed. Additional criteria have not been developed but may be considered in the future.

Paragraph (e) specifies that the State Conservationist, with advice from the State Technical Committee and local work groups, will identify not less than three nor more than five priority resource concerns for a State, or the specific geographic areas within a State. Examples of priority resource concerns include: soil quality, soil erosion, water quality, water quantity, air, plants, animals, and energy. Public comment is requested on whether or not at least one of the priority resource concerns should be identified specifically to address wildlife habitat issues.

Paragraph (f) has been added to describe how State or geographic area boundaries, used by State Conservationists to identify priority resource concerns, will also be used to establish ranking pool boundaries so that applicants will be ranked relative to other applicants who share similar resource challenges. For example, a State with diverse natural resource conditions and environmental factors may have multiple geographic areas established based on the distinct sets of priority resource concerns identified within each of these areas. The boundaries of these geographic areas will serve as the boundaries of ranking pools, within which applicants' operations would compete for funding approval. Nonindustrial forest land will compete in separate ranking pools from agricultural land. Paragraph (f)(3) enables State Conservationists to set up pools for conservation access for socially disadvantaged farmers or ranchers and beginning farmers or ranchers. Paragraph (f) also specifies that in any fiscal year, acres allocated to a funding pool that are not enrolled by a date determined by the State Conservationist may be reallocated, with associated funds, for use in that fiscal year under CSP.

Paragraph (g) specifies that the State Conservationist or Designated Conservationist will make application approval determinations during established ranking periods based on eligibility and ranking score.

Section 1470.21 Contract Requirements

Section 1470.21, "Contract requirements," identifies elements contained within a contract and the responsibilities of a CSP contract participant. A participant must enter into a CSP contract, including a conservation stewardship plan, to enroll their eligible land and to receive payment. The CSP contract will: Provide for payments over a period of five years; incorporate by reference the conservation stewardship plan; state the payment to be issued by NRCS; and incorporate all provisions as required by law or statute. In order to receive payment and be in compliance with the CSP contract, the participant will agree to implement the conservation stewardship plan, operate and maintain the conservation activities, maintain and make available appropriate records documenting applied conservation activities and production system information, not engage in any action on the enrolled land that would interfere with the purposes of the conservation stewardship contract, and comply with terms and documents incorporated by reference in the contract.

Section 1470.22 Conservation Stewardship Plan

Section 1470.22, "Conservation stewardship plan," describes that NRCS will use the conservation planning process to encourage producers to address resource concerns in a comprehensive manner. The conservation stewardship plan contains a record of the participant's decisions on the schedule of conservation activities to be implemented, managed, and improved under CSP.

Associated information maintained with the participant's conservation stewardship plan includes: An inventory of resource concerns; benchmark data on the condition of the existing conservation activities; the participant's conservation objectives; a plan map; and other information determined appropriate by NRCS. Where a participant wishes to pursue organic certification, their conservation stewardship plan information will document the participant's transition to or participation in the National Organic Program. If a participant is approved for the on-farm research and demonstration or pilot testing option, a research, demonstration or pilot testing job sheet consistent with design protocols and application procedures established by NRCS will be included in the associated information.

Section 1470.23 Conservation System Operation and Maintenance

Section 1470.23, "Conservation system operation and maintenance," addresses the participant's responsibility for operating and maintaining existing conservation activities on the agricultural operation to at least the level of conservation performance identified at the time of application for the conservation stewardship contract period. Additional activities installed and adopted over the term of the conservation stewardship contract also need to be maintained.

Section 1470.24 Payments

Section 1470.24, "Payments," describes the types of payments issued under CSP, how payments will be derived, and payment limitations. NRCS will provide annual payments for installing and adopting additional conservation activities, and improving, maintaining, and managing existing activities. A participant's annual payment will be determined based on expected environmental benefits, determined by estimating conservation performance improvement using the CMT, and computed by land-use type for enrolled eligible land.

If operational adjustments are needed during the contract, the participant may replace enhancements with similar enhancements, provided the resulting conservation performance improvement is equal to or better than the participant's additional enhancements agreed upon at enrollment. A replacement that results in a decline below the original conservation performance level will not be allowed. A participant may be compensated through their annual payment for on-farm research and demonstration activities, or pilot testing of new technologies or innovative conservation activities.

In establishing annual payment rates, NRCS will consider: estimated costs incurred by the participant associated with planning, design, materials,

installation, labor, management, maintenance, and training; estimated income foregone by the participant; and expected conservation performance increase as determined using the CMT. Consideration of these factors in CSP payment levels is intended to make them compliant with World Trade Organization green box requirements, which in brief call for payments to be based on producer cost incurred and income foregone.

A participant may receive supplemental payments when he or she adopts a resource-conserving crop rotation. To be eligible for a supplemental payment, the participant must agree to adopt and maintain a beneficial resource-conserving crop rotation for the term of the contract. An example of a resource-conserving crop rotation would be adding alfalfa to a small grain, row crop rotation.

NRCS will make CSP payments as soon as practicable after October 1 for the previous fiscal year's activities. This retrospective payment approach will allow NRCS to field-verify applied conservation activities prior to contract obligation and payment.

A CSP payment to a participant shall not be provided for conservation practices or enhancements applied with financial assistance through other USDA conservation programs, the installation or maintenance of animal waste storage or treatment facilities or associated waste transport or transfer devices for animal feeding operations, or conservation activities for which there is no cost incurred or income forgone by the participant.

The 2008 Act requires that a person or legal entity may not receive, directly or indirectly, payments that, in the aggregate, exceed $200,000 for all contracts entered into during any 5-year period. The regulation includes an annual payment limit of $40,000 during any fiscal year to a person or legal entity. This annual limit was added to reduce the chance that participants of large contracts would reach their $200,000 five-year limit early in their contract term and have reduced incentive to meet their obligations over the five year life of the contract. NRCS will monitor person or legal entity payment limitations through direct attribution to real persons.

The absence of a contract payment limitation in the 2008 Act caused concern because of the potential for excessively large contracts. Since each member of a joint operation is treated as a separate person or legal entity with payments directly attributed to them, contracts with a joint operation could be very large. For example, a contract with a joint operation with five members who each reach their $200,000 per person or legal entity limit could have contract payments of $1 million. To prevent large contracts of this nature, the rule includes a contract limit of $200,000 over the term of the initial contract period.

With regard to the payment limitation as it applies to contracts with Indians represented by the Bureau of Indian Affairs (BIA) or an Indian Tribe, payments exceeding the payment limitation may be made to the Tribal participant if the BIA or Tribal official certifies in writing that no one individual will receive more than the payment limitation. The BIA or Tribe must also provide, annually, a listing of individuals and payments made, by tax identification number or other unique identification number, during the previous year for calculation of overall payment limitations. The BIA or Indian Tribe must also produce, at the request of NRCS, proof of payments made to the person or legal entity that incurred costs or sacrificed income related to conservation practice implementation.

Section 1470.25 Contract Modifications and Transfers of Land

Section 1470.25, "Contract modifications and transfers of land," provides that NRCS will not modify a contract to increase the contract obligation beyond the amount of the initial contract, with exception for contracts approved for renewal. The section further clarifies the participant's contract responsibilities as they relate to loss of control of land and the obligations of the transferee. In particular, paragraph (c) identifies that it is the participant's responsibility to notify NRCS of any voluntary or involuntary land transfer. If all or part of the land under contract is transferred, the contract terminates with respect to the transferred acres unless the transferee is eligible for CSP payments and agrees to accept all contractual obligations.

Section 1470.26 Contract Renewal

From Section 1470.26, "Contract renewal," NRCS will allow a participant to renew the contract for one additional five-year period if they meet specific criteria. Paragraph (b) contains the criteria, which include that the participant must, as determined by NRCS:

- Be in compliance with the terms of their initial contract;
- Add any newly-acquired eligible land that is part of their operation and meets minimum treatment criteria;
- Meet stewardship thresholds for additional priority resource concerns; and
- Agree to adopt conservation activities.

Section 1470.27 Contract Violations and Termination

Section 1470.27, "Contract violations and termination," addresses the procedures that NRCS will take when a violation has occurred or a contract termination is needed. Specifically, paragraph (a) provides that the State Conservationist, individually or by mutual consent, may terminate a contract when it is in the public interest or where the participants are unable to comply with the terms of the contract as a result of conditions beyond their control.

Paragraph (b) states that the State Conservationist may allow the participant to retain a portion of any payments received in the case of hardship or, as appropriate, to the effort the participant has made to comply with the contract. When a participant claims that the reason for the violation is a form of hardship, the claim must be documented and have occurred after the participant entered into the contract.

When a participant makes a hardship claim, the participant will provide documentation that details the hardship, when the hardship began, and why the hardship has prevented fulfilling requirements of the contract. Examples of hardship include: natural disasters, major illness, bankruptcy, and matters of public interest (*e.g.*, military service, public utilities' easement or condemnation of land, or environmental and archeological concerns).

Paragraph (c) specifies that if NRCS determines that a participant is in violation, the participant will be given a period of time to correct the violation. If a participant continues to violate the contract, NRCS may terminate the contract.

NRCS may terminate a contract immediately if, in accordance with paragraph (d) of this section, the participant has filed a false claim, engaged in a scheme or device, or engaged in actions that are sufficiently purposeful or negligent to warrant a termination without delay.

Paragraph (e) specifies that if NRCS terminates a contract, the participant forfeits all rights to future payments. Paragraph (e) provides notice to the public that NRCS has the ability to collect liquidated damages, along with payments received, plus interest. Additionally, participants who violate CSP contracts may be determined ineligible for future CSP funding or

funding in other programs administered by NRCS.

Subpart C—General Administration

Section 1470.30 Fair Treatment of Tenants and Sharecroppers

Section 1470.30, "Fair treatment of tenants and sharecroppers," specifies that any CSP payments received must be divided in the manner specified in the contract. Where conflicts arise between an operator and landowner, NRCS may refuse to enter into a CSP contract.

Section 1470.31 Appeals

Section 1470.31, "Appeals," notifies NRCS applicants and participants that they have the right to appeal in accordance with the processes and procedures outlined in 7 CFR 11 and 614. Matters of general applicability, such as payment rates and limits, and eligible conservation activities, are not subject to appeal.

Section 1470.32 Compliance With Regulatory Measures

Section 1470.32, "Compliance with regulatory measures," is added to notify participants that they are responsible for obtaining necessary authorities, rights, easements, permits, and other approvals necessary to implement, operate, and maintain items specified in the conservation stewardship plan. Additionally, participants are responsible for compliance with all laws and for all effects or actions resulting from the implementation of the CSP contract.

Section 1470.33 Access to Operating Unit

Section 1470.33, "Access to operating unit," is added to notify potential CSP applicants and CSP participants that an authorized NRCS representative may enter an operating unit for the purpose of determining eligibility, ascertaining accuracy of any representations, and confirming compliance with program requirements during the term of the contract. NRCS will attempt to contact the participant prior to entering the property.

Section 1470.34 Equitable Relief

Section 1470.34, "Equitable relief," notifies a participant that he or she may be eligible for equitable relief in accordance with 7 CFR part 635, if the participant relied upon the advice or action of NRCS and did not know or have reason to know that the action or advice was erroneous. This section also clarifies that liability for any action or advice taken on behalf of the TSP will be assumed by the TSP.

Section 1470.35 Offsets and Assignments

Section 1470.35, "Offsets and assignments," specifies any payment or portion of a payment will be issued without regard to any claim or lien by a creditor, except for agencies of the United States Government. A participant may assign any payment in accordance with the provisions of 7 CFR part 1404.

Section 1470.36 Misrepresentation and Scheme or Device

Section 1470.36, "Misrepresentation and scheme or device," outlines the remedies available to NRCS should NRCS determine that an applicant or participant misrepresented any fact affecting a CSP determination, adopted any scheme or device that tends to defeat the purpose of the program, deprives any tenant or sharecropper of payments to which they otherwise would be entitled, or made any fraudulent representation. Among the remedies available, NRCS may have their interest in all CSP contracts terminated, and determine them ineligible for future NRCS-administered conservation program funding.

Section 1470.37 Environmental Credits for Conservation Improvements

Section 1470.37, "Environmental credits for conservation improvements," provides NRCS' policy on environmental credits. NRCS believes that environmental benefits can be achieved by implementing conservation activities funded through CSP. These environmental benefits may result in opportunities for the program participant to sell environmental credits. These environmental credits must be compatible with the purposes of the CSP contract. NRCS asserts no direct or indirect interest in these credits. However, NRCS retains the authority to ensure that operation and maintenance requirements for CSP-funded improvements are met, consistent with § 1470.21 and § 1470.23. Where actions may impact the land and conservation activities under a CSP contract, NRCS will at the request of the participants, assist with the development of an O&M compatibility assessment.

List of Subjects in 7 CFR Part 1470

Agricultural operation, Conservation activities, Conservation measurement tool, Natural resources, Priority resource concern, Stewardship threshold, Resource-conserving crop rotation, Soil and water conservation, Soil quality, Water quality and water conservation, Wildlife and forestry management.

■ For the reasons stated above, the Commodity Credit Corporation adds Part 1470 of Title 7 of the Code of Federal Regulations to read as follows:

PART 1470—CONSERVATION STEWARDSHIP PROGRAM

Subpart A—General Provisions

Sec.

Subpart B—Contracts and Payments

Subpart C—General Administration

Authority: 16 U.S.C. 3838d–3838g.

Subpart A—General Provisions

§ 1470.1 Applicability.

(a) This part sets forth the policies, procedures, and requirements for the Conservation Stewardship Program (CSP) as administered by the Natural Resources Conservation Service (NRCS), for enrollment during fiscal year 2009 and thereafter.

(b) The purpose of CSP is to encourage producers to address resource concerns in a comprehensive manner by:

(1) Undertaking additional conservation activities; and

(2) Improving, maintaining, and managing existing conservation activities.

(c) CSP is applicable in any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the

Commonwealth of the Northern Mariana Islands.

(d) NRCS provides financial assistance and technical assistance to participants for the conservation, protection, and improvement of soil, water, and other related natural resources, and for any similar conservation purpose as determined by NRCS.

§ 1470.2 Administration.

(a) The regulations in this part will be administered under the general supervision and direction of the Chief, NRCS, who is a Vice President of the Commodity Credit Corporation (CCC).

(b) The Chief is authorized to modify or waive a provision of this part if the Chief deems the application of that provision to a particular limited situation to be inappropriate and inconsistent with the purposes of the program. This authority cannot be further delegated. The Chief may not modify or waive any provision of this part which is required by applicable law.

(c) To achieve the conservation goals of CSP, NRCS will:

(1) Make the program available nationwide to eligible applicants on a continuous application basis with one or more ranking periods to determine enrollments, one of the ranking periods shall occur in the first quarter of each fiscal year, to the extent practicable; and

(2) Develop conservation measurement tools for the purpose of carrying out the program.

(d) NRCS will, to the maximum extent practicable, manage CSP to achieve a national average rate of $18 per acre, which includes the costs of all financial and technical assistance, and any other expenses associated with program enrollment and participation.

(e) NRCS will establish a national target to set aside five percent of CSP acres for socially disadvantaged farmers or ranchers, and an additional five percent of CSP acres for beginning farmers or ranchers.

(f) The State Conservationist will:

(1) Obtain advice from the State Technical Committee and local working groups on the development of State-level technical, outreach, and program issues, including the identification of priority resource concerns for a State, or the specific geographic areas within a State;

(2) Assign NRCS employees as Designated Conservationists to be responsible for CSP at the local level; and

(3) Be responsible for the program in their assigned State.

(g) NRCS may enter into agreements with Federal agencies, State and local agencies, conservation districts, Indian Tribes, private entities, and individuals to assist NRCS with program implementation.

§ 1470.3 Definitions.

The following definitions will apply to this part and all documents issued in accordance with this part, unless specified otherwise:

Agricultural land means cropland, rangeland, and pastureland on which agricultural products, or livestock are produced and resource concerns may be addressed. Agricultural lands may also include other land and incidental areas included in the agricultural operation as determined by NRCS.

Agricultural operation means all agricultural land and other land, as determined by NRCS, whether contiguous or noncontiguous:

(1) Which is under the effective control of the applicant for the term of the proposed contract; and

(2) Which is operated by the applicant with equipment, labor, management, and production or cultivation practices that are substantially separate from other operations.

Animal waste storage or treatment facility means a structural conservation practice used for storing or treating animal waste.

Applicant means a person, legal entity, joint operation, or Indian Tribe that has an interest in an agricultural operation, as defined in 7 CFR part 1400, who has requested in writing to participate in CSP.

Beginning farmer or rancher means:

(1) An individual or legal entity who:

(i) Has not operated a farm, ranch, or nonindustrial private forest land, or who has operated a farm, ranch, or nonindustrial private forest land for not more than 10 consecutive years (this requirement applies to all members of a legal entity); and

(ii) Will materially and substantially participate in the operation of the farm or ranch.

(2) In the case of a contract with an individual, individually or with the immediate family, material and substantial participation requires that the individual provide substantial day-to-day labor and management of the farm or ranch, consistent with the practices in the county or State where the farm is located.

(3) In the case of a contract with a legal entity or joint operation, all members must materially and substantially participate in the operation of the farm or ranch. Material and substantial participation requires that each of the members provide some amount of the management, or labor and management necessary for day-to-day activities, such that if each of the members did not provide these inputs, operation of the farm or ranch would be seriously impaired.

Chief means the Chief of NRCS, United States Department of Agriculture (USDA), or designee.

Conservation activities means conservation systems, practices, or management measures needed to address a resource concern or improve environmental quality through the treatment of natural resources, and includes structural, vegetative, and management activities, as determined by NRCS.

Conservation district means any district or unit of State, Tribal, or local government formed under State, Tribal, or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a "conservation district," "soil conservation district," "soil and water conservation district," "resource conservation district," "land conservation committee," "natural resource district," or similar name.

Conservation measurement tool means procedures developed by NRCS, to estimate the level of environmental benefit to be achieved by a producer using the proxy of conservation performance improvement.

Conservation planning means using the planning process outlined in the applicable National Planning Procedures Handbook of the United States Department of Agriculture.

Conservation practice means a specified treatment, such as a structural or vegetative practice or management technique, commonly used to meet a specific need in planning and carrying out soil and water conservation programs for which standards and specifications, including interim standards and specifications, have been developed. Conservation practices are in the NRCS Field Office Technical Guide (FOTG), Section IV, which is based on the National Handbook of Conservation Practices (NHCP).

Conservation stewardship plan means a record of the participant's decisions that describes the schedule of conservation activities to be implemented, managed, or improved. Associated supporting information that identifies and inventories resource concerns and existing conservation activities, establishes benchmark data, and documents the participant's conservation objectives will be maintained with the plan.

Conservation system means a combination of conservation practices,

management measures, and enhancements used to address natural resource and environmental concerns in a comprehensive, holistic, and integrated manner.

Contract means a legal document that specifies the rights and obligations of any participant who has been accepted into the program. A CSP contract is an agreement for the transfer of assistance from NRCS to the participant for installing, adopting, improving, managing, and maintaining conservation activities.

Designated Conservationist means an NRCS employee whom the State Conservationist has designated as responsible for CSP at the local level.

Enhancement means a type of conservation activity used to treat natural resources and improve conservation performance. Enhancements are installed at a level of management intensity that exceeds the sustainable level for a given resource concern, and those directly related to a practice standard are applied in a manner that exceeds the minimum treatment requirements of the standard.

Enrollment means for the initial signup for FY2009, NRCS will consider a participant "enrolled" in CSP based on the fiscal year the application is submitted, once NRCS approves the participant's contract. For subsequent ranking cut-off periods, NRCS will consider a participant enrolled in CSP based on the fiscal year the contract is approved.

Field office technical guide (FOTG) means the official local NRCS source of resource information and interpretations of guidelines, criteria, and standards for planning and applying conservation practices and conservation management systems. It contains detailed information on the conservation of soil, water, air, plant, and animal resources applicable to the local area for which it is prepared.

Indian lands means all lands held in trust by the United States for individual Indians or Indian Tribes, or all land titles held by individual Indians or Tribes, subject to Federal restrictions against alienation or encumbrance, or lands subject to the rights of use, occupancy and/or benefit of certain Indian Tribes. This term also includes lands for which the title is held in fee status by Indian Tribes, and the U.S. Government-owned land under the Bureau of Indian Affairs jurisdiction.

Indian Tribe means any Indian Tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village or regional corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Joint operation means, as defined in part 1400 of this chapter, a general partnership, joint venture, or other similar business arrangement in which the members are jointly and severally liable for the obligations of the organization.

Legal entity means, as defined in part 1400 of this chapter, an entity created under Federal or State law.

Liquidated damages means a sum of money stipulated in the CSP contract that the participant agrees to pay NRCS if the participant fails to fulfill the terms of the contract. The sum represents an estimate of the technical assistance expenses incurred to service the contract, and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

Local working group means the advisory body as described in 7 CFR part 610.

Management measure means one or more specific actions that is not a conservation practice, but has the effect of alleviating problems or improving the treatment of the natural resources.

National Organic Program means the program, administered by the Agricultural Marketing Service, USDA, which regulates the standards for any farm, wild crop harvesting, or handling operation that wants to market an agricultural product as organically produced.

Natural Resources Conservation Service means an agency of the USDA, which has responsibility for administering CSP using the funds, facilities, and authorities of the Commodity Credit Corporation.

Nonindustrial private forest land means rural land that has existing tree cover or is suitable for growing trees, and is owned by an individual, group, association, corporation, Indian Tribe, or other private legal entity that has definitive decision-making authority over the land.

Operation and maintenance means work performed by the participant to maintain existing conservation activities to at least the level of conservation performance identified at the time of application, and maintain additional conservation activities installed and adopted over the contract period.

Participant means a person, legal entity, joint operation, or Indian Tribe that is receiving payment or is responsible for implementing the terms and conditions of a CSP contract.

Payment means financial assistance provided to the participant under the terms of the CSP contract.

Person means, as defined in part 1400 of this chapter, an individual, natural person and does not include a legal entity.

Priority resource concern means a resource concern that is identified by the State Conservationist, in consultation with the State Technical Committee and local working groups, as a priority for a State, or the specific geographic areas within a State.

Producer means a person, legal entity, or joint operation who has an interest in the agricultural operation, according to part 1400 of this chapter, or who is engaged in agricultural production or forest management.

Resource concern means a specific natural resource problem that is likely to be addressed successfully through the implementation of conservation activities by producers.

Resource-conserving crop means a crop that is one of the following:

(1) A perennial grass, legume, or grass/legume grown for use as forage, seed for planting, or green manure;

(2) A high residue producing crop; or

(3) A cover crop following an annual crop.

Resource-conserving crop rotation means a crop rotation that:

(1) Includes at least one resource conserving crop as determined by the State Conservationist;

(2) Reduces erosion;

(3) Improves soil fertility and tilth;

(4) Interrupts pest cycles; and

(5) Reduces depletion of soil moisture or otherwise reduces the need for irrigation in applicable areas.

Secretary means the Secretary of the USDA.

Socially disadvantaged farmer or rancher means a producer who has been subjected to racial or ethnic prejudices because of their identity as a member of a group without regard to their individual qualities. A socially disadvantaged group is a group whose members have been subject to racial or ethnic prejudice because of their identity as members of a group, without regard to their individual qualities. These groups consist of American Indians or Alaskan Natives, Asians, Blacks or African Americans, Native Hawaiians or other Pacific Islanders, and Hispanics. Gender alone is not a covered group for the purposes of NRCS conservation programs. A socially disadvantaged applicant is an individual or entity who is a member of a socially disadvantaged group. For an entity, at least 50 percent ownership in the farm business must be held by socially disadvantaged individuals.

State Conservationist means the NRCS employee authorized to implement CSP and direct and supervise NRCS activities in a State, the Caribbean Area, or the Pacific Islands Area.

State Technical Committee means a committee established by the Secretary in a State pursuant to 16 U.S.C. 3861.

Stewardship threshold means the level of natural resource conservation and environmental management required, as determined by NRCS using conservation measurement tools, to conserve and improve the quality and condition of a natural resource.

Technical assistance means technical expertise, information, and tools necessary for the conservation of natural resources on land active in agricultural, forestry, or related uses. The term includes the following:

(1) Technical services provided directly to farmers, ranchers, and other eligible entities, such as conservation planning, technical consultation, and assistance with design and implementation of conservation activities; and

(2) Technical infrastructure, including processes, tools and agency functions needed to support delivery of technical services, such as technical standards, resource inventories, training, data, technology, monitoring, and effects analyses.

Technical Service Provider (TSP) means an individual, private-sector entity, or public agency certified by NRCS to provide technical services to program participants, in lieu of or on behalf of NRCS as referenced in 7 CFR part 652.

§ 1470.4 Allocation and management.

(a) The Chief will allocate acres and associated funds to State Conservationists, based:

(1) Primarily on each State's proportion of eligible land to the total amount of eligible land in all States; and

(2) On consideration of—

(i) The extent and magnitude of the conservation needs associated with agricultural production in each State,

(ii) The degree to which implementation of the program in the State is, or will be, effective in helping producers address those needs, and

(iii) Other considerations determined by the Chief, to achieve equitable geographic distribution of program participation.

(b) In any fiscal year, acres allocated to a State that are not enrolled by a date determined by the Chief, may be reallocated with associated funds to another State for use in that fiscal year under CSP.

§ 1470.5 Outreach activities.

(a) NRCS will establish program outreach activities at the national, State, and local levels to ensure that potential applicants who control eligible land are aware and informed that they may be eligible to apply for program assistance.

(b) Special outreach will be made to eligible producers with historically low participation rates, including but not restricted to, beginning farmers or ranchers, limited resource producers, and socially disadvantaged farmers or ranchers, Indian Tribes, Alaska Natives, and Pacific Islanders.

(c) NRCS will ensure that outreach is provided so as not to limit producer participation because of size or type or operation, or production system, including specialty crop and organic production.

§ 1470.6 Eligibility requirements.

(a) *Eligible applicant.* To be eligible to participate in CSP, at the time of application, an applicant must meet all the following requirements:

(1) Be the operator in the Farm Service Agency (FSA) farm records management system for the agricultural operation being offered for enrollment in the program. Potential applicants that are not in the FSA farm records management system must establish records with FSA prior to application. Potential applicants whose records are not current in the FSA farm records management system must update those records with FSA prior to application;

(2) Have documented control of the land for the term of the proposed contract unless an exception is made by the Chief in the case of land allotted by the Bureau of Indian Affairs (BIA), Indian lands, or other instances in which the Chief determines that there is sufficient assurance of control;

(3) Be in compliance with the highly erodible land and wetland conservation provisions found at 7 CFR part 12;

(4) Be in compliance with Adjusted Gross Income provisions found at 7 CFR part 1400;

(5) Supply information, as required by NRCS, to determine eligibility for the program, including but not limited to, information related to eligibility requirements and ranking factors; conservation activity and production system records; information to verify the applicant's status as a beginning farmer and rancher or socially disadvantaged farmer or rancher, if applicable; and payment eligibility as established by 7 CFR part 1400; and

(6) Provide a list of all members of the legal entity and embedded entities along with members' tax identification numbers and percentage interest in the entity. Where applicable, American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment.

(b) *Eligible land.* A contract application must include the eligible land on an applicant's entire agricultural operation, except as identified in paragraph (b)(3) of this section. The land as described below is part of the agricultural operation, and eligible for enrollment and payment under CSP:

(1) Private agricultural land;

(2) Agricultural Indian lands; and

(3) Nonindustrial private forest land (NIPF).

(i) By special rule in the statute, NIPF is eligible land.

(ii) No more than 10 percent of the acres enrolled nationally in any fiscal year may be NIPF.

(iii) The applicant will designate by submitting a separate application if they want to offer NIPF for funding consideration.

(iv) If designated for funding consideration, then the NIPF component of the operation will include all the applicant's NIPF. If not designated for funding consideration, then the applicant's NIPF will not be part of the agricultural operation.

(c) *Ineligible land.* The following ineligible lands are part of the agricultural operation, but ineligible for inclusion in the contract or for payment in CSP:

(1) Land enrolled in the Conservation Reserve Program, 7 CFR part 1410;

(2) Land enrolled in the Wetlands Reserve Program, 7 CFR part 1467;

(3) Land enrolled in the Grassland Reserve Program, 7 CFR part 1415;

(4) Land enrolled in the Conservation Security Program, 7 CFR part 1469;

(5) Public land including land owned by a Federal, State, or local unit of government; and

(6) Land used for crop production after June 18, 2008, that had not been planted, considered to be planted, or devoted to crop production for at least 4 of the 6 years preceding that date, unless that land—

(i) Had previously been enrolled in the Conservation Reserve Program,

(ii) Has been maintained using long-term crop rotation practices as determined by the Designated Conservationist, or

(iii) Is incidental land needed for efficient operation of the farm or ranch as determined by the Designated Conservationist.

§ 1470.7 Enhancements and conservation practices.

(a) Participant decisions describing the additional enhancements and conservation practices to be implemented under the conservation stewardship contract will be recorded in the conservation stewardship plan.

(b) NRCS will make available to the public the list of enhancements and conservation practices available to be installed, adopted, maintained, and managed through CSP.

§ 1470.8 Technical and other assistance.

(a) NRCS may provide technical assistance to an eligible applicant or participant either directly or through a technical service provider as set forth in 7 CFR part 652.

(b) NRCS retains approval authority over certification of work done by non-NRCS personnel for the purpose of approving CSP payments.

(c) NRCS will ensure that technical assistance is available and program specifications are appropriate so as not to limit producer participation because of size or type or operation, or production system, including specialty crop and organic production. In providing technical assistance to specialty crop and organic producers, NRCS will provide appropriate training to field staff to enable them to work with these producers and to utilize cooperative agreements and contracts with nongovernmental organizations with expertise in delivering technical assistance to these producers.

(d) NRCS will assist potential applicants dealing with the requirements of certification under the National Organic Program and CSP requirements concerning how to coordinate and simultaneously meet eligibility standards under each program.

Subpart B—Contracts and Payments

§ 1470.20 Application for contracts and selecting offers from applicants.

(a) *Submission of contract applications.* Eligible applicants may submit an application to enroll eligible land into CSP on a continuous basis.

(b) Eligibility. To be eligible to participate in CSP, an applicant must submit to the Designated Conservationist for approval, a contract application that:

(1) Indicates the applicant's conservation activities, at the time of application, are meeting the stewardship threshold for at least one resource concern;

(2) Would, at a minimum, meet or exceed the stewardship threshold for at least one priority resource concern by the end of the conservation stewardship contract by—

(i) Installing and adopting additional conservation activities, and

(ii) Improving, maintaining, and managing conservation activities present on the agricultural operation at the time the contract application is accepted by NRCS;

(3) Provides a map, aerial photograph, or overlay that—

(i) Identifies the applicant's agricultural operation and/or NIPF component of the operation, and

(ii) Delineates eligible land offered for payment with associated acreage amounts; and

(4) If the applicant is applying for on-farm research and demonstration activities or for pilot testing, describes the nature of the research, demonstration or pilot testing in a manner consistent with design protocols and application procedures established by NRCS.

(c) *Evaluation of contract applications.* NRCS will conduct one or more ranking periods each fiscal year.

(1) To the extent practicable, one ranking period will occur in the first quarter of the fiscal year.

(2) In evaluating CSP applications, the State Conservationist or Designated Conservationist will rank applications based on the following factors, using the conservation measurement tool, to the maximum extent practicable—

(i) Level of conservation treatment on all applicable priority resource concerns at the time of application;

(ii) Degree to which the proposed conservation treatment on applicable priority resource concerns effectively increases conservation performance;

(iii) Number of applicable priority resource concerns proposed to be treated to meet or exceed the stewardship threshold by the end of the contract; and

(iv) Extent to which other resource concerns, in addition to priority resource concerns, will be addressed to meet or exceed the stewardship threshold by the end of the contract period.

(3) In the event that application ranking scores from (2) above are similar, the application that represents the least cost to the program will be given higher priority.

(4) The State Conservationist or Designated Conservationist may not assign a higher priority to any application because the applicant is willing to accept a lower payment than the applicant would otherwise be eligible to receive.

(d) *State and local priorities.* The Chief may develop and use additional criteria for evaluating applications that are determined necessary to ensure that national, State, and local conservation priorities are effectively addressed.

(e) *Application.* The State Conservationist will take the following actions to facilitate the evaluation and ranking of applications:

(1) Implement the use of the conservation measurement tool to estimate existing and proposed conservation performance;

(2) Identify not less than 3 nor more than 5 priority resource concerns for a State, or the specific geographic areas within a State, with advice from the State Technical Committee and local working groups; and

(3) Establish ranking pools for application evaluation purposes.

(f) *Ranking pools.* Ranking pools will be established based on the same State or geographic area boundaries used to identify priority resource concerns so applicants will be ranked relative to other applicants who share similar resource challenges.

(1) NIPF will compete in ranking pools separate from agricultural land. An applicant with both NIPF and agricultural land will have the options to submit:

(i) One application for NIPF;

(ii) One application for agricultural land; or

(iii) Two applications, one for each land type.

(2) An applicant with an agricultural operation or NIPF component of the operation that crosses ranking pool boundaries will make application and be ranked in the ranking pool where the largest acreage portion of their operation occurs.

(3) Within each established geographic area, the State Conservationist will set up special pools for conservation access for certain farmers or ranchers, including:

(i) One pool for socially disadvantaged farmers or ranchers; and

(ii) One pool for beginning farmers or ranchers.

(4) Applicants who want their application considered in the pool for socially disadvantaged farmers or ranchers or beginning farmers or ranchers will designate that intent on their application and provide the required information.

(5) In any fiscal year, acres and associated funds allocated to a ranking pool or pool that are not enrolled by a date determined by the State Conservationist, may be reallocated within the State for use in that fiscal year under CSP.

(g) *Application approval.* The State Conservationist or Designated

Conservationist will make application approval determinations during established ranking periods based on eligibility and ranking score. An eligible application may be approved for funding after a determination of the application's ranking priority.

§ 1470.21 Contract requirements.

(a) After a determination that the application will be approved and a conservation stewardship plan will be developed in accordance with § 1470.22, the State Conservationist or designee shall enter into a conservation stewardship contract with the participant to enroll the eligible land to receive payment.

(b) The conservation stewardship contract shall:

(1) Provide for payments over a period of 5 years;

(2) Incorporate by reference the conservation stewardship plan;

(3) State the payment amount NRCS agrees to make to the participant annually, subject to the availability of funds;

(4) Incorporate all provisions as required by law or statute, including requirements that the participant will—

(i) Implement the conservation stewardship plan approved by NRCS during the term of the contract,

(ii) Operate and maintain conservation activities on the agricultural operation consistent with § 1470.23,

(iii) Comply with the terms of the contract, or documents incorporated by reference into the contract,

(iv) Refund as determined by NRCS, any program payments received with interest, and forfeit any future payments under the program, upon the violation of a term or condition of the contract, consistent with § 1470.27,

(v) Refund as determined by NRCS, all program payments received with interest, upon the transfer of the right and interest of the participant, in land subject to the contract, unless the transferee of the right and interest agrees to assume all obligations of the contract, consistent with § 1470.25,

(vi) Maintain, and make available to NRCS upon request, appropriate records documenting applied conservation activity and production system information, and providing evidence of the effective and timely implementation of the conservation stewardship plan and contract, and

(vii) Not engage in any action during the term of the conservation stewardship contract on the eligible land covered by the contract that would interfere with the purposes of the conservation stewardship contract;

(5) Permit all economic uses of the land that:

(i) Maintain the agricultural or forestry nature of the land, and

(ii) Are consistent with the conservation purposes of the contract;

(6) Include a provision to ensure that a participant shall not be considered in violation of the contract for failure to comply with the contract due to circumstances beyond the control of the participant, including a disaster or related condition, as determined by the State Conservationist; and

(7) Include such other provisions as NRCS determines necessary to ensure the purposes of the program are achieved.

§ 1470.22 Conservation stewardship plan.

(a) NRCS will use the conservation planning process as outlined in the National Planning Procedures Handbook to encourage participants to address resource concerns in a comprehensive manner.

(b) The conservation stewardship plan will contain a record of the participant's decisions that describes the schedule of conservation activities to be implemented, managed, or improved under the conservation stewardship contract.

(c) Associated supporting information maintained with the participant's plan will:

(1) Identify and inventory resource concerns;

(2) Establish benchmark data on the condition of existing conservation activities;

(3) Document the participant's conservation objectives to reach and exceed stewardship thresholds;

(4) Include a plan map delineating enrolled land with associated acreage amounts receiving program payments;

(5) Include in the case where a participant wishes to initiate or retain organic certification, documentation that will support the participant's transition to or participation in the National Organic Program;

(6) Include in the case where a participant is approved for the on-farm research and demonstration or pilot testing option, a research, demonstration or pilot testing plan consistent with design protocols and application procedures established by NRCS; and

(7) Contain other information as determined appropriate by NRCS.

§ 1470.23 Conservation activity operation and maintenance.

The participant will operate and maintain existing conservation activities on the agricultural operation to at least the level of conservation performance identified at the time of application for the conservation stewardship contract period and additional activities installed and adopted over the term of the conservation stewardship contract.

§ 1470.24 Payments.

(a) *Annual payments.* Subject to the availability of funds, NRCS will provide an annual payment under the program to compensate a participant for installing and adopting additional conservation activities, and improving, maintaining, and managing existing activities.

(1) To receive an annual payment, a participant must:

(i) Install and adopt additional conservation activities as scheduled in the conservation stewardship plan. At least one enhancement must be scheduled, installed, and adopted in the first year of the contract. All enhancements must be scheduled, installed, and adopted by the end of the third year of the contract; and

(ii) Maintain at least the level of existing conservation performance identified at the time of application for the conservation stewardship contract period.

(2) A participant's annual payment will be determined using the conservation performance estimated by the conservation measurement tool, and computed by land-use type for enrolled eligible land.

(3) The annual payment rates will be based to the maximum extent practicable, on the following factors:

(i) Costs incurred by the participant associated with planning, design, materials, installation, labor, management, maintenance, or training;

(ii) Income foregone by the participant; and

(iii) Expected environmental benefits, determined by estimating conservation performance improvement using the conservation measurement tool.

(4) The annual payment method will accommodate some participant operational adjustments without the need for contract modification.

(i) Enhancements may be replaced with similar enhancements as long as the conservation performance estimated by the conservation measurement tool is equal to or better than the conservation performance of the additional enhancements offered at enrollment. An enhancement replacement that results in a decline below that conservation performance level will not be allowed.

(ii) Adjustments to existing activities may occur consistent with conservation performance requirements from § 1470.23(a).

(5) Enhancements may be applied on other land included in an agricultural operation, as determined by NRCS.

(b) *Supplemental payments.* Subject to the availability of funds, NRCS will provide a supplemental payment to a participant receiving annual payments, who also agrees to adopt a resource-conserving crop rotation.

(1) The State Conservationist will determine whether a resource-conserving crop rotation is eligible for supplemental payments based on whether the resource-conserving crop rotation is designed to provide natural resource conservation and production benefits.

(2) A participant must agree to adopt and maintain a beneficial resource-conserving crop rotation for the term of the contract to be eligible to receive a supplemental payment. A resource-conserving crop rotation is considered adopted when the resource-conserving crop is planted on at least one-third of the rotation acres. The resource-conserving crop must be adopted by the third year of the contract and planted on all rotation acres by the fifth year of the contract.

(3) The supplemental payment rate will be based, to the maximum extent practicable, on costs incurred and income foregone by the participant and expected environmental benefits, determined by estimating conservation performance improvement using the conservation measurement tool.

(c) *On-farm research and demonstration or pilot testing.* A participant may be compensated through their annual payment for:

(1) On-farm research and demonstration activities; or

(2) Pilot testing of new technologies or innovative conservation activities.

(d) *Timing of payments.* NRCS will make payments as soon as practicable after October 1 of each fiscal year for activities carried out in the previous fiscal year.

(e) *Noncompensatory matters.* A CSP payment to a participant shall not be provided for:

(1) Conservation practices or enhancements applied with financial assistance through other USDA conservation programs;

(2) The design, construction, or maintenance of animal waste storage or treatment facilities or associated waste transport or transfer devices for animal feeding operations; or

(3) Conservation activities for which there is no cost incurred or income foregone by the participant.

(f) *Payment limits.* A person or legal entity may not receive, directly or indirectly, payments that, in the aggregate, exceed $40,000 during any fiscal year for all CSP contracts entered into, and $200,000 for all CSP contracts entered into during any 5-year period, excluding funding arrangements with federally recognized Indian tribes or Alaska Native corporations, regardless of the number of contracts entered into under the CSP by the person or legal entity.

(g) *Contract limit.* Each conservation stewardship contract will be limited to $200,000 over the term of the initial contract period.

(h) *Payment limitation provisions for Indians for Indians represented by the BIA.* With regard to contracts with individual Indians or Indians represented by BIA, payments exceeding the payment limitation may be made to the Tribal participant if a BIA or Tribal official certifies in writing that no one individual, directly or indirectly, will receive more than the payment limitation. The Tribal entity must also provide, annually, a listing of individuals and payments made, by social security or tax identification number or other unique identification number, during the previous year for calculation of overall payment limitations. The Tribal entity must also produce, at the request of NRCS, proof of payments made to the person or legal entity that incurred costs or sacrificed income related to conservation activity implementation.

(i) *Requirements for payment.* To be eligible to receive a CSP payment, all legal entities or persons applying, either alone or as part of a joint operation, must provide a tax identification number and percentage interest in the legal entity. In accordance with 7 CFR part 1400, an applicant applying as a joint operation or legal entity must provide a list of all members of the legal entity and joint operation and associated embedded entities, along with the members' social security numbers and percentage interest in the joint operation or legal entity. Where applicable, American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment.

(j) *Unique tax identification numbers.* Any participant that utilizes a unique identification number as an alternative to a tax identification number will utilize only that identifier for any and all other CSP contracts to which the participant is a party. Violators will be considered to have provided fraudulent representation and be subject to full penalties of § 1470.36.

(k) *Payment data.* NRCS will maintain detailed and segmented data on CSP contracts and payments to allow for quantification of the amount of payments made for:

(1) Installing and adopting additional activities;

(2) Improving, maintaining, and managing existing activities;

(3) Participation in research and demonstration, or pilot projects; and

(4) Development and periodic assessment and evaluation of conservation stewardship plans developed under this rule.

§ 1470.25 Contract modifications and transfers of land.

(a) NRCS may allow a participant to modify a conservation stewardship contract if NRCS determines that the modification is consistent with achieving the purposes of the program.

(b) NRCS will not allow a participant to modify a conservation stewardship contract to increase the contract obligation beyond the amount of the initial contract, with exception for contracts approved by NRCS for renewal.

(c) Land under contract will be considered transferred if the participant loses control of the acreage for any reason.

(1) The participant is responsible to notify NRCS prior to any voluntary or involuntary transfer of land under contract.

(2) If all or part of the land under contract is transferred, the contract terminates with respect to the transferred land unless:

(i) The transferee of the land provides written notice within 60 days to NRCS that all duties and rights under the contract have been transferred to, and assumed by, the transferee; and

(ii) The transferee meets the eligibility requirements of the program.

§ 1470.26 Contract renewal.

(a) At the end of an initial conservation stewardship contract, NRCS will allow a participant to renew the contract to receive payments for one additional five-year period, subject to the availability of funds, if they meet criteria from paragraph (b) of this section.

(b) To be considered for contract renewal, the participant must:

(1) Be in compliance with the terms of their initial contract as determined by NRCS;

(2) Add any newly acquired eligible land that is part of the agricultural operation and meets minimum treatment criteria as established and determined by NRCS;

(3) Meet stewardship thresholds for additional priority resource concerns as determined by NRCS; and

(4) Agree to adopt conservation activities as determined by NRCS.

§ 1470.27 Contract violations and termination.

(a) The State Conservationist may terminate, or by mutual consent with the participants, terminate a contract where:

(1) The participants are unable to comply with the terms of the contract as the result of conditions beyond their control; or

(2) Contract termination, as determined by the State Conservationist, is in the public interest.

(b) If a contract is terminated in accordance with the provisions of paragraph (a) of this section, the State Conservationist may allow the participant to retain a portion of any payments received appropriate to the effort the participant has made to comply with the contract, or, in cases of hardship, where forces beyond the participant's control prevented compliance with the contract. If a participant claims hardship, such claims must be clearly documented and cannot have existed when the applicant applied for participation in the program.

(c) If NRCS determines that a participant is in violation of the contract terms or documents incorporated therein, NRCS shall give the participant a period of time, as determined by NRCS, to correct the violation and comply with the contract terms and attachments thereto. If a participant continues in violation, NRCS may terminate the CSP contract in accordance with paragraph (e) of this section.

(d) Notwithstanding the provisions of paragraph (c) of this section, a contract termination shall be effective immediately upon a determination by NRCS that the participant:

(1) Has submitted false information or filed a false claim;

(2) Engaged in any act, scheme, or device for which a finding of ineligibility for payments is permitted under the provisions of § 1470.36; or

(3) Engaged in actions that are deemed to be sufficiently purposeful or negligent to warrant a termination without delay.

(e) If NRCS terminates a contract, the participant will forfeit all rights to future payments under the contract, pay liquidated damages, and refund all or part of the payments received, plus interest. Participants violating CSP contracts may be determined ineligible for future NRCS-administered conservation program funding.

(1) NRCS may require a participant to provide only a partial refund of the payments received if a previously installed conservation activity has achieved the expected conservation performance improvement, is not adversely affected by the violation or the absence of other conservation activities that would have been installed under the contract, and the associated operation and maintenance requirement of the activity had been met.

(2) NRCS will have the option to reduce or waive the liquidated damages, depending upon the circumstances of the case.

(i) When terminating a contract, NRCS may reduce the amount of money owed by the participant by a proportion that reflects the good faith effort of the participant to comply with the contract or the existence of hardships beyond the participant's control that have prevented compliance with the contract. If a participant claims hardship, that claim must be well documented and cannot have existed when the applicant applied for participation in the program.

(ii) In carrying out its role in this section, NRCS may consult with the local conservation district.

Subpart C—General Administration

§ 1470.30 Fair treatment of tenants and sharecroppers.

Payments received under this part must be divided in the manner specified in the applicable contract. NRCS will ensure that tenants and sharecroppers who would have an interest in acreage being offered receive treatment which NRCS deems to be equitable, as determined by the Chief. NRCS may refuse to enter into a contract when there is a disagreement among joint applicants seeking enrollment as to an applicant's eligibility to participate in the contract as a tenant.

§ 1470.31 Appeals.

A participant may obtain administrative review of an adverse decision under this part in accordance with 7 CFR parts 11 and 614. Determinations in matters of general applicability, such as payment rates, payment limits, the designation of identified priority resource concerns, and eligible conservation activities are not subject to appeal.

§ 1470.32 Compliance with regulatory measures.

Participants shall be responsible for obtaining the authorities, rights, easements, permits, or other approvals or legal compliance necessary for the implementation, operation, and maintenance associated with the conservation stewardship plan. Participants shall be responsible for compliance with all laws and for all effects or actions resulting from the implementation of the contract.

§ 1470.33 Access to agricultural operation.

NRCS will have the right to enter an agricultural operation for the purposes of determining eligibility and for ascertaining the accuracy of any representations, including natural resource information provided by an applicant for the purpose of evaluating a contract application. Access shall include the right to provide technical assistance, determine eligibility, assess natural resource conditions, inspect any work undertaken under the contract, and collect information necessary to evaluate the implementation of conservation activities in the contract. NRCS shall make an effort to contact the participant prior to the exercise of this provision.

§ 1470.34 Equitable relief.

(a) If a participant relied upon the advice or action of NRCS and did not know, or have reason to know, that the action or advice was improper or erroneous, the participant may be eligible for equitable relief under 7 CFR part 635. The financial or technical liability for any action by a participant that was taken based on the advice of a Technical Service Provider will remain with the Technical Service Provider and will not be assumed by NRCS.

(b) If a participant has been found in violation of a provision of the conservation stewardship contract or any document incorporated by reference through failure to comply fully with that provision, the participant may be eligible for equitable relief under 7 CFR part 635.

§ 1470.35 Offsets and assignments.

(a) Any payment or portion thereof due any participant under this part shall be allowed without regard to any claim or lien in favor of any creditor, except agencies of the United States Government. The regulations governing offsets and withholdings found at 7 CFR part 1403 shall be applicable to contract payments.

(b) Any participant entitled to any payment may assign any payments in accordance with regulations governing assignment of payment found at 7 CFR part 1404.

§ 1470.36 Misrepresentation and scheme or device.

(a) If NRCS determines that an applicant intentionally misrepresented any fact affecting a CSP determination, the application will be cancelled immediately.

(b) A participant who is determined to have erroneously represented any fact affecting a program determination made in accordance with this part shall not be entitled to contract payments and must refund to NRCS all payments, plus interest determined in accordance with 7 CFR part 1403.

(c) A participant shall refund to NRCS all payments, plus interest determined in accordance with 7 CFR part 1403, received by such participant with respect to all CSP contracts if they are determined to have:

(1) Adopted any scheme or device that tends to defeat the purpose of the program;

(2) Made any fraudulent representation;

(3) Adopted any scheme or device for the purpose of depriving any tenant or sharecropper of the payments to which such person would otherwise be entitled under the program; or

(4) Misrepresented any fact affecting a program determination.

(d) Participants determined to have committed actions identified in paragraph (c) of this section shall:

(1) Have their interest in all CSP contracts terminated; and

(2) In accordance with § 1470.27(e), may be determined by NRCS to be ineligible for future NRCS-administered conservation program funding.

§ 1470.37 Environmental credits for conservation improvements.

NRCS believes that environmental benefits will be achieved by implementing conservation activities funded through CSP. These environmental benefits may result in opportunities for the program participant to sell environmental credits. These environmental credits must be compatible with the purposes of the contract. NRCS asserts no direct or indirect interest on these credits. However, NRCS retains the authority to ensure that operation and maintenance (O&M) requirements for CSP-funded improvements are met, consistent with §§ 1470.21 and 1470.23. Where actions may impact the land and conservation activities under a CSP contract, NRCS will at the request of the participant, assist with the development of an O&M compatibility assessment prior to the participant entering into any credit agreement.

Signed this 21st day of July 2009, in Washington, DC.

Dave White,

Vice President, Commodity Credit Corporation and Chief, Natural Resources Conservation Service.

[FR Doc. E9–17812 Filed 7–28–09; 8:45 am]

BILLING CODE 3410–16–P

FEDERAL ELECTION COMMISSION

11 CFR Part 8

[Notice 2009–17]

ELECTION ASSISTANCE COMMISSION

11 CFR Part 9428

Reorganization of National Voter Registration Act Regulations

AGENCY: Federal Election Commission; Election Assistance Commission.

ACTION: Final rule.

SUMMARY: The Federal Election Commission (FEC) and the Election Assistance Commission (EAC) are jointly taking action to transfer regulations implementing the National Voter Registration Act of 1993 (NVRA) from the FEC to the EAC. The Help America Vote Act of 2002 transferred the FEC's former statutory authority regarding the NVRA regulations to the EAC. Further information is provided in the **SUPPLEMENTARY INFORMATION** that follows.

DATES: This rule is effective August 28, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Tamar Nedzar, Attorney, Election Assistance Commission, 1225 New York Avenue, NW., Suite 1100, Washington, DC 20005, (202) 566–3100 or (866) 747–1471; or Mr. Robert M. Knop, Assistant General Counsel, or Mr. Joshua S. Blume, Attorney, Federal Election Commission, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

Background

The National Voter Registration Act of 1993 ("NVRA") [1] required the Federal Election Commission, in consultation with the chief election officers of the States, to develop a mail voter registration application form for elections to Federal office, and to submit to Congress no later than June 30 of each odd-numbered year (beginning June 30, 1995) a report that assesses the impact of the NVRA and recommends improvements in Federal and State procedures, forms, and other matters affected by the NVRA. 42 U.S.C. 1973gg–7(a)(2), (a)(3) (1993). The NVRA also assigned to the FEC the responsibility of prescribing, in consultation with the chief election officers of the States, such regulations as are necessary to carry out the aforementioned functions. 42 U.S.C. 1973gg–7(a)(1) (1993). The FEC issued regulations implementing these NVRA requirements on June 23, 1994.[2] These regulations are all currently codified in Part 8 of title 11, Chapter 1 of the Code of Federal Regulations ("11 CFR Part 8").

Section 802 of the Help America Vote Act of 2002 ("HAVA") [3] transferred the FEC's responsibilities under the NVRA to the EAC—an independent Federal agency created by HAVA[4] with responsibilities related to various aspects of Federal election administration. 42 U.S.C. 15532.[5] Accordingly, in order to facilitate the EAC's exercise of its statutory authority, the FEC is transferring the regulations implementing Section 9(a) (42 U.S.C. 1973gg–7(a)) of the NVRA to the EAC.

Transfer and Redesignation of Part 8

The FEC and the EAC, through this joint final rule, are removing the regulations in 11 CFR part 8 and simultaneously recodifying them in Chapter II of Title 11, which houses regulations created and administered by the EAC. Part 8 is simultaneously redesignated as Part 9428. Accordingly, 11 CFR 8.1 through 8.7 are redesignated as new 11 CFR 9428.1 through 9428.7. This is illustrated in a table below.

[1] Pub. L. 103–31, 107 Stat. 77, 42 U.S.C. 1973gg–1 *et seq.* (1993).

[2] 59 FR 32323 (June 23, 1994).

[3] Pub. L. 107–252, 116 Stat. 1726, 42 U.S.C. 15532 (2002).

[4] 42 U.S.C. 15321.

[5] "There are transferred to the Election Assistance Commission established under section 201 all functions which the Federal Election Commission exercised under section 9(a) of the National Voter Registration Act of 1993 before the date of the enactment of this Act." HAVA was enacted on October 29, 2002.

Part 8	Heading	New Part 9428
	Subpart A—General Provisions	
§ 8.1	Purpose & scope	§ 9428.1
§ 8.2	Definitions	§ 9428.2
	Subpart B—National Mail Voter Registration Form	
§ 8.3	General information	§ 9428.3
§ 8.4	Contents	§ 9428.4
§ 8.5	Format	§ 9428.5
§ 8.6	Chief state election official	§ 9428.6
	Subpart C—Recordkeeping and Reporting	
§ 8.7	Contents of reports from the states	§ 9428.7

The FEC and EAC are also making conforming changes to the rules to replace references to rules in Part 8 with references to corresponding rules in Part 9428, and to replace references to the "Federal Election Commission" with references to the "Election Assistance Commission." The rule does not make any substantive changes to the new Part 9428 regulations. The EAC may exercise its rulemaking authority to make substantive and technical changes to these rules in the future.

Administrative Procedure Act

The FEC and the EAC find that good cause exists for adopting this rule as a final rule and without public notice and comment under 5 U.S.C. 553(b) because this rule simply relocates and redesignates the regulations in 11 CFR part 8, while making only minor conforming technical changes and no substantive changes to those regulations. The rule reflects the transfer of functions contemplated by the Help America Vote Act of 2002. Accordingly, public notice and comment is unnecessary. 5 U.S.C. 553(b)(B).[6] Further, because the transfer of the regulations is vital to the EAC's ability to function in an area of core responsibility assigned by Congress, the additional delay that would be incurred by resorting to notice and comment procedures would be contrary to the public interest. 5 U.S.C. 553(b)(B). *See, e.g. National Nutritional Foods Assoc.* v. *Kennedy,* 572 F.2d 377, 384–85 (2nd Cir. 1978), *quoting* Senate Report, No. 752, 79th Cong. 1st Sess. (1945).

Transmittal of Final Rule to Congress

Under the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate before they take effect. The final rule that follows was transmitted to Congress on July 24, 2009.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

Because no notice of proposed rulemaking is required for this rule under the Administrative Procedure Act (5 U.S.C. 553), the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. *See* 5 U.S.C. 604(a).

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations at 5 CFR part 1320, require that an agency subject to PRA submit to OMB for approval information collection and recordkeeping requirements associated with agency actions. The FEC is statutorily exempted from the provisions of the PRA while the EAC is not. Consequently, the regulations currently at 11 CFR part 8 do not have an associated OMB control number; whereas the transferred regulations at 11 CFR part 9428 are required to have an associated OMB control number. Accordingly, concurrent with this joint rulemaking activity, the EAC will independently publish a separate PRA notice seeking emergency clearance.

List of Subjects

11 CFR Part 8 and 11 CFR Part 9428

Elections, reporting and recordkeeping requirements.

■ For the reasons discussed in the preamble, the Federal Election Commission and the Election Assistance Commission amend chapters I and II of title 11 of the Code of Federal Regulations as follows:

TITLE 11—FEDERAL ELECTIONS

CHAPTER I—FEDERAL ELECTION COMMISSION

PART 8—[REDESIGNATED AS PART 9428]

■ 1. Transfer 11 CFR Part 8 from Chapter I to Chapter II and redesignate as 11 CFR part 9428.

CHAPTER II—ELECTION ASSISTANCE COMMISSION

PART 9428—NATIONAL VOTER REGISTRATION ACT (42 U.S.C. 1973gg–1 et seq.)

■ 2. The authority citation for the newly redesignated 11 CFR part 9428 is revised to read as follows:

Authority: 42 U.S.C. 1973gg–1 *et seq.*, 15532

§§ 9428.3, 9428.4, 9428.5 and 9428.7 [Amended]

■ 3. Amend the newly redesignated Part 9428 as follows:

[6] Should the EAC propose substantive changes to these regulations on future occasions, it will provide notice and an opportunity to comment pursuant to the Administrative Procedure Act.

Amend	By removing the reference to	And adding in its place
§ 9428.3(a)	11 CFR 8.4	11 CFR 9428.4.
§ 9428.4(a)(6)(ii)	11 CFR 8.6(c)	11 CFR 9428.6(c).
§ 9428.5(a)	"Federal Election Commission's"	"Commission's".
§ 9428.5(b)	11 CFR 8.4(c)	11 CFR 9428.4(c).
§ 9428.5(f)(2)	11 CFR 8.4(b)(1), (6), and (7)	11 CFR 9428.4(b)(1), (6), and (7).
§ 9428.5(f)(2)	11 CFR 8.4(b)(2)	11 CFR 9428.4(b)(2).
§ 9428.6(b)	11 CFR 8.4(a)(2)	11 CFR 9428.4(a)(2).
§ 9428.7(a)	"Federal Election Commission, 999 E Street, NW., Washington, DC 20463.".	"Election Assistance Commission, 1225 New York Avenue, NW., Washington, DC 20005.".

On behalf of the Commission.

Steven T. Walther,

Chairman, Federal Election Commission.

Gineen B. Beach,

Chair, Election Assistance Commission.

[FR Doc. E9–18031 Filed 7–28–09; 8:45 am]

BILLING CODE 6820–KF–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1005; Directorate Identifier 2008–NM–119–AD; Amendment 39–15981; AD 2009–15–18]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–120, –120ER, –120FC, –120QC, and –120RT Airplanes

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

ACTION: Final rule.

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

It was found one occurrence of a fuel booster pump circuit br[e]aker opening during an engine maintenance servicing. An inspection inside the fuel tank revealed the fuel booster pump[']s electrical harness chafing against its body, causing the loss of the electrical wiring protection and resulting in a short circuit. Further in-tank inspections have showed other fuel booster pump electrical harnesses chafing either with the pump body and/or with adjacent fuel lines, causing damage to the harness protective layers and resulting * * * [in a] possible ignition source inside the fuel tank.

* * * * *

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

DATES: This AD becomes effective September 2, 2009.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of September 2, 2009.

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

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1405; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on October 7, 2008 (73 FR 58507). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

It was found one occurrence of a fuel booster pump circuit br[e]aker opening during an engine maintenance servicing. An inspection inside the fuel tank revealed the fuel booster pump[']s electrical harness chafing against its body, causing the loss of the electrical wiring protection and resulting in a short circuit. Further in-tank inspections have showed other fuel booster pump electrical harnesses chafing either with the pump body and/or with adjacent fuel lines, causing damage to the harness protective layers and resulting * * * [in a] possible ignition source inside the fuel tank.

* * * * *

The corrective actions include revising the Limitations section of the airplane flight manual to include a minimum fuel quantity, adding a minimum fuel quantity limitation for operation of the fuel booster pump, inspecting the fuel booster pump electrical harness of the left- and right-hand fuel tanks for damage, replacing any fuel booster pump assembly having a damaged electrical harness, installing clamps on the tank structure, and installing tie down straps for the fuel booster pump electrical harness. You may obtain further information by examining the MCAI in the AD docket.

Changes to the NPRM

We have clarified the references to the fuel booster pump by adding "assembly" where applicable in the paragraph immediately above this paragraph, and in paragraphs (e) and (f)(3)(i) of the AD.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comment received.

Request To Remove Fuel Restriction for Certain Airplanes

The manufacturer, Embraer, agrees with the main concern for issuing the AD, and understands that the addressed unsafe condition does exist. However, Embraer requests that operators who have inspected for and replaced damaged wires inside the fuel tanks be excluded from the minimum requirement of 300 kg of fuel in each tank. Embraer requests that the AD allow operators that have already inspected their airplanes, and are flying under a safe condition, to fly without the restriction of 300 kg of fuel in each tank for at least 2,000 flight hours or 12 months.

Embraer recommends adding the following paragraph to the "Actions and Compliance" section of the proposed AD: "Aircraft that have been inspected in accordance with paragraph (f)(3)(i) of this AD, prior to the effective date of this AD, are exempt from the limitations imposed by paragraphs (f)(1) and (f)(2) for a period of 12 calendar months or 2,000 flight hours from the time of inspection, whichever occurs first." Embraer bases this request on

inspections of 28 airplanes where damage was found only on the first layer of protection of the pumps' wiring, and on service experience showing that very few fuel pumps with chafed wiring have been found on airplanes with more than 20,000 flight hours and 18 years of operation.

We disagree with Embraer's request to remove the fuel quantity restriction. Paragraph (f)(4) of this AD specifies that the limitations imposed by paragraphs (f)(1) and (f)(2) of this AD are no longer required only after complying with both the inspection specified in paragraph (f)(3)(i) of this AD and the installation specified in paragraph (f)(3)(ii) of this AD (both actions must be done in accordance with Embraer Service Bulletin 120–28–0016, dated January 9, 2008).

We contacted Agência Nacional de Aviação Civil (ANAC), the aviation authority for Brazil, which issued the Brazilian Airworthiness Directive 2008–05–01, effective June 13, 2008, referenced in the NPRM. We agree with ANAC that the unsafe condition can continue to exist until Embraer Service Bulletin 120–28–0016, dated January 9, 2008, has been accomplished, including installing the clamps in accordance with paragraph (f)(3)(ii) of this AD. Therefore, even if the inspection has been accomplished in accordance with paragraph (f)(3)(i) of this AD, the limitations must remain in effect until the installation required by paragraph (f)(3)(ii) of this AD is also done. However, under the provisions of paragraph (g)(1) of this AD, we will consider requests for approval of an alternative method of compliance if sufficient data are submitted to substantiate that the method would provide an acceptable level of safety. We have not changed the AD in this regard.

Conclusion

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

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

We estimate that this AD will affect 110 products of U.S. registry. We also estimate that it will take about 8 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Required parts will cost about $269 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 parts. 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 this AD to the U.S. operators to be $99,990, or $909 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://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 the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2009–15–18 Empresa Brasileira de Aeronautica S.A. (EMBRAER): Amendment 39–15981. Docket No. FAA–2008–1005; Directorate Identifier 2008–NM–119–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective September 2, 2009.

Affected ADs

(b) None.

Applicability

(c) This AD applies to EMBRAER Model EMB–120, –120ER, –120FC, –120QC, and –120RT airplanes, certificated in any category, serial numbers 120001 to 120359.

Subject

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

Reason

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

It was found one occurrence of a fuel booster pump circuit br[e]aker opening during an engine maintenance servicing. An inspection inside the fuel tank revealed the fuel booster pump[']s electrical harness chafing against its body, causing the loss of the electrical wiring protection and resulting in a short circuit. Further in-tank inspections have showed other fuel booster pump electrical harnesses chafing either with the pump body and/or with adjacent fuel lines, causing damage to the harness protective layers and resulting * * * [in a] possible ignition source inside the fuel tank.

* * * * *

The corrective actions include revising the Limitations section of the airplane flight manual (AFM) to include a minimum fuel quantity, adding a minimum fuel quantity limitation for operation of the fuel booster pump, inspecting the fuel booster pump electrical harness of the left- and right-hand fuel tanks for damage, replacing any fuel booster pump assembly having a damaged electrical harness, installing clamps on the tank structure, and installing tie down straps for the fuel booster pump electrical harness.

Actions and Compliance

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

(1) Within 30 days after the effective date of this AD, insert in the Limitations section of the AFM a copy of this AD or the following statement:

The minimum fuel quantity inside each tank must be 300 kg (662 pounds) or 370 liters (97.75 gallons).

(2) As of the effective date of this AD, any fuel tank defueling or other maintenance action which demands use of the fuel booster pumps is limited to a minimum fuel quantity of no less than 300 kilograms (662 pounds) or 370 liters (97.75 gallons) inside the respective tank.

(3) Within 4,000 flight hours, or 24 months, or at the next scheduled or unscheduled fuel tank opening after the effective date of this AD, whichever occurs first, do the following actions:

(i) Inspect the fuel booster pump electrical harness of the left- and right-hand fuel tanks for damage on its external protection, in accordance with paragraph 3.F. (Part I) of the Accomplishment Instructions of Embraer Service Bulletin 120–28–0016, dated January 9, 2008. If any damaged fuel booster pump electrical harness is found, before further flight, replace the affected fuel booster pump assembly with another fuel booster pump assembly bearing the same part number, in accordance with the Accomplishment Instructions of Embraer Service Bulletin 120–28–0016, dated January 9, 2008.

(ii) Install clamps and tie down straps on the tank structure and attach each fuel booster pump electrical harness to the left- and right-hand fuel tanks to avoid eventual chafing against the pump body, adjacent fuel lines, structure or any other part, and to prevent damage to the harness protective layers, in accordance with paragraph 3.G. (Part II) of the Accomplishment Instructions of Embraer Service Bulletin 120–28–0016, dated January 9, 2008.

(4) After complying with the actions in paragraphs (f)(3)(i) and (f)(3)(ii) of this AD, the limitations imposed by paragraphs (f)(1) and (f)(2) of this AD are no longer required, and the AFM revision required by paragraph (f)(1) of this AD may be removed from the AFM.

FAA AD Differences

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

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1405; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

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

Related Information

(h) Refer to MCAI Brazilian Airworthiness Directive 2008–05–01, effective June 13, 2008; and Embraer Service Bulletin 120–28–0016, dated January 9, 2008; for related information.

Material Incorporated by Reference

(i) You must use Embraer Service Bulletin 120–28–0016, dated January 9, 2008, to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170—Putim—12227–901 São Jose dos Campos—SP—BRASIL; telephone: +55 12 3927–5852 or +55 12 3309–0732; fax: +55 12 3927–7546; e-mail: *distrib@embraer.com.br*; Internet: *http://www.flyembraer.com.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on July 13, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–17534 Filed 7–28–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0211; Directorate Identifier 2008–NM–028–AD; Amendment 39–15980 AD 2009–15–17]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330–200, A330–300, A340–200, and A340–300 Series Airplanes

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

ACTION: Final rule.

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

* * * * *

[B]ogie beam internal paint has been degraded, leading to a loss of cadmium plating and thus allowing development of corrosion pitting.

If not corrected, this situation under higher speed could result in the aircraft departing the runway or in the bogie [beam] detaching from the aircraft or [main landing] gear collapses, which would constitute an unsafe condition.

* * * * *

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

DATES: This AD becomes effective September 2, 2009.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of September 2, 2009.

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

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on March 10, 2009 (74 FR 10199). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> The operator of an A330 aircraft (which has a common bogie beam with the A340) has reported a fracture of the RH (right-hand) MLG (main landing gear) Bogie Beam whilst turning during low speed taxi maneuvers. The bogie [beam] fractured aft of the pivot point and remained attached to the sliding tube by the brake torque reaction rods. After this RH bogie [beam] failure, the aircraft continued for approximately 40 meters on the forks of the sliding member before coming to rest on the taxiway without any passenger injury.
>
> The preliminary investigations revealed that this event was due to corrosion pitting occurring on the bore of the bogie beam. Investigations are ongoing to determine why bogie beam internal paint has been degraded, leading to a loss of cadmium plating and thus allowing development of corrosion pitting.
>
> If not corrected, this situation under higher speed could result in the aircraft departing the runway or in the bogie [beam] detaching from the aircraft or [main landing] gear collapses, which would constitute an unsafe condition.
>
> To enable early detection and repair of any corrosion of the internal surfaces, EASA (European Aviation Safety Agency) AD 2007–0314 required a one-time inspection on all MLG Bogie Beams except Enhanced MLG Bogie Beams and the reporting of the results to AIRBUS.
>
> The Revision 1 of AD 2007–0314 aimed to clarify the compliance time of the inspection and to extend the reporting period.
>
> The present AD which supersedes the AD 2007–0314R1:
>
> —Takes over the AD 2007–0314R1 requirements and
>
> —Reduces the inspection threshold from 6 to 4.5 years due to significant findings on the inspected aircraft.

Required actions include applying protective treatments to the bogie beam and corrective actions. Corrective actions include repair of any damaged or corroded surfaces or surface treatments, and contacting Messier-Dowty for repair instructions and doing the repair. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received.

Request To Revise References to the French Export Certificate in the NPRM

Airbus requests that we revise the phrase "French export certificate of airworthiness" that is specified in paragraphs (f)(2), (f)(2)(i), (f)(3), and (f)(3)(i) of the NPRM. Airbus states that there is no more "French" export airworthiness certificate and states that it has been replaced with the EASA export airworthiness certificate.

We agree to revise paragraphs (f)(2), (f)(2)(i), (f)(3), and (f)(3)(i) of this AD for the reason provided by the commenter. We have replaced the phrase "French export certificate of airworthiness" with "French or EASA export certificate of airworthiness."

Request To Revise Compliance Time Specified in Paragraphs (f)(3)(i) and (f)(3)(ii) of the NPRM

Airbus requests that we revise the compliance time specified in paragraphs (f)(3)(i) and (f)(3)(ii) of the NPRM to include the additional phrase "or at the next scheduled bogie beam overhaul, whichever occurs first."

We disagree with revising the compliance time, "within 18 months after the effective date of this AD," specified in paragraphs (f)(3)(i) and (f)(3)(ii) of this AD to include the additional phrase. The requested change would shorten the compliance time for certain operators. In developing an appropriate compliance time, we considered the safety implications and normal maintenance schedules for timely accomplishment of the required actions. We determined that the compliance time represents an appropriate interval in which the actions required by this AD can be done, in a timely manner within the fleet, while still maintaining an adequate level of safety. Operators are always permitted to accomplish the requirements of an AD at a time earlier than the specified compliance time. If additional data are presented that would justify a shorter compliance time, we might consider further rulemaking on this issue. We have not revised this AD in this regard.

New Relevant Service Information

Airbus and Messier-Dowty have issued the service information described in the following table.

NEW SERVICE INFORMATION

Service Bulletin	Revision	Date
Airbus Mandatory Service Bulletin A330–32–3225, including Appendix 1	01	October 30, 2008.
Airbus Mandatory Service Bulletin A340–32–4268, including Appendix 1	01	October 30, 2008.
Messier-Dowty Service Bulletin A33/34–32–271, including Appendixes A and B	1	November 16, 2007.
Messier-Dowty Service Bulletin A33/34–32–272, including Appendixes A, B, C, and D	1	September 22, 2008.

We referred to earlier revisions of the service bulletins in the NPRM, as described in the following table.

SERVICE INFORMATION SPECIFIED IN THE NPRM

Service Bulletin	Date
Airbus Mandatory Service Bulletin A330–32–3225, including Appendix 01	November 21, 2007.

SERVICE INFORMATION SPECIFIED IN THE NPRM—Continued

Service Bulletin	Date
Airbus Mandatory Service Bulletin A340–32–4268, including Appendix 01	November 21, 2007.
Messier-Dowty Service Bulletin A33/34–32–271, including Appendix A	September 13, 2007.
Messier-Dowty Service Bulletin A33/34–32–272, including Appendixes A, B, C, and D	November 16, 2007.

The new service information does not add work for airplanes on which the actions specified in the earlier revisions of the service bulletins have been accomplished.

Revision 01 of Airbus Mandatory Service Bulletins A330–32–3225 and A340–32–4268 revises references to Messier-Dowty Service Bulletin A33/34–32–272. We have revised paragraphs (f)(1) and (h) of this AD to refer to Revision 01 of Airbus Mandatory Service Bulletins A330–32–3225 and A340–32–4268. We have also added Airbus Mandatory Service Bulletins A330–32–3225 and A340–32–4268, both dated November 21, 2007, to paragraph (f)(6) of this AD to give credit for actions done in accordance with these service bulletins before the effective date of this AD.

Revision 1 of Messier-Dowty Service Bulletin A33/34–32–271 provides a new illustration and updates the procedures. We have revised paragraphs (f)(5) and (h) of this AD to refer to Revision 1 of Messier-Dowty Service Bulletin A33/34–32–271. We have also added Messier-Dowty Service Bulletin A33/34–32–271, including Appendix A, dated September 13, 2007, to paragraph (f)(6) of this AD to give credit for actions done in accordance with that service bulletin before the effective date of this AD.

Revision 1 of Messier-Dowty Service Bulletin A33/34–32–272 provides new illustrations and updates the procedures. We have revised paragraphs (f)(1)(i), (f)(1)(ii), and (h), and Note 1 of this AD to refer to Revision 1 of Messier-Dowty Service Bulletin A33/34–32–272. We have also added Messier-Dowty Service Bulletin A33/34–32–272, including Appendixes A, B, C, and D, dated November 16, 2007, to paragraph (f)(6) of this AD to give credit for actions done in accordance with that service bulletin before the effective date of this AD.

Conclusion

We reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

We estimate that this AD will affect 29 products of U.S. registry. We also estimate that it will take about 22 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $51,040, or $1,760 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://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 the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2009–15–17 Airbus: Amendment 39–15980. Docket No. FAA–2009–0211; Directorate Identifier 2008–NM–028–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective September 2, 2009.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A330–200, A330–300, A340–200, and A340–300 series airplanes; certificated in any category; all certified models; all serial numbers, except those on which Airbus modification 54500 has been embodied in production or Airbus Service Bulletin A330–32–3212 has been embodied in service.

Subject

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

Reason

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

The operator of an A330 aircraft (which has a common bogie beam with the A340) has reported a fracture of the RH (right-hand) MLG (main landing gear) Bogie Beam whilst turning during low speed taxi maneuvers. The bogie [beam] fractured aft of the pivot point and remained attached to the sliding tube by the brake torque reaction rods. After this RH bogie [beam] failure, the aircraft continued for approximately 40 meters on the forks of the sliding member before coming to rest on the taxiway without any passenger injury.

The preliminary investigations revealed that this event was due to corrosion pitting occurring on the bore of the bogie beam. Investigations are ongoing to determine why bogie beam internal paint has been degraded, leading to a loss of cadmium plating and thus allowing development of corrosion pitting.

If not corrected, this situation under higher speed could result in the aircraft departing the runway or in the bogie [beam] detaching from the aircraft or [main landing] gear collapses, which would constitute an unsafe condition.

To enable early detection and repair of any corrosion of the internal surfaces, EASA (European Aviation Safety Agency) AD 2007–0314 required a one-time inspection on all MLG Bogie Beams except Enhanced MLG Bogie Beams and the reporting of the results to AIRBUS.

The Revision 1 of AD 2007–0314 aimed to clarify the compliance time of the inspection and to extend the reporting period.

The present AD which supersedes the AD 2007–0314R1:

—Takes over the AD 2007–0314R1 requirements and

—Reduces the inspection threshold from 6 to 4.5 years due to significant findings on the inspected aircraft.

Required actions include applying protective treatments to the bogie beam and corrective actions. Corrective actions include repair of any damaged or corroded surfaces or surface treatments, and contacting Messier-Dowty for repair instructions and doing the repair.

Actions and Compliance

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

(1) At the applicable compliance time specified in paragraph (f)(2) or (f)(3) of this AD: Clean the internal bore and perform a detailed visual inspection of internal surfaces of the MLG bogie beam (right-hand and left-hand) for any damage to the protective treatments or any corrosion, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330–32–3225 or A340–32–4268, both Revision 01, both dated October 30, 2008; as applicable.

(i) If no damage and corrosion is found, before further flight, apply the protective treatments of the bogie beam, in accordance with the Accomplishment Instructions of Messier-Dowty Service Bulletin A33/34–32–272, Revision 1, including Appendixes A, B, C, and D, dated September 22, 2008.

(ii) If any damage or corrosion is found, before further flight, do all applicable corrective actions and apply the protective treatments of the bogie beam, in accordance with the Accomplishment Instructions of Messier-Dowty Service Bulletin A33/34–32–272, Revision 1, including Appendixes A, B, C, and D, dated September 22, 2008.

(2) For airplanes with 54 months or less time-in-service since the date of issuance of the original French airworthiness certificate or the date of issuance of the original French or EASA export certificate of airworthiness as of the effective date of this AD: At the latest of the applicable times specified in paragraphs (f)(2)(i), (f)(2)(ii), and (f)(2)(iii) of this AD, do the actions required by paragraph (f)(1) of this AD.

(i) Not before 54 months since the date of issuance of the original French airworthiness certificate or the date of issuance of the original French or EASA export certificate of airworthiness, but no later than 72 months since the date of issuance of the original French airworthiness certificate or the date of issuance of the original French or EASA export certificate of airworthiness.

(ii) Not before 54 months since the installation of a new bogie beam in-service before the effective date of this AD, but no later than 72 months since the installation of a new bogie beam in-service before the effective date of this AD.

(iii) Not before 54 months since the last overhaul of a bogie beam before the effective date of this AD, but no later than 72 months since the last overhaul of a bogie beam before the effective date of this AD.

(3) For airplanes with more than 54 months time-in-service since the date of issuance of the original French airworthiness certificate or the date of issuance of the original French or EASA export certificate of airworthiness as of the effective date of this AD: At the applicable time specified in paragraph (f)(3)(i), (f)(3)(ii), f)(3)(iii), (f)(3)(iv), or (f)(3)(v) of this AD, do the actions required by paragraph (f)(1) of this AD.

(i) For airplanes on which the bogie beam has not been replaced or overhauled since the date of issuance of the original French airworthiness certificate or the date of issuance of the original French or EASA export certificate of airworthiness as of the effective date of this AD: Within 18 months after the effective date of this AD.

(ii) For airplanes on which the bogie beam has been replaced in-service with a new bogie beam and the new bogie beam has more than 54 months time-in-service as of the effective date of this AD: Within 18 months after the effective date of this AD.

(iii) For airplanes on which the bogie beam has been replaced in-service with a new bogie beam and the new bogie beam has 54 months or less time-in-service as of the effective date of this AD: Not before 54 months since the installation of a new bogie beam in-service before the effective date of this AD, but no later than 72 months since the installation of a new bogie beam in-service before the effective date of this AD.

(iv) For airplanes on which the bogie beam has been overhauled and the overhauled bogie beam has more than 54 months time-in-service as of the effective date of this AD: Within 18 months after the effective date of this AD, or at the next scheduled bogie beam overhaul, whichever occurs first.

(v) For airplanes on which the bogie beam has been overhauled and the overhauled bogie beam has 54 months or less time-in-service as of the effective date of this AD: Not before 54 months since the last overhaul of a bogie beam before the effective date of this AD, but no later than 72 months since the last overhaul of a bogie beam before the effective date of this AD.

(4) Within 30 days after accomplishment of the inspection required by paragraph (f)(1) of this AD or within 30 days after the effective date of this AD, whichever occurs later, report the results, including no findings, to Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; e-mail *airworthiness.A330-A340@airbus.com.*

(5) Actions accomplished in accordance with Messier-Dowty Service Bulletin A33/34–32–271, Revision 1, including Appendixes A and B, dated November 16, 2007, are considered acceptable for compliance with the corresponding requirements of this AD.

(6) Actions accomplished before the effective date of this AD in accordance with the service bulletins specified in Table 1 of this AD are considered acceptable for compliance with the corresponding requirements of this AD.

TABLE 1—CREDIT SERVICE INFORMATION

Service Bulletin	Date
Airbus Mandatory Service Bulletin A330–32–3225	November 21, 2007.
Airbus Mandatory Service Bulletin A340–32–4268	November 21, 2007.
Messier-Dowty Service Bulletin A33/34–32–271, including Appendix A	September 13, 2007.
Messier-Dowty Service Bulletin A33/34–32–272, including Appendixes A, B, C, and D	November 16, 2007.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: The MCAI specifies repair and corrective actions in accordance with Airbus Mandatory Service Bulletin A330–32–3225 or A340–32–4268, both dated November 21, 2007; however, these Airbus service bulletins do not describe those actions. Paragraphs (f)(1)(i) and (f)(1)(ii) of this AD specify repair and corrective actions in accordance with Messier-Dowty Service Bulletin A33/34–32–272, Revision 1, including Appendixes A, B, C, and D, dated September 22, 2008.

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: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office.

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

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

Related Information

(h) Refer to EASA Airworthiness Directive 2008–0093, dated May 20, 2008, and the service bulletins specified in Table 2 of this AD, for related information.

TABLE 2—SERVICE INFORMATION

Service Bulletin	Revision	Date
Airbus Mandatory Service Bulletin A330–32–3225, including Appendix 1	01	October 30, 2008.
Airbus Mandatory Service Bulletin A340–32–4268, including Appendix 1	01	October 30, 2008.
Messier-Dowty Service Bulletin A33/34–32–271, including Appendixes A and B	1	November 16, 2007.
Messier-Dowty Service Bulletin A33/34–32–272, including Appendixes A, B, C, and D	1	September 22, 2008.

Material Incorporated by Reference

(i) You must use the service information contained in Table 3 of this AD to do the actions required by this AD, unless the AD specifies otherwise.

TABLE 3—MATERIAL INCORPORATED BY REFERENCE

Service Bulletin	Revision	Date
Airbus Mandatory Service Bulletin A330–32–3225, including Appendix 1	01	October 30, 2008.
Airbus Mandatory Service Bulletin A340–32–4268, including Appendix 1	01	October 30, 2008.
Messier-Dowty Service Bulletin A33/34–32–271, including Appendixes A and B	1	November 16, 2007.
Messier-Dowty Service Bulletin A33/34–32–272, including Appendixes A, B, C, and D	1	September 22, 2008.

(Pages identified as "intentionally blank" in the Messier-Dowty service bulletins identified in Table 3 of this AD are at the revision level and date specified in Table 3 for those documents.)

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

(2) For Airbus service information identified in this AD, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; fax +33 5 61 93 45 80, e-mail *airworthiness.A330-A340@airbus.com*; Internet *http://www.airbus.com*. For Messier-Dowty service information identified in this AD, contact Messier Services Americas, Customer Support Center, 45360 Severn Way, Sterling, Virginia 20166–8910; telephone 703–450–8233; fax 703–404–1621; Internet *https://techpubs.services.messier-dowty.com*.

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

Issued in Renton, Washington, on July 2, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–17539 Filed 7–28–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0432; Directorate Identifier 2008–NM–168–AD; Amendment 39–15982; AD 2009–15–19]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited Model BAe 146–100A and 146–200A Series Airplanes

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

ACTION: Final rule.

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

> BAE Systems (Operations) Ltd has determined that in order to assure the continued structural integrity of the horizontal stabilizer lower skin and joint plates in the rib 1 area of certain BAe 146 aircraft, a revised inspection programme for this area is considered necessary. The disbonding of joints can lead to corrosion which, if undetected, could result in degradation of the structural integrity of the horizontal stabilizer.

* * * * *

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

DATES: This AD becomes effective September 2, 2009.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of September 2, 2009.

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

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

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on May 7, 2009 (74 FR 21281). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> BAE Systems (Operations) Ltd has determined that in order to assure the continued structural integrity of the horizontal stabilizer lower skin and joint plates in the rib 1 area of certain BAe 146 aircraft, a revised inspection programme for this area is considered necessary. The disbonding of joints can lead to corrosion, which, if undetected, could result in degradation of the structural integrity of the horizontal stabilizer.
>
> For the reasons described above, this EASA AD requires the implementation of repetitive inspections and corrective actions, depending on findings. It also provides an approved repair as optional terminating action for the repetitive inspections.

The repetitive inspections for damage of the left and right side of the horizontal stabilizer lower skin and joint plates include a detailed visual inspection for damage (including distortion, loose or distorted fasteners, and corrosion) of the horizontal stabilizer lower skin, a borescopic inspection for damage (including staining, debris around the stringer and joint plate edges, cracked or broken stringers, and distortion or corrosion in rivet holes) of the internal structure of the horizontal stabilizer, and a low frequency eddy current inspection for damage (including corrosion) of the horizontal stabilizer lower skin. For airplanes on which no damage is found, the required actions include drilling and reaming four holes and doing a detailed visual inspection of the holes for distortion and corrosion. Corrective actions include installing rivets, and contacting BAE Systems (Operations) Limited for repair instructions and doing the repair. Doing a repair of the horizontal stabilizer (which consists of partially replacing the lower skin from the center line to inboard of rib 3) ends the repetitive inspections. You may obtain further information by examining the MCAI in the AD docket.

Comments

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

Conclusion

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

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

We estimate that this AD will affect 5 products of U.S. registry. We also estimate that it will take about 9 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $3,600, or $720 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://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 the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008–15–19 BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Amendment 39–15982. Docket No. FAA–2009–0432; Directorate Identifier 2008–NM–168–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective September 2, 2009.

Affected ADs

(b) None.

Applicability

(c) This AD applies to BAE Systems (Operations) Limited Model BAe 146–100A and 146–200A series airplanes, certificated in any category, as identified in BAE Systems (Operations) Limited Inspection Service Bulletin ISB.55–020, dated December 11, 2007.

Subject

(d) Air Transport Association (ATA) of America Code 55: Stabilizers.

Reason

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

BAE Systems (Operations) Ltd has determined that in order to assure the continued structural integrity of the horizontal stabilizer lower skin and joint plates in the rib 1 area of certain BAe 146 aircraft, a revised inspection programme for this area is considered necessary. The disbonding of joints can lead to corrosion, which, if undetected, could result in degradation of the structural integrity of the horizontal stabilizer.

For the reasons described above, this EASA AD requires the implementation of repetitive inspections and corrective actions, depending on findings. It also provides an approved repair as optional terminating action for the repetitive inspections.

The repetitive inspections for damage of the left and right side of the horizontal stabilizer lower skin and joint plates include a detailed visual inspection for damage (including distortion, loose or distorted fasteners, and corrosion) of the horizontal stabilizer lower skin, a borescopic inspection for damage (including staining, debris around the stringer and joint plate edges, cracked or broken stringers, and distortion or corrosion in rivet holes) of the internal structure of the horizontal stabilizer, and a low frequency eddy current inspection for damage (including corrosion) of the horizontal stabilizer lower skin. For airplanes on which no damage is found, the required actions include drilling and reaming four holes and doing a detailed visual inspection of the holes for distortion and corrosion. Corrective actions include installing rivets, and contacting BAE Systems (Operations) Limited for repair instructions and doing the repair. Doing a repair of the horizontal stabilizer (which consists of partially replacing the lower skin from the center line to inboard of rib 3) ends the repetitive inspections.

Actions and Compliance

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

(1) Within 6 months after the effective date of this AD, inspect for damage of the horizontal stabilizer lower skin and joint plates, in accordance with paragraphs 2.C.(1) through 2.C.(3) of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.55–020, dated December 11, 2007 (the "service bulletin"); and, if no damage is found, drill and ream four holes in accordance with paragraph 2.C.(4)(a) of the service bulletin, and do a detailed visual inspection of the holes for distortion and corrosion, in accordance with paragraph 2.C.(4)(b) of the service bulletin.

(i) If any distortion or corrosion is found in any rivet hole, before further flight, contact BAE Systems (Operations) Limited for approved repair instructions and do the repair prior to the fitment of the rivets.

(ii) If no distortion and no corrosion is found, before further flight, install the four rivets in accordance with paragraph 2.C.(4)(c) of the service bulletin.

(2) Repeat the inspection for damage of the horizontal stabilizer lower skin and joint plates required by paragraph (f)(1) of this AD thereafter at intervals not to exceed 24 months.

(3) If damage is found during any inspection required by paragraph (f)(1) or (f)(2) of this AD, before further flight, contact BAE Systems (Operations) Limited in accordance with paragraph 2.C.(5) of the service bulletin, and accomplish an approved repair in accordance with paragraph 2.C.(6) of the service bulletin.

(4) Doing the repair of the horizontal stabilizer in accordance with BAE Systems (Operations) Limited Repair Instruction Leaflet (RIL) HC551H9061, Issue 3, dated January 31, 2008, on the left and right sides of the horizontal stabilizer, terminates the repetitive inspections required by paragraph (f)(2) of this AD.

(5) Actions accomplished before the effective date of this AD according to BAE Systems (Operations) Limited RIL HC551H9061, Issue 2, dated November 16, 2007, are considered acceptable for compliance with the corresponding action specified in this AD.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

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

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

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

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

Related Information

(h) Refer to MCAI European Aviation Safety Agency (EASA) Airworthiness Directive 2008–0167, dated September 2, 2008; BAE Systems (Operations) Limited Inspection Service Bulletin ISB.55–020, dated December 11, 2007; and BAE Systems (Operations) Limited Repair Instruction Leaflet HC551H9061, Issue 3, dated January 31, 2008; for related information.

Material Incorporated by Reference

(i) You must use BAE Systems (Operations) Limited Inspection Service Bulletin ISB.55–020, dated December 11, 2007, to do the actions required by this AD, unless the AD specifies otherwise. If you do the repair option provided in paragraph (f)(4) of this AD, you must use BAE Systems (Operations) Limited Repair Instruction Leaflet-HC551H9061, Issue 3, dated January 31, 2008, unless the AD specifies otherwise. (The issue date, January 31, 2008, of BAE Systems (Operations) Limited Repair Instruction Leaflet HC551H9061, Issue 3, is specified only on the first page of the document.)

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

(2) For service information identified in this AD, contact BAE Systems Regional Aircraft, 13850 McLearen Road, Herndon, Virginia 20171; telephone 703–736–1080; e-mail *raebusiness@baesystems.com;* Internet *http://www.baesystems.com/Businesses/RegionalAircraft/index.htm.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on July 13, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–17542 Filed 7–28–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Part 697

[Docket No. 070717357–91069–03]

RIN 0648–AV77

Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery

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

ACTION: Final rule.

SUMMARY: NMFS announces new Federal American lobster (Homarus americanus) regulations which implement a mandatory Federal lobster dealer electronic reporting requirement, changes to the maximum carapace length regulations for several lobster conservation management areas (LCMAs/Areas), and a modification of the v-notch definition for protection of egg-bearing female American lobsters in certain LCMAs.

DATES: *Effective Date:* This final rule is effective August 28, 2009.

Applicability dates: The revised broodstock protection measures (maximum carapace length and v-notch definition) set forth in this final rule in § 697.20(b)(3) through § 697.20(b)(6) and § 697.20(g)(3) and (4) for Areas 2, 3, 4, 5 and 6 are applicable August 28, 2009. Broodstock protection measures relevant to the Outer Cape Area are applicable July 1, 2010 as set forth in § 697.20(b)(7) and (8) and § 697.20(g)(7) and (8). The weekly trip-level Federal lobster dealer electronic reporting requirements are applicable for all Federal lobster dealers beginning January 1, 2010 as set forth in § 697.6 paragraphs (n) through (s).

ADDRESSES: Copies of the American Lobster Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) prepared for this regulatory action are available upon written request to Harold C. Mears, Director, State, Federal and constituent Programs Office, NMFS, 55 Great Republic Drive, Gloucester, MA 01930, telephone (978) 281–9327. The documents are also available online at *http://www.nero.noaa.gov.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to the mailing address listed above and by e-mail to *David_Rostker@omb.eop.gov* or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Peter Burns, Fishery Management Specialist, telephone (978) 281–9144, fax (978) 281–9117.

SUPPLEMENTARY INFORMATION: This action responds to the recommendations for Federal action in the Atlantic States Marine Fisheries Commission's (Commission) Interstate Fishery Management Plan for American Lobster (ISFMP). The mandatory Federal lobster dealer reporting requirement is consistent with the recommendations for Federal action by the Commission in Addendum X to Amendment 3 of the ISFMP and allows for a more comprehensive and consistent coastwide accounting of lobster harvest data to facilitate stock assessment and fishery management. Accordingly, effective January 1, 2010, this final rule requires all Federal lobster dealers to provide trip-level electronic reports on a weekly basis. Under the preferred alternative in the proposed rule for this action (70 FR 58099), the dealer reporting requirements would have been effective thirty days after publication of this final rule. However, in consideration of the public comments received on the reporting requirements, NMFS has deferred the effective date for electronic reporting for affected lobster dealers until January 1, 2010, to provide dealers with several additional months to adjust their business practices and comply with these new requirements.

In addition to expanded dealer reporting requirements, this action revises existing Federal lobster regulations and implements new requirements to support the Commission's ISFMP by adopting v-notching and maximum carapace length measures (together referred to as broodstock protection measures) in Areas 2, 3, 4, 5 and 6 (see 50 CFR § 697.18 for descriptions and locations of all LCMAs). These measures are, for the most part, identical to those already enforced by the states. These Federal broodstock protection measures complement the Commission's ISFMP objectives and state regulations, thereby reducing confusion and facilitating enforcement and resource assessment within and across lobster stock and management areas.

Specifically, for Areas 2, 4, 5 and 6, this rule implements a maximum carapace size restriction for both male and female American lobster at 5 1/4 inches (13.34 cm) and a maximum size

of 6 7/8 inches (17.46 cm) for offshore Area 3. These measures take effect thirty days after the publication of this final rule. On July 1, 2010, the maximum carapace length regulation in Area 3 will decrease to 6 3/4 inches (17.15 cm). Further, effective thirty days after the publication of this rule, Areas 2, 3, 4, 5 and 6 will be held to the Commission's v-notch definition which is a notch or indentation in the base of the flipper that is at least as deep as 1/8 inch (0.32 cm), with or without setal hairs. The Commission's definition revises the definition of a standard v-shaped notch in § 697.2.

Finally, this action expands the Commission's recommended broodstock protection measures to include the Outer Cape Management Area (Outer Cape Area/Outer Cape) to provide further opportunities to protect lobster broodstock and provide for a framework of consistent management measures across lobster stock areas. The broodstock protection measures for the Outer Cape Area, under the preferred alternative in the proposed rule, would have taken effect thirty days after the publication of this final rule, consistent with the broodstock requirements for Areas 2, 3, 4, 5 and 6. However, after considering the concerns of the Outer Cape lobster industry regarding the perceived economic impacts of these measures, and after reviewing, at the request of the Outer Cape industry, newly-available Outer Cape sea sampling data provided by the Commonwealth of Massachusetts, NMFS has deferred effective implementation of the Outer Cape Area broodstock measures until July 1, 2010, to allow affected fishers in the Outer Cape Area additional time to adjust to these new regulatory requirements. Accordingly, the revised standard v-notch definition (a notch or indentation in the base of the flipper that is at least as deep as 1/8 inch (0.32 cm), with or without setal hairs) and the 6 3/4–inch (17.15 cm) maximum size will take effect in the Outer Cape Area on July 1, 2010. Until July 1, 2010, the Outer Cape Area will not have a maximum carapace length restriction and will remain governed by the 1/4–inch (0.64–cm) v-notch definition in the Federal lobster regulations which is a straight-sided triangular cut, without setal hairs, at least 1/4 inch (0.64 cm) in depth and tapering to a point.

Statutory Authority

This final rule modifies the Federal lobster regulations in the Exclusive Economic Zone (EEZ) under the authority of section 803(b) of the Atlantic Coastal Fisheries Cooperative Management Act (Atlantic Coastal Act) 16 U.S.C. 5101 *et seq.*, which states, in the absence of an approved and implemented Fishery Management Plan under the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (Magnuson-Stevens Act) (16 U.S.C. 1801 *et seq.*) and, after consultation with the appropriate Fishery Management Council(s), the Secretary of Commerce may implement regulations to govern fishing in the EEZ, i.e., from 3 to 200 nautical miles (nm) offshore. The regulations must be (1) compatible with the effective implementation of an ISFMP developed by the Commission and (2) consistent with the national standards set forth in section 301 of the Magnuson-Stevens Act.

Purpose and Need for Management

One purpose of this action is to improve the availability and utility of fishery-dependent lobster data to meet the need for a more comprehensive baseline for assessing the status of lobster stocks coastwide. It also will provide NMFS with a complete set of trip-level harvest data from all Federal lobster dealers for use in cooperative and internal policy decisions and analyses. Additionally, this action will enhance lobster broodstock protection, facilitate enforcement of lobster measures, and aid in resource assessment by revising American lobster maximum carapace size and v-notch requirements, consistent with the recommendations of the Commission in the ISFMP. Finally, this rule expands the curtain of protection on broodstock lobster migrating among lobster management areas by extending the revised maximum carapace size and v-notch requirements to the Outer Cape Management Area. As referenced in the EA for this action, the Outer Cape lobster fishery is categorized as fishing on a population of transient lobsters migrating between inshore and offshore areas. Therefore, the expansion of the broodstock measures in the Outer Cape Area complements those measures in adjacent areas which may augment long-term biological benefits on a multi-area and multi-stock basis and aid in resource assessment since the Outer Cape Area overlaps all three lobster stock areas.

The need for action is rooted in the 2005 peer-reviewed American lobster stock assessment and in recommendations in a subsequent peer review panel report. The findings of the stock assessment and peer review panel prompted the Commission to take action by adopting measures to address the need for improved fishery data collection and broodstock protection. The Commission took action to address these issues through the adoption of Addendum X and Addendum XI to Amendment 3 of the ISFMP. The focus of this rulemaking is on the mandatory dealer reporting requirements in Addendum X and the broodstock protection measures of Addendum XI. This action also will facilitate enforcement and resource assessment by aligning measures of different management areas that fish on a common lobster stock.

A new stock assessment was completed and approved by the Commission's Lobster Management Board in May 2009 and released to the Lobster Technical Committee for recommendations on future management measures to address the concerns raised by the assessment. Due to the timing of this Federal regulatory action, the Lobster Technical Committee recommendations are not available for incorporation in this document. However, a review of the assessment information available when this rule was prepared suggests that the measures identified in this action will not be contrary to the assessment results.

Background

American lobsters are managed within the framework of the Commission. The Commission serves to develop fishery conservation and management strategies for certain coastal species and coordinates the efforts of the states and Federal Government toward concerted sustainable ends. The Commission decides upon a management strategy as a collective and then forwards that strategy to the states and Federal Government, along with a recommendation that the states and Federal Government take action (e.g., enact regulations) in furtherance of this strategy. The Federal Government is obligated by statute to support the Commission's ISFMP and overall fishery management efforts.

In support of the ISFMP, NMFS revises the Federal American lobster regulations in response to the Commission's recommendations for Federal action in Addenda X and XI. The addenda were themselves a response, at least in part, to conclusions contained in the 2005 lobster stock assessment. More specifically, the 2005 stock assessment and peer review process identified the dearth of landings data in the American lobster fishery as an inhibitor to the effective evaluation of the status of the lobster resource, that available data are woefully inadequate to fulfill the management needs of the

resource, and that a mandatory catch reporting system is needed. Such conclusions provided the impetus for Addendum X's reporting requirements, which initiated this action to implement the mandatory Federal dealer reporting requirement.

This same 2005 assessment and peer review process concluded that the Southern New England (SNE) lobster stock is suffering from depleted stock abundance and recruitment with high dependence on new recruits. The SNE stock component is in poor shape with respect to spawning, recruit and full-recruit abundance indices. The assessment results also indicated that the Georges Bank (GBK) lobster stock, although in a stable state with respect to abundance and recruitment, is also dependent on new entrants to the fishery a cause for concern that the fishery is too reliant on newly recruited lobster. These issues prompted the Commission to adopt Addendum XI, which sought to protect SNE broodstock lobsters by creating new maximum carapace lengths and implementing a more restrictive definition of a v-notch in certain Lobster Management Areas. Accordingly, NMFS published a proposed rule in the **Federal Register** on October 6, 2008 (73 FR 58099) which presented the following three independent regulatory actions for public comment:

(1) Requiring all Federal lobster dealers to electronically report trip-level lobster landings to NMFS on a weekly basis;

(2) Establishing a maximum carapace length restriction for lobster in Area 2, Area 3, Area 6, and the Outer Cape Management Area and revising the maximum carapace length requirements for Areas 4 and 5; and

(3) Revising the Federal definition of a standard v-notched lobster, applicable to lobster in all areas, with the exception of Area 1.

Three alternatives for each of the three proposed regulatory actions were analyzed in a draft Environmental Assessment (EA) and included: a status quo (no action) alternative; an alternative to implement the Commission's ISFMP recommendations in Addendum X and XI; and a third modified alternative which varies in certain aspects from the Commission recommendations, but still would be compatible with the Commission's ISFMP. Specifically, with respect to issue (1) - Dealer Reporting - the preferred alternative would have implemented weekly, trip-level electronic reporting requirements for all Federal lobster dealers within 30 days of publication of the final rule. The modified option allowed for a one-year delay in the implementation of the measure. This final rule finds a middle ground between the two options by requiring all Federal American lobster dealers to comply with electronic reporting requirements beginning several months after publication of this rule, effective January 1, 2010. The decision is based on public comments (five in favor of mandatory dealer reporting and four in opposition, See Comments and Responses) in response to the proposed rule that electronic reporting requirements may be expensive for dealers who do not currently own computers. The EA prepared for this action determined that delaying the requirements would reduce short-term costs of acquiring Internet service, for those who did not already have it, during that interim year. Additionally, a delay would provide more time for affected dealers to obtain the required equipment and otherwise adjust their business practices to accommodate electronic reporting. Some affected dealers may choose to offset costs by obtaining the file upload software through a NMFS contractor, at no cost to the impacted dealer. The no-cost option could mitigate some of the financial impact to Federal lobster dealers who now will be subject to mandatory dealer reporting on January 1, 2010. Additionally, delaying implementation of the dealer reporting program until January 1, 2010 will allow for a more seamless integration of the new dealers into the data collection program since the effective date coincides with the start of the annual Federal dealer reporting period which is January 1. All dealer data are entered into the Standard Atlantic Fisheries Information System (SAFIS).

With respect to the broodstock protection measures of this rule: Issue (2)- Maximum Size Restrictions; and Issue (3) - Revisions to the V-Notch Definition, NMFS analyzed two options in addition to the no action alternative. These options included the straight Commission recommendations that would not extend the broodstock measures to the Outer Cape Area and a modified alternative that would include the Outer Cape Area.

NMFS received many comments from the Outer Cape industry in opposition to the expansion of the broodstock measures into the Outer Cape (See Comments and Responses). The general theme of the comments was that the proposed broodstock measures would affect a higher percentage of the catch than the NMFS analysis in the draft EA had determined and would, consequently, have greater economic impacts. In an effort to understand industry concerns with the proposed rule, NMFS attended an Outer Cape Lobster Conservation Management Team (LCMT) meeting in Chatham, MA on November 10, 2008, which occurred during the comment period for the proposed rule. This industry meeting, facilitated by the Massachusetts Division of Marine Fisheries (MA DMF), was widely attended by the Outer Cape lobster fishing sector as well as members and proxies of the Massachusetts state legislature and local media.

NMFS listened to the concerns of the industry during the meeting and encouraged the public to submit written comments by the end of the comment period. At the suggestion of the industry during the meeting, NMFS agreed to review data from an ongoing expanded sea sampling program designed to further evaluate the potential impacts of the proposed measures on the Outer Cape lobster fishing sector. Conducted as a cooperative effort between MA DMF and the Outer Cape industry, the expanded sea sampling program in 2008 was initiated to more accurately document the impacts of the broodstock measures in the Outer Cape Management Area.

Accordingly, in 2008, MA DMF enhanced its ongoing sea sampling program by doubling the number of Outer Cape sea sampling trips for the 2008 sampling year. Normally, MA DMF takes 14 sea sampling trips from the Outer Cape ports of Chatham and Nauset from May through November of each year (seven trips from each of Chatham (southern part of the Outer Cape Area) and Nauset (central part of the Outer Cape Area)). However, for this expanded 2008 program MA DMF completed an additional 14 Outer Cape sea sampling trips during the sampling season. All 14 additional trips were conducted aboard vessels operating out of the port of Provincetown (northern part of the Outer Cape Area), a port not previously included in MA DMF's lobster sea sampling program.

NMFS received the completed analysis of the expanded sea sampling program from MA DMF on February 11, 2009. Upon review of the MA DMF analysis (MA DMF Report) of the enhanced sea sampling program data, NMFS chose to support the preferred alternative to expand the broodstock measures into the Outer Cape Area, as the information in the report did not contradict the rationale for expanding the broodstock measures to include the Outer Cape Area. However, in consideration of the comments and concerns of the Outer Cape industry as

demonstrated through the industry meeting and in written comments, NMFS defers the effective date of these measures (the 6 3/4–inch (17.15–cm) maximum carapace length restriction and 1/8–inch (0.32 cm) v-notch definition) only in the Outer Cape Area for a full year (until July 1, 2010) to allow the industry time to adjust to the new requirements.

The decision to move ahead with the preferred alternative was straightforward with respect to the maximum size requirements. The NMFS EA analysis estimates impacts to the Outer Cape industry due to restricting the harvest of lobster in excess of 6 3/4 inches (17.15 cm) as not significant - about 0.5 percent for the trap sector and about 5.7 percent for the non-trap sector. The MA DMF 2008 expanded sea sampling data analysis had similar findings. In fact, the expanded sea sampling data suggest that the impacts on Outer Cape lobstermen of the 6 3/4–inch (17.15–cm) maximum size are even less than estimated in the NMFS analysis. Specifically, during the entire 2008 sea sampling season, which included 28 sampling trips aboard commercial trap fishing vessels in the Outer Cape Area, not one harvestable lobster was observed in excess of the 6 3/4–inch (17.15–cm) maximum carapace length. Although the MA DMF report affirms NMFS' rationale in proposing these new regulations, the report is not being relied upon to form the basis of the rationale.

Based on the findings of the NMFS analysis with which the expanded MA DMF sampling program data is consistent, the impacts of the maximum size regulations on the Outer Cape lobster industry are not expected to be significant. This finding is highlighted in the MA DMF report on the expanded Outer Cape sea sampling program which indicated that "very few marketable (non-egg bearing, non-v-notched) lobsters greater than the proposed maximum sizes were observed, as such the potential loss to the fishery...would be negligible." The MA DMF report further states that only 14 lobsters out of 85,695 lobsters sampled in the Outer Cape region since 1981 (0.02 percent) had a carapace length which exceeded the proposed maximum size of 6 3/4 inches (17.15 cm). NMFS stands behind its analysis of the impacts of these measures in the EA and reviewed the MA DMF report at the industry's request as a check on the accuracy of the analysis. After reviewing the MA DMF report, there is nothing to change the decision to expand the maximum size restrictions to include the Outer Cape. It should be noted that the MA DMF expanded survey only sampled trap vessels but the expected impacts to the non-trap component of the Outer Cape lobster fishery are not expected to be significant based on the analysis conducted in the EA for this action. On balance, NMFS will defer the implementation of the 6 3/4–inch (17.15–cm) maximum size in the Outer Cape Area for a full year, until July 1, 2010, to allow the industry additional time to mitigate any adverse impacts resulting from the implementation of these broodstock measures on Outer Cape lobstermen.

NMFS review of the v-notch data from the expanded MA DMF sea sampling program found results to be consistent with the NMFS impact analysis in the EA regarding the Nauset and Chatham trips. The EA considered MA DMF sea sampling data collected from 1999 to 2005, which indicated that the percentage of females with a v-notch in the Outer Cape Area varied between 2 percent and 4 percent of the lobsters observed as cited in the EA. This long-term data set is among the few available for assessing v-notch status for the northwest Atlantic lobster resource and the best available for assessing v-notch status in the Outer Cape Area. Despite the longevity and consistency of the data set, concerns with the precision of the v-notch measurement are notable. Specifically, MA DMF sampling protocol did not include quantitative measurement of notch depth. Since the notches were not measured, it is not known what proportion of the population of v-notched lobsters would be legal under various v-notching definitions. Regardless of the notch depth, if the most conservative assumption is applied (essentially a zero-tolerance definition) and all the v-notched lobsters are considered illegal for harvest, still only about 4 percent of the lobster would be illegal due to the presence of any type of v-notch. However, the percentage of illegal lobster is likely less than 4 percent since some unknown number of notched lobsters would still be legal under either the 1/8–inch (0.32–cm) or 1/4–inch (0.64–cm) v-notch definitions.

Since the 1/8–inch (0.32–cm) definition is more restrictive (assuming that all notches are made consistent with an industry standard of a 1/4–inch (0.64–cm) notch), it would appear that the impacts of this standard would be somewhat less than 4 percent, although somewhat higher than under a 1/4–inch (0.64–cm) standard. Regardless, these losses in catch are expected to be relatively low for the Nauset and Chatham fleets. This estimate was supported by MA DMF's expanded sea sampling program which considered Outer Cape v-notch statistics from 2005 through 2008. That data segment estimated that the difference in losses in catch between the current 1/4–inch (0.64–cm) v-notch definition and the proposed 1/8–inch (0.32–cm) v-notch would fall between 3.8 percent to 5 percent for the Nauset and Chatham areas.

The data in the MA DMF report on the 14 Provincetown trips revealed a much higher instance of v-notched female lobster, estimated at approximately 14.9 percent of the catch. Therefore, without considering the manner in which the sampling was conducted and other relevant factors, the report indicates that implementation of a 1/8–inch (0.32–cm) v-notch standard could result in a 10.7 percent loss in harvest when compared to the 1/4–inch (0.64–cm) v-notch standard. However, this estimate does not accurately reflect the expected losses in catch that would be endured by the lobster industry if the 1/8–inch (0.32–cm) v-notch standard is applied, in fact, the impacts are expected to be much less. The MA DMF report aptly points out the reasons for this over-estimation as noted below and cautions users of the data from accepting the data on face value, stating "the dramatic difference in v-notch rate detected by location mandates caution when applying any OCC-wide estimates of losses."

When considering the data from the Provincetown sampling trips, many factors must be considered. Primarily, the data reflect only one season's worth of sea sampling, totaling 14 trips between May and November, 2008. More than one third of the trips were conducted in November when lobsters are expected to be moving from cooling inshore waters to deeper offshore locations. Therefore, more notched lobsters may be present and observed as they move offshore from Massachusetts and Cape Cod Bays through the Outer Cape Area. Further, the sampling bias from conducting over 30 percent of the sampling trips for the season in a single month limits the manner in which the data can be interpreted and applied. More importantly, one would expect the incidence of v-notched lobsters in the northern portion of the Outer Cape Area to be higher than other parts of the Outer Cape Area since it is immediately adjacent to Lobster Management Area 1, which is part of the GOM Stock Area and subject to a mandatory v-notching requirement (lobstermen must v-notch and release all egg-bearing lobsters) and a more restrictive "zero-tolerance" v-notch definition. According to the MA DMF report, 87 percent of the sampling

trips out of Provincetown occurred west of 70 ° W. Long., the meridian which separates the GOM and GBK stocks, with the former on the west side of the meridian (NMFS Statistical Area 514) and the latter on the east side (NMFS Statistical Area 521). Additionally, the MA DMF report states that "the highest incidence of v-notched lobster was observed in the "overlap area" around Provincetown where Area 1 lobstermen and Outer Cape lobstermen fish side-by-side....indicating that the majority of the Provincetown fishery occurred within the Gulf of Maine Stock Unit." The overlap area refers to the Area 1/Outer Cap Overlap Area. Lobstermen who traditionally fish in Area 1 can fish in this overlap area under Area 1 management regulations, while lobstermen who fish in the Outer Cape Area can fish in the overlap under the Outer Cape Area management measures.

Another important fact in assessing the extent to which the incidence of v-notched lobsters in the MA DMF investigation may be interpreted is that the sea samplers did not measure the depth of the v-notch of the lobsters encountered during the sea sampling trips. Rather, samplers categorized notches as either a sharp notch, old notch, or mutilated or missing flipper. In the MA DMF report, a sharp notch is a defined as a straight-sided v-shaped notch without setal hair. An old notch is defined as a notch that has endured at least one molt, usually more irregular in shape and often with setal hair present. A flipper that is missing or mutilated in a manner that could obscure the notch was considered by samplers as a v-notch. Therefore, since all such notches were not measured, the MA DMF analysis assumes that all old notches were deeper than 1/8 inch (0.32 cm) and therefore all such lobster were protected, as cited in the MA DMF report. However, it is expected that many of these old notches, as well as some subset of the mutilated lobster, would actually be legal for harvest under the 1/8–inch (0.32 cm) notch definition. In other words, the sampling design estimated the incidence of v-notch based on a zero-tolerance definition and assumes that all notched lobster are illegal. The MA DMF report points out that this represents "a worst case scenario" and that the "actual degree of protection and losses to the industry would be less" than the additional 10.7 percent calculated in the report for the Provincetown area, based only on one season's worth of data (2008).

Despite the short time series of the Provincetown v-notch data set and the skewed distribution of sampling trips from that port over the course of the season, the 2008 MA DMF data affirms the rationale for NMFS to carry forward with the expansion of the 1/8–inch (0.32–cm) v-notch requirement to include the Outer Cape Area. Under the current scenario, fishermen in Area 1 are subject to the most restrictive zero tolerance v-notch definition. These fishermen are discarding lobster with any mark resembling a trace of a notch or any which are mutilated in a manner that could obscure a notch. Fishing alongside them are Provincetown fishermen who, prior to this rulemaking, were subject to the least restrictive 1/4–inch (0.64–cm) v-notch definition and allowed to harvest some percentage of the v-notched lobsters that the Commission's ISFMP, as well as Area 1 lobstermen, are trying to protect from harvest. Mitigating the compromising effects of inconsistent management measures across management areas is one of the intentions of this rule which has generally focused on alignment of the broodstock protection measures of the Outer Cape with those of Area 3 since the majority of the Outer Cape fishery targets the GBK stock it shares with Area 3. However, the 2008 data from the MA DMF expanded sampling program suggests that inconsistent measures may be compromising management of the GOM stock as well, although the short-term nature of this data should not be over-interpreted and is insufficient to make any robust determinations. The expanded MA DMF sampling data provided a snapshot of conditions existing at the time of observation, and accordingly, the MA DMF report cautioned against giving it undue weight. Nevertheless, even if accorded little weight, the report was notable in that it did nothing to contradict NMFS' findings.

Although the MA DMF data indicate that the majority of the Provincetown fishery occurs on the GOM stock, they still remain part of the Outer Cape fishery and their continuance in this category was affirmed by the adoption of a common overlap area with Area 1 in the Commission's plan, and subsequently by NMFS for the purposes of consistency and cooperation. Applying the more restrictive zero-tolerance v-notch definition to the Provincetown sector of the fishery may more directly assist in the conservation of the GOM stock, although such an assumption warrants more extensive review and evaluation. The scope of the analysis of the broodstock protection measures focused on aligning the Outer Cape with Area 3 since the majority of the Outer Cape and a major component of Area 3 fall within the GBK stock area. Given the confusion that differential management measures would cause within a single management area, the potential for additional economic impacts due to the implementation of the zero-tolerance definition, and the lack of confidence in a single years' worth of data (2008) for making such assumptions, NMFS intends to implement the 1/8–inch (0.32–cm) standard to the entire Outer Cape Area.

The MA DMF study shows that the impacts of the 1/8–inch (0.32 cm) v-notch on Nauset and Chatham fishermen are relatively consistent with those estimated by NMFS in the EA (3.8–5 percent loss of catch in the MA DMF study versus less than 4 percent in the EA based on previous MA DMF sea sampling time series data). At the same time, data collected in 2008 by MA DMF indicate additional losses in Provincetown could exceed 10 percent under an unlikely "worst case scenario" due to the manner in which the sea sampling data was collected. However, NMFS acknowledges the challenges referenced in the report which states that "the dramatic difference in v-notch rate detected by location mandates caution when applying any OCC-wide estimates of losses." Accordingly, NMFS maintains its intent to expand the 1/8–inch (0.32–cm) v-notch measure to the Outer Cape Area. However, the effective implementation date for Federal Outer Cape Area permit holders is deferred until July 1, 2010, to mitigate the impacts and allow the industry additional time to adjust their business practices to this new requirement.

Description of the Public Process

The actions set forth in this Final Rule have undergone extensive and open public notice, debate and discussion both at the Commission and Federal levels.

1. Commission Public Process

Typically, this public discussion of a potential Federal lobster action begins within the Commission process. Specifically, the Commission's Lobster Board often charges its Plan Development Team or Plan Review Team sub-committees of the Lobster Board - to investigate whether the existing ISFMP needs to be revised or amended to address a problem or need, often as identified in a lobster stock assessment. The Plan Review and Plan Development Teams are typically comprised of personnel from state and federal agencies knowledgeable in scientific data, stock and fishery condition and fishery management issues. If a team or teams conclude that

management action is warranted, it will so advise the Lobster Board, which would then likely charge the LCMTs to develop a plan to address the problem or need. The LCMTs most often comprised of industry representatives will conduct a number of meetings open to the public wherein they will develop a plan or strategy, i.e., remedial measures, in response to the Lobster Board's request. The LCMTs then vote on the plan and report the results of their vote back to the Lobster Board. Minutes of the LCMT public meetings can be found at the Commission's website at *http://www.asmfc.org* under the "Minutes & Meetings Summary" page in the American Lobster sub-category of the Interstate Fishery Management heading.

After receiving an LCMT proposal, the Commission's Lobster Board will often attempt to seek specialized comment from both the Lobster Technical Committee and Lobster Advisory Panel before the proposal is formally brought before the Board. The Technical Committee is comprised of specialists, often scientists, whose role is to provide the Lobster Board with specific technical or scientific information. The Advisory Panel is a committee of individuals with particular knowledge and experience in the fishery, whose role is to provide the Lobster Board with comment and advice. Minutes of the Technical Committee and Advisory Panel can be found at the Commission's website at *http://www.asmfc.org* under the "Minutes & Meetings Summary" page in the American Lobster sub-category of the Interstate Fishery Management heading.

After receiving sub-committee advice, the Lobster Board debates the proposed measures in an open forum whenever the Board convenes (usually four times per year, one time in each of the spring, summer, fall and winter seasons). Meeting transcripts of the Lobster Board can be found at the Commission's website at *http://www.asmfc.org* under "Board Proceedings" on the "Minutes & Meetings Summary" page in the American Lobster sub-category of the Interstate Fishery Management heading. These meetings are typically scheduled months in advance and the public is invited to comment at every Board meeting. In the circumstance of an addendum, the Board will vote on potential measures to include in a draft addendum. Upon approving a draft addendum, the Lobster Board will conduct further public hearings on that draft addendum for any state that so requests. After conducting the public hearing, the Lobster Board will again convene to discuss the public comments, new information, and/or whatever additional matters are relevant. After the debate, which may or may not involve multiple Lobster Board meetings, additional public comment and/or requests for further input from the LCMTs, Technical Committee and Advisory Panel, the Lobster Board will vote to adopt the draft addendum, and if applicable, request that the Federal Government implement compatible regulations.

The need for the Federal action is rooted in the 2005 peer-reviewed American lobster stock assessment and in recommendations in a subsequent peer review panel report. The findings of the stock assessment and peer review panel prompted the Commission to take action by adopting measures to address the need for improved fishery data collection and broodstock protection. The Commission took action to address these issues through the adoption of Addendum X and Addendum XI to Amendment 3 of the ISFMP. The focus of this rulemaking is on the mandatory dealer reporting requirements in Addendum X and the broodstock protection measures of Addendum XI.

Addendum X was approved by the Board in February 2007 to augment and enhance fisheries-dependent and fisheries-independent data collection efforts at the state and Federal level and set forth an expanded coastwide mandatory reporting and data collection program. The program set coastwide standards for the submission of dealer and harvester reports, sea and port sampling and trawl surveys. The purpose of the addendum was to address the concerns of inadequate data for use in fishery assessments as indicated in the 2005 stock assessment peer-review process.

Addendum XI was released for public comment as a draft document in April 2007 and responded to the findings of the 2005 peer-reviewed stock assessment regarding the need for the development of management measures to address the depleted abundance, low recruitment and high fishing mortality rates in the SNE stock. Several states held public hearings on the draft addendum in April 2007 and the final addendum was approved by the Commission's Lobster Board in May 2007. Addendum XI includes a full suite of management measures designed as the SNE Stock Rebuilding Program. Certain measures in the Addendum XI SNE Stock Rebuilding Program, such as the Area 3 minimum gauge size increase and escape vent size increase, and two additional Area 3 trap reductions of 2.5 percent, were implemented by NMFS in a separate rulemaking published in the **Federal Register** (72 FR 56935). The dealer reporting requirements and broodstock protection measures of the SNE Stock Rebuilding Program are addressed here in this final rule.

2. Federal Public Process

Since the transfer of Federal lobster management in December 1999 from the Magnuson Stevens Act, with its Federal Fishery Management Councils, to the Atlantic Coastal Act, with the Atlantic States Marine Fisheries Commission, Federal lobster action has typically been undertaken in response to a Commission action.

The development of this current rulemaking began in response to the Commission's approval of Addenda X and XI February 2007 and May 2007, respectively, and the Commission's request for complementary Federal regulations. Since that time, NMFS has filed an Advance Notice of Proposed Rulemaking (ANPR) in the **Federal Register** (72 FR 53978, September 21, 2007) and a proposed rule (73 FR 58099, October 6, 2008) seeking public comment on the recommendations made by the Commission and the NMFS alternatives based on Addenda X and XI. The Commission and the New England and Mid-Atlantic Fishery Management Councils were also invited to comment and consult on the proposed rule, consistent with past actions, in letters dated October 6, 2008. Since the publication of the proposed rule, NMFS met with concerned members of the Outer Cape lobster industry to hear their comments. At the industry's request and in cooperation with the Commonwealth of Massachusetts, NMFS received additional information from MA DMF and considered its findings in determining the measures for implementation in this final rule. NMFS received 49 comments to its proposed Federal action, which are summarized below.

Comments and Responses

The proposed rule for this action was published in the **Federal Register** on October 6, 2008 (73 FR 58099) to address the Commission's recommendations for Federal action in Addenda X (dealer reporting) and XI (broodstock protection) to Amendment 3 of the Commission's ISFMP for American Lobster. The proposed rule solicited public comments through November 20, 2008. A total of 49 comments were received. Four comments were received in opposition to the Federal lobster dealer electronic reporting requirements, while five wrote in favor of the dealer electronic

reporting requirements. Similar to those received in response to the ANPR for this action as addressed in the proposed rule, the comments in opposition to the electronic dealer reporting requirements were received from two lobster dealers, the State of Maine Department of Marine Resources (ME DMR), and a lobster fishermen's organization. The general theme of these comments was that mandatory weekly electronic reporting would add more administrative burden to affected lobster dealers and would be redundant since many dealers are already providing the data to their respective state fisheries agency.

Thirty-two comments were received in opposition to the inclusion of the Outer Cape Area under the expanded broodstock protection measures. Seven comments were received in general support of the broodstock protection measures, while four individuals wrote to support the expansion of the broodstock measures into the Outer Cape Area. Three commenters opposed the broodstock protection measures in management areas other than the Outer Cape Area.

Two comments opposing the maximum size requirements were received by a mid-Atlantic pot gear fisherman and a recreational diving group. Representatives of the offshore lobster fishing sector wrote in favor of the dealer reporting, maximum size and v-notching requirements. Two fishermen recommended consistent measures throughout all lobster management areas and one fisherman commented that more restrictive broodstock measures are needed coastwide.

The significant comments and the NMFS response to each comment are provided here.

Comment 1: Two lobster dealers from Maine wrote in opposition to the mandatory electronic dealer reporting requirement, generally stating that this measure would unnecessarily add to the reporting burden already mandated by the state.

Response: NMFS understands that there might be a small amount of redundancy for those Federally permitted dealers who also have a state dealer permit and who are thus already bound to report by virtue of their state permit. Generally, these requirements mirror those of state agencies as both NMFS and the states use the same SAFIS system (see Changes to Existing Regulations). By design, users meet the requirements of all relevant regulatory entities. On balance, NMFS believes that the utility of electronic reporting outweighs the burden associated with the minority of dealers who would have to report both electronically and by paper. More specifically, the majority of Federal lobster permit dealers, approximately 71 percent, already have to report electronically. Collection and assembly of the requisite data likely the most time intensive task is a one-time event that must occur regardless of the format in which the data is ultimately reported (and such data is undoubtedly being collected by the business in some form as part of the dealer's regular business practices). Although there might be some start-up costs associated with electronic reporting, computer reporting is intuitively more efficient and less time intensive than having to write the data out and submit it in paper format. Whether computer reporting would ultimately result in new efficiencies in every case is difficult to gauge and might be dependent on individuals on a case by case basis.

In adopting the mandatory electronic Federal lobster dealer reporting, NMFS balances the relatively small additional burden against the utility gained by the requirement. First, there is great utility for Federal managers having access to, and thus having their decisions guided by, up-to-date harvest information. Electronic reporting allows for far more expedient collection of data than can be accomplished through a paper reporting system. The submission of paper reports is cumbersome and the data are not consistently loaded by the states into the SAFIS system in a timely manner. Some states require trip-level dealer reports be submitted on a monthly basis and upon receipt, state employees enter in the data. Consequently, the data may not reach the SAFIS system until several weeks or more after a particular lobster fishing trip which could hamper fisheries management and assessment efforts and limit the availability and utility of the dataset for internal needs. Conversely, under the proposed electronic reporting process, once received, the data is already in the system, with no data entry or handling of paper reports needed. Some states may even eliminate their paper-based reporting requirements for those state dealers who would be required under a Federal mandatory reporting program to report to NMFS on an electronic basis, although such an outcome is speculative.

Second, NMFS believes that data received through different systems can undermine the integrity and usefulness of the data. When similar data elements are collected in an inconsistent manner, the ability to efficiently utilize that information is compromised. NMFS finds it advantageous for its data to be collected in consistent fashion, such as through the use of the SAFIS system, not only for administrative efficiencies (NMFS already has a successful and tested electronic reporting system in place for other species), but for the statistical integrity of collecting similar data sets for a single species by the same means. Further, NMFS's experience suggests that while overall compliance with Commission plans is excellent, states do not always interpret, and are not always able to implement, the plans consistently and uniformly. Accordingly, NMFS believes it more prudent in this instance to mandate a single uniform Federal lobster dealer reporting system rather than rely on the eleven states on the Lobster Board to submit data for certain Federal dealers according to the individual state's reporting program.

Comment 2: One dealer wrote that he purchases lobster from fishermen who drop off their catch on a floating lobster car. The lobster are dropped off by fishermen when the dealer is not there, complicating the ability to garner specific data on the statistical area and time the lobster where harvested.

Response: The Commission's plan recommends that the dealer provide the statistical area where the lobster were harvested. The Final Rule does not implement such a requirement. NMFS has considered but rejected this recommendation and has not adopted a fishing area data collection requirement for dealers. NMFS believes that lobster harvesting information is best provided by the harvester, not the dealer.

Comment 3: Some commenters commented that dealer reporting for lobster is not necessary since lobster is not a quota-managed species and the data are not needed on a weekly basis.

Response: Although the lobster fishery is not managed by a quota system, the benefits of consistent fishery-dependent data in effectively managing the resource cannot be overstated. The lobster fishery is the most economically lucrative in the Northwest Atlantic, with ex-vessel revenues totaling nearly $349 million in 2007, sustaining numerous fishing communities. Yet, only 61 percent of Federal lobster harvesters and only 71 percent of Federal lobster dealers provide landings data to NMFS. The 2005 peer-reviewed lobster stock assessment indicated that improvements to the quality and quantity of fishery-dependent data, including dealer data, are needed to facilitate the assessment of the lobster stocks. In the absence of a mandatory Federal harvester reporting program NMFS has adopted a mandatory electronic dealer reporting

program for Federal dealers to complement the Commission's plan and the actions of the states in enhancing the quality and quantity of lobster fishery data to assist in the management of this important fishery.

More and more, landings data are needed by NMFS to address not only lobster policy issues, but other relevant issues such as large whale take reduction planning, Endangered Species Act analyses, and economic analyses, for example. NMFS is consistently challenged with insufficient and questionable data and sees this as an opportunity to obtain a consistent data set, from its own dealers, to assist in its decision-making and policy analysis responsibilities for lobster management and other critical needs.

Although data on lobster landings may not be needed on a weekly basis, weekly receipt of trip-level data from all Federal dealers is certainly more timely and hence, more readily available. Additionally, implementing a weekly reporting requirement for the affected Federal lobster dealers will mesh with the current requirements in place for all Federal seafood dealers, creating a common format across all Federal fisheries. The opportunity to obtain this important information in a consistent manner will improve its utility for internal as well as for cooperative management and policy needs.

Comment 4: ME DMR responded in opposition to the dealer reporting measure, indicating that it would impact about 86 small dealers in Maine. ME DMR is collecting trip-level data from dealers on a monthly basis and believes that weekly electronic reporting requirements would be too burdensome on dealers who do not have access to the Internet or to a computer and are now able to provide this data on paper trip tickets to fulfill state requirements.

Response: NMFS understands that Maine lobster dealers have recently begun reporting trip level transactions to ME DMR on a monthly basis. Although a Federal electronic dealer reporting requirement would only impact a minority of lobster dealers (estimated to be 29 percent of all Federal lobster dealers), a large portion of the 29 percent come from Maine (88 of the 148 non-reporting Federal lobster dealers are based in Maine, based on NMFS permit data). At the same time, 36 dealers in Maine are successfully reporting on an electronic basis. However, as the largest lobster harvesting state by far, Maine harvest data is critical to ensure the responsible management of the fishery and comprises a major component of the overall universe of Federal harvest data that currently is not readily available to NMFS in a consistent, reliable or easily-accessible fashion.

It is evident, both anecdotally and from some of the comments received that some dealers, especially in more remote areas, may not use computers as part of their business operations. However, that number is unknown. Since no additional information is available regarding either the number of individuals without the required equipment or more specific details on the costs of acquiring the technology, NMFS stands behind its analysis in the EA regarding the impacts of electronic reporting on the affected set of Federal dealers. As such, NMFS estimates that the initial costs to dealers would be about $580 for an adequate computer and approximately $652 annually to support Internet access for those dealers that currently do not have a computer or Internet service. In consideration of ME DMR's concern, however, NMFS re-assessed the potential costs to dealers and found that they are likely to be less than initially estimated (see response to comment 6).

Comment 5: ME DMR and one other commenter disputed that dealers get a 40 percent markup on lobsters they sell and, therefore, the NMFS estimates of the costs of purchasing the necessary equipment as a percentage of gross income, based on this percentage, are inaccurate.

Response: It is possible that many affected dealers, especially smaller operations, do not convey a 40–percent markup on their product. ME DMR made these comments based on responses to an "informal survey" of Maine dealers but it is not known how many dealers ME DMR canvassed or the size of their respective operations. The NMFS analysis of impacts is based on business transaction information acquired from Federal dealer data which is the best information available for assessing the impacts of Federal dealers. NMFS understands that this data may not be reflective of the entire universe of Federal lobster dealers which vary in size and sales volume. Consequently, if all Federal dealers report to NMFS in a consistent fashion, then the assessment of future impacts on dealers may more accurately reflect the overall range of affected businesses.

The potential impact that the cost of acquiring a computer and maintaining Internet access would have on affected Federal dealer business income is uncertain. However, potential impacts to lobster dealers with no other Federal permits could be assumed to be similar to Federal dealers who are currently subject to mandatory reporting whose business is solely or primarily comprised of lobster sales. Under this assumption, the estimated first-year cost of purchasing equipment and Internet access would represent 0.47 percent of gross net sales assuming a 40–percent markup (based on a NMFS economic analysis conducted on lobster fishery transactions) and median purchases of 134,000 pounds (60,909 kg) with net gross sales valued at $245,000 during 2007. These estimates are based on dealer reports for all Federal lobster permit holders who were subject to mandatory reporting during 2007. At these values, the annual cost of maintaining Internet access would be 0.27 percent of net gross sales. The expected costs would be lower for any dealer who already has Internet access and a computer meeting the minimum specifications. Further, the computer and Internet service, having been purchased, may provide additional benefits to the dealer's business in ways not associated with data reporting.

Comment 6: ME DMR commented that NMFS failed to account for the time and cost burdens to dealers associated with completing the weekly electronic reports and underestimated the costs associated with purchasing a computer and Internet service.

Response: NMFS analyzed the costs associated with the collection of information requirements for weekly electronic dealer reporting. This analysis was completed under the authority of the Paperwork Reduction Act (OMB Control Number 0648–0229). NMFS based the burden estimates on the data available from the current pool of Federal seafood dealers who are already required to submit weekly electronic reports. The analysis estimated the reporting burden for each weekly transaction to be about 4 minutes to populate and submit the electronic data files. The reporting costs are based on a respondent wage of $18.88 per hour, with the overall annual burden for all 148 affected dealers estimated at 539 hours, costing $10,171. NMFS realizes that the time needed to complete and upload the reports may be higher for some dealers who may not be familiar with the electronic programs. However, NMFS staff will work with all dealers to assist them in meeting their reporting requirements, consistent with past practices.

Although 148 Federal lobster dealers will be affected by the electronic dealer reporting requirement, NMFS believes that only a small, albeit unknown, number will need to purchase both a computer and acquire Internet service to comply with the new reporting standards. Further, only one dealer

commented that the costs associated with purchasing the necessary equipment would be too expensive. However, to further address concerns with costs to Federal dealers associated with acquiring the necessary technology to comply with electronic reporting, NMFS reassessed its cost estimates by investigating computer pricing in May 2009. The investigation revealed that the costs for a computer as presented in the initial NMFS analysis are probably overestimated and, more than likely, represent a high-end, worst-case scenario of potential cost to affected Federal lobster dealers. Based on the information obtained through the new cost investigation, a new desk-top personal computer system can be purchased for as little as $272. This is a price for a system with specifications that reflect the most current technology with electronic capabilities (speed and memory) which far exceed what is needed for the purposes of electronic dealer reporting. The pricing query revealed the availability of 17 models of desktop computer systems that range in price from $272 to $403 with sufficient technology such as 1.60 GHz, 1 GB RAM, 160 GB hard drive (www.pricescan.com). Further, it is expected that the cost of purchasing a used computer would likely be even less, especially since old computers usually require a disposal fee, prompting many who have upgraded their systems to attempt to sell their used computer equipment rather than pay for disposal. These figures reveal the potential for substantially lower costs than the initial NMFS estimates of about $580.

NMFS also re-assessed the costs associated with Internet service, particularly in Maine where the majority of the affected Federal lobster dealers do business. The inquiry revealed that Internet service could be attained throughout Maine at a cost of about $20 per month. Even more remote, down-east locations such as Machias have access to Internet service providers offering dial-up Internet service for as low as $14.95 per month. This equates to annual Internet service costs of between $180 and $240, compared to the more conservative initial NMFS estimates of about $652 or approximately $54 per month.

NMFS stands by its initial estimates of costs to Federal lobster dealers associated with the electronic reporting requirements which, on balance, are not perceived to be overly intrusive to the majority of dealers since most are likely to have a computer and Internet service already. However, these more recent investigations of the economic impacts of acquiring the computer and Internet service should not be overlooked and may, in fact, reflect a more current and realistic estimate of the costs associated with this action. Generally, in consideration of the more recent cost query, if one considers the cost of a computer to be about $400 and the annual cost of Internet service to be $240 (assuming the $20 per month charge and not the lowest possible charge) then the annual cost could be about 50 percent less than NMFS has estimated in the initial estimation. More specifically, the cost to pay in full for a brand new computer and the annual Internet service charge would be approximately $640 or about $53 per month, compared to the initial estimate of $1,232 or about $103 per month.

Comment 7: ME DMR commented that some affected dealers from Maine may not have the appropriate software or other capabilities to upload the information to SAFIS.

Response: NMFS acknowledges that some unknown, but likely small, number of affected dealers may not have the appropriate electronic capabilities at the current time to facilitate the submission of electronic reports. However, on balance, NMFS believes that acquiring the data in an electronic format will provide long-term benefits for the management of the resource and improve the usefulness of the data, consistent with the recommendations for improved coastwide fishery dependent data in the 2005 stock assessment peer review. Understanding that a subset of affected dealers may not have the necessary technological means, NMFS has postponed the electronic reporting requirement for the 148 Federal lobster dealers who previously have not been required to report to NMFS. The delay until January 1, 2010, of the weekly electronic reporting requirements, will allow these dealers some additional time to adjust their business practices to mitigate the impacts of electronic reporting. During that time, NMFS will inform the affected dealers of the specifics of the reporting systems. Additionally, due to this specific situation, affected dealers will have the opportunity to acquire the necessary software packages from a NMFS contractor at no charge to the dealer.

NMFS is aware that the costs associated with the electronic reporting requirements will vary for some affected dealers, and those costs may be higher for some businesses than the NMFS estimates, although it is difficult to envision it being significantly so based upon the best available present information. Expanding the weekly electronic dealer reporting requirements to all Federal lobster dealers will provide a consistent framework for Federal dealer data submission to assist NMFS in fisheries policy decisions and will facilitate error checking and reporting compliance checks. On balance, NMFS anticipates that the longer term benefits will outweigh the shorter term impacts. Further, the transition to an electronic reporting format is expected to ease the cost and time burdens to dealers, states and the Federal Government as users become more adept at electronic reporting and if states decide to accept Federal dealer reports in satisfaction of state requirements for Federal dealers with state dealer permits.

Comment 8: A representative of a federally permitted wholesale lobster dealer who purchases lobster exclusively from other dealers requested that NMFS clarify whether the trip level reporting requirements would apply to dealer-to-dealer transactions.

Response: The trip-level electronic dealer reporting requirements apply to first-point-of-sale transactions between federally permitted lobster vessels and federal lobster dealers. The trip level information is reflected in the dealer reports which would document the dealer's purchase from each vessel. Lobster sold by those dealers to other dealers or to other establishments would not need to be reported by either the dealer or the recipient of the lobsters since the purchases would already be accounted for.

Comment 9: Two dealers from Maine responded that the data NMFS collects from a mandatory dealer reporting program will be flawed because the data set will not include the several hundred dealers that have state dealer licenses but no Federal dealer permit. Similarly, ME DMR quoted the NMFS proposed rule for this action wherein it states that NMFS is proposing that all Federal dealers report because such a requirement would "...assist in providing a more comprehensive and consistent coastwide accounting of lobster harvest data...". ME DMR and the dealers who commented point out that, in spite of mandatory reporting for Federal permit holders, NMFS will not obtain a comprehensive data set of lobster landings because the requirements fail to include lobster dealers with only a state and not a federal dealer permit and thus not be required to report.

Response: To clarify, NMFS intends to obtain a "comprehensive and consistent" set of electronic data from all Federal dealers, not all dealers coast wide. The intent of this Federal data

collection program is to obtain data on lobster purchased by Federal dealers, a statistic that is not currently available to NMFS in a simple, common, or real-time capacity. NMFS is not using the data to estimate the overall coastwide catch, although a consistent and commonly reported Federal dealer dataset will certainly assist in stock assessments and other resource-wide needs. The states will continue to provide the data from state-only dealers into the SAFIS system which is designed to hold the data for all lobster landed coastwide and used for the stock assessments and other cooperative interjurisdictional management purposes. Overall, a consistent Federal lobster dealer reporting system will improve the data available to NMFS and will enhance its utility for internal and shared management and policy purposes.

NMFS is implementing the electronic dealer reporting requirement because, under the current scenario, NMFS does not have comprehensive, real-time data on lobster catch from either the full complement of Federal harvesters or Federal dealers readily available in a consistent format. Since the Federal reporting requirements are currently determined by the type of permits a vessel or dealer holds, and not mandated by a random stratified or other statistically sound means, extrapolating the data from a portion of the industry to derive total coast-wide Federal landings, landings by area or other useful statistics is difficult to accomplish with certainty.

Mandating dealer reports from all Federal lobster dealers will address a gap in the current Federal catch data resulting from a lack of mandatory vessel and dealer reporting. About 61 percent of all Federal lobster vessels report their landings on a trip-by-trip basis to NMFS through the Federal Vessel Trip Report (VTR) system and about 71 percent of Federal dealers report electronically to NMFS. However, at any given time, NMFS does not have an internal data set that fully accounts for current lobster purchases by dealers from Federal vessels. Specifically, 77 percent (about 1,000 lobster vessels) of the Federal lobster vessels which are not required to report landings to NMFS because they hold only a Federal lobster permit and no other federal permits, hail from Maine ports. Moreover, more than half of the Federal lobster dealers who are not reporting are from Maine. Therefore, this represents a component of both the harvester and dealer sectors from the most prolific lobster-producing state that is not reporting landings to NMFS. NMFS eventually can access this data through the SAFIS system, but only after it is sent to ME DMR by the dealers on a monthly basis, keypunched into an electronic system by ME DMR staff and then, at some later date, uploaded onto SAFIS. The time lag and inconsistency in reporting delays the availability of the data and decreases its utility in management and policy decisions.

Comment 10: One lobster industry association wrote in favor of the broodstock protection measures, including the expansion of these measures to the Outer Cape Management Area. The association, representing a large portion of both the offshore and coastal lobster industry approves of these measures because of the benefits of protecting large broodstock lobsters, and because including the Outer Cape will provide additional benefits by protecting lobsters that migrate in and out of the Outer Cape Area.

Response: NMFS agrees and believes that the broodstock measures set forth in this final rule provide a balanced approach for protecting lobster broodstock across and within management and stock areas. Further, the measures will complement the Commission's plan and address efforts to improve broodstock protection as recommended in the 2005 stock assessment peer review.

Comment 11: Several Area 3 lobstermen and a lobster industry association representing offshore lobstermen wrote in favor of mandatory dealer reporting, the modified v-notch definition and the Area 3 maximum size requirements.

Response: NMFS agrees and believes that the maximum size and broodstock protection measures provide a measure of protection to GBK and SNE lobster broodstock with minimal impact to the industry. These measures will also facilitate enforcement and resource evaluation efforts by aligning management measures on a stock-wide basis. Electronic trip-level reporting for Federal dealers will assist NMFS in its role in managing the fishery and will improve the quality of Federal lobster data for internal and cooperative management purposes.

Comment 12: One Area 1 lobsterman agreed with the broodstock protection measures established in this final rule but recommended even more restrictive measures such as a 5–inch (12.7–cm) maximum size and a zero-tolerance v-notch requirement coast-wide. A mid-Atlantic lobsterman who fishes in Area 4 is opposed to the implementation of a more restrictive maximum size requirement for that area because it will add to the numerous restrictions already in place. Specifically, the maximum size in Area 4 will decrease from 5 1/2 inches (13.97 cm) to 5 1/4 inches (13.34 cm) and will now include both male and female lobster. Finally, one lobsterman recommended that a 6–inch (15.24–cm) maximum size be implemented coastwide.

Response: NMFS understands the view points on all sides of this issue as expressed by these commenters. One commenter believes even more stringent regulations are necessary, another feels that the fishery is already too restricted, and a third states the need for a consistent maximum size coastwide.

Lobster management is complicated by several factors. First, it requires the management of three distinct stock units, each with its own stock rebuilding needs. Second, these stock areas include either all, or portions, of multiple management areas. There are multiple jurisdictions - both state and Federal - which must implement and enforce the differential area-specific management measures in place in the Commission's plan. Additionally, there are several different sectors of the fishery - a nearshore fishery, offshore fishery, a directed trap fishery, and multiple non-trap sectors that rely on lobster as a bycatch. All of these important factors influence and complicate the management of the lobster resource.

Overall, NMFS embraces the concept of cooperative management and the area-based management of the lobster fishery. This concept allows stakeholders to have input in how their segment of the fishery is managed. However, a balance must be achieved that allows for the responsible management of the resource in consideration of the impacts on the industry. On balance, given the multi-faceted nature of the industry, NMFS believes that the broodstock measures in this final rule will best complement Addendum XI of the Commission's plan which is intended to protect lobster and enhance the SNE stock. With this rule, affected management areas will have a maximum size that corresponds to the needs of the resource and the industry working in those areas, consistent with limits already in place and enforced at the state level. Although broodstock measures are expanded to the Outer Cape Area beyond the scope of the Commission's plan, NMFS believes that these measures complement the plan, will benefit the resource and will facilitate management and enforcement efforts within and across stock and management areas since both the Outer Cape and Area 3 overlap into all three stock areas.

Comment 13: Thirty-two commenters wrote in opposition to the expansion of the broodstock protection measures into the Outer Cape lobster management area. Among the reasons for the opposition, the commenters stated that the estimates for impacts in catch by NMFS were underestimated. Some commenters suggested that the since the broodstock measures were not part of those approved in the Commission's plan for the Outer Cape Area, their inclusion in this final rule undermines the utility and integrity of the LCMT process.

Response: NMFS used the best available data to determine the biological, social and economic impacts associated with this action. The impact estimates were largely based on v-notching and sea sampling data collected consistently in the Outer Cape Area since 1981 by the MA DMF with industry cooperation. As necessary, NMFS observer data and other relevant research was referenced to estimate the impacts of the broodstock measures. At the industry's request, more recent and expanded sea sampling data from the Outer Cape was also considered in this final rule.

Upon review of the additional data MA DMF sea sampling data, there was no information to significantly alter the basis for selection of the preferred alternatives or the expansion of the broodstock measures to the Outer Cape Area. The maximum size data from the MA DMF report indicated that no lobsters over the intended 6 3/4–inch (17.15–cm) maximum size were encountered during any of the 2008 sea sampling trips.

Certainly, the information regarding the estimates of the v-notch in the Provincetown fleet due to the location of the fishing grounds largely within Area 1 was notable, suggesting a higher proportion of v-notched lobster than in the more southerly parts of the Outer Cape Area. In fact, this component of the data underscored the relevance of consistent protections for broodstock lobster across management areas sharing a common stock; in this case the GOM stock (see response to Comment 14). The limitations of the Provincetown data such as its short time series, lack of measured v-notches, and the strong words of caution in the MA DMF report relevant to its application across the entire Outer Cape Area limit its utility in forming any significant conclusions. Thus the additional MA DMF sea sampling data on the Provincetown fleet is not sufficient to cause NMFS to implement either more restrictive v-notch measures commensurate with those in the GOM stock area. Nor is it sufficient to justify less restrictive v-notch measures due to the potential for higher rates of v-notched lobster and decreased landings. Maintaining the initial intent to implement the 1/8–inch (0.32–cm) v-notch will allow for consistency within the Outer Cape Area itself as well as across the GBK stock area. It will also provide some additional level of protection to lobster in the GOM sector of the Outer Cape fishery beyond the status quo, albeit not as extensive as those imparted upon Area 1 fishermen.

NMFS acknowledges that expansion of the broodstock measures to the Outer Cape Area was not part of the Commission's plan and not recommended for implementation by the Outer Cape LCMT, but that does not mean that NMFS must implement only Commission-sanctioned management measures. Section 803(b) of the Atlantic Coastal Act states that the Secretary of Commerce may implement regulations to govern fishing in federal waters that are both compatible with the effective implementation of a coastal fishery management plan (in this case, the Commission's ISFMP) and consistent with the national standards set forth in the Magnuson-Stevens Act. As such, NMFS is obligated to support the effective implementation of the Commission's lobster plan but retains the authority to enact compatible regulations in Federal waters as long as those regulations are consistent with the MSA National Standards. Therefore, even though the broodstock measures were not part of the Outer Cape component of the Commission's plan, NMFS believes, based on the analysis of the best available and most recent data, that the expansion of the broodstock measures to the Outer Cape Area will support the Commission's intent to protect lobster broodstock in the SNE stock areas as intended in Addendum XI and will extend that barrier of protection to include the GBK stock area. NMFS further acknowledges that the LCMTs serve a valuable role in recommended measures which reflect the fishing practices and nuances of their respective fishing communities and the associated lobster resource. However, this is an advisory role and NMFS maintains the discretion to enact regulations to support the Commission's plan. See Description of the Public Process under **SUPPLEMENTARY INFORMATION** for more details on the role of the LCMTs, NMFS and the Commission. Furthermore, NMFS listened to the industry, specifically the Outer Cape LCMT, waiting to review and consider the expanded 2008 MA DMF sea sampling data before making a final decision on the management measures associated with this rulemaking. NMFS does not take lightly the advice of the LCMTs and other industry advisors as demonstrated in the consideration of the expanded Outer Cape data in the evaluation of this Final Rule.

Comment 14: A Massachusetts Congressman commented that NMFS should postpone the broodstock rule changes for six months and form a working group consisting of NMFS, state and industry representatives to further assess the impacts of these measures on the Outer Cape lobster industry. Similarly, commenters representing the Outer Cape lobster industry requested that NMFS review 2008 sea sampling data collected by the MA DMF to better assess the economic impacts resulting from this final rule.

Response: NMFS agrees and postponed the rulemaking to allow for the review of additional sea sampling data, which was not made available by MA DMF until February 2009. In consideration of that data and public comments, NMFS has postponed action in the Outer Cape for a full year to allow the industry to adjust to the new requirements.

As explained in detail in the Background section of this final rule, NMFS staff attended a meeting consisting of Outer Cape lobstermen, a representative of the MA DMF, and representatives of the state legislature and local media in Chatham, MA on November 10, 2008. NMFS listened to the concerns of the industry and explained the rationale for the proposed broodstock protection measures. Many in attendance stated that the NMFS estimates of lost catch resulting from the expansion of the broodstock measures into the Outer Cape area were understated and warranted further investigation. The industry commented that more recent sea sampling in the Outer Cape area was underway to more specifically address the impacts of these measures on the Outer Cape lobster fleet and requested that NMFS consider this new data when determining the course of the final rule.

Upon review of the expanded sea sampling data, NMFS found nothing to suggest that a 6 3/4–inch (17.15–cm) maximum size would substantially impact landings in the Outer Cape lobster fishery. In fact, review of the MA DMF expanded sea sampling data revealed that the impacts could be even less than initially determined in the NMFS EA for this action. Similarly, the findings of the expanded MA DMF sea sampling data collection program were

consistent with the NMFS estimates for catch reductions associated with the implementation of a 1/8–inch (0.32–cm) v-notch standard for the Nauset and Chatham regions of the Outer Cape.

The data collected during the 14 sea sampling trips out of Provincetown provided an interesting perspective on the nature of the lobster fishery in the northern portion of the Outer Cape Area. Specifically, the MA DMF expanded study indicates that the Provincetown fleet is essentially fishing on the GOM lobster stock and the majority of the sea sampling trips (87 percent) occurred in the Outer Cape/Area 1 overlap area, where fishermen from these two adjacent management areas fish side by side but are subject to different maximum size and v-notch standards. Under the current regulatory framework, Area 1 lobstermen are subjected to more restrictive maximum carapace length and v-notching requirements than those in the Outer Cape Area. This phenomenon highlights one of the intentions of this rulemaking which aims to provide a more consistent and enforceable set of broodstock measures within and across management areas, especially among those areas which fish on a common lobster stock. Although it appears that a large proportion of Provincetown's lobster fishery may involve the GOM stock, NMFS did not fully analyze the impacts of applying Area 1 broodstock measures to that segment of the Outer Cape fishery. Limitations in the MA DMF sampling design as illustrated in the MA DMF report caution the use of this data for making assumptions on the entire Outer Cape Area. It is expected that this part of the Outer Cape Area would have a higher instance of v-notched lobster due to its overlap with the Gulf of Maine Area 1 fishery wherein Area 1 lobstermen are required to v-notch all egg-bearing lobsters and are subject to a more restrictive zero-tolerance v-notch definition.

Provincetown fishermen are likely to endure more impacts due to the 1/8–inch (0.32–cm) v-notch requirements than are fellow lobstermen in more southerly portions of the Outer Cape Area. In contrast, the impacts of this rule are likely to be far less than if the northern portion of the Outer Cape were subject to the Area 1 broodstock measures. On balance, and given the uncertainties associated with one year's worth of sampling data, but also considering the potentially higher losses in catches for the northern portion of the Outer Cape Area, NMFS has deferred the effective implementation of the 1/8–inch (0.32–cm) v-notch standard for the Outer Cape until July 1, 2010.

Comment 15: Two state legislators and some industry commenters wrote in opposition to the expansion of the broodstock measures into the Outer Cape Area, stating that the measures could result in a 30–percent loss in catch for the Outer Cape fleet.

Response: Initial estimates from the EA, based on NMFS observer data, indicate that less than 5.7 percent of the lobster harvested by non-trap vessels in the GBK stock area is larger than the proposed maximum carapace length of 6 3/4 inches (17.15 cm), while only about 0.5 percent of the trap fishery catch is expected to be impacted in the GBK portion of the Outer Cape. Review of the 2008 expanded sea sampling data provided by the MA DMF revealed similar results. In fact, in 28 sea sampling trips - during the entire 2008 sea sampling season - not one lobster was observed with a carapace length in excess of 6 3/4 inches (17.15 cm).

NMFS agrees that Outer Cape lobstermen are relying heavily on "large" lobsters as the Outer Cape is comprised of individual lobster that are larger, on average, than the minimum legal size. This trend has been documented by MA DMF researchers as cited in the EA. As such, the Outer Cape Area is known for generally landing a "larger-sized" lobster. However, lobstermen, in the general course of their fishing operations, are likely only measuring lobsters against the legal lobster minimum size gauge and are not measuring the actual carapace length of the lobsters. Until now, lobstermen in the Outer Cape Area have not had a maximum size requirement and have needed only to assure that the lobsters they harvest are larger than the minimum size. Therefore, many of the lobsters they encounter at sea and believe to be over 6 3/4 inches (17.15 cm) may not be that large and may remain legal for harvest under the new maximum size requirements. Notably, any lobster with a carapace measuring more than 5 inches (12.7 cm) may be considered a "large" lobster and without actually measuring a lobster, it is difficult to estimate its actual carapace length. This could lead to misconceptions among the fleet of the actual impacts in terms of lost catch resulting from a 6 3/4–inch (17.15–cm) maximum carapace length regulation.

When analyzing the potential impacts of a maximum size restriction for lobster harvested in the Outer Cape, NMFS chose the standard equal to that implemented for Area 3, since both areas are largely within the GBK stock area, although both areas overlap all three stock areas. Area 3 is subject to these management measures as part of the Commission's SNE stock rebuilding initiatives and including the Outer Cape Area will ensure that stock protection measures occurring in Area 3 and other areas will not be undermined due to a lack of consistent measures in the Outer Cape Area which shares all three stocks with Area 3.

Based on observer data, nearly 17 percent of the lobsters encountered in GBK traps were between 5 inches (12.7 cm) and 6 3/4 inches (17.15–cm) carapace length, and this was true for about 41 percent of the non-trap observances of lobster in GBK. NMFS considered this and concluded that a 5–inch (12.7–cm) maximum size would be too restrictive on the Outer Cape fishery and inconsistent with the management measures set forth for the GBK stock, which accounts for the largest component of the Outer Cape Area.

Comment 16: MA DMF stated that they do not dispute the reasons for the expansion of the broodstock measures into the Outer Cape fishery because doing so improves regulatory consistency and compliance and would provide protection to GBK lobster which is the dominant stock in the Outer Cape Area; a stock protected by similar measures in Area 3. MA DMF cautioned that this action could immediately impact Outer Cape lobstermen, especially those in the non-trap sector, and recommended that NMFS postpone any final action until the expanded Outer Cape sea sampling data is considered.

Response: NMFS agrees. Review of the expanded sea sampling data provided perspective on the evaluation of the impacts of these new measures to the trap sector of the fishery but the MA DMF investigations did not include any additional data on the non-trap fishery. As previously stated, NMFS expects the resulting losses in catch to be higher for the non-trap fishery, consistent with the estimations in the NMFS EA for this action.

Comment 17: The two state legislators indicate that the measures have no basis in science, citing Section 4.2.3.5 of the EA which states, in part, "...there are no expected impacts or benefits to protected resources directly attributable to the maximum lobster size requirements...", and Section 4.3.3.1 which states, "Limited data are available regarding the number or percentage of lobster that may be conserved if the more restrictive v-notch were to expand into the Outer Cape Area...broodstock measures have an inherent uncertainty since so many environmental factors affect larval

survival...and recruitment....these factors...make it difficult to assure Outer Cape Area participants a stake in the economic benefits that would accrue due to the proposed broodstock measures."

Response: As a preliminary matter, given the low observance rate of oversized lobsters present in Outer Cape traps over the years as highlighted by the recently enhanced MA DMF sea sampling program data, some may question the biological need for this management measure. However, the inclusion of the measure is consistent with that for the offshore fishery and could protect some lobster that migrate inshore from Area 3. Aligning the Outer Cape broodstock measures with those in Area 3 is reasonable given the fact that both areas overlap all three stock areas and rely mostly on the GBK stock. Additionally, the inclusion of the maximum size limit to the Outer Cape Area would reduce confusion and facilitate enforcement. Equating a maximum size in the Outer Cape to that of Area 1 (5 inches (12.7 cm)) would be much more restrictive to the industry as NMFS observer data indicate that over 16 percent of the trap harvest and about 41 percent of the non-trap lobster harvested in the GBK stock area fall between 5 inches (12.7 cm) and 6 3/4 inches (17.15 cm) carapace length.

To clarify with respect to Section 4.2.3.5, "protected resources" is a term of art that relates to animals protected under either or both of the Marine Mammal Protection Act and Endangered Species Act. Therefore, this excerpt from the EA indicates, quite simply, that the imposition of a maximum size requirement in the Outer Cape Area is not expected to impact whales or other marine mammals, sea turtles or any species granted special statutory protection.

Regarding Section 4.3.3.1, NMFS agrees that there is little information on the percentage of lobster that may be conserved if the more restrictive v-notch definition is applied to the Outer Cape. The broodstock measures are intended to protect lobster broodstock which are known to travel in and out of the Outer Cape Area. Therefore, as the referenced passage suggests, the broodstock measures may benefit the lobster on a stock-wide or regional level but there is no way to guarantee or equate any such benefits directly to the Outer Cape Area. The same is true for Area 3, since lobsters in that area may move in and out of the Outer Cape Area and elsewhere. Therefore, given the propensity of lobsters to migrate across management and stock areas, these measures will assure consistent application on a stock-wide basis.

Comment 18: Some Outer Cape industry members expressed concerns that the vessels sampled by MA DMF in the expanded sea sampling program are biased against the harvest of larger lobster since these vessels fish traps with smaller entrance heads than are routinely deployed by Outer Cape fishermen.

Response: MA DMF staff did not measure the entrance heads on the traps fished during the sea sampling trips so there is no way of verifying this statistic, and thus no means of considering it in the analysis of management alternatives. MA DMF researchers have determined, based on 27 years of sea sampling data that, unlike surrounding management areas, more than 90 percent of the total catch in the Outer Cape Area is comprised of individuals that are larger on average than the minimum legal size. Accordingly, the Outer Cape Area is known for generally landing a "larger-sized" lobster. Because of this areal trend, there is no reason to expect that Outer Cape lobstermen would fish with traps that do not select for larger lobsters. This does not mean that larger lobster are not present in the Outer Cape Area, although MA DMF sea sampling data since 1981 indicates that a relatively low percentage of lobsters over 6 3/4 inches (17.15 cm) are caught in traps. Consequently, as indicated by a review of the NMFS observer data for GBK, the non-trap fishery is expected to suffer more losses due to the maximum size regulations than the trap fishery since non-trap gears are not as size selective and this sector of the industry may high-grade the catch over the course of a fishing trip, selectively retaining the largest lobsters caught.

Comment 19: A commercial lobster fishing industry association commented in favor of the proposed maximum size and v-notching requirements as described in the proposed rule, including the expansion of those measures into the Outer Cape Area.

Response: NMFS agrees and believes that the implementation of the proposed measures would be compatible with the Commission's recommendations for Federal action and would reduce confusion on the part of the participants and regulatory agencies, and facilitate enforcement by aligning state and Federal lobster management measures. Additionally, by expanding the scope of this action to include the Outer Cape Area under the maximum size and v-notching requirements as proposed, some, albeit difficult to quantify, level of protection to transient lobster moving among different management areas may be realized. Further, this action could reduce the potential for more directed fishing effort into the Outer Cape Area that could occur if that area remained the only management area not governed by a maximum size requirement and bound to a less restrictive definition of a legal v-notch.

Comment 20: An Outer Cape lobster fisherman wrote in favor of expansion of the maximum size requirements into the Outer Cape Area, specifying that the maximum carapace lengths consistent with those established for the offshore fishery, are appropriate. The commenter added that the maximum size will protect large lobster and accordingly, foster recruitment, and may help to increase the lobster price by lowering the supply of large lobsters on the market.

Response: NMFS agrees that applying the maximum sizes to the Outer Cape, consistent with those for Area 3, is appropriate given that Area 3 and a large component of the Outer Cape Area fall within the GBK stock area.

Expanding the Area 3 maximum size requirements to the Outer Cape Area will support efforts to protect broodstock on a stock-wide basis, as the Outer Cape Area is known as a corridor for lobster moving between inshore and offshore areas and between stock and management areas. As such, this action will limit the potential to undermine the maximum size broodstock protection benefits of these proposed measures if lobster are protected in one area (i.e., caught, but released back to the sea), only to have that lobster caught and kept after transiting into another area. In addition, at-sea enforcement would be significantly enhanced if the proposed broodstock measures are implemented in the relevant lobster management areas.

Comment 21: A representative of a recreational diving club wrote to express concerns over the passage of Addendum XI wherein the Commission adopted the revised maximum sizes to include both male and female lobster. This group submitted a proposal before the Commission's Lobster Management Board after adoption of Addendum XI to request the recreational take of one oversized lobster per trip by divers. Although discussed at several Board meetings, both prior to and after approval of Addendum XI, the proposal was not approved by the Board.

Response: NMFS acknowledged the recreational dive industry's concerns about the impacts of maximum size regulations in Areas 4 and 5 beginning with a prior Federal rulemaking in response to the Commission's recommendations in Addenda II and III.

Those addenda required the states to implement a maximum carapace size for the first time in Area 4 and Area 5 of 5 1/4 inches (13.34 cm) and 5 1/2 inches (13.97 cm) respectively, pertaining only to female lobster. In evaluating the impacts of these measures, NMFS responded to the concerns of the mid-Atlantic recreational dive fishery which tends to target large "trophy lobsters" on wreck sites aboard charter and party vessels. It was determined by canvassing state agencies that an extremely low number of lobster in excess of these new maximum sizes would be taken by the recreational dive sector, considering that most oversized lobsters are likely taken in the deeper offshore areas along the continental shelf in excess of 150 feet (46 meters) which is beyond the depth range of the divers. Consequently, in consideration of the dive industry's concerns and given the small chance that a substantial number of oversized lobsters would be taken in these management areas by the dive sector, the NMFS final rule on this issue (71 FR 13027) allowed recreational divers to possess one female lobster per trip in excess of the maximum carapace length in Area 4 and Area 5. Since then, the Commission adopted the more stringent maximum sizes of Addendum XI which revised the maximum carapace measures for Area 4 and 5 to be consistent at 5 1/4 inches (13.34 cm) and pertain both male and female lobster. Once these regulations became effective at the state level, the more restrictive state regulations negated the standing Federal allowance for recreational divers.

Although NMFS had acknowledged the relatively minimal impacts on the lobster resource associated with allowing the harvest of a single trophy lobster per recreational dive trip, NMFS believes that revising the maximum sizes in Areas 4 and 5 is the best alternative. Given the strong recommendations for broodstock protection in SNE in the 2005 stock assessment peer review, and the continued poor condition of the SNE stock, NMFS will implement measures that remain consistent with those required under the Commission's plan.

Although NMFS acknowledges that the proposed regulation might have some impact on recreational divers seeking so-called "trophy-sized" lobster, NMFS believes that, on balance, applying maximum sizes consistently to male and female lobster is prudent. As a preliminary matter, maximum size restrictions are known to protect larger lobsters which, according to the best available scientific information, are more prolific breeders. Further, application of the standard to both male and female lobsters would make the regulation more consistent, understandable, and enforceable. Additionally, the maximum size restriction of 5 1/4 inches (13.34 cm) would still allow for the capture of large lobsters and NMFS has received no information to suggest that divers currently diving for oversized lobster would not dive for lobsters in excess of 5 inches (12.7 cm) which would still remain legal under this final rule. Regardless of Federal action, recreational divers are already bound by the proposed maximum size revisions by virtue of the states having approved the restrictions of the Commission's Addendum XI.

Comment 22: Some commenters say that the Outer Cape Area is meeting its conservation goals and this final rule will cause unnecessary financial hardship for Outer Cape fishermen. Further, some dissenters state that the Outer Cape industry did not know about this issue prior to the publication of the proposed rule.

Response: Outer Cape lobstermen fish primarily on the GOM and GBK lobster stocks. These two stocks tend to be stable, but the 2005 stock assessment raised concerns about high fishing effort and high dependence on newly-recruited lobster which could have impacts on the future stability of these stocks despite relatively high landings. The Outer Cape Area does have an approved effort management plan based on state-level historical participation under the Commission's ISFMP. However, the MA DMF expanded sea sampling data from 2008 brings to light the possibility that a component of the Outer Cape fishery is occurring predominantly in statistical area 514, which is part of the GOM stock. Therefore, it is unknown whether the Outer Cape effort control measures are sufficient in addressing the effort issue in the GOM stock area. Statistical area 514 was identified in the 2005 stock assessment as an area of concern due to extremely high lobster trap fishing effort. Further, from a broodstock perspective, the Outer Cape is the only management area that does not have any broodstock protection measures in place. Given that the Outer Cape Area straddles all three lobster stocks and is a known migratory pathway for lobster from other management areas with broodstock protection, it is reasonable to apply some consistent standard to the Outer Cape Area. Failing to do so could undermine the ongoing broodstock protection measures in place in adjacent management areas, affecting multiple stocks. NMFS has applied the more liberal standards consistent with the Area 3 offshore fishery since the Outer Cape is known to fish on a larger-sized lobster and the majority of the Outer Cape Area resides within the GBK stock area shared by both the Outer Cape and Area 3.

The commenters also state that the measures could result in undue financial hardship. NMFS expects that the Outer Cape lobster industry will be impacted by this measure but, on balance, believes that the stock-wide broodstock protection, enforcement and resource assessment benefits outweigh the financial impacts. The impacts as estimated in the EA were supported after review of the MA DMF expanded 2008 sea sampling data. The economic impacts are discussed in more detail in the **SUPPLEMENTARY INFORMATION** section and under Economic Impacts of the Selected Actions in the Classification section. NMFS has deferred the implementation of these measures until July 1, 2010 to offset any economic impacts and allow the industry more time to adjust to the new regulations.

NMFS heard the concerns of the Outer Cape industry at the November 10, 2008, LCMT meeting in Chatham, MA. NMFS staff addressed this concern and stated that the general scope of measures was initially announced in the ANPR for this action wherein NMFS notified the public that broodstock measures related to the recommendations of the Commission in Addendum XI were being considered. The ANPR and proposed rule for this action were posted on the NMFS website along with a notice of availability informing the public of this action and how to comment and obtain copies of the relevant documents. Some in attendance stated that they are normally notified by mail of such actions. NMFS does not contact permit holders by mail regarding proposed rules or ANPR publications. However, NMFS does have an email and fax contact list for such actions. NMFS received the contact information of those in attendance expressing interest for electronic notification and NMFS has included these individuals on the list. Further, it should be stated that the Fishery Management Councils, the Commission, state agencies, and a wide range of fishermen's organizations and media contacts were notified of prior publications relevant to this action.

Comment 23: One individual commented that the v-notch requirements make the lobster industry more inefficient by increasing the discard rate and requiring harvesters to spend more money on bait, fuel, labor and capital. The commenter suggests

that more effective alternatives such as catch quotas or effort limitations be implemented to control fishing effort at the desired fishing mortality rate.

Response: The commenter here suggests a paradigm shift in overall management theory wherein management would focus on input controls (e.g., trap numbers, limited entry) rather than output controls (gauge size, escape vent size requirements). The relative merit to such a theory is the subject of ongoing discussion within industry, academic and management circles. However, the Commission's plan does consider effort as part of the coast-wide lobster fishery management program. The Outer Cape industry has already instituted such a plan as facilitated by the MA DMF which has allocated vessel specific trap allocations to qualified Outer Cape lobstermen. Similar programs are in place at the state level concerning the SNE stock and NMFS is in rulemaking now to address limited entry and trap transferability in multiple management areas, including the Outer Cape, as recommended by the Commission. Effort control is an important component to assuring both economic and biological sustainability with respect to the lobster industry and the resource. Output controls are also important and the two work hand-in-hand by controlling both inputs and outputs in the fishery. However, with respect to this action, the commenter's approach may fall beyond the scope of the present action, although NMFS welcomes such comments and will continue to monitor, and as appropriate, participate in discussions on ways to improve management of the lobster resource.

Changes From the Proposed Rule

The following minor changes were made to the regulatory text since the publication of the proposed rule to reflect the timing adjustments made to the implementation dates of the various regulations based on industry concerns and to clarify the revised definition of a standard v-shaped notch.

Edit 1

This final rule modifies the wording in the definition of a standard v-shaped notch from that provided in the regulatory text of the proposed rule. The definition in the proposed rule read, "a straight-sided triangular cut, with or without setal hairs, at least 1/8 inch (0.32 cm) in depth and tapering to a point." The wording was modified in the final rule to match the Commission's recommended wording in Addendum XI and now reads, "a notch or indentation in the base of the flipper that is at least as deep as 1/8 inch (0.32 cm), with or without setal hairs." This change in wording is considered minor, is within the scope of this rulemaking, and reflects the true intent of this action to support the Commission's plan and effectuate interjurisdictional management of the lobster resource through compatible broodstock regulations.

Edit 2

The final rule defers the effective implementation of the revised v-notch measure in the Outer Cape Area until July 1, 2010, whereas in the proposed rule, the Outer Cape Area would have been subject to this measure thirty days after the publication of the final rule. Until July 1, 2010, the Outer Cape Area remains held to the 1/4–inch (0.64–cm) v-notch definition which served as the definition for a standard v-shaped notch prior to this rulemaking. Since the definition of a standard v-shaped notch now relates to a 1/8–inch (0.32–cm) notch effective with this final rule, a new definition for the 1/4–inch (0.64 cm) notch has been established in the regulations to cover the Outer Cape Area through June 30, 2010. This measure is now referred to as a "One-quarter-inch (1/4–inch) v-shaped notch," and defined as "... a straight-sided triangular cut, without setal hairs, at least 1/4 inch (0.64 cm) in depth and tapering to a point."

Edit 3

Revisions were made to § 697.7 Prohibitions to reflect the changes to the maximum size and v-notching requirements to indicate that those requirements would be effective in the Outer Cape Area beginning July 1, 2010, and effective in Areas 2, 3, 4, 5, and 6 thirty days after the publication of the final rule.

Edit 4

The text, "Effective January 1, 2010," was added to § 697.6(n)(1) to indicate that the reporting requirements for affected lobster dealers would not begin until that date. In the proposed rule, the preferred alternative would have implemented those requirements 30 days after the publication of this rule.

Changes to Existing Regulations

NMFS herein amends the Federal lobster regulations by expanding reporting requirements to all Federal lobster dealers and revising the maximum carapace length regulations and v-notch definition for several LCMAs.

Mandatory Federal Lobster Dealer Electronic Reporting

The Commission's Expanded Coastwide Data Collection Program set forth in Addendum X is intended to increase the quality and quantity of fishery-dependent and fishery-independent data collected at the state and Federal level and sets guidelines for data collection associated with dealer and harvester reporting, sea sampling, port sampling and fishery-independent data collection programs. Consistent with the Commission's recommendations in Addendum X, NMFS, by way of this final rule, extends weekly, trip-level electronic reporting coverage to all Federal lobster dealers. Formerly, if a seafood dealer held a Federal lobster dealer permit and no other Federal seafood dealer permits, that dealer was not required to report lobster or other seafood purchases to the Federal Government. Based on the analysis completed for this action, 148 Federal lobster dealers (29 percent of all Federal lobster dealers) fell in this category and, therefore, were not previously subjected to Federal reporting requirements. The other 71 percent of Federal lobster dealers have another Federal seafood dealer permit that requires routine reporting. Such dealers have been and will continue to be mandated to report all species purchased, including lobster. The reporting requirements for these dealers who were required to report prior to this rulemaking will not change as a result of this action. Accordingly, this action affects only those Federal lobster dealers not previously required to report lobster sales based on reporting requirements mandated by other federally-managed fisheries.

Under this final rule, all Federal lobster dealers must complete trip-level reports and submit them electronically each week, consistent with current Federal dealer reporting requirements. This measure differs from the Commission's recommendations because it requires the electronic submission of the reports and would collect the data in a timelier manner (weekly vs. monthly). To address concerns from some dealers, the State of Maine, and industry groups which wrote in opposition to this requirement, NMFS has deferred the effective date of this action to January 1, 2010, to allow those affected by this rule some additional time to adjust their business practices to comply with the new requirements.

This action does not alter harvester reporting, sea sampling, port sampling or fishery-independent data collection

programs. Federal fishery-dependent data collection programs, such as sea sampling and port sampling activities, are longstanding and underway, contributing substantially to the pool of information used for lobster stock assessments, as are the trawl surveys conducted by the Northeast Fisheries Science Center. NMFS believes that these Federal fishery-dependent and fishery-independent data collection activities exceed those identified in Addendum X and, therefore, do not warrant further action at this time. Further, with respect to harvester reporting, Addendum X mandates participating states, and recommends that NMFS, require at least 10 percent of all lobster harvesters to report their catch. Currently, approximately 61 percent of all Federal lobster vessels report their catch through the NMFS VTR program, thus exceeding the reporting threshold under the ISFMP. Therefore, with respect to the reporting requirements in Addendum X of the Commission's ISFMP, this final rule changes only the dealer reporting requirements and no other data collection or reporting programs.

Both NMFS and the states acquire dealer and harvester data, although the frequency and reporting requirements vary across state and Federal jurisdictions. In an effort to achieve a common forum for collecting and assessing coastwide fishery data, NMFS and its Atlantic states partners developed the Atlantic Coastal Cooperative Statistics Program (ACCSP). ACCSP is a state and Federal fisheries statistical data collection program. The data are compiled into a common management system to facilitate fishery management and meet the needs of fishery managers, scientists and the fishing industry. To more specifically address the need for real-time landings data to assist in fisheries management, the ACCSP established the Standard Atlantic Fisheries Information System (SAFIS). Since 2003, SAFIS has evolved to handle the fisheries data from state-permitted dealers from participating states along the Atlantic coast. Since May 2004, SAFIS has incorporated Federal seafood dealer data.

Although SAFIS was intended to be the overall entry point and warehouse for state and Federal dealer data, NMFS relies on its Commercial Fisheries Database System (CFDBS), managed by the Northeast Fisheries Science Center, as the official warehouse for Federal dealer data even though all Federal and state data are, ultimately, available on the SAFIS database. The new Federal dealer reporting requirements are consistent with the reporting requirements already in place for Federal seafood dealers who are already subject to electronic reporting requirements for fisheries managed under the authority of the Magnuson-Stevens Act, including those of whom also hold Federal lobster permits. The electronic dealer reporting requirements for fisheries managed under the authority of the Magnuson-Stevens Act are set forth in 50 CFR 648.6 and 50 CFR 648.7 of the Federal fisheries regulations and specify the data elements and technological requirements needed for electronic reporting.

Federal lobster dealers affected by this action, similar to Federal dealers already required to report, may choose one of three methods for submitting their electronic reports: direct real-time, online data entry into SAFIS; off-line data entry using software provided by NMFS, followed by file upload to SAFIS; or proprietary record-keeping software followed by file upload to SAFIS. Those entering the data directly into the SAFIS system could do so with a personal computer and Internet access. Those who choose to enter the data using a file upload system would also need a computer and Internet access. However, these respondents would be eligible to obtain the file upload software through a NMFS contractor, at no cost to the impacted dealer. The no-cost option would mitigate some of the financial impact to Federal lobster dealers who would be subject to mandatory dealer reporting. All impacted lobster dealers would be required to maintain or have access to a personal computer and Internet connection.

Maximum Carapace Length Requirements

In support of the Commission's measures in Addendum XI to address the recommendations provided in the stock assessment and peer review process, this final rule establishes a maximum size of 5 1/4 inches (13.34 cm) on all (male and female) lobsters in Area 2 wherein there was formerly no maximum size requirement in the Federal regulations. Formerly, in Area 4, the Federal maximum carapace length regulation restricted the harvest of female lobster in excess of 5 1/4 inches (13.34 cm). This final rule broadens the scope of the maximum size to include all lobsters (male and female) in Area 4. In Area 5, the former Federal maximum carapace regulation restricted harvest of female lobster in excess of 5 1/2 inches (13.97 cm). This action reduces the maximum size in Area 5 to 5 1/4 inches (13.34 cm) and applies to both male and female lobster. Prior to this rule, the Federal lobster regulations for Area 4 and Area 5 allowed recreational fishermen to retain one female lobster exceeding the maximum size requirement as long as such lobster is not intended for commercial sale. This so-called "trophy" lobster allowance in Area 4 and Area 5 is now eliminated. In Area 6, this action establishes a maximum size of 5 1/4 inches (13.34 cm) for all lobster harvested by Federal vessels in this area. Consequently, with this final rule, the maximum size restrictions are identical for Areas 2, 4, 5 and 6 and consistent with the maximum size measures already enforced by the states adjacent to these management areas.

In addition to the changes in the maximum sizes in the near shore lobster management areas, this regulatory action establishes a maximum carapace size requirement in offshore Area 3. The Commission's plan requires the states to implement a lobster maximum carapace length of 7 inches (17.78 cm) by July 1, 2008, reduced by 1/8 inches (0.32) during each of two successive subsequent years until a terminal maximum size of 6 3/4 inches (17.15 cm) is in place in July 2010. Therefore, to be consistent with the Commission and States' recommended time frame for implementation and fully complement state regulations, this action establishes the maximum size recommended by the Commission for the second year of the three-year implementation schedule, which equates to a 6 7/8–inch (17.46–cm) maximum size effective thirty days after the publication of the final rule. Consistent with the ISFMP, the terminal maximum size for Area 3 of 6 3/4 inches (17.15 cm) will take effect on July 1, 2010. The aforementioned measures are consistent with the Commission's plan. The Commission's plan does not include a maximum size requirement for the Outer Cape Area, the only Area without a maximum size requirement under the Commission's ISFMP. As part of this final rule, NMFS establishes a maximum carapace length requirement for the Federal waters of the Outer Cape Area, consistent with the terminal maximum size for Area 3. The rationale for the expansion of this measure is that the Outer Cape lobster resource, like that of offshore Area 3, is largely composed of animals from the Georges Bank lobster stock. Given the propensity of lobster to move inshore and offshore and between Area 3, the Outer Cape Area and other areas, consistent broodstock protection measures are a reasonable and prudent means of assuring protection of broodstock throughout the stock area. The

expansion of these broodstock measures into the Outer Cape would support the efforts of lobstermen in Area 3 and Area 1 whom are releasing lobster broodstock which would otherwise be harvested as these lobsters move into the Outer Cape Area. The concerns of the Outer Cape industry in response to the proposed rule were seriously considered by NMFS. In consideration of comments in opposition by the Outer Cape lobster industry in response to the proposed broodstock measures and timeline for implementation which under the preferred alternative would have established a 6 7/8–inch (17.46–cm) maximum carapace limit effective thirty days after the publication of this final rule, NMFS has adjusted these requirements in this final rule to alleviate the economic burden on the industry while providing a plan for conserving lobster broodstock throughout the stock area. Accordingly, the maximum size requirement for the Outer Cape Area will be deferred until July 1, 2010. At that time, the maximum size will be 6 3/4 inches (17.15 cm), consistent with the terminal maximum size for Area 3 at that time.

Modified Definition of V-Notch

As approved by the Commission in Addendum XI, NMFS revises the v-notch definition in Areas 2, 3, 4, 5 and 6 to apply to any female lobster that bears a notch or indentation in the base of the flipper that is at least as deep as 1/8 inches (0.32 cm), with or without setal hairs. The Commission's definition also pertains to any female which is mutilated in a manner which could hide, obscure, or obliterate such a mark; a clause which is previously existed and remains part of the definition of a v-notched American lobster in § 697.2. As with the Commission's ISFMP, the zero tolerance v-notch definition for Area 1 remains unchanged. The Commission's ISFMP allows the Outer Cape Area to maintain the former definition of a standard v-notch (at least 1/4 inch (0.64 cm) in depth, without setal hair). However, to provide a consistent set of regulations to protect broodstock across stock and management areas while balancing economic impacts to the Outer Cape lobster industry, this final rule extends the modified definition of a standard v-notch (at least as deep as 1/8 inches (0.32 cm), with or without setal hairs) to include the Outer Cape Area.

The concerns of the Outer Cape industry were not overlooked in selecting the manner in which the v-notch regulation is implemented. Specifically, NMFS has deferred the effective date of the 1/8–inch (0.32–cm) v-notch in the Outer Cape until July 1, 2010, consistent with the effective date for the maximum size regulations in this area. In the meantime, and consistent with the Commission's ISFMP, the Outer Cape v-notch restriction will prohibit possession of any lobster bearing a notch at least 1/4 inch (0.64 cm) in depth, without setal hair, now defined in the Federal lobster regulations as a "1/4–inch (0.64–cm) v-notch lobster." Effective July 1, 2010, all lobster management areas, with the exception of Area 1- essentially all of the SNE and GBK stock areas - will be bound by a consistent v-notch size which will be the standard v-shaped notch (at least as deep as 1/8 inches (0.32 cm), with or without setal hairs).

Classification

This final rule has been determined to be not significant for the purposes of Executive Order (E.O.) 12866.

This final rule does not contain policies with Federalism implications as defined in E.O. 13132. The measures set forth in this final rule are based upon the lobster ISFMP that was created and is overseen by the states. The measures are the result of addenda that were unanimously approved by the states, have been recommended by the states through the Commission, for Federal adoption, and are in place at the state level. Consequently, NMFS has consulted with the states in the creation of the ISFMP which makes recommendations for Federal action. Additionally, these regulations do not pre-empt state law and do nothing to directly regulate the states.

This final rule contains a collection of information requirement subject to the Paperwork Reduction Act (PRA) which has been approved by the Office of Management and Budget (OMB) under control number 0648–0229. Public reporting burden for the Mandatory Federal Lobster Dealer Electronic Reporting requirement is estimated to average four minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Public comment was sought during the proposed rule stage regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Some comments were received in response to the proposed rule regarding the collection of information requirements. Those comments disagreed with the estimates for operating and start-up costs associated with the electronic dealer reporting requirements and asked why the proposed rule did not estimate the costs associated with the compilation and submission of the electronic reports. NMFS used existing data based on Federal dealers who already report as the basis for the burden estimates. Further, NMFS did provide information in the proposed rule concerning the estimates of compiling and submitting the data. Since the proposed rule, NMFS reassessed the costs associated with complying with the reporting requirements and found that the initial estimates likely overstated the potential costs of these requirements to affected dealers. This additional information was assessed in the EA for this action. More detailed responses to these and other comments are provided in the Comments and Responses section under **SUPPLEMENTARY INFORMATION**.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

NMFS prepared a Final Regulatory Flexibility Analysis (FRFA) as required by section 603 of the Regulatory Flexibility Act (RFA). The FRFA describes the economic impact this rule, if adopted, will have on small entities. A description of the action, the reason for consideration, and the legal basis are contained in the **SUPPLEMENTARY INFORMATION** section of this final rule.

The FRFA incorporates the initial regulatory flexibility analysis (IRFA), a summary of the significant issues raised by the public comments in response to the IRFA, the NMFS responses to those comments, and a summary of the analyses completed to support the action. The IRFA was summarized in the proposed rule (73 FR 58099, October 6, 2008) and is thus not repeated here. Copies of the FRFA, RIR, and the EA prepared for this action are available from the Northeast Regional Office (see **ADDRESSES**). A description of the action, its reasons for consideration, and the legal basis for this action are contained in the **SUMMARY** and **SUPPLEMENTARY INFORMATION** sections of this final rule.

Summary of the Significant Issues Raised by the Public Comments

A total of 49 comments were received. Four comments were received in opposition to the Federal lobster dealer electronic reporting requirements, while five wrote in favor of the dealer electronic reporting requirements. Similar to those received in response to the ANPR for this action as addressed in the proposed rule, the comments in opposition to the electronic dealer reporting requirements were received from two lobster dealers, the State of Maine Department of Marine Resources (ME DMR), and a lobster fishermen's organization. The general theme of these comments was that mandatory weekly electronic reporting would add more administrative burden to affected lobster dealers and would be redundant since many dealers are already providing the data to their respective state fisheries agency.

Thirty-two comments were received in opposition to the inclusion of the Outer Cape Area under the expanded broodstock protection measures. Of those comments, 14 stated that the expansion of the broodstock requirements into the Outer Cape Area would cause some level of financial hardship for Outer Cape lobster trap fishermen. Seven of the 32 individuals disagreed with the NMFS estimates of catch reductions in the Outer Cape lobster trap sector associated with the new requirements, stating that the losses in catch would be higher than the NMFS estimates.

Seven comments were received in general support of the broodstock protection measures, and four individuals wrote expressly to support the expansion of the broodstock measures into the Outer Cape Area. Three commenters opposed the broodstock protection measures in management areas other than the Outer Cape Area.

Two comments opposing the maximum size requirements were received, one by a mid-Atlantic pot gear fisherman and one by a recreational diving group. Representatives of the offshore lobster fishing sector wrote in favor of the dealer reporting, maximum size and v-notching requirements. Two fishermen recommended consistent measures throughout all lobster management areas and one fisherman commented that more restrictive broodstock measures are needed coastwide.

Detailed responses to all the comments are provided in the Comments and Responses section of **SUPPLEMENTARY INFORMATION.**

Description and Estimate of the Number of Small Entities to Which the Final Rule Applies

The final rule will impact approximately 148 Federal lobster dealers who were not formerly required to report lobster purchases to NMFS. With this action, these Federal lobster dealers will be required to submit weekly electronic reports of trip-level lobster purchases from lobster vessels. These requirements are consistent with the reporting requirements in place for all other Federal seafood dealers who are subject to reporting requirements.

Promulgation of Federal regulations to implement the broodstock management measures in Areas 2, 3, 4, 5 and 6 are not expected to impact any vessels as these measures are part of the Commission's plan. Consequently, the measures are currently enforced by the states and Federal vessels are subject to these more restrictive requirements in the absence of complementary Federal regulations. In the Outer Cape Area, the broodstock measures are not part of the Commission's plan and Federal implementation of the broodstock measures in the Outer Cape Area are expected to impact a maximum of 184 to 203 trap and non-trap vessels. However, the actual number of impacted vessels is expected to be much less. The broadness of this estimate is evident because Federal lobster vessels fishing with non-trap gear are not required to indicate a lobster trap fishing area on their permit. If such vessels provide VTRs then a statistical area is provided to reflect fishing areas but the statistical areas do not always fall exclusively within a single management area, complicating the ability to narrow down the specific areas fished. Further, trap vessels may select the Outer Cape Area on their permit but may not fish in that area. For these reasons, the exact number of vessels is unknown but is likely less than the upper end estimates determined from the EA.

Economic Impacts of the Selected Action

Mandatory Federal Lobster Dealer Electronic Reporting

Federal lobster dealers are the entity most affected by this requirement. According to the Small Business Administration (SBA), lobster dealers are considered small entities when they employ less than 100 people. NMFS does not collect employment data from Federally-permitted lobster dealers in the Northeast region. However, based on review of data reported in the U.S. Census Bureau's County Business Patterns it is estimated that all regulated entities that specialize in lobster wholesale trade, as well as those entities that may not specialize in the lobster trade yet would be required to comply with the proposed action, are presumed to be small entities for purposes of the Regulatory Flexibility Act (RFA).

This action requires all federally-permitted lobster dealers to report all seafood purchases, including lobster, through an electronic reporting system. This action affects regulated lobster dealers who are not already required to report by virtue of holding at least one other Federal dealer permit requiring reporting. During 2007 there were 511 lobster dealers issued a Federal permit to purchase lobster. Of these dealers the majority (71 percent) were already required to report to NMFS leaving 148 regulated small entities required to comply with this action.

To comply with the electronic reporting requirements, dealers need a personal computer and Internet service. The required specifications for the personal computer are such that any recently purchased computer, and most older computers would meet the minimum specifications. For this reason, any dealer who currently owns a computer would not likely be required to purchase new equipment. The number of regulated lobster dealers who do not now own a computer is uncertain but is expected to be low. Those who already have Internet access and a computer would not have any specific costs associated with this new reporting requirement. It is estimated that the average start-up costs for those lobster dealers who do not have a computer would be about $580 to purchase a personal computer and monitor that would meet or exceed the specifications needed to participate in the electronic dealer reporting program. Preliminary estimates of additional costs of about $ 652 per year for Internet access would bring the total start-up costs to approximately $ 1,232, with costs for Internet access continuing annually. The unknown number of dealers impacted by the proposed dealer reporting program, whom already own a computer but are not connected to the Internet, would assume the estimated annual fees for this service at about $ 652 annually. Based on data from dealers who are currently required to report, these costs were estimated to be 0.47 percent of gross net sales (i.e. sales less the cost of purchasing lobster) in the first year for the one-time cost of purchasing a computer and the first year of Internet service. Ongoing costs were estimated to represent 0.27 percent of gross net sales. Since the publication of

the proposed rule and in response to comments regarding the accuracy of the economic impact estimates, NMFS reassessed the costs associated with acquiring the necessary computer and Internet requirements. Although NMFS stands by its initial estimates, the reassessment suggests that the costs for a computer and Internet service as presented in the initial NMFS analysis are probably overestimated and, more than likely, represent a high-end, worst-case scenario of potential cost to affected Federal lobster dealers. Based on the information obtained through the new cost investigation, a new desk-top personal computer system can be purchased for as little as $272 and Internet service can be acquired in most areas for about $20 per month. In consideration of the more recent cost query, if one considers the cost of a computer to be about $400 and the annual cost of Internet service to be $240 (assuming the $20 per month charge and not the lowest possible charge) then the annual cost could be about 50 percent less than NMFS has estimated in the initial analysis. More specifically, the cost to pay in full for a brand new computer and the annual Internet service charge would be approximately $640 or about $53 per month, compared to the initial estimate of $1,232 or about $103 per month.

Changes to Maximum Carapace Length Requirements and Revision to V-Notch Definition

Since the states have already implemented the maximum size and v-notch requirements for the affected areas, with the exception of the Outer Cape Area as reflected in this rulemaking action, the small entities impacted by the maximum size and v-notch provisions proposed herein would be limited to the Federal commercial lobster fishing vessels and party/charter dive vessels that fish, or are permitted to fish, in the Outer Cape Area. The Outer Cape Area has been characterized as fishing on a population of transient lobsters migrating between inshore and offshore areas.

Party/Charter Vessels. Party/Charter operators are classified with businesses that offer sightseeing and excursion services where the vessel departs and returns to the same location within the same day. Relevant to this proposed action, these businesses include party/charter recreational fishing vessels which offer SCUBA divers recreational opportunities to harvest lobsters for personal use. The SBA size standard for this sector is $ 7 million in gross sales. Although sales data are not available, party/charter operators in the lobster fishery tend to be small in size and do not carry a large number of passengers on any given trip. For these reasons it is expected that all regulated party/charter operators holding a Federal lobster permit would be classified as a small entity for purposes of the RFA. All Federal lobster party/charter permit holders are already required to abide by all state regulations under the most restrictive rule of the ISFMP. This means that this action would only affect party/charter operators that take passengers for hire in the Outer Cape Area since this is the only area in the proposed Federal action not included for a maximum size or a more restrictive v-notch in the ISFMP and therefore, not under such restrictions by any state.

During 2007 there were a total of 31 Federal permit holders with a party/charter lobster permit. Of these vessels all but one held at least one other Federal party/charter permit (for another species), while the majority (24) held four or more other Federal party/charter permits in addition to the lobster permit. These data indicate nearly all lobster party/charter permit holders have at least one other Federal permit requiring mandatory reporting. Available logbook (VTR) data show that only 3 of the 31 lobster party/charter permit holders reported taking passengers for hire during trips when lobster were kept during the 2007 fishing year. Of the trips that did report landing lobsters none took place within NMFS statistical area 521, used as a proxy for the Outer Cape Area. In fact, all for-hire recreational trips took place in statistical areas in the Mid-Atlantic region. Although the number of participating for-hire vessels was larger in Fishing Year (FY) 2005 (6 vessels) and FY 2006 (7 vessels), these vessels also took recreational lobster fishing trips only within the Mid-Atlantic area. None took a for-hire trip in the Outer Cape Area.

These data suggest that participating for-hire lobster permit holders would not be affected by the proposed action in the Outer Cape Area although these permit holders may have been affected by action already taken by individual states. While the magnitude of any impact associated with state action is uncertain, it is likely to have been relatively small. In the areas where recreational lobster fishing was reported (corresponding to Area 4 and/or 5) a maximum size for female lobsters has already been in place for several years. Despite the state action and this Federal action to reduce the maximum size from 5 1/2 inches (13.97 cm) to 5 1/4 inches (13.34 cm) in Area 5 and expand it to provide additional protection for male lobsters in Areas 4 and 5, these areas represent the southern terminus of the lobster resource. Therefore, eliminating the exemption for a trophy lobster would have little impact on the recreational fishery since the encounter rate with lobsters of that size is expected to be very low.

Federal Commercial Lobster Vessels. The SBA size standard for commercial fishing businesses is $ 4 million in gross sales. According to dealer records, no single lobster vessel would exceed $ 4 million in gross sales. Therefore, all operating units in the commercial lobster fishery are considered small entities for purposes of analysis. The economic impacts of the change in maximum size in the Outer Cape Area are uncertain since all vessels are not required to report their landings to NMFS. Survey data collected during 2005 by researchers at the Gulf of Maine Research Institute and made available to NMFS included information on lobster business profitability for vessels operating in Areas 1, 2, and 3. Operators in the Outer Cape Area were not specifically sampled. However, it is likely that these entities are of similar scale to operators that were sampled and fish on a lobster stock that bear some similarities to operators in Area 1 although the size composition of catch tends to be larger than would be the case in Area 1. Subject to these caveats, it was assumed that the cost and earnings profile for Area 1 survey participants would be a suitable proxy for financial performance of Outer Cape Area trap participants.

The survey data indicate that the majority of Area 1 lobster businesses were able to cover operating costs with gross sales. However, net earnings for the majority of businesses were below median personal income for the New England region and only about 20 percent of lobster businesses earned a positive return to invested capital. Since 2005, fuel costs have more than doubled cutting average net return by about 30 percent; this is before taking into account the opportunity cost of the owner's labor or capital. Thus, profit margins have shrunk significantly since 2005 and even small changes in revenue streams could place lobster businesses in financial risk. However, as the following analysis describes, few vessels rely exclusively on the Outer Cape Area for lobster fishing revenue. Further, only a small percentage of the catch in the trap sector is expected to be impacted by the proposed measures.

Trap Gear Vessels. This Federal action would directly affect only those Federal lobster vessels that selected the Outer Cape Area. For the 2007 fishing

year, 184 Federal lobster trap vessels selected the Outer Cape as one of the potential trap fishing areas. Federal Fisheries Observer data suggest, in consideration of the terminal maximum size proposed in the preferred alternative of 6 3/4 inches (17.15 cm), trap vessels operating in this area would expect a reduction in catch of approximately 0.5 percent. Note, however, that a price premium is paid for larger lobsters such that the realized economic impact on lobster fishing businesses is likely to be proportionally larger than the expected change in catch.

Non-Trap Gear Vessels. Based on a three-year average (2005–2007) overall dependence on lobster for non-trap vessels ranged from 0.03 percent to 30.6 percent in terms of annual value and from 0.01 percent to 10.6 percent in volume. Few vessels relied exclusively on the Outer Cape Area for lobster fishing revenue. Using statistical area 521 as a proxy for the Outer Cape during the 2005–2007 period, dependence on lobster in value ranged from 0.01 percent to 19.4 percent, averaging 1.4 percent of overall value. In volume, lobster harvested from area 521 ranged from 0.002 percent to 5.7 percent, averaging 0.4 percent of overall volume. The maximum expected annual economic impact of the 6 3/4–inch (17.15–cm) maximum size in the Outer Cape Area on non-trap vessels is estimated to be about $ 1,000, while the median annual impact was estimated to be $ 117 per vessel. These values are reflective of the relatively low dependence on the Outer Cape Area for lobster fishing revenue and the low encounter rate suggested by observer data of lobsters above the 6 3/4–inch (17.15–cm) maximum size. In terms of total fishing revenue these estimated revenue impacts represent between 0.01 percent and 1.2 percent of total fishing revenue for participating regulated non-trap gear small entities.

The added economic impact of the change in v-notch definition across all areas is highly uncertain. Although this change would result in an unknown level of reduced opportunities to retain legal lobsters it seems likely that this additional impact would have less impact on non-trap than trap vessels since non-trap vessels earn only a portion of total fishing revenue from lobsters. The added effect on trap vessels is difficult to assess, but would reduce potential revenue in addition to that which may be associated with either changes in existing maximum size or implementation of new maximum size regulations. Available sea sampling data from the Commonwealth of Massachusetts indicate that between 2 percent and 4 percent of females encountered in the Outer Cape Area were v-notched. A substantial portion of the Outer Cape Area legal harvest is comprised of females (64 percent), an unknown proportion of which would be illegal under the preferred alternative.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which and agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules.

As part of this rulemaking process, a letter to permit holders that also serves as a small entity compliance guide (the guide) was prepared. The small entity compliance guide will be sent to all holders of Federal American lobster vessel and dealer permits as part of the permit holder letter. Copies of this final rule and the small entity compliance guide are available upon request from the Northeast Regional Office (see **ADDRESSES**).

List of Subjects

15 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 697

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: July 22, 2009.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 15 CFR part 902 and 50 CFR part 697 are amended as follows:

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

■ 1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

■ 2. In § 902.1, the table in paragraph (b) under "50 CFR" is amended by adding a new entry for 697.7 to read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

CFR part or section where the information collection requirement is located	Current OMB control number the information (All numbers begin with 0648–)
* * *	* *
50 CFR	
* * *	* *
697.7	–0202
* * *	* *

PART 697—ATLANTIC COASTAL FISHERIES COOPERATIVE MANAGEMENT

■ 3. The authority citation for part 697 continues to read as follows:

Authority: 16 U.S.C. 5101 *et seq.*

■ 4. In § 697.2(a), the definition for "One-quarter-inch (1/4–inch) v-shaped notch" is added and the and the definition for "Standard v-shaped notch" is revised to read as follows:

§ 697.2 Definitions.

(a) * * *

One-quarter-inch (1/4–inch) v-shaped notch means a straight-sided triangular cut, without setal hairs, at least 1/4 inch (0.64 cm) in depth and tapering to a point.

* * * * *

Standard V-shaped notch means a notch or indentation in the base of the flipper that is at least as deep as 1/8 inch (0.32 cm), with or without setal hairs.

* * * * *

■ 5. In § 697.6, paragraphs (n) through (s) are added to read as follows:

§ 697.6 Dealer permits.

* * * * *

(n) *Lobster dealer recordkeeping and reporting requirements.* (1) *Detailed report.* Effective January 1, 2010, all Federally-permitted lobster dealers, and any person acting in the capacity of a dealer, must submit to the Regional Administrator or to the official designee a detailed report of all fish purchased or received for a commercial purpose, other than solely for transport on land, within the time periods specified in paragraph (q) of this section, or as specified in § 648.7(a)(1)(f) of this chapter, whichever is most restrictive, by one of the available electronic reporting mechanisms approved by NMFS, unless otherwise directed by the Regional Administrator. The following information, and any other information required by the Regional Administrator, must be provided in each report:

(i) *Required information.* All dealers issued a Federal lobster dealer permit under this part must provide the following information, as well as any additional information as applicable under § 648.7(a)(1)(i) of this chapter: Dealer name; dealer permit number; name and permit number or name and hull number (USCG documentation number or state registration number, whichever is applicable) of vessel(s) from which fish are transferred, purchased or received for a commercial purpose; trip identifier for each trip from which fish are purchased or received from a commercial fishing vessel permitted under part 648 of this chapter with a mandatory vessel trip reporting requirement; date(s) of purchases and receipts; units of measure and amount by species (by market category, if applicable); price per unit by species (by market category, if applicable) or total value by species (by market category, if applicable); port landed; cage tag numbers for surfclams and ocean quahogs, if applicable; disposition of the seafood product; and any other information deemed necessary by the Regional Administrator. If no fish are purchased or received during a reporting week, a report so stating must be submitted.

(ii) *Exceptions.* The following exceptions apply to reporting requirements for dealers permitted under this part:

(A) Inshore Exempted Species, as defined in § 648.2 of this chapter, are not required to be reported under this part;

(B) When purchasing or receiving fish from a vessel landing in a port located outside of the Northeast Region (Maine, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Delaware, Virginia and North Carolina), only purchases or receipts of species managed by the Northeast Region under this part (American lobster), and part 648 of this chapter, must be reported. Other reporting requirements may apply to those species not managed by the Northeast Region, which are not affected by the provision; and

(C) Dealers issued a permit for Atlantic bluefin tuna under part 635 of this chapter are not required to report their purchases or receipts of Atlantic bluefin tuna under this part. Other reporting requirements, as specified in § 635.5 of this chapter, apply to the receipt of Atlantic bluefin tuna.

(iii) *Dealer reporting requirements for skates.* In addition to the requirements under paragraph (n)(1)(i) of this section, dealers shall report the species of skates received. Species of skates shall be identified according to the following categories: winter skate, little skate, little/winter skate, barndoor skate, smooth skate, thorny skate, clearnose skate, rosette skate, and unclassified skate. NMFS will provide dealers with a skate species identification guide.

(2) *System requirements.* All persons required to submit reports under paragraph (n)(1) of this section are required to have the capability to transmit data via the Internet. To ensure compatibility with the reporting system and database, dealers are required to utilize a personal computer, in working condition, that meets the minimum specifications identified by NMFS. The affected public will be notified of the minimum specifications via a letter to all Federal lobster dealer-permit holders. Failure to comply with the minimum specifications identified in the permit holder letter are prohibited.

(3) *Annual report.* All persons issued a permit under this part are required to submit the following information on an annual basis, on forms supplied by the Regional Administrator:

(i) All dealers and processors issued a permit under this part must complete all sections of the Annual Processed Products Report for all species that were processed during the previous year. Reports must be submitted to the address supplied by the Regional Administrator.

(ii) Surfclam and ocean quahog processors and dealers whose plant processing capacities change more than 10 percent during any year shall notify the Regional Administrator in writing within 10 days after the change.

(iii) Atlantic herring processors, including processing vessels, must complete and submit all sections of the Annual Processed Products Report.

(iv) Atlantic hagfish processors must complete and submit all sections of the Annual Processed Products Report.

(o) *Inspection.* Upon the request of an authorized officer or an employee of NMFS designated by the Regional Administrator to make such inspections, all persons required to submit reports under this part must make immediately available for inspection copies of reports, and all records upon which those reports are or will be based, that are required to be submitted or kept under this part.

(p) *Record retention.* Any record as defined at § 648.2, related to fish possessed, received, or purchased by a dealer that is required to be reported, must be retained and be available for immediate review for a total of 3 years after the date the fish were first possessed, received, or purchased. Dealers must retain the required records and reports at their principal place of business.

(q) *Submitting dealer reports.* (1) Detailed dealer reports required by paragraph (n)(1)(i) of this section must be received by midnight of the first Tuesday following the end of the reporting week. If no fish are purchased or received during a reporting week, the report so stating required under paragraph (n)(1)(i) of this section must be received by midnight of the first Tuesday following the end of the reporting week.

(2) Dealers who want to make corrections to their trip-level reports via the electronic editing features may do so for up to 3 business days following submission of the initial report. If a correction is needed more than 3 business days following the submission of the initial trip-level report, the dealer must contact NMFS directly to request an extension of time to make the correction.

(3) The trip identifier required under paragraph (n)(1) of this section for each trip from which fish are purchased or received from a commercial fishing vessel permitted under part 648 of this chapter with a mandatory vessel trip reporting requirement must be submitted with the detailed report, as required under paragraph (q)(1) of this section. Price and disposition information may be submitted after the initial detailed report, but must be received within 16 days of the end of the reporting week.

(4) Annual reports for a calendar year must be postmarked or received by February 10 of the following year. Contact the Regional Administrator (see Table 1 to § 600.502) for the address of NMFS Statistics.

(5) *At-sea purchasers and processors.* With the exception of the owner or operator of an Atlantic herring carrier vessel, the owner or operator of an at-sea purchaser or processor that purchases or processes any Atlantic herring, Atlantic mackerel, squid, butterfish, scup, or black sea bass at sea must submit information identical to that required by paragraph (n)(1) of this section and provide those reports to the Regional Administrator or designee by the same mechanism and on the same frequency basis.

(r) *Additional data and sampling.* Federally permitted dealers must allow access to their premises and make available to an official designee of the Regional Administrator any fish purchased from vessels for the collection of biological data. Such data include, but are not limited to, length measurements of fish and the collection

of age structures such as otoliths or scales.

(s) *Additional dealer reporting requirements.* All persons issued a lobster dealer permit under this part are subject to the reporting requirements set forth in paragraph (n) of this section, as well as §§ 648.6 and 648.7 of this chapter, whichever is most restrictive.

■ 6. In § 697.7, paragraph (c)(1)(v) is revised, paragraph (c)(2)(xxi) is added, and paragraph (c)(3)(iii) is revised to read as follows:

§ 697.7 Prohibitions.

* * * * *

(c) * * *

(1) * * *

(v) Retain on board, land, or possess any female lobster that do not meet the area-specific v-notch requirements set forth in § 697.20(g).

* * * * *

(2) * * *

(xxi) Fail to comply with dealer record keeping and reporting requirements as specified in § 697.6.

* * * * *

(3) * * *

(iii) The possession of egg-bearing female American lobsters, v-notched female American lobsters in violation of the v-notch requirements set forth in § 697.20(g), American lobsters that are smaller than the minimum size set forth in § 697.20(a), American lobsters that are larger than the maximum carapace sizes set forth in § 697.20(b), or lobster parts, possessed at or prior to the time when the aforementioned lobsters or parts are received by a dealer, will be prima facie evidence that such American lobsters or parts were taken or imported in violation of these regulations. A preponderance of all submitted evidence that such American lobsters were harvested by a vessel not holding a permit under this part and fishing exclusively within state or foreign waters will be sufficient to rebut the presumption.

* * * * *

■ 7. In § 697.20, paragraphs (b)(3) through (b)(7) are revised and paragraph (b)(8) is added; paragraphs (g)(3) and (g)(4) are revised, and paragraphs (g)(5) through (g)(8) are added as follows:

§ 697.20 Size, harvesting and landing requirements.

* * * * *

(b) * * *

(3) The maximum carapace length for all American lobster harvested in or from the EEZ Nearshore Management Areas 2, 4, 5, and 6 is 5 1/4 inches (13.34 cm).

(4) The maximum carapace length for all American lobster landed, harvested, or possessed by vessels issued a Federal limited access American lobster permit fishing in or electing to fish in one or more of EEZ Nearshore Management Areas 2, 4, 5, and 6 is 5 1/4 inches (13.34 cm).

(5) The maximum carapace length for all American lobster harvested in or from EEZ Offshore Management Area 3 is 6 7/8 inches (17.46 cm).

(6) The maximum carapace length for all American lobster landed, harvested, or possessed by vessels issued a Federal limited access American lobster permit fishing in or electing to fish in EEZ Offshore Management Area 3 is 6 7/8 inches (17.46 cm).

(7) Effective July 1, 2010, the maximum carapace length for all American lobster harvested in or from EEZ Offshore Management Area 3 or the Outer Cape Lobster Management Area is 6 3/4 inches (17.15 cm).

(8) Effective July 1, 2010, the maximum carapace length for all American lobster landed, harvested, or possessed by vessels issued a Federal limited access American lobster permit fishing in or electing to fish in EEZ Offshore Management Area 3 or the Outer Cape Lobster Management Area is 6 3/4 inches (17.15 cm).

* * * * *

(g) * * *

(3) No person may possess any female lobster possessing a standard v-shaped notch harvested in or from the EEZ Nearshore Management Area 2, 4, 5, 6, or the EEZ Offshore Management Area 3.

(4) No vessel, owner or operator issued a Federal limited access American lobster permit fishing in or electing to fish in the EEZ Nearshore Management Area 2, 4, 5, 6 or the EEZ Offshore Management Area 3 may land, harvest or possess any female lobster possessing a standard v-shaped notch.

(5) Through June 30, 2010, no person may possess any female lobster possessing a 1/4–inch (0.64–cm) v-shaped notch harvested in or from the EEZ Outer Cape Lobster Management Area.

(6) Through June 30, 2010, no vessel, owner or operator issued a Federal limited access American lobster permit fishing in or electing to fish in the EEZ Outer Cape Lobster Management Area may land, harvest or possess any female lobster possessing a 1/4–inch (0.64–cm) v-shaped notch.

(7) Effective July 1, 2010, no person may possess any female lobster possessing a standard v-shaped notch harvested in or from the EEZ Outer Cape Lobster Management Area.

(8) Effective July 1, 2010, no vessel, owner or operator issued a Federal limited access American lobster permit fishing in or electing to fish in the EEZ Outer Cape Lobster Management Area may land, harvest or possess any female lobster possessing a standard v-shaped notch.

* * * * *

[FR Doc. E9–17941 Filed 7–28–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Parts 40, 41, and 45

[Docket No. TTB–2009–0002; T.D. TTB–80; Re: T.D. TTB–78 and Notice No. 95]

RIN 1513–AB72

Implementation of Statutory Amendments Requiring the Qualification of Manufacturers and Importers of Processed Tobacco and Other Amendments Related to Permit Requirements, and the Expanded Definition of Roll-Your-Own Tobacco; Correction

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Temporary rule; Treasury decision; correction.

SUMMARY: On June 22, 2009, the Alcohol and Tobacco Tax and Trade Bureau published a temporary rule in the **Federal Register** to implement certain changes made to the Internal Revenue Code of 1986 by the Children's Health Insurance Program Reauthorization Act of 2009. The principal changes involve permit and related requirements for manufacturers and importers of processed tobacco and an expansion of the definition of roll-your-own tobacco. That temporary rule contained several minor inadvertent errors; this document corrects those errors.

DATES: *Effective Date:* These amendments are effective July 29, 2009 through June 22, 2012.

FOR FURTHER INFORMATION CONTACT: Amy R. Greenberg, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau (202–453–2099).

SUPPLEMENTARY INFORMATION: On June 22, 2009, the Alcohol and Tobacco Tax and Trade Bureau (TTB) published a temporary rule in the **Federal Register** to implement certain changes made to the Internal Revenue Code of 1986 by the Children's Health Insurance Program Reauthorization Act of 2009 (see T.D. TTB–78, 74 FR 29401). The temporary rule was effective on the date

of publication, June 22, 2009, and, unless otherwise finalized, will expire on June 22, 2012. The principal changes to our regulations made by T.D. TTB–78 involve permit and related requirements for manufacturers and importers of processed tobacco and an expansion of the definition of roll-your-own tobacco.

After its publication, we found that T.D. TTB–78 contained several minor inadvertent errors. This document corrects these errors.

Three errors involved improperly cited cross-references. In § 40.216c(b), the citation for § 40.216(b) should have read § 40.216b; in § 41.72c, the citation for § 41.72(b) should have read § 41.72b; and in § 45.45c, the citation for § 40.216(b) should have read § 45.45b. Two errors involved improper dates. In § 40.522(b), the date August 15, 2009, cited in the example, should have read August 20, 2009, and in § 45.45c(a), the use up date for packages labeled with "Tax Class L" (to designate pipe tobacco) or "Tax Class J" (to designate roll-your-own tobacco) should have read August 1, 2009, rather than July 1, 2009.

In addition, we are correcting five passages to clarify a date or numerical limit, to clarify a regulation's intent, or to clarify to whom the regulation applies. In § 40.256, we clarify the last sentence so that the quantity of tobacco products manufactured may be equal to or exceed the quantity transferred or received in bond rather than only exceed that quantity. In § 40.493(a)(2), we clarify that a manufacturer of processed tobacco may continue in business if an application for a permit is submitted on or before June 30, 2009, rather than only before that date. In § 40.496, we clarify that the regulation applies only to manufacturers of processed tobacco operating under a trade name rather than to all manufacturers of processed tobacco. In § 40.513, we clarify that a manufacturer of processed tobacco who changes the factory's location must apply for and obtain an amended permit before beginning operations at the new location rather than merely apply for an amended permit. In § 40.528, we clarify that the regulation applies to manufacturers of processed tobacco rather than to manufacturers of tobacco products.

We also solicited public comments on the amendments contained in the temporary rule through a concurrent notice of proposed rulemaking (see Notice No. 95, June 22, 2009, 74 FR 29433). Given that the corrections in this document do not make substantial changes to the amendments contained in the temporary rule, we are not issuing a formal correction to the notice of proposed rulemaking, and we are not extending its comment period, which closes on August 21, 2009.

List of Subjects

27 CFR Part 40

Cigars and cigarettes, Claims, Electronic funds transfers, Excise taxes, Imports, Labeling, Packaging and containers, Reporting and recordkeeping requirements, Surety bonds, Tobacco.

27 CFR Part 41

Cigars and cigarettes, Claims, Customs duties and inspection, Electronic funds transfers, Excise taxes, Imports, Labeling, Packaging and containers, Puerto Rico, Reporting and recordkeeping requirements, Surety bonds, Tobacco, Virgin Islands, Warehouses.

27 CFR Part 45

Administrative practice and procedure, Authority delegations (Government agencies), Cigars and cigarettes, Excise taxes, Labeling, Packaging and containers, Reporting and recordkeeping requirements, Tobacco.

Amendments to the Regulations

■ For the reasons set forth in the preamble, title 27, chapter I, of the Code of Federal Regulations is amended as follows:

PART 40—MANUFACTURE OF TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES, AND PROCESSED TOBACCO

■ 1. The authority citation for part 40 continues to read as follows:

Authority: 26 U.S.C. 5142, 5143, 5146, 5701–5705, 5711–5713, 5721–5723, 5731, 5741, 5751, 5753, 5761–5763, 6061, 6065, 6109, 6151, 6301, 6302, 6311, 6313, 6402, 6404, 6423, 6676, 6806, 7011, 7212, 7325, 7342, 7502, 7503, 7606, 7805; 31 U.S.C. 9301, 9303, 9304, 9306.

§ 40.216c [Amended]

■ 2. In paragraph (b) of § 40.216c, revise the cross-reference "§ 40.216(b)" to read "§ 40.216b".

§ 40.256 [Amended]

■ 3. In the last sentence of § 40.256, remove the word "exceed" and add in its place the words "be equivalent to, or exceed,".

§ 40.493 [Amended]

■ 4. In paragraph (a)(2) of § 40.493, remove the word "Before" and add in its place the words "On or before".

§ 40.496 [Amended]

■ 5. In the first sentence of § 40.496, after the words "manufacturer of processed tobacco", add the words "operating under a trade name".

§ 40.513 [Amended]

■ 6. In the first sentence of § 40.513, after the phrase "make application on TTB F 5200.16 for" add the phrase ", and obtain,".

§ 40.522 [Amended]

■ 7. In last sentence of paragraph (b) in § 40.522, revise the date "August 15, 2009" to read "August 20, 2009".

§ 40.528 [Amended]

■ 8. In the first sentence of § 40.528, remove the phrase "manufacturer of tobacco products" and add in its place the phrase "manufacturer of processed tobacco".

PART 41—IMPORTATION OF TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES, AND PROCESSED TOBACCO

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

Authority: 26 U.S.C. 5701–5705, 5708, 5712, 5713, 5721–5723, 5741, 5754, 5761–5763, 6301, 6302, 6313, 6402, 6404, 7101, 7212, 7342, 7606, 7651, 7652, 7805; 31 U.S.C. 9301, 9303, 9304, 9306.

§ 41.72c [Amended]

■ 10. In paragraph (b) of § 41.72c, revise the cross-reference "§ 41.72(b)" to read "§ 41.71b".

PART 45—REMOVAL OF TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES, WITHOUT PAYMENT OF TAX, FOR USE OF THE UNITED STATES

■ 11. The authority citation for part 45 continues to read as follows:

Authority: 26 U.S.C. 5702–5705, 5723, 5741, 5751, 5762, 5763, 6313, 7212, 7342, 7606, 7805; 44 U.S.C. 3504(h).

§ 45.45c [Amended]

■ 12. Amend § 45.45c in paragraph (a) by removing the date "July 1, 2009" and adding in its place the date "August 1, 2009" and in paragraph (b) by revising the cross-reference "§ 40.216(b)" to read "§ 45.45b".

Dated: July 15, 2009.

John J. Manfreda,

Administrator.

[FR Doc. E9–17920 Filed 7–28–09; 8:45 am]

BILLING CODE 4810–31–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3020

[Docket Nos. MC2009–28 and CP2009–38; Order No. 232]

Priority Mail Contract

AGENCY: Postal Regulatory Commission.

ACTION: Final rule.

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

DATES: Effective July 29, 2009 and is applicable beginning July 1, 2009.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–7890–6824 or *stephen.sharfman@prc.gov.*

SUPPLEMENTARY HISTORY: *Regulatory History,* 74 FR 30333 (June 25, 2009).

I. Background

The Postal Service seeks to add a new product identified as Priority Mail Contract 12 to the Competitive Product List. For the reasons discussed below, the Commission approves the Request.

On June 11, 2009, the Postal Service filed a notice, pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5, announcing that it has entered into an additional contract (Priority Mail Contract 12), which it attempts to classify within the previously proposed Priority Mail Contract Group product.[1] In support, the Postal Service filed the proposed contract and referenced Governors' Decision 09–6 filed in Docket No. MC2009–25. *Id.* at 1. The Notice has been assigned Docket No. CP2009–38.

In response to Order No. 223,[2] and in accordance with 39 U.S.C. 3642 and 39 CFR 3020 subpart B, the Postal Service filed a formal request to add Priority Mail Contract 12 to the Competitive Product List as a separate product.[3] The Postal Service asserts that the Priority Mail Contract 12 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. MC2009–28.

In support of its Notice and Request, the Postal Service filed the following materials: (1) 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 the day that the Commission issues all regulatory approvals;[4] (2) requested changes in the Mail Classification Schedule product list;[5] (3) a Statement of Supporting Justification as required by 39 CFR 3020.32;[6] and (4) certification of compliance with 39 U.S.C. 3633(a).[7]

In the Statement of Supporting Justification, Mary Prince Anderson, Acting 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 B, at 1. W. Ashley Lyons, Manager, Corporate Financial Planning, Finance Department, certifies that the contract complies with 39 U.S.C. 3633(a). Notice, Attachment B.

The Postal Service filed much of the supporting materials, including the unredacted contract, under seal. In its Notice, 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. Notice at 2–3.

In Order No. 223, the Commission gave notice of the two dockets, requested supplemental information, appointed a public representative, and provided the public with an opportunity to comment.[8] On June 22, 2009, Chairman's Information Request No. 1 was filed.[9] On June 23, 2009, the Postal Service filed the supplemental information requested.[10] The Postal Service filed its response to the Chairman's Information Request on June 26, 2009.[11]

II. Comments

Comments were filed by the Public Representative.[12] No comments were submitted by other interested parties. The Public Representative states that the Postal Service's filing complies with applicable Commission rules of practice and procedure, and concludes that the Priority Mail Contract 12 agreement comports with the requirements of title 39 and is appropriately classified as competitive. *Id.* at 3.

The Public Representative believes that the Postal Service has provided adequate justification for maintaining confidentiality in this case. *Id.* at 2–3. He indicates that the contractual provisions are mutually beneficial to the parties and general public. *Id.* at 4.

III. Commission Analysis

The Commission has reviewed the Notice, the Request, the contract, the financial analysis provided under seal that accompanies it, the Postal Service's responses to Chairman's Information Request No. 1, the Postal Service's response to the Commission's request for supplemental information, and the comments filed by the Public Representative.

Statutory requirements. The Commission's statutory responsibilities in this instance entail assigning Priority Mail Contract 12 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 Priority Mail Contract 12 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 offering similar products.

[1] Notice of Establishment of Rates and Class Not of General Applicability (Priority Mail Contract 12), June 11, 2009 (Notice).

[2] PRC Order No. 223, Notice and Order Concerning Filing of Priority Mail Contract 12 Negotiated Service Agreement, June 17, 2009 (Order No. 223).

[3] Request of the United States Postal Service to Add Priority Mail Contract 12 to Competitive Product List, June 23, 2009 (Request).

[4] Attachment A to the Notice.

[5] Attachment A to the Request.

[6] Attachment B to the Request.

[7] Attachment B to the Notice.

[8] Order No. 223 at 1–4.

[9] Chairman's Information Request No. 1 and Notice of Filing of Question Under Seal, June 22, 2009. A portion of the Chairman's Information Request was filed under seal.

[10] Response of the United States Postal Service to Commission's Request for Supplemental Information in Order No. 223, June 23, 2009.

[11] Response to Chairman's Information Request No. 1, Question 2 and Notice of Filing Responses to Questions 1 and 3 Under Seal, June 26, 2009.

[12] Public Representative Comments in Response to United States Postal Service Notice of Establishment of Rates and Class Not of General Applicability (Priority Mail Contract 12), June 26, 2009 (Public Representative Comments).

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 B, para. (d). 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.* It further states that the contract partner supports the addition of the contract to the Competitive Product List to effectuate the negotiated contractual terms. *Id.* at para. (g). 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.* at para. (h).

No commenter opposes the proposed classification of Priority Mail Contract 12 as competitive. Having considered the statutory requirements and the support offered by the Postal Service, the Commission finds that Priority Mail Contract 12 is appropriately classified as a competitive product and should be added to the Competitive Product List.

Cost considerations. The Postal Service presents a financial analysis showing that Priority Mail Contract 12 results in cost savings 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. Order No. 223 and Chairman's Information Request No. 1 sought additional support and justification for particular cost saving elements. The Postal Service's responses did not persuade the Commission that certain cost savings elements were appropriate here.

Accordingly, the Commission's analysis of the proposed contract is based on alternative cost estimates of certain mail functions. The Commission employed this analysis to determine whether changed cost inputs would materially affect the contract's financial analysis.[13] The Commission concludes that the changed inputs do not have a material effect on the underlying financial analysis of the contract.

Based on the data submitted and the Commission's alternative analysis, the Commission finds that Priority Mail Contract 12 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 proposed Priority Mail Contract 12 indicates that it comports with the provisions applicable to rates for competitive products.

The electronic files submitted in support of the Notice did not include all supporting data. As noted in Order No. 231, Docket Nos. MC2009–27 and CP2009–37, issued concurrently today, future requests must provide all electronic files showing calculations in support of the financial models associated with the request. A failure to provide such information may delay resolution of requests in the future.

Other considerations. The Postal Service shall promptly notify the Commission of the scheduled termination date of the agreement. If the agreement terminates earlier than anticipated, the Postal Service shall inform the Commission prior to the new termination date. The Commission will then remove the product from the Mail Classification Schedule at the earliest possible opportunity.

In conclusion, the Commission approves Priority Mail Contract 12 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. Priority Mail Contract 12 (MC2009–28 and CP2009–38) 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 scheduled termination date and update the Commission if the termination date occurs prior to that date, as discussed in this order.

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

[13] The Commission's analysis is set forth in Library Reference PRC–CP2009–38–NP–LR–1, which, because it contains confidential information, is being filed under seal.

List of Subjects in 39 CFR Part 3020

Administrative practice and procedure; Postal Service.

Issued: July 1, 2009.

By the Commission.

Judith M. Grady,

Acting 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:

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 Schedule 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
- Inbound International
- Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Market Dominant Services

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
- [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
- [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)
- Inbound International Expedited Services 2 (MC2009–10 and CP2009–12)

Priority Mail
- Priority Mail
- Outbound Priority Mail International
- Inbound Air Parcel Post
- Royal Mail Group Inbound Air Parcel Post Agreement

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)
- Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services (MC2009–8 and CP2009–9)
- 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 Contract 3 (MC2009–15 and CP2009–21)
- Express Mail & Priority Mail Contract 1 (MC2009–6 and CP2009–7)
- Express Mail & Priority Mail Contract 2 (MC2009–12 and CP2009–14)
- Express Mail & Priority Mail Contract 3 (MC2009–13 and CP2009–17)
- Express Mail & Priority Mail Contract 4 (MC2009–17 and CP2009–24)
- Express Mail & Priority Mail Contract 5 (MC2009–18 and CP2009–25)
- 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)
- Priority Mail Contract 5 (MC2009–21 and CP2009–26)
- Priority Mail Contract 6 (MC2009–25 and CP2009–30)
- Priority Mail Contract 7 (MC2009–25 and CP2009–31)
- Priority Mail Contract 8 (MC2009–25 and CP2009–32)
- Priority Mail Contract 9 (MC2009–25 and CP2009–33)
- Priority Mail Contract 10 (MC2009–25 and CP2009–34)
- Priority Mail Contract 11 (MC2009–27 and CP2009–37)
- Priority Mail Contract 12 (MC2009–28 and CP2009–38)

- Outbound International
- Global Direct Contracts (MC2009–9, CP2009–10, and CP2009–11)
- 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 International
Inbound Direct Entry Contracts with Foreign Postal Administrations (MC2008–6, CP2008–14 and CP2008–15)
International Business Reply Service Competitive Contract 1 (MC2009–14 and CP2009–20)
Competitive Product Descriptions
Express Mail
[Reserved for Group Description]
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. E9–18030 Filed 7–28–09; 8:45 am]
BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL–8933–5]

Approval and Promulgation of Air Quality Implementation Plans; Iowa; Update to Materials Incorporated by Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; notice of administrative change.

SUMMARY: EPA is updating the materials submitted by Iowa that are incorporated by reference (IBR) into the State implementation plan (SIP). The regulations affected by this update have been previously submitted by the State agency and approved by EPA. This update affects the SIP materials that are available for public inspection at the National Archives and Records Administration (NARA), the Air and Radiation Docket and Information Center located at EPA Headquarters in Washington, DC, and the Regional Office.

DATES: *Effective Date:* This action is effective July 29, 2009.

ADDRESSES: SIP materials which are incorporated by reference into 40 CFR part 52 are available for inspection at the following locations: Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101; or at *http://www.epa.gov/region07/programs/artd/air/rules/fedapprv.htm*; the Air and Radiation Docket and Information Center, EPA Headquarters Library, Room Number 3334, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC 20460, and the National Archives and Records Administration. If you wish to obtain materials from a docket in the EPA Headquarters Library, please call the Office of Air and Radiation Docket at (202) 566–1742. 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*.

FOR FURTHER INFORMATION CONTACT: Evelyn VanGoethem at (913) 551–7659, or by e-mail at *vangoethem.evelyn@epa.gov*.

SUPPLEMENTARY INFORMATION: The SIP is a living document which the State revises as necessary to address the unique air pollution problems in the State. Therefore, EPA from time to time must take action on SIP revisions containing new and/or revised regulations to make them part of the SIP. On May 22, 1997 (62 FR 27968), EPA revised the procedures for incorporating by reference Federally approved SIPs, as a result of consultations between EPA and the Office of the Federal Register. The description of the revised SIP document, IBR procedures and "Identification of plan" format are discussed in further detail in the May 22, 1997, **Federal Register** document.

On February 12, 1999, EPA published a document in the **Federal Register** (64 FR 7091) beginning the new IBR procedure for Iowa. On September 23, 2004 (69 FR 56942), EPA published an update to the IBR material for Iowa.

In this document, EPA is doing the following:

1. Announcing the update to the IBR material as of July 1, 2009.

2. Correcting the date format in the "State effective date" or "State Submittal date" and "EPA approval date" columns in § 52.820 paragraphs (c), (d) and (e). Dates are numerical month/day/year without additional zeros.

3. Modifying the **Federal Register** citation in § 52.820 paragraphs (c), (d) and (e) to reflect the beginning page of the preamble as opposed to the page number of the regulatory text.

4. Removing the second entry for 567–22.4 in § 52.820 paragraph (c) under Chapter 22.

EPA has determined that today's rule falls under the "good cause" exemption in section 553(b)(3)(B) of the Administrative Procedures Act (APA) which, upon finding "good cause," authorizes agencies to dispense with public participation and section 553(d)(3), which allows an agency to make a rule effective immediately (thereby avoiding the 30-day delayed effective date otherwise provided for in the APA). Today's rule simply codifies provisions which are already in effect as a matter of law in Federal and approved State programs. Under section 553 of the APA, an agency may find good cause where procedures are "impractical, unnecessary, or contrary to the public interest." Public comment is "unnecessary" and "contrary to the public interest" since the codification only reflects existing law. Immediate notice in the CFR benefits the public by providing notice of the updated Iowa SIP compilation.

Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable

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

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

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

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

EPA has also determined that the provisions of section 307(b)(1) of the Clean Air Act pertaining to petitions for judicial review are not applicable to this action. This action is simply an announcement of prior rulemakings that have previously undergone notice and comment. Prior EPA rulemaking actions for each individual component of the Iowa SIP compilation previously afforded interested parties the opportunity to file a petition for judicial review in the United States Court of Appeals for the appropriate circuit within 60 days of such rulemaking action.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: July 8, 2009.

William Rice,

Acting Regional Administrator, Region 7.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart Q—Iowa

■ 2. In § 52.820 paragraphs (b), (c), (d) and (e) are revised to read as follows:

§ 52.820 Identification of plan.

* * * * *

(b) *Incorporation by reference.* (1) Material listed in paragraphs (c) and (d) of this section with an EPA approval date prior to July 1, 2009, was approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Material is incorporated as it exists on the date of the approval, and notice of any change in the material will be published in the **Federal Register.** Entries in paragraphs (c) and (d) of this section with EPA approval dates after July 1, 2009, will be incorporated by reference in the next update to the SIP compilation.

(2) EPA Region 7 certifies that the rules/regulations provided by EPA in the SIP compilation at the addresses in paragraph (b)(3) of this section are an exact duplicate of the officially promulgated State rules/regulations which have been approved as part of the SIP as of July 1, 2009.

(3) Copies of the materials incorporated by reference may be inspected at the Environmental Protection Agency, Region 7, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101; at the EPA, Air and Radiation Docket and Information Center, Room Number 3334, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC 20460; or at the National Archives and Records Administration (NARA). If you wish to obtain material from the EPA Regional Office, please call (913) 551–7659; for material from a docket in EPA Headquarters Library, please call the Office of Air and Radiation Docket at (202) 566–1742. 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.*

(c) *EPA-approved regulations.*

EPA-APPROVED IOWA REGULATIONS

Iowa citation	Title	State effective date	EPA approval date	Explanation
Iowa Department of Natural Resources Environmental Protection Commission [567] Chapter 20—Scope of Title-Definitions-Forms-Rule of Practice				
567–20.1	Scope of Title	N/A	8/6/07, 72 FR 43539.	This rule is a non-substantive description of the Chapters contained in the Iowa rules. EPA has not approved all of the Chapters to which this rule refers.
567–20.2	Definitions	3/19/08	8/25/08, 73 FR 49950.	The definitions for anaerobic lagoon, odor, odorous substance, and odorous substance source, are not SIP approved.
567–20.3	Air Quality Forms Generally	4/24/02	3/7/03, 68 FR 10969.	
Chapter 21—Compliance				
567–21.1	Compliance Schedule	7/12/06	8/6/07, 72 FR 43539.	
567–21.2	Variances	4/4/07	10/16/07, 72 FR 58535.	
567–21.3	Emission Reduction Program	3/14/90	6/29/90, 55 FR 26690.	
567–21.4	Circumvention of Rules	3/14/90	6/29/90, 55 FR 26690.	
567–21.5	Evidence Used in Establishing That a Violation Has or Is Occurring.	11/16/94	10/30/95, 60 FR 55198.	
Chapter 22—Controlling Pollution				
567–22.1	Permits Required for New or Existing Stationary Sources.	3/19/08	8/25/08, 73 FR 49950.	
567–22.2	Processing Permit Applications	4/9/97	6/25/98, 63 FR 34600.	
567–22.3	Issuing Permits	7/13/05	12/20/05, 70 FR 75399.	Subrule 22.3(6) is not SIP approved.
567–22.4	Special Requirements for Major Stationary Sources Located in Areas Designated Attainment or Unclassified (PSD).	11/1/06	5/14/07, 72 FR 27056.	
567–22.5	Special Requirements for Nonattainment Areas.	7/21/99	3/4/02, 67 FR 9591.	
567–22.8	Permit by Rule	7/21/99	3/4/02, 67 FR 9591.	
567–22.9	Special Requirements for Visibility Protection.	4/20/05	9/13/05, 70 FR 53939.	
567–22.10	Permitting Requirements for Country Grain Elevators, Country Grain Terminal Elevators, Grain Terminal Elevators and Feed Mill Equipment.	3/19/08	8/25/08, 49950.	
567–22.105	Title V Permit Applications	11/16/94	10/30/95, 60 FR 55198.	Only subparagraph (2)i(5) is included in the SIP.
567–22.200	Definitions for Voluntary Operating Permits.	10/18/95	4/30/96, 61 FR 18958.	
567–22.201	Eligibility for Voluntary Operating Permits.	4/4/07	10/16/07, 72 FR 58535.	
567–22.202	Requirement To Have a Title V Permit	4/9/97	6/25/98, 63 FR 34600.	
567–22.203	Voluntary Operating Permit Applications	10/14/98	3/4/02, 67 FR 9591.	
567–22.204	Voluntary Operating Permit Fees	12/14/94	4/30/96, 61 FR 18958.	
567–22.205	Voluntary Operating Permit Processing Procedures.	12/14/94	4/30/96, 61 FR 18958.	
567–22.206	Permit Content	10/18/95	4/30/96, 61 FR 18958.	
567–22.207	Relation to Construction Permits	12/14/94	4/30/96, 61 FR 18958.	
567–22.208	Suspension, Termination, and Revocation of Voluntary Operating Permits.	12/14/94	4/30/96, 61 FR 18958.	
567–22.209	Change of Ownership for Facilities With Voluntary Operating Permits.	7/13/05	12/20/05, 70 FR 75399.	

EPA-APPROVED IOWA REGULATIONS—Continued

Iowa citation	Title	State effective date	EPA approval date	Explanation
567–22.300	Operating Permit by Rule for Small Sources.	4/4/07	10/16/07, 72 FR 58535.	
	Chapter 23—Emission Standards for Contaminants			
567–23.1	Emission Standards	10/14/98	5/22/00, 65 FR 32030.	Subrules 23.1(2)–(5) are not SIP approved.
567–23.2	Open Burning	1/14/04	11/3/04, 69 FR 63945.	Subrule 23.2(3)g(2) was not submitted for approval. Variances from open burning rule 23.2(2) are subject to EPA approval.
567–23.3	Specific Contaminants	12/15/04	5/31/07, 72 FR 30275.	Subrule 23.3(3) "(d)" is not SIP approved.
567–23.4	Specific Processes	3/19/08	8/25/08, 73 FR 49950.	Subrule 23.4(10) is not SIP approved.
	Chapter 24—Excess Emissions			
567–24.1	Excess Emission Reporting	5/13/98	5/22/00, 65 FR 32030.	
567–24.2	Maintenance and Repair Requirements	3/14/90	6/29/90, 55 FR 26690.	
	Chapter 25—Measurement of Emissions			
567–25.1	Testing and Sampling of New and Existing Equipment.	4/4/07	10/16/07, 72 FR 58535.	
	Chapter 26—Prevention of Air Pollution Emergency Episodes			
567–26.1	General	3/14/90	6/29/90, 55 FR 26690.	
567–26.2	Episode Criteria	3/14/90	6/29/90, 55 FR 26690.	
567–26.3	Preplanned Abatement Strategies	3/14/90	6/29/90, 55 FR 26690.	
567–26.4	Actions During Episodes	3/14/90	6/29/90, 55 FR 26690.	
	Chapter 27—Certificate of Acceptance			
567–27.1	General	3/14/90	6/29/90, 55 FR 26690.	
567–27.2	Certificate of Acceptance	3/14/90	6/29/90, 55 FR 26690.	
567–27.3	Ordinance or Regulations	3/14/90	6/29/90, 55 FR 26690.	
567–27.4	Administrative Organization	3/14/90	6/29/90, 55 FR 26690.	
567–27.5	Program Activities	3/14/90	6/29/90, 55 FR 26690.	
	Chapter 28—Ambient Air Quality Standards			
567–28.1	Statewide Standards	3/14/90	6/29/90, 55 FR 26690.	
	Chapter 29—Qualification in Visual Determination of the Opacity of Emissions			
567–29.1	Methodology and Qualified Observer	5/13/98	5/22/00, 65 FR 32030.	
	Chapter 31—Nonattainment Areas			
567–31.1	Permit Requirements Relating to Nonattainment Areas.	2/22/95	10/23/97, 62 FR 55172.	
567–31.2	Conformity of General Federal Actions to the Iowa SIP or Federal Implementation Plan.	5/3/98	5/22/00, 65 FR 32030.	

EPA-APPROVED IOWA REGULATIONS—Continued

Iowa citation	Title	State effective date	EPA approval date	Explanation
Chapter 33—Special Regulations and Construction Permit Requirements for Major Stationary Sources—Prevention of Significant Deterioration (PSD) of Air Quality				
567–33.1	Purpose	11/1/06	5/14/07, 72 FR 27056.	
567–33.2	Reserved	11/1/06	5/14/07, 72 FR 27056.	
567–33.3	Special Construction Permit Requirements for Major Stationary Sources in Areas Designated Attainment or Unclassified (PSD).	11/1/06	5/14/07, 72 FR 27056.	
567–33.4 to 567–33.8.	Reserved	11/1/06	5/14/07, 72 FR 27056.	
567–33.9	Plantwide Applicability Limitations (PALs).	11/1/06	5/14/07, 72 FR 27056.	
567–33.10	Exceptions to Adoption by Reference	11/1/06	5/14/07, 72 FR 27056.	
Chapter 34—Provisions for Air Quality Emissions Trading Programs				
567–34.1	Purpose	7/12/06	8/6/07, 72 FR 43539.	
567–34.2 to 567–34.199.	Reserved	7/12/06	8/6/07, 72 FR 43539.	
567–34.201	CAIR NO_X Annual Trading Program Provisions.	11/28/07	4/15/08, 73 FR 20177.	
567–34.202	CAIR Designated Representative for CAIR NO_X Sources.	7/12/06	8/6/07, 72 FR 43539.	
567–34.203	Permits	7/12/06	8/6/07, 72 FR 43539.	
567–34.204	Reserved	7/12/06	8/6/07, 72 FR 43539.	
567–34.205	CAIR NO_X Allowance Allocations	7/12/06	8/6/07, 72 FR 43539.	
567–34.206	CAIR NO_X Allowance Tracking System	7/12/06	8/6/07, 72 FR 43539.	
567–34.207	CAIR NO_X Allowance Transfers	7/12/06	8/6/07, 72 FR 43539.	
567–34.208	Monitoring and Reporting	7/12/06	8/6/07, 72 FR 43539.	
567–34.209	CAIR NO_X Opt-in Units	7/12/06	8/6/07, 72 FR 43539.	
567–34.210	CAIR SO_2 Trading Program	11/28/07	4/15/08, 73 FR 20177.	
567–34.211 to 567–34.219.	Reserved	7/12/06	8/6/07, 72 FR 43539.	
567–34.220	CAIR NO_X Ozone Season Trading Program.	7/12/06	8/6/07, 72 FR 43539.	
567–34.221	CAIR NO_X Ozone Season Trading Program General.	11/28/07	4/15/08, 73 FR 20177.	
567–34.222	CAIR Designated Representative for CAIR NO_X Ozone Season Sources.	7/12/06	8/6/07, 72 FR 43539.	
567–34.223	CAIR NO_X Ozone Season Permits	7/12/06	8/6/07, 72 FR 43539.	
567–34.224	Reserved	7/12/06	8/6/07, 72 FR 43539.	
567–34.225	CAIR NO_X Ozone Season Allowance Allocations.	7/12/06	8/6/07, 72 FR 43539.	
567–34.226	CAIR NO_X Ozone Season Allowance Tracking System.	7/12/06	8/6/07, 72 FR 43539.	
567–34.227	CAIR NO_X Ozone Season Allowance Transfers.	7/12/06	8/6/07, 72 FR 43539.	
567–34.228	CAIR NO_X Ozone Season Monitoring and Reporting.	7/12/06	8/6/07, 72 FR 43539.	
567–34.229	CAIR NO_X Ozone Season Opt-in Units	7/12/06	8/6/07, 72 FR 43539.	

EPA-APPROVED IOWA REGULATIONS—Continued

Iowa citation	Title	State effective date	EPA approval date	Explanation
	Linn County			
Chapter 10	Linn County Air Quality Ordinance, Chapter 10.	3/1/05	8/16/05, 70 FR 48073.	10.2, Definitions of Federally Enforceable, Maximum Achievable Control Technology (MACT), and MACT floor; 10.4(1), Title V Permits; 19.9(2), NSPS; 19.9(3), Emission Standards for HAPs; 19.9(4), Emission Standards for HAPs for Source Categories; 10.11, Emission of objectionable odors; and, 10.15, Variances are not a part of the SIP.
	Polk County			
Chapter V	Polk County Board of Health Rules and Regulations Air Pollution Chapter V.	11/7/06	6/26/07, 72 FR 35018.	Article I, Section 5–2, definition of "variance"; Article VI, Sections 5–16(n), (o) and (p); Article VIII, Article IX, Sections 5–27(3) and (4); Article XIII, and Article XVI, Section 5–75(b) are not a part of the SIP. Article X, Section 5–28 has a State effective date of 8/24/05.

(d) *EPA-approved State source-specific permits.*

EPA-APPROVED IOWA SOURCE-SPECIFIC ORDERS/PERMITS

Name of source	Order/permit No.	State effective date	EPA approval date	Explanation
(1) Archer-Daniels Midland Company.	90–AQ–10	3/25/91	11/1/91, 56 FR 56158.	
(2) Interstate Power Company	89–AQ–04	2/21/90	11/1/91, 56 FR 56158.	
(3) Grain Processing Corporation	74–A–015–S	9/18/95	12/1/97, 62 FR 63454.	
(4) Grain Processing Corporation	79–A–194–S	9/18/95	12/1/97, 62 FR 63454.	
(5) Grain Processing Corporation	79–A–195–S	9/18/95	12/1/97, 62 FR 63454.	
(6) Grain Processing Corporation	95–A–374	9/18/95	12/1/97, 62 FR 63454.	
(7) Muscatine Power and Water	74–A–175–S	9/14/95	12/1/97, 62 FR 63454.	
(8) Muscatine Power and Water	95–A–373	9/14/95	12/1/97, 62 FR 63454.	
(9) Monsanto Corporation	76–A–161S3	7/18/96	12/1/97, 62 FR 63454.	
(10) Monsanto Corporation	76–A–265S3	7/18/96	12/1/97, 62 FR 63454.	
(11) IES Utilities, Inc	97–AQ–20	11/20/98	3/11/99, 64 FR 12087.	SO_2 Control Plan for Cedar Rapids.
(12) Archer-Daniels-Midland Corporation.	SO_2 Emission Control Plan	9/14/98	3/11/99, 64 FR 12087.	ADM Corn Processing SO_2 Control Plan for Cedar Rapids.
(13) Linwood Mining and Minerals Corporation.	98–AQ–07	3/13/98	3/18/99, 64 FR 13343.	PM_{10} control plan for Buffalo.
(14) Lafarge Corporation	98–AQ–08	3/13/98	3/18/99, 64 FR 13343.	PM_{10} control plan for Buffalo.
(15) Holnam, Inc	A.C.O. 1999–AQ–31	9/2/99	11/6/02, 67 FR 67563.	For a list of the 47 permits issued for individual emission points see IDNR letters to Holnam, Inc., dated 7/24/01.
(16) Holnam, Inc	Consent Amendment to A.C.O. 1999–AQ–31.	5/16/01	11/6/02, 67 FR 67563.	For a list of the 47 permits issued for individual emission points see IDNR letters to Holnam, Inc., dated 7/24/01.

EPA-APPROVED IOWA SOURCE-SPECIFIC ORDERS/PERMITS—Continued

Name of source	Order/permit No.	State effective date	EPA approval date	Explanation
(17) Holnam, Inc	Permits for 17–01–009, Project Nos. 99–511 and 00–468.	7/24/01	11/6/02, 67 FR 67563.	For a list of the 47 permits issued for individual emission points see IDNR letters to Holnam, Inc., dated 7/24/01.
(18) Lehigh Portland Cement Company.	A.C.O. 1999–AQ–32	9/2/99	11/6/02, 67 FR 67563.	For a list of the 41 permits issued for individual emission points see IDNR letters to Lehigh dated 7/24/01 and 2/18/02.
(19) Lehigh Portland Cement Company.	Permits for plant No. 17–01–005, Project Nos. 99–631 and 02–037.	2/18/02	11/6/02, 67 FR 67563.	For a list of the 41 permits issued for individual emission points see IDNR letters to Lehigh dated 7/24/01 and 2/18/02.
(20) Blackhawk Foundry and Machine Company.	A.C.O. 03–AQ–51	12/4/03	6/10/04, 69 FR 32454.	Together with the permits listed below this order comprises the PM_{10} control strategy for Davenport, Iowa.
(21) Blackhawk Foundry and Machine Company.	Permit No. 02–A–116 (Cold Box Core Machine).	8/19/02	6/10/04, 69 FR 32454.	Provisions of the permit that relate to pollutants other than PM_{10} are not approved by EPA as part of this SIP.
(22) Blackhawk Foundry and Machine Company.	Permit No. 02–A–290 (Wheelabrator #2 and Casting Sorting).	8/19/02	6/10/04, 69 FR 32454.	Provisions of the permit that relate to pollutants other than PM_{10} are not approved by EPA as part of this SIP.
(23) Blackhawk Foundry and Machine Company.	Permit No. 02–A–291 (Mold Sand Silo).	8/19/02	6/10/04, 69 FR 32454.	Provisions of the permit that relate to pollutants other than PM_{10} are not approved by EPA as part of this SIP.
(24) Blackhawk Foundry and Machine Company.	Permit No. 02–A–292 (Bond Storage).	8/19/02	6/10/04, 69 FR 32454.	Provisions of the permit that relate to pollutants other than PM_{10} are not approved by EPA as part of this SIP.
(25) Blackhawk Foundry and Machine Company.	Permit No. 02–A–293 (Induction Furnace and Aluminum Sweat Furnace).	8/19/02	6/10/04, 69 FR 32454.	Provisions of the permit that relate to pollutants other than PM_{10} are not approved by EPA as part of this SIP.
(26) Blackhawk Foundry and Machine Company.	Permit No. 77–A–114–S1 (Wheelabrator #1 & Grinding).	8/19/02	6/10/04, 69 FR 32454.	Provisions of the permit that relate to pollutants other than PM_{10} are not approved by EPA as part of this SIP.
(27) Blackhawk Foundry and Machine Company.	Permit No. 84–A–055–S1 (Cupola ladle, Pour deck ladle, Sand shakeout, Muller, Return sand #1, Sand cooler, Sand screen, and Return sand #2).	8/19/02	6/10/04, 69 FR 32454.	Provisions of the permit that relate to pollutants other than PM_{10} are not approved by EPA as part of this SIP.
(28) Blackhawk Foundry and Machine Company.	Permit No. 72–A–060–S5 (Cupola).	8/19/02	6/10/04, 69 FR 32454.	Provisions of the permit that relate to pollutants other than PM_{10} are not approved by EPA as part of this SIP.

(e) *The EPA-approved nonregulatory provisions and quasi-regulatory measures.*

EPA-APPROVED IOWA NONREGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
(1) Air Pollution Control Implementation Plan.	Statewide	1/27/72	5/31/72, 37 FR 10842.	
(2) Request for a Two Year Extension to Meet the NAAQS.	Council Bluffs	1/27/72	5/31/72, 37 FR 10842.	Correction notice published 3/2/76.
(3) Revisions to Appendices D and G.	Statewide	2/2/72	5/31/72, 37 FR 10842.	Correction notice published 3/2/76.
(4) Source Surveillance and Record Maintenance Statements.	Statewide	4/14/72	3/2/76, 41 FR 8960.	

EPA-APPROVED IOWA NONREGULATORY PROVISIONS—Continued

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
(5) Statement Regarding Public Availability of Emissions Data.	Statewide	5/2/72	3/2/76, 41 FR 8960.	
(7) Letter Describing the Certificates of Acceptance for Local Air Pollution Control Programs.	Linn County, Polk County	12/14/72	10/1/76, 41 FR 43407.	
(8) High Air Pollution Episode Contingency Plan.	Statewide	6/20/73	10/1/76, 41 FR 43407.	
(9) Summary of Public Hearing on Revised Rules Which Were Submitted on July 17, 1975.	Statewide	9/3/75	10/1/76, 41 FR 43407.	
(10) Air Quality Modeling to Support Sulfur Dioxide Emission Standards.	Statewide	3/4/77	6/1/77, 42 FR 27892.	
(11) Nonattainment Plans	Mason City, Davenport, Cedar Rapids, Des Moines.	6/22/79	3/6/80, 45 FR 14561.	
(12) Information on VOC Sources to Support the Nonattainment Plan.	Linn County	10/8/79	3/6/80, 45 FR 14561.	
(13) Information and Commitments Pertaining to Legally Enforceable RACT Rules to Support the Nonattainment Plan.	Linn County	11/16/79	3/6/80, 45 FR 14561.	
(14) Lead Plan	Statewide	8/19/80	3/20/81, 46 FR 17778.	
(15) Letter to Support the Lead Plan.	Statewide	1/19/81	3/20/81, 46 FR 17778.	
(16) Nonattainment Plans to Attain Secondary Standards.	Mason City, Cedar Rapids, Des Moines, Davenport, Keokuk, Council Bluffs, Fort Dodge, Sioux City, Clinton, Marshalltown, Muscatine, Waterloo.	4/18/80	4/17/81, 46 FR 22372.	
(17) Information to Support the Particulate Matter Nonattainment Plan.	Mason City, Cedar Rapids, Des Moines, Davenport, Keokuk, Council Bluffs, Fort Dodge, Sioux City, Clinton, Marshalltown, Muscatine, Waterloo.	9/16/80	4/17/81, 46 FR 22372.	
(18) Information to Support the Particulate Matter Nonattainment Plan.	Mason City, Cedar Rapids, Des Moines, Davenport, Keokuk, Council Bluffs, Fort Dodge, Sioux City, Clinton, Marshalltown, Muscatine, Waterloo.	11/17/80	4/17/81, 46 FR 22372.	
(19) Schedule for Studying Nontraditional Sources of Particulate Matter and for Implementing the Results.	Mason City, Cedar Rapids, Des Moines, Davenport, Keokuk, Council Bluffs, Fort Dodge, Sioux City, Clinton, Marshalltown, Muscatine, Waterloo.	6/26/81	3/5/82, 47 FR 9462.	
(20) Air Monitoring Strategy	Statewide	7/15/81	4/12/82, 47 FR 15583.	
(21) Letter of Commitment to Revise Unapprovable Portions of Chapter 22.	Statewide	5/14/85	9/12/85, 50 FR 37176.	
(22) Letter of Commitment to Submit Stack Height Regulations and to Implement the EPA's Regulations until the State's Rules Are Approved.	Statewide	4/22/86	7/11/86, 51 FR 25199.	
(23) Letter of Commitment to Implement the Stack Height Regulations in a Manner Consistent with the EPA's Stack Height Regulations with Respect to NSR/PSD Regulations.	Statewide	4/22/87	6/26/87, 52 FR 23981.	
(24) PM_{10} SIP	Statewide	10/28/88	8/15/89, 54 FR 33536.	

EPA-APPROVED IOWA NONREGULATORY PROVISIONS—Continued

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
(25) Letter Pertaining to NO_X Rules and Analysis Which Certifies the Material Was Adopted by the State on October 17, 1990.	Statewide	11/8/90	2/13/91, 56 FR 5757.	
(26) SO_2 Plan	Clinton	3/13/91	11/1/91, 56 FR 56158.	
(27) Letter Withdrawing Variance Provisions.	Polk County	10/23/91	11/29/91, 56 FR 60924.	Correction notice published 1/26/93.
(28) Letter Concerning Open Burning Exemptions.	Statewide	10/3/91	1/22/92, 57 FR 2472.	
(29) Compliance Sampling Manual	Statewide	1/5/93	5/12/93, 58 FR 27939.	
(30) Small Business Assistance Plan.	Statewide	12/22/92	9/27/93, 58 FR 50266.	
(31) Voluntary Operating Permit Program.	Statewide	12/8/94 2/16/96 2/27/96	4/30/96, 61 FR 18958.	
(32) SO_2 Plan	Muscatine	6/19/96 5/21/97	12/1/97, 62 FR 63454.	
(33) SO_2 Maintenance Plan	Muscatine	4/25/97	3/19/98, 63 FR 13343.	
(34) SO_2 Control Plan	Cedar Rapids	9/11/98	3/11/99, 64 FR 12090.	
(35) PM_{10} Control Plan	Buffalo, Iowa	10/1/98	3/18/99, 64 FR 13346.	
(36) CAA 110(a)(2)(D)(i) SIP—Interstate Transport.	Statewide	11/22/06	3/8/07, 72 FR 10380.	
(37) SO_2 Maintenance Plan for the Second 10-year Period.	Muscatine	4/5/07	8/1/07; 72 FR 41900.	
(38) CAA 110(a)(1) and (2)—Ozone Infrastructure SIP.	Statewide	6/15/07	3/04/08; 73 FR 11554.	

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0130; FRL–8429–3]

N,N,N′,N″,-Tetrakis-(2-Hydroxypropyl) Ethylenediamine; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of *N,N,N′,N″,*-tetrakis-(2-hydroxypropyl) ethylenediamine (NTHE) when used as an inert ingredient for pre-harvest uses under 40 CFR 180.920 at a maximum of 20% by weight in pesticide formulations. The Joint Inerts Task Force (JITF), Cluster Support Team Number 15 (CST 15), submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of NTHE.

DATES: This regulation is effective July 29, 2009. Objections and requests for hearings must be received on or before September 28, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0130. 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: Kerry Leifer, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8811; e-mail address: *leifer.kerry@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 those engaged in the following activities:

- 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 to provide 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 EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR cite at *http://www.gpoaccess.gov/ecfr*. To access the OPPTS Harmonized Guidelines referenced in this document, go directly to the guidelines at *http://www.epa.gov/opptsfrs/home/guidelin.htm*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0130 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before September 28, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2009–0130, by one of the following methods:

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

II. Background

In the **Federal Register** of April 15, 2009 (74 FR 17487) (FRL–8409-7), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9E7531) by JITF, CST 15, c/o CropLife America, 1156 15th St., NW., Suite 400, Washington, DC 20005. The petition requested that 40 CFR 180.920 be amended by establishing exemptions from the requirement of a tolerance for residues of the inert ingredient NTHE. That notice referenced a summary of the petition prepared by JITF, CST 15, the petitioner, which is available to the public in the docket, *http://www.regulations.gov*.

The Agency received only one comment in response to the notice of filing. One comment was received from a private citizen who opposed the authorization to sell any pesticide that leaves a residue on food. The Agency understands the commenter's concerns and recognizes that some individuals believe that no residue of pesticides should be allowed. However, under the existing legal framework provided by FFDCA section 408, EPA is authorized to establish pesticide tolerances or exemptions where persons seeking such tolerances or exemptions have demonstrated that the pesticide meets the safety standard imposed by that statute.

Based upon review of the data supporting the petition, EPA has modified the exemption requested by limiting NTHE to a maximum of 20% by weight in pesticide formulations. This limitation is based on the Agency's risk assessment which can be found at *http://www.regulations.gov* in document, *N,N,N',N'',-Tetrakis-(2-Hydroxypropyl) Ethylenediamine (NTHE - JITF CST 15 Inert Ingredient). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as an Inert Ingredient in Pesticide Formulations* in docket ID number EPA–HQ–OPP–2009–0130.

This petition was submitted in response to a final rule published in the **Federal Register** issue of August 9, 2006, (71 FR 45415) (FRL–8084–1) in which the Agency revoked, under FFDCA section 408(e)(1), the existing exemptions from the requirement of a tolerance for residues of certain inert ingredients because of insufficient data to make the determination of safety required by FFDCA section 408(b)(2). The expiration date for the tolerance exemptions subject to revocation was August 9, 2008, which was later extended to August 9, 2009 by a final rule published in the **Federal Register** of August 4, 2008 (73 FR 45312) (FRL–8372–7) to allow for data to be submitted to support the establishment of tolerance exemptions for these inert ingredients prior to the effective date of the tolerance exemption revocation.

III. Inert Ingredient Definition

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

IV. Aggregate Risk Assessment and Determination of Safety

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

408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue...."

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

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for exemption from the requirement of a tolerance for residues of NTHE provided that the concentration of NTHE inerts is limited to no more than 20% by weight in pesticide formulations. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The existing toxicology database for NTHE consists of one OPPTS Harmonized Guideline 870.3650 (combined repeated dose toxicity study with the reproduction/developmental screening study in rats), a 90–day toxicity study in rats, and several studies in the scientific literature on acute oral toxicity and mutagenicity.

The available toxicity data indicates that NTHE has low acute oral toxicity. NTHE was not mutagenic in an Ames Test. In the OPPTS Harmonized Guideline 870.3650 rat reproductive/developmental toxicity screening study, there was no evidence of increased susceptibility. Parental toxicity manifested as microscopic brain lesions at 1,000 milligrams/kilograms/day (mg/kg/day) (the highest dose tested). No developmental or reproductive effects were observed at doses of 100, 300, and 1,000 mg/kg/day. There is no evidence of increased susceptibility to the offspring of rats following prenatal and postnatal exposure in the OPPTS Harmonized Guideline 870.3650 study. There were no offspring effects at any dose level up to the limit dose (1,000 mg/kg/day). In addition, in a 90–day dietary study in rats (1956), where the no-observed-adverse-effect-level (NOAEL) was set at 600–900 mg/kg/day (1% in diet), based on body-weight gain effects at 3% and 5% in the diet and a slightly greater incidence of borderline abnormalities of the liver of questionable significance, there are no other repeat dose toxicity data available. The NOAEL from the OPPTS Harmonized Guideline 870.3650 study (300 mg/kg/day) is protective of any potential liver toxicity.

However, there is suggestive evidence of adverse neurotoxic effects in the adult animal in the OPPTS Harmonized Guideline 870.3650 study at the limit dose of 1,000 mg/kg/day. These effects manifested as different sized vacuoles in the choroid plexus epithelial cells (some were signet-ring shaped) of the lateral ventricles of the brain in all high-dose parental male and female rats. None of the low- or mid-dose or control animals showed a similar change.

Pharmacokinetics in rats indicate that, following oral dosing, NTHE is poorly absorbed and rapidly excreted in the urine, mainly unchanged (92%–96%). None of the hypothetical metabolites, such as keto- or *N*-dealkylated derivatives, were observed. The calculated bioavailability factor (F=0.018) revealed that less than 2% of the orally administered dose of NTHE is absorbed through the stomach and intestine. The half-life for elimination is 82 minutes (in non-diabetic rats) as a first order process.

There are no chronic toxicity studies available for NTHE. The Agency used a qualitative structure activity relationship (SAR) database, DEREK 11, to determine if there were structural alerts suggestive of carcinogenicity. No structural alerts were identified. In addition, there was little concern about any of the postulated metabolites having greater toxicity than the parent compounds.

Specific information on the studies received and the nature of the adverse effects caused by NTHE, as well as, the NOAEL and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document *N,N,N',N',-Tetrakis-(2-Hydroxypropyl) Ethylenediamine (NTHE - JITF CST 15 Inert Ingredient). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as an Inert Ingredient in Pesticide Formulations* at pp. 7–11 and 31–34 in docket ID number EPA–HQ–OPP–2009–0130.

B. Toxicological Endpoints

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

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

A summary of the toxicological endpoints for NTHE used for human health risk assessment is shown in Table 1 of this unit.

TABLE 1.—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/Scenario	POD and Uncertainty/Safety Factors	RfD, PAD, LOC for Risk Assessment	Study and Toxicological Effects
Acute dietary (all populations)	No appropriate endpoint was identified for acute dietary assessment. The brain lesions observed following repeat dosing at the limit dose would not be expected to occur following a single exposure.		
Chronic dietary (all populations)	NOAEL= 300 mg/kg/day UF_A = 10X UF_H = 10X FQPA SF = 10X	Chronic RfD = 3 mg/kg/day cPAD = 3 mg/kg/day	OPPTS Harmonized Guideline 870.3650 reproduction/developmental screen in rats LOAEL = 1,000 mg/kg/day, based on microscopic lesions (vacuoles in choroid plexus epithelial cells of the lateral ventricles) of the brain in all high-dose animals (both sexes).
Short-Term (1–30 days) Incidental Oral and Inhalation	NOAEL= 300 mg/kg/day UF_A = 10X UF_H = 10X FQPA SF = 10X Inhalation hazard assumed to be equivalent to oral hazard	Residential LOC for MOE = 1,000	OPPTS Harmonized Guideline 870.3650 reproduction/developmental screen in rats LOAEL = 1,000 mg/kg/day, based on microscopic lesions (vacuoles in choroid plexus epithelial cells of the lateral ventricles) of the brain in all high-dose animals (both sexes).
Intermediate- and Long-Term (1–6 months and >6 months) Incidental Oral and Inhalation	Oral NOAEL = 300 mg/kg/day UF_A = 10X UF_H = 10X FQPA SF = 10X Inhalation hazard assumed to be equivalent to oral hazard	Residential LOC for MOE = 1,000	OPPTS Harmonized Guideline 870.3650 reproduction/developmental screen in rats LOAEL = 1,000 mg/kg/day, based on microscopic lesions (vacuoles in choroid plexus epithelial cells of the lateral ventricles) of the brain in all high-dose animals (both sexes).
Cancer (oral, dermal, inhalation)	Classification: No animal toxicity data available for an assessment. Based on SAR analysis, NTHE is not expected to be carcinogenic.		

Point of departure (POD) = A data point or an estimated point that is derived from observed dose-response data and used to mark the beginning of extrapolation to determine risk associated with lower environmentally relevant human exposures. NOAEL = no-observed-adverse-effect-level. LOAEL = lowest-observed-adverse-effect-level. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). PAD = population adjusted dose (a=acute, c=chronic). FQPA SF = Food Quality Protection Act of 1996 Safety Factor. RfD = reference dose. MOE = margin of exposure. LOC = level of concern. SAR = structure activity relationship.

C. Exposure Assessment

Limited information is available on the metabolism and environmental degradation of this compound. The Agency has considered the chemical structure, the submitted physicochemical data, as well as SAR information, to determine the residues of concern for this inert ingredient.

A rat metabolism study showed little absorption, with most of the parent compound excreted unchanged in the urine. Although data on plant metabolism and environmental degradation are not available, any postulated metabolites as a result of dealkylation are likely to be highly water soluble (like the parent) and are not likely to be more toxic than the parent compound. Therefore, a risk assessment based on the toxicity data for the parent compound is not likely to underestimate risk.

Available data indicate that oral absorption of NTHE is low, and dermal absorption is expected to be very low. Low dermal absorption is expected based on its physicochemical properties. Therefore, it is concluded that quantification of dermal risk is not necessary for NTHE.

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to NTHE, EPA considered exposure under the petitioned-for exemption from the requirement of a tolerance. EPA assessed dietary exposures from NTHE in food as follows:

i. *Acute exposure.* No adverse effects attributable to a single exposure of NTHE was seen in the toxicity databases; therefore, an acute exposure assessment for NTHE is not necessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, no residue data were submitted for NTHE. In the absence of specific residue data, EPA has developed an approach which uses surrogate information to derive upper bound exposure estimates for the subject inert ingredient. Upper bound exposure estimates are based on the highest tolerance for a given commodity from a list of high-use insecticides, herbicides, and fungicides. A complete description of the general approach taken to assess inert ingredient risks in the absence of residue data is contained in the memorandum entitled *Alkyl Amines Polyalkoxylates (Cluster 4): Acute and Chronic Aggregate (Food and Drinking Water) Dietary Exposure and Risk Assessments for the Inerts* (D361707, S. Piper, 2/25/09) and can be found at *http://www.regulations.gov* in docket ID number EPA–HQ–OPP–2008–0738.

In the dietary exposure assessment, the Agency assumed that the residue level of the inert ingredient would be no higher than the highest tolerance for a given commodity. Implicit in this assumption is that there would be similar rates of degradation (if any) between the active and inert ingredient

and that the concentration of inert ingredient in the scenarios leading to these highest of tolerances would be no higher than the concentration of the active ingredient.

The Agency believes the assumptions used to estimate dietary exposures lead to an extremely conservative assessment of dietary risk due to a series of compounded conservatisms. First, assuming that the level of residue for an inert ingredient is equal to the level of residue for the active ingredient will overstate exposure. The concentrations of active ingredient in agricultural products is generally at least 50% of the product and often can be much higher. Further, pesticide products rarely have a single inert ingredient; rather there is generally a combination of different inert ingredients used which additionally reduces the concentration of any single inert ingredient in the pesticide product in relation to that of the active ingredient. In the case of NTHE, EPA made a specific adjustment to the dietary exposure assessment to account for the use limitations of the amount of NTHE that may be in formulations (no more than 20% by weight in pesticide formulations) and assumed that NTHE is present at the maximum limitation rather than at equal quantities with the active ingredient. This remains a very conservative assumption because surfactants are generally used at levels far below this percentage.

Second, the conservatism of this methodology is compounded by EPA's decision to assume that, for each commodity, the active ingredient which will serve as a guide to the potential level of inert ingredient residues is the active ingredient with the highest tolerance level. This assumption overstates residue values because it would be highly unlikely, given the high number of inert ingredients, that a single inert ingredient or class of ingredients would be present at the level of the active ingredient in the highest tolerance for every commodity. Finally, a third compounding conservatism is EPA's assumption that all foods contain the inert ingredient at the highest tolerance level. In other words, EPA assumed 100% of all foods are treated with the inert ingredient at the rate and manner necessary to produce the highest residue legally possible for an active ingredient. In summary, EPA chose a very conservative method for estimating what level of inert residue could be on food, then used this methodology to choose the highest possible residue that could be found on food and assumed that all food contained this residue. No consideration was given to potential degradation between harvest and consumption even though monitoring data shows that tolerance level residues are typically one to two orders of magnitude higher than actual residues in food when distributed in commerce.

Accordingly, although sufficient information to quantify actual residue levels in food is not available, the compounding of these conservative assumptions will lead to a significant exaggeration of actual exposures. EPA does not believe that this approach underestimates exposure in the absence of residue data.

iii. *Cancer.* The Agency used a qualitative SAR database, DEREK11, to determine if there were structural alerts suggestive of carcinogenicity. No structural alerts for carcinogenicity were identified. NTHE is not expected to be carcinogenic. Therefore a cancer dietary exposure assessment is not necessary to assess cancer risk.

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for NTHE. Tolerance level residues and/or 100 PCT were assumed for all food commodities.

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

A screening level drinking water analysis, based on the Pesticide Root Zone Model /Exposure Analysis Modeling System (PRZM/EXAMS) was performed to calculate the estimated drinking water concentrations (EDWCs) of NTHE. Modeling runs on four surrogate inert ingredients using a range of physical chemical properties that would bracket those of NTHE were conducted. Modeled acute drinking water values ranged from 0.001 part per billion (ppb) to 41 ppb. Modeled chronic drinking water values ranged from 0.0002 ppb to 19 ppb. Further details of this drinking water analysis can be found at *http://www.regulations.gov* in the document *N,N,N',N'',-Tetrakis-(2-Hydroxypropyl) Ethylenediamine (NTHE - JITF CST 15 Inert Ingredient). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as an Inert Ingredient in Pesticide Formulations* at pp. 11–12 and 36–38 in docket ID number EPA–HQ–OPP–2009–0130.

For the purpose of the screening level dietary risk assessment to support this request for an exemption from the requirement of a tolerance for NTHE, a conservative drinking water concentration value of 100 ppb based on screening level modeling was used to assess the contribution to drinking water for the chronic dietary risk assessments for parent compound. These values were directly entered into the dietary exposure model.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). NTHE may be used as inert ingredients in pesticide products that are registered for specific uses that may result in outdoor residential exposures.

A screening level residential exposure and risk assessment was completed for products containing NTHE as an inert ingredient. In this assessment, representative scenarios, based on end-use product application methods and labeled application rates, were selected. The Agency did not identify any products intended for use on pets or home cleaning products that contain NTHE. For each of the use scenarios, the Agency assessed residential handler (applicator) inhalation exposure for outdoor scenarios with high exposure potential (i.e., exposure scenarios with high end unit exposure values) to serve as a screening assessment for all potential residential pesticides containing. Similarly, residential post application oral exposure assessments were also performed utilizing high end outdoor exposure scenarios. Further details of this residential exposure and risk analysis can be found at *http://www.regulations.gov* in the memorandum entitled *JITF Inert Ingredients. Residential and Occupational Exposure Assessment Algorithms and Assumptions Appendix for the Human Health Risk Assessments to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations* (D364751, 5/7/09, Lloyd/LaMay) in docket ID number EPA–HQ–OPP–2008–0710.

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

cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA has not found to share a common mechanism of toxicity with any other substances, and NTHE does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that NTHE does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* The existing toxicology database for NTHE consists of one OPPTS Harmonized Guideline 870.3650 combined repeated dose toxicity study with the reproduction/developmental screening study in rats, and several studies in the scientific literature on acute oral toxicity and mutagenicity.

In the case of NTHE, there was no increased susceptibility to the offspring of rats following pre and postnatal (PND 0–4) exposure in the OPPTS Harmonized Guideline 870.3650 study (gavage dosing of males for 28 days, females for 46 days). There were no offspring effects at any dose level up to the limit dose (1,000 mg/kg/day) where maternal/paternal toxicity was manifested as microscopic lesions in the brain at 1,000 mg/kg/day. Although the parental NOAEL selected as the POD for the chronic dietary, incidental oral, and inhalation risk assessments is protective of the adult animal, the particular findings in the parental animals lead to uncertainties for the offspring. There is a concern for neurodevelopment since this is not addressed in the OPPTS Harmonized Guideline 870.3650 reproduction/developmental screening study.

3. *Conclusion.* Despite the fact that no quantitative or qualitative increased susceptibility to offspring was seen in the OPPTS Harmonized Guideline 870.3650 combined repeated dose toxicity study and the conservative exposure assessment, EPA has determined that the FQPA SF cannot be reduced. A 10X FQPA SF is retained for the following reason:

In the OPPTS Harmonized Guideline 870.3650 study in rats there is some evidence of neurotoxicity in the adult animals in the OPPTS Harmonized Guideline 870.3650 reproductive/developmental study, which occurred only at the highest-dose tested of 1,000 mg/kg/day. The vacuoles in the choroid plexus epithelial cells of the lateral ventricles of the brain were of different size, and some of the epithelial cells were signet-ring shaped. None of the other dose groups (100 and 300 mg/kg/day) showed a similar change. These results indicate a potential concern for effects on neurodevelopment at high doses following repeat exposure. Given that neither neurotoxicity nor standard developmental toxicity studies are available on NTHE, retention of the FQPA SF is appropriate.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* There was no hazard attributable to a single exposure seen in the toxicity database for NTHE. Therefore, NTHE is not expected to pose an acute risk.

2. *Chronic risk.* A chronic aggregate risk assessment takes into account exposure estimates from chronic dietary consumption of food and drinking water. Using the exposure assumptions discussed in this unit for chronic exposure and the use limitations of not more than 20% by weight in pesticide formulations, the chronic dietary exposure from food and water to NTHE is 26% of the cPAD for the U.S. population and 84% of the cPAD for children 1–2 years old, the most highly exposed population subgroup.

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

NTHE is used as an inert ingredient in pesticide products that are currently registered for uses that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to NTHE. Using the exposure assumptions described in this unit, EPA has concluded that the combined short-term aggregated food, water, and residential exposures result in aggregate MOEs of 4,800 and 5,000 for adult males and females, respectively. Adult residential exposure includes high-end inhalation handler exposure from outdoor uses. EPA has concluded the combined short-term aggregated food, water, and residential exposures result in an aggregate MOE of 1,100 for children. Children's residential exposure includes incidental oral exposure from treated turf. As the LOC is for MOEs that are lower than 1,000, these MOEs are not of concern.

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

NTHE is currently registered for uses that could result in intermediate-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with intermediate-term residential exposures to NTHE. Using the exposure assumptions described in this unit, EPA has concluded that the combined intermediate-term aggregated exposures result in aggregate MOEs of 4,800 and 5,100, for adult males and females, respectively. EPA has concluded the combined intermediate-term aggregated food, water, and residential exposures result in an aggregate MOE of 1,200 for children. Children's residential exposure includes incidental oral exposure from treated turf. As the LOC is for MOEs that are lower than 1,000, these MOEs are not of concern.

5. *Aggregate cancer risk for U.S. population.* The Agency has not identified any concerns for carcinogenicity relating to NTHE.

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

V. Other Considerations

A. Analytical Enforcement Methodology

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

B. International Residue Limits

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

VI. Conclusion

Therefore, an exemption from the requirement of a tolerance is established for residues of *N,N,N′,N′*,-tetrakis-(2-hydroxypropyl) ethylenediamine when used as an inert ingredient for pre-harvest uses under 40 CFR 180.920 at a maximum of 20% by weight in pesticide formulations.

VII. Statutory and Executive Order Reviews

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

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

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

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

VIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: July 21, 2009.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

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

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

* * * * *

Inert Ingredients	Limits	Uses
* * * *	* * * *	
N,N,N′,N′,-tetrakis-(2-hydroxypropyl) ethylenediamine (CAS Reg. No. 102–60–3).	Concentration in formulated end-use products not to exceed 20% by weight in pesticide formulations.	Stabilizer for formulation
* * * *	* * * *	

[FR Doc. E9–17945 Filed 7–28–09; 8:45 am]
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0131; FRL–8424–6]

Alkyl Alcohol Alkoxylate Phosphate and Sulfate Derivatives; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes exemptions from the requirement of a tolerance for residues of alkyl alcohol alkoxylate phosphate derivatives when used as inert ingredients in growing crops under 40 CFR 180.920 and for residues of alkyl alcohol alkoxylate sulfate derivatives when used as inert ingredients in pesticide formulations applied to growing crops, raw agricultural commodities after harvest, and animals under 40 CFR 180.910 and 40 CFR 180.930. The Joint Inerts Task Force (JITF), Cluster Support Team Number 2 (CST 2) submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of alkyl alcohol alkoxylate phosphate and sulfate derivatives.

DATES: This regulation is effective July 29, 2009. Objections and requests for hearings must be received on or before September 28, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0131. 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: Kerry Leifer, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8811; e-mail address: *leifer.kerry @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 those engaged in the following activities:

- 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 to provide 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 EPA's tolerance regulations at 40 CFR part180 through the Government Printing Office's e-CFR cite at *http://www.gpoaccess.gov/ecfr*. To access the OPPTS Harmonized Guidelines referenced in this document, go directly to the guidelines at *http://www.epa.gov/opptsfrs/home/guidelin.htm*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0131 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before September 28, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2009–0131, by one of the following methods:

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

II. Background

In the **Federal Register** of April 15, 2009 (74 FR 17487) (FRL–8409–7), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9E7533) by JITF, CST 2, c/o CropLife America, 1156 15th St., NW., Suite 400, Washington, DC 20005, The petition requested that 40 CFR 180.910, 40 CFR 180.920, and 40 CFR 180.930 be amended by establishing exemptions from the

requirement of a tolerance for residues of various alkyl alcohol alkoxylate phosphate and sulfate derivatives when used as inert ingredients in pesticide formulations applied to raw agricultural commodities, growing crops, and animals. The petition specifically requested the establishment of an exemption from the requirement of a tolerance under 40 CFR 180.920 for residues of α-alkyl (minimum C_6 linear, branched, saturated and/or unsaturated)-ω-hydroxypolyoxyethylene polymer with or without polyoxypropylene, mixture of di- and monohydrogen phosphateesters and the corresponding ammonium, calcium, magnesium, monoethanolamine, potassium, sodium, and zinc salts of the phosphate esters; minimum oxyethylene content is 2 moles; minimum oxypropylene content is 0 moles (Chemical Abstract Service Registry numbers (CAS Nos.) 9046–01–9, 39464–66–9, 50643–20–4, 52019–36–0, 68071–35–2, 68458–48–0, 68585–36–4, 68815–11–2, 68908–64–5, 68511–37–5,68130–47–2, 42612–52–2, 58318–92–6, 60267–55–2, 68070–99–5, 68186–36–7, 68186–37–8, 68610–65–1, 68071–17–0, 936100–29–7, 936100–30–0, 73038–25–2, 78330–24–2, 154518–39–5, 317833–96–8, 108818–88–8, 873662–29–4, 61837–79–4, 68311–02–4, 68425–73–0, 37280–82–3, 68649–29–6, 67711–84–6, 68891–13–4); and the establishment of an exemption from the requirement of a tolerance under 40 CFR 180.910 and 40 CFR 180.930 for residues of α-alkyl(C_6-C_{15})-ω-hydroxypoly(oxyethylene)sulfate, and its ammonium, calcium, magnesium, potassium, sodium, and zinc salts, poly(oxyethylene) content averages 2–4 moles (CAS Nos. 9004–82–4, 68585–34–2, 68891–38–3, 9004–84–6, 13150–00–0, 26183–44–8, 68611–55–2, 68511–39–7, 3088–31–1, 9004–82–4, 25446–78–0, 32612–48–9, 50602–06–7, 62755–21–9, 68424–50–0, 73665–22–2). For ease of reading, the alkyl alcohol alkoxylate phosphate and sulfate derivatives are referred to throughout this document as AAAPDs and AAASDs respectively, and collectively as AAAPSDs. That notice referenced a summary of the petition prepared by JITF, CST 2, the petitioner which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

This petition, which also included a limitation of the concentration of alkyl alcohol alkoxylate phosphate and sulfate derivatives to not exceed 30% by weight of the pesticide formulation, was submitted in response to a final rule of August 9, 2006 (71 FR 45415) (FRL–8084–1) in which the Agency revoked, under FFDCA section 408(e)(1) the existing exemptions from the requirement of a tolerance for residues of certain inert ingredients because of insufficient data to make the determination of safety required by FFDCA section 408(b)(2). The expiration date for the tolerance exemptions subject to revocation was August 9, 2008, which was later extended to August 9, 2009, by a document published in the **Federal Register** issue of August 4, 2008 (73 FR 45312) (FRL–8372–7) to allow for data to be submitted to support the establishment of tolerance exemptions for these inert ingredients prior to the effective date of the tolerance exemption revocation.

III. Inert Ingredient Definition

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

IV. Aggregate Risk Assessment and Determination of Safety

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

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

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for exemption from the requirement of a tolerance for residues of AAAPSDs when used as inert ingredients in pesticide formulations applied to growing crops, raw agricultural commodities and food-producing animals. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The AAAPSDs are not acutely toxic by the oral and dermal routes of exposure under normal use conditions; however, concentrated materials are generally moderate to severe eye and skin irritants and may be skin sensitizers. Following subchronic exposure to rats, gastrointestinal irritation (increased incidences of hyperplasia, submucosal edema, and ulceration) was observed, but no specific target organ toxicity or neurotoxicity was seen. No neurotoxicological effects were detected in a functional observational battery or a motor activity assessment. No reproductive effects were noted in the database. There was a qualitative increase in susceptibility to pups seen in a rat developmental/reproductive toxicity screening study; however, effects were seen only in one study and were in the presence of maternal toxicity. Further, a clear no-observed-adverse-effect-level (NOAEL) was

established for the developmental effects and this NOAEL is significantly higher than the toxicological points of departure selected for risk assessment. There are no carcinogenicity concerns based on structure activity modeling. Points of departure for chronic dietary, incidental oral, inhalation, and dermal exposure were selected from a 2–generation reproduction and fertility effects study in rats. The endpoint was decreased absolute and relative liver weights and increased incidence in the number of animals with minimal hepatocyte necrosis in males.

Sufficient data were provided on the chemical identity of the AAAPSDs; however, limited data are available on the metabolism and environmental degradation of these compounds. The Agency relied collectively on information provided on the representative chemical structures, the submitted physicochemical data, structure activity relationship (SAR) information, as well as information on other surfactants and chemicals of similar size and functionality to determine the residues of concern for the AAAPSDs. The Agency has concluded that since metabolites and environmental degradates are not likely to be more toxic than the parent compounds, a risk assessment based on the parent compounds is not likely to underestimate risk.

Specific information on the studies received and the nature of the adverse effects caused by the AAAPSDs as well as the NOAEL and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document *Alkyl Alcohol Alkoxylate Phosphate and Sulfate Derivatives (AAAPDs and AAASDs—JITF CST 2 Inert Ingredients). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide*, pages 11–17 in docket ID number EPA–HQ–OPP–2009–0131.

B. Toxicological Endpoints

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

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

A summary of the toxicological endpoints for AAAPSDs used for human risk assessment is shown in Table 1 of this unit.

TABLE 1.—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR AAAPSDS FOR USE IN HUMAN RISK ASSESSMENT

Exposure/Scenario	Point of Departure and Uncertainty/ Safety Factors	RfD, PAD, LOC for Risk Assessment	Study and Toxicological Effects
Acute dietary (all populations)	No appropriate endpoint was identified for acute dietary assessment		
Chronic dietary (all populations)	NOAEL= 87 millgrams/kilograms/day (mg/kg/day) UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 0.87 mg/kg/day cPAD = 0.87 mg/kg/day	Reproduction/fertility effects in male rats (Master Record Identification number (MRID) 47060903)) LOAEL = 223 mg/kg/day based on a dose-related decrease in absolute and relative liver weight and an increased incidence in the number of animals with "minimal" hepatocyte necrosis in males in the high-dose group compared to control group
Incidental oral short-term (1 to 30 days) and intermediate-term (1 to 6 months)	NOAEL= 87 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	Reproduction/fertility effects in male rats (MRID 47060903) LOAEL = 223 mg/kg/day based on a dose-related decrease in absolute and relative liver weight and an increased incidence in the number of animals with "minimal" hepatocyte necrosis in males in the high-dose group compared to control group

TABLE 1.—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR AAAPSDs FOR USE IN HUMAN RISK ASSESSMENT—Continued

Exposure/Scenario	Point of Departure and Uncertainty/ Safety Factors	RfD, PAD, LOC for Risk Assessment	Study and Toxicological Effects
Dermal and inhalation (all durations)	Oral study NOAEL = 87 mg/kg/day (dermal absorption rate = 5% (inhalation absorption rate = 100%) UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	Reproduction/fertility effects in male rats (MRID 47060903) LOAEL = 223 mg/kg/day based on a dose-related decrease in absolute and relative liver weight and an increased incidence in the number of animals with "minimal" hepatocyte necrosis in males in the high-dose group compared to control group.
Cancer (oral, dermal, inhalation)	Classification: No animal toxicity data available for an assessment; based on SAR analysis, AAAPSDs are not expected to be carcinogenic.		

UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). FQPA SF = FQPA Safety Factor. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. MOE = margin of exposure. LOC = level of concern.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to AAAPSDs, EPA considered exposure under the petitioned-for exemptions from the requirement of a tolerance. EPA assessed dietary exposures from AAAPSDs in food as follows:

i. *Acute and chronic exposure.* In conducting the acute and chronic dietary exposure assessments, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, no residue data were submitted for the AAAPSDs. In the absence of specific residue data EPA has developed an approach which uses surrogate information to derive upper bound exposure estimates for the subject inert ingredients. Upper bound exposure estimates are based on the highest tolerance for a given commodity from a list of high-use insecticides, herbicides, and fungicides. A complete description of the dietary exposure and risk assessment can be found at *http://www.regulations.gov* in *Alkyl Amines Polyalkoxylates (Cluster 4): Acute and Chronic Aggregate (Food and Drinking Water) Dietary Exposure and Risk Assessments for the Inerts* in docket ID number EPA–HQ–OPP–2008–0738.

In the assessment, the Agency assumed that the residue level of the inert ingredient would be no higher than the highest tolerance for a given commodity. Implicit in this assumption is that there would be similar rates of degradation (if any) between the active and inert ingredient and that the concentration of inert ingredient in the scenarios leading to these highest of tolerances would be no higher than the concentration of the active ingredient.

The Agency believes the assumptions used to estimate dietary exposures lead to an extremely conservative assessment of dietary risk due to a series of compounded conservatisms. First, assuming that the level of residue for an inert ingredient is equal to the level of residue for the active ingredient will overstate exposure. The concentrations of active ingredient in agricultural products are generally at least 50% of the product and often can be much higher. Further, pesticide products rarely have a single inert ingredient; rather there is generally a combination of different inert ingredients used which additionally reduces the concentration of any single inert ingredient in the pesticide product in comparison with the active ingredient. In the case of AAAPSDs, EPA made a specific adjustment to the dietary exposure assessment to account for the use limitations of the amount of AAAPSDs that may be in formulations (no more than 30%) and assumed that the AAAPSDs are at the maximum limitations rather than at equal quantities with the active ingredient. This remains a very conservative assumption because surfactants are generally used at levels far below these percentages. For example, EPA examined several of the pesticide products associated with the tolerance/commodity combination which are the driver of the risk assessment and found that these products did not contain surfactants at levels greater than 2.25% and that none of the surfactants were AAAPSDs.

Second, the conservatism of this methodology is compounded by EPA's decision to assume that, for each commodity, the active ingredient which will serve as a guide to the potential level of inert ingredient residues is the active ingredient with the highest tolerance level. This assumption overstates residue values because it would be highly unlikely, given the high number of inert ingredients, that a single inert ingredient or class of ingredients would be present at the level of the active ingredient in the highest tolerance for every commodity. Finally, a third compounding conservatism is EPA's assumption that all foods contain the inert ingredient at the highest tolerance level. In other words, EPA assumed 100% of all foods are treated with the inert ingredient at the rate and manner necessary to produce the highest residue legally possible for an active ingredient. In sum, EPA chose a very conservative method for estimating what level of inert residue could be on food, and then used this methodology to choose the highest possible residue that could be found on food and assumed that all food contained this residue. No consideration was given to potential degradation between harvest and consumption even though monitoring data shows that tolerance level residues are typically one to two orders of magnitude higher than actual residues in food when distributed in commerce.

Accordingly, although sufficient information to quantify actual residue levels in food is not available, the compounding of these conservative assumptions will lead to a significant exaggeration of actual exposures. EPA does not believe that this approach underestimates exposure in the absence of residue data.

ii. *Cancer.* The Agency used a qualitative SAR database, DEREK11, to determine if there were structural alerts for potential carcinogenicity of a

representative AAAPSD. No structural alerts for carcinogenicity were identified and the AAAPSDs are not expected to be carcinogenic. Therefore a quantitative cancer exposure assessment is not necessary to assess cancer risk.

iii. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue or PCT information in the dietary assessment for AAAPSDs. Tolerance level residues or 100 PCT were assumed for all food commodities.

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

A screening level drinking water analysis, based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) was performed to calculate the estimated drinking water concentrations (EDWCs) of AAAPSDs. Modeling runs on four surrogate inert ingredients using a range of physical chemical properties that would bracket those of the AAAPSDs were conducted..Modeled acute drinking water values ranged from 0.001 parts per billion (ppb) to 41 ppb. Modeled chronic drinking water values ranged from 0.0002 ppb to 19 ppb. Further details of this drinking water analysis can be found at *http://www.regulations.gov* in document *Alkyl Amine Polyalkoxylates (JITF CST 4 Inert Ingredients). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations*, pages 18 and 70–72 in docket ID number EPA–HQ–OPP–2008–0738.

For the purpose of the screening level dietary risk assessment to support this request for an exemption from the requirement of a tolerance for AAAPSDs, a conservative drinking water concentration value of 100 ppb based on screening level modeling was used to assess the contribution to drinking water for both the acute and chronic dietary risk assessments. These values were directly entered into the dietary exposure model.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). AAAPSDs are used as inert ingredients in pesticide products that are registered for specific uses that could result in indoor residential exposures and may have uses as inert ingredients in pesticide products that may result in outdoor residential exposures.

A screening level residential exposure and risk assessment was completed for products containing AAAPSDs as inert ingredients. In this assessment, representative scenarios, based on end-use product application methods and labeled application rates, were selected. For each of the use scenarios, the Agency assessed residential handler (applicator) inhalation and dermal exposure for use scenarios with high exposure potential (i.e., exposure scenarios with high-end unit exposure values) to serve as a screening assessment for all potential residential pesticides containing AAAPSDs. Similarly, residential postapplication dermal and oral exposure assessments were also performed utilizing high-end exposure scenarios. Further details of this residential exposure and risk analysis can be found at *http://www.regulations.gov* in document *JITF Inert Ingredients. Residential and Occupational Exposure Assessment Algorithms and Assumptions Appendix for the Human Health Risk Assessments to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations* in docket ID number EPA–HQ–OPP–2008–0710.

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

EPA has not found AAAPSDs to share a common mechanism of toxicity with any other substances, and AAAPSDs do not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that AAAPSDs do not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* The toxicity database consists of OPPTS Harmonized Guideline 870.3650 (combined repeated dose toxicity study with the reproduction/developmental toxicity screening test) studies in rats conducted with representative AAAPDs, as well as a 2–generation rat reproduction toxicity (OPPTS Harmonized Guideline 870.3800) study and a rat developmental toxicity study conducted with a representative AAASD.

In an OPPTS Harmonized Guideline 870.3650 study conducted with a representative AAAPD, no increased susceptibility to the offspring of rats following prenatal and postnatal exposure was observed. In a second OPPTS Harmonized Guideline 870.3650 study conducted with another representative AAAPD, there was evidence of increased qualitative susceptibility as indicated by the increased number of stillborn pups and pups dying within lactation day (LD) 4/5 and clinical observations (coldness to the touch, discolored heads, and a lack of nesting behavior) at 800 mg/kg/day where lesions in the forestomach and thymus atrophy was observed in the parental animals. However, this qualitative susceptibility seen in the OPPTS Harmonized Guideline 870.3650 study does not indicate a heightened risk for infants and children because a clear NOAEL (200 mg/kg/day) was established for developmental effects and an additional margin of safety is provided since the point of departure selected from the 2–generation rat reproduction study for chronic exposure is 87 mg/kg/day.

In a rat developmental study with AAASD, no maternal or developmental toxicity was observed at the limit dose. In the 2–generation reproduction study with AAASD, the only significant effects observed were liver effects

characterized by dose-related decrease in absolute and relative liver weight and an increased incidence in the number of animals with "minimal" hepatocyte necrosis in males. No treatment-related effects were observed on reproduction or in the offspring.

There are no residual uncertainties identified in the exposure databases. The food exposure assessments are considered to be conservative. The food and drinking water assessment is not likely to underestimate exposure to any subpopulation, including those comprised of infants and children.

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

i. The toxicity database for AAAPSDs is considered adequate for assessing the risks to infants and children (the available studies are described in Unit IV.D.2.).

ii. No susceptibility was demonstrated in the offspring in the reproductive/developmental screening test portion of an OPPTS Harmonized Guideline 870.3650 study with one AAAPD following prenatal and postnatal exposure at 800 mg/kg/day.

iii. Although increased qualitative susceptibility was demonstrated in the offspring in a reproductive/developmental screening test portion of an OPPTS Harmonized Guideline 870.3650 study with another AAAPD, the Agency did not identify any residual uncertainties after establishing toxicity endpoints and traditional UFs to be used in the risk assessment of the AAAPSDs.

iv. There is no indication that AAAPSDs are neurotoxic chemicals and thus there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

v. There are no residual uncertainties identified in the exposure databases. The food and drinking water assessment is not likely to underestimate exposure to any subpopulation, including those comprised of infants and children. The food exposure assessments are considered to be highly conservative as they are based on the use of the highest tolerance level from the surrogate pesticides for every food and 100 PCT is assumed for all crops. EPA also made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to AAAPSDs in drinking water. EPA used similarly conservative assumptions to assess postapplication exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by AAAPSDs.

E. Aggregate Risks and Determination of Safety

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

In conducting this aggregate risk assessment, the Agency has incorporated the petitioner's requested use limitations of AAAPSDs as inert ingredients in pesticide product formulations into its exposure assessment. Specifically the petition includes a use limitation of AAAPSDs at not more than 30% by weight in pesticide formulations.

1. *Acute risk.* An acute aggregate risk assessment takes into account exposure estimates from acute dietary consumption of food and drinking water. No adverse effects attributable to a single exposure to the AAAPSDs were seen in the toxicity databases, therefore, AAAPSDs are not expected to pose an acute risk.

2. *Chronic risk.* A chronic aggregate risk assessment takes into account exposure estimates from chronic dietary consumption of food and drinking water. Using the exposure assumptions discussed in this unit for chronic exposure, and the use limitations of not more than 30% by weight in pesticide formulations, the chronic dietary exposure from food and water to AAAPSDs is 13% of the cPAD for the U.S. population and 43% of the cPAD for children 1–2 yrs old, the most highly exposed population subgroup.

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

AAAPSDs are used as inert ingredients in pesticide products that are currently registered for uses that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to AAAPSDs.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures aggregated result in aggregate MOEs of 130 and 140, for adult males and females respectively, for a combined high-end dermal and inhalation handler exposure with a high-end postapplication dermal exposure and an aggregate MOE of 110 for children for a combined turf dermal exposure with hand-to-mouth exposure.

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

AAAPSDs are used as inert ingredients in pesticide products that are currently registered for uses that could result in intermediate-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with intermediate-term residential exposures to AAAPSDs.

Using the exposure assumptions described in this unit for intermediate-term exposures, EPA has concluded the combined intermediate-term food, water, and residential exposures aggregated result in aggregate MOEs of 270 and 280, for adult males and females respectively, for a combined high-end dermal and inhalation handler exposure with a high-end postapplication dermal exposure and an MOE of 110 for children for a combined high-end dermal exposure with hand-to-mouth exposure.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of structural alerts for carcinogenicity, AAAPSDs are not expected to pose a cancer risk to humans.

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

V. Other Considerations

A. Analytical Enforcement Methodology

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

B. International Residue Limits

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

VI. Conclusion

Therefore, exemptions from the requirement of a tolerance are established for residues of AAAPDs when used as inert ingredients in pesticide formulations applied to growing crops only under 40 CFR 180.920 and residues of AAASDs when used as inert ingredients in raw agricultural commodities, growing crops, and animals under 40 CFR 180.910, 40 CFR 180.920, and 40 CFR 180.930.

VII. Statutory and Executive Order Reviews

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

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

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

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

VIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: July 20, 2009.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. In § 180.910, the table is amended by adding alphabetically the following inert ingredients to read as follows:

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

* * * * *

Inert ingredients	Limits	Uses
* * * * *		
α-Alkyl(C_6–C_{15})-ω-hydroxypoly(oxyethylene)sulfate, and its ammonium, calcium, magnesium, potassium, sodium, and zinc salts, poly(oxyethylene) content averages 2–4 moles (CAS Reg. Nos. 3088–31–1, 9004–82–4, 9004–84–6, 13150–00–0, 25446–78–0, 26183–44–8, 32612–48–9, 50602–06–7, 62755–21–9, 68424–50–0, 68511–39–7, 68585–34–2, 68611–55–2, 68891–38–3, 73665–22–2).	Not to exceed 30% of pesticide formulation.	Surfactants, related adjuvants of surfactants
* * * * *		

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

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

* * * * *

Inert ingredients	Limits	Uses
* * * * *		
α-Alkyl (minimum C_6 linear, branched, saturated and/or unsaturated)-ω-hydroxypolyoxyethylene polymer with or without polyoxypropylene, mixture of di- and monohydrogen phosphate esters and the corresponding ammonium, calcium, magnesium, monoethanolamine, potassium, sodium, and zinc salts of the phosphate esters; minimum oxyethylene content is 2 moles; minimum oxypropylene content is 0 moles (CAS Reg. Nos. 9046–01–9, 37280–82–3, 39464–66–9, 42612–52–2, 50643–20–4, 52019–36–0, 58318–92–6, 60267–55–2, 61837–79–4, 67711–84–6, 68070–99–5, 68071–35–2, 68071–17–0, 68130–47–2, 68186–37–8, 68186–36–7, 68311–02–4, 68425–73–0, 68458–48–0, 68511–37–5, 68610–65–1, 68585–36–4, 68649–29–6, 68815–11–2, 68908–64–5, 68891–13–4, 73038–25–2, 78330–24–2, 108818–88–8, 154518–39–5, 317833–96–8, 873662–29–4, 936100–29–7, 936100–30–0).	Not to exceed 30% of pesticide formulation.	Surfactants, related adjuvants of surfactants
* * * * *		

■ 4. In § 180.930, the table is amended by adding alphabetically the following inert ingredients to read as follows:

§ 180.930 Inert ingredients applied to animals; exemptions from the requirement of a tolerance.

* * * * *

Inert ingredients	Limits	Uses
* * * * *		
α-Alkyl(C_6-C_{15})-ω-hydroxypoly(oxyethylene)sulfate, and its ammonium, calcium, magnesium, potassium, sodium, and zinc salts, poly(oxyethylene) content averages 2–4 moles (CAS Reg. Nos. 3088–31–1, 9004–82–4, 9004–84–6, 13150–00–0, 25446–78–0, 26183–44–8, 32612–48–9, 50602–06–7, 62755–21–9, 68424–50–0, 68511–39–7, 68585–34–2, 68611–55–2, 68891–38–3, 73665–22–2).	Not to exceed 30% of pesticide formulation.	Surfactants, related adjuvants of surfactants
* * * * *		

[FR Doc. E9–18033 Filed 7–28–09; 8:45 am]
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0046; FRL–8428–9]

N-alkyl (C_8-C_{18}) Primary Amines and Acetate Salts; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of N-alkyl (C_8-C_{18}) primary amines and acetate salts where the alkyl group is linear and may be saturated and/or unsaturated, herein referred to in this document as NAPAAS, when used as inert ingredients for pre-harvest uses under 40 CFR 180.920 at a maximum concentration in formulated end-use products of 10% by weight in herbicide products, 4% by weight in insecticide products, and 4% by weight in fungicide products. The Joint Inerts Task Force (JITF), Cluster Support Team Number 25 (CST 25), submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of NAPAAS.

DATES: This regulation is effective July 29, 2009. Objections and requests for hearings must be received on or before September 28, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0046. 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: Kerry Leifer, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8811; e-mail address: *leifer.kerry@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 those engaged in the following activities:

- 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 to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System

(NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

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

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0046 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before September 28, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2009–0046, by one of the following methods:

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

II. Background

In the **Federal Register** of March 4, 2009 (74 FR 9397) (FRL–8401–8), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9E7519) by The Joint Inerts Task Force (JITF), Cluster Support Team 25 (CST 25), c/o CropLife America, 1156 15th Street, N.W., Suite 400, Washington, DC 20005. The petition requested that 40 CFR 180.920 be amended by establishing exemptions from the requirement of a tolerance for residues of the inert ingredients N-alkyl (C_8-C_{18}) primary amines and acetate salts where the alkyl group is linear and may be saturated and/or unsaturated (NAPAAS). Concentration in formulated end-use products not to exceed 8% by weight in herbicide products, 5% by weight in insecticide products, and 30% by weight in fungicide products. That notice referenced a summary of the petition prepared by JITF, CST 25, the petitioner, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has modified the exemption requested by changing the use limitations in pesticide products as follows: A maximum concentration in formulated end-use products of 10% by weight in herbicide products, 4% by weight in insecticide products, and 4% by weight in fungicide products. These limitations are based on the Agency's risk assessment which can be found at *http://www.regulations.gov*, in document N-alkyl (C_8-C_{18}) Primary Amines and Acetate Salts (NAPAAS - JITF CST 25 Inert Ingredients). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations, in docket ID number EPA–HQ–OPP–2009–0046.

This petition was submitted in response to a final rule of August 9, 2006 (71 FR 45415) (FRL–8084–1) in which the Agency revoked, under section 408(e)(1) of the FFDCA, the existing exemptions from the requirement of a tolerance for residues of certain inert ingredients because of insufficient data to make the determination of safety required by FFDCA section 408(b)(2). The expiration date for the tolerance exemptions subject to revocation was August 9, 2008, which was later extended to August 9, 2009 (73 FR 45311) (FRL–8372–7) to allow for data to be submitted to support the establishment of tolerance exemptions for these inert ingredients prior to the effective date of the tolerance exemption revocation.

III. Inert Ingredient Definition

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

IV. Aggregate Risk Assessment and Determination of Safety

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

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for exemption from the requirement of a tolerance for residues of NAPAAS provided that the concentration of the NAPAAS inerts are limited in formulated end-use product to no more than 10% by weight in herbicide products, 4% by weight in insecticide products, and 4% by weight in fungicide products. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The available mammalian toxicology database for NAPAAS consists of one OPPTS Harmonized Guideline 870.3650 (combined repeated dose toxicity study with the reproduction/developmental toxicity screening test in rats); acute oral, dermal, and eye toxicity data; and *in vitro* mutagenicity data.

NAPAAS are not acutely toxic by the oral route of exposure but are corrosive to the skin and are severe eye irritants. There is no clear target organ identified for NAPAAS inert compounds. In the OPPTS Harmonized Guideline 870.3650 study on the representative surfactant, treatment-related microscopic lesions were observed in both sexes, which included histomorphologic changes in the stomach (hyperplasia and hyperkeratosis of the squamous mucosa of the forestomach), and erosions, ulcers, inflammatory cell infiltrations, and/or edema in the submucosa of the forestomach and glandular areas of the mucosa. The accumulation of macrophages was most prevalent in the mesenteric lymph nodes and small intestine where they were large with an abundant amount of pale foamy cytoplasm. In the mesenteric lymph node and liver, coalescence of the large macrophages occurred forming microgranulomas. Thymic atrophy was observed in both sexes. Histologically, the thymus was smaller due to a decrease in the amount of cortical lymphocytes, which may be an indirect or secondary phenomenon, as thymic atrophy often occurs in animals under stress. No evidence of potential neurotoxicity was observed in the females, and the reduced motor activity observed in the high-dose males was considered to be secondary to the gastrointestinal irritation and general malaise and not a neurotoxic effect.

There was no evidence of increased susceptibility to the offspring following prenatal and postnatal (four days) exposure and reproductive toxicity was not observed. There is no evidence of mutagenicity or carcinogenicity.

Primary amines and primary amine acetates are biologically equivalent and follow the same metabolic pathways of oxidation by monoamine oxidases to generate the C_8-C_{18} fatty acid and ammonia. The fatty acid would be degraded by well-known pathways (β-oxidation) to successive releases of acetic acid, which enters into intermediary metabolism or is metabolized ultimately to carbon dioxide and water. The CST 25 NAPAAS primary amines and primary amine acetate salt may also be conjugated, whether by glucuronidation or sulfonation, and excreted directly.

There are no chronic toxicity studies available for this series of surfactants. The Agency used a qualitative structure activity relationship (SAR) database, DEREK 11, to determine if there were structural alerts suggestive of carcinogenicity. No structural alerts were identified.

Specific information on the studies received and the nature of the adverse effects caused by the NAPAAS, as well as, the no observed adverse effect level (NOAEL) and the lowest observed adverse effect level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document N-alkyl (C_8-C_{18}) Primary Amines and Acetate Salts (NAPAAS - JITF CST 25 Inert Ingredients). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations at pp. 8–12 and pp. 19–22 in docket ID number EPA–HQ–OPP–2009–0046.

B. Toxicological Endpoints

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

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

A summary of the toxicological endpoints for the NAPAAS used for human health risk assessment is shown in Table 1. below:

TABLE 1.—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR THE NAPAAS FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors[1]	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (all populations)	No appropriate endpoint was identified for acute dietary assessment		
Chronic dietary (all populations)	NOAEL= 5 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 0.05 mg/kg/day cPAD = 0.05 mg/kg/day	OPPTS harmonized guideline 870.3650 reproduction/developmental screen in rats LOAEL = 20 mg/kg/day, based on microscopic lesions in the stomach, jejunum, thymus, and lymph nodes in both sexes
Incidental oral short- (1–30 days) and intermediate term (1–6 months)	Oral NOAEL= 5 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 1x 5% dermal and 100% inhalation absorption assumed	Residential LOC for MOE = 100	OPPTS harmonized guideline 870.3650 reproduction/developmental screen in rats LOAEL = 20 mg/kg/day, based on microscopic lesions in the stomach, jejunum, thymus, and lymph nodes in both sexes
Cancer (oral, dermal, inhalation)	Classification: No animal toxicity data available for an assessment. Based on SAR analysis, the NAPAAS are not expected to be carcinogenic		

[1]Point of departure (POD) = A data point or an estimated point that is derived from observed dose-response data and used to mark the beginning of extrapolation to determine risk associated with lower environmentally relevant human exposures. NOAEL = no observed adverse effect level. LOAEL = lowest observed adverse effect level. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). PAD = population adjusted dose (a = acute, c = chronic). FQPA SF = FQPA safety factor. RfD = reference dose. MOE = margin of exposure. LOC = level of concern. N/A = not applicable.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to the NAPAAS, EPA considered exposure under the petitioned-for exemption from the requirement of a tolerance. EPA assessed dietary exposures from NAPAAS in food as follows:

i. *Acute exposure.* No adverse effects attributable to a single exposure of the NAPAAS inerts were seen in the toxicity databases; therefore, an acute exposure assessment for the NAPAAS is not necessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment, EPA used food consumption information from the United States Department of Agriculture (USDA) (1994–1996 and 1998) Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, no residue data were submitted for the NAPAAS. In the absence of specific residue data, EPA has developed an approach which uses surrogate information to derive upper bound exposure estimates for the subject inert ingredient. Upper bound exposure estimates are based on the highest tolerance for a given commodity from a list of high-use insecticides, herbicides, and fungicides. A complete description of the general approach taken to assess inert ingredient risks in the absence of residue data is contained in the memorandum entitled "Alkyl Amines Polyalkoxylates (Cluster 4): Acute and Chronic Aggregate (Food and Drinking Water) Dietary Exposure and Risk Assessments for the Inerts." (D361707, S. Piper, 2/25/09) and can be found at *http://www.regulations.gov* in docket ID number EPA–HQ–OPP–2008–0738.

In the dietary exposure assessment, the Agency assumed that the residue level of the inert ingredient would be no higher than the highest tolerance for a given commodity. Implicit in this assumption is that there would be similar rates of degradation (if any) between the active and inert ingredient and that the concentration of inert ingredient in the scenarios leading to these highest of tolerances would be no higher than the concentration of the active ingredient.

The Agency believes the assumptions used to estimate dietary exposures lead to an extremely conservative assessment of dietary risk due to a series of compounded conservatisms. First, assuming that the level of residue for an inert ingredient is equal to the level of residue for the active ingredient will overstate exposure. The concentrations of active ingredient in agricultural products is generally at least 50% of the product and often can be much higher. Further, pesticide products rarely have a single inert ingredient; rather there is generally a combination of different inert ingredients used which additionally reduces the concentration of any single inert ingredient in the pesticide product in relation to that of the active ingredient. In the case of NAPAAS, EPA made a specific adjustment to the dietary exposure assessment to account for the use limitations of the amount of NAPAAS that may be in formulations (4% by weight in fungicide products) and assumed that the NAPAAS are present at the maximum limitation rather than at equal quantities with the active ingredient. The Agency does not expect that allowing a maximum of 10% in the final formulation for herbicides only will have a significant impact on the dietary exposure. Across the board it appears that selecting the highest fungicide tolerance and correcting for its limitation to 4% by weight as a maximum in the final formulation, results in a higher residue input into the dietary risk assessment than selecting the highest herbicide tolerance and correcting for 10% by weight as a maximum in the final formulation. This remains a very conservative assumption because surfactants are generally used at levels far below this percentage. For example, EPA examined several of the pesticide products associated with the tolerance/commodity combination which are the driver of the risk assessment and found that these products did not contain surfactants at levels greater than 2.25% and that none of the surfactants were NAPAAS.

Second, the conservatism of this methodology is compounded by EPA's decision to assume that, for each commodity, the active ingredient which will serve as a guide to the potential level of inert ingredient residues is the active ingredient with the highest tolerance level. This assumption overstates residue values because it would be highly unlikely, given the

high number of inert ingredients, that a single inert ingredient or class of ingredients would be present at the level of the active ingredient in the highest tolerance for every commodity. Finally, a third compounding conservatism is EPA's assumption that all foods contain the inert ingredient at the highest tolerance level. In other words, EPA assumed 100% of all foods are treated with the inert ingredient at the rate and manner necessary to produce the highest residue legally possible for an active ingredient. In summary, EPA chose a very conservative method for estimating what level of inert residue could be on food, then used this methodology to choose the highest possible residue that could be found on food and assumed that all food contained this residue. No consideration was given to potential degradation between harvest and consumption even though monitoring data shows that tolerance level residues are typically one to two orders of magnitude higher than actual residues in food when distributed in commerce.

Accordingly, although sufficient information to quantify actual residue levels in food is not available, the compounding of these conservative assumptions will lead to a significant exaggeration of actual exposures. EPA does not believe that this approach underestimates exposure in the absence of residue data.

iii. *Cancer.* The Agency used a qualitative SAR database, DEREK11, to determine if there were structural alerts suggestive of carcinogenicity. No structural alerts for carcinogenicity were identified. The Agency has not identified any concerns for carcinogenicity relating to the inerts NAPAAS. Therefore a cancer dietary exposure assessment is not necessary to assess cancer risk.

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for NAPAAS. Tolerance level residues and/or 100% crop treated were assumed for all food commodities.

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

A screening level drinking water analysis, based on the Pesticide Root Zone Model /Exposure Analysis Modeling System (PRZM/EXAMS) was performed to calculate the estimated drinking water concentrations (EDWCs) of NAPAAS. Modeling runs on four surrogate inert ingredients using a range of physical chemical properties that would bracket those of the NAPAAS were conducted. Modeled acute drinking water values ranged from 0.001 parts per billion (ppb) to 41 ppb. Modeled chronic drinking water values ranged from 0.0002 ppb to 19 ppb. Further details of this drinking water analysis can be found at *http://www.regulations.gov* in the document N-alkyl (C_8-C_{18}) Primary Amines and Acetate Salts (NAPAAS - JITF CST 25 Inert Ingredients). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations at pp. 13 and 25–27 in docket ID number EPA–HQ–OPP–2009–0046.

For the purpose of the screening level dietary risk assessment to support this request for an exemption from the requirement of a tolerance for the NAPAAS, a conservative drinking water concentration value of 100 ppb based on screening level modeling was used to assess the contribution to drinking water for the chronic dietary risk assessments for parent compounds and for the metabolites of concern. These values were directly entered into the dietary exposure model.

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

The Agency has reviewed the submitted petition as well as all available data on the use of these inert ingredients in pesticide formulations, and concludes that the NAPAAS inerts are not used in formulations that would be applied in and around the home or in a way that would result in residential exposures; therefore, a residential exposure risk assessment is not necessary for the NAPAAS inerts.

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

EPA has not found NAPAAS to share a common mechanism of toxicity with any other substances, and NAPAAS do not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that NAPAAS do not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* In the case of the NAPAAS, there was no increased susceptibility to the offspring of rats following prenatal and post-natal exposure in the OPPTS Harmonized Guideline 870.3650 reproductive/developmental screening study. Decreased pup body weight was observed at 40 and 80 mg/kg/day where maternal/paternal toxicity was manifested as microscopic lesions in the stomach, jejunum, thymus, and lymph nodes at 20, 40, and 80 mg/kg/day. Since the rat reproduction/developmental study identified a clear NOAEL of 20 mg/kg/day for offspring effects, and the selected point of departure of 5 mg/kg/day (parental NOAEL for stomach/jejunum/thymus/lymph node lesions) for the dietary risk assessment is protective of the offspring effects, there are no residual concerns.

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

i. The toxicity database for the NAPAAS inerts is considered adequate for assessing the risks to infants and children. The toxicity data available on

the NAPAAS consists of one OPPTS Harmonized Guideline 870.3650 combined repeated dose toxicity study with the reproduction/development toxicity screening test (rat); acute oral, dermal, and eye toxicity data; and *in vitro* mutagenicity data. The Agency noted changes in thymus weight and thymus atrophy. However, these were determined to be non-specific changes not indicative of immunotoxicity. In addition, no blood parameters were affected. Furthermore, these compounds do not belong to a class of chemicals that would be expected to be immunotoxic. Therefore, these identified effects do not raise a concern necessitating an additional uncertainty.

ii. No quantitative or qualitative increased susceptibility was demonstrated in the offspring in the OPPTS Harmonized Guideline 870.3650 combined repeated dose toxicity study with the reproduction/developmental toxicity screening test in rats following prenatal and postnatal exposure.

iii. Although the available mammalian toxicity database does not include any chronic toxicity data, the effects observed in the parental animals following gavage dosing are mainly portal-of-entry effects (stomach irritation), and gavage dosing is not a relevant exposure condition in humans. The effects observed would not be expected to occur at a lower dose with increased duration of exposure under relevant exposure conditions. Also, based on the very conservative exposure assessment, the 10X interspecies and 10X intraspecies uncertainty factor would be adequately protective, and no additional uncertainty factor is needed for extrapolating from subchronic to chronic exposure.

iv. No neurotoxicity was demonstrated in the OPPTS Harmonized Guideline 870.3650 study. Thus, there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

v. There are no residual uncertainties identified in the exposure databases. The food and drinking water assessment is not likely to underestimate exposure to any subpopulation, including those comprised of infants and children. The food exposure assessments are considered to be highly conservative as they are based on the use of the highest tolerance level from the surrogate pesticides for every food and 100% crop treated is assumed for all crops. EPA also made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to NAPAAS in drinking water. These assessments will not underestimate the exposure and risks posed by NAPASS.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. The aPAD and cPAD represent the highest safe exposures, taking into account all appropriate SFs. EPA calculates the aPAD and cPAD by dividing the POD by all applicable UFs. For linear cancer risks, EPA calculates the probability of additional cancer cases given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the POD to ensure that the MOE called for by the product of all applicable UFs is not exceeded. No residential aggregate exposure assessment was conducted because no residential uses for NAPAAS are anticipated. Therefore, the aggregate risk for these inerts includes exposures through food and drinking water only.

1. *Acute risk.* There was no hazard attributable to a single exposure seen in the toxicity database for NAPAAS. Therefore, the NAPAAS are not expected to pose an acute risk.

2. *Chronic risk.* A chronic aggregate risk assessment takes into account exposure estimates from chronic dietary consumption of food and drinking water using the exposure assumptions discussed in this unit for chronic exposure and the use limitations to no more than 4% in fungicide and insecticide formulations and 10% in herbicide formulations, the chronic dietary exposure from food and water to NAPAAS is 36% of the cPAD for the U.S. population and 106% of the cPAD for children 1–2 yrs old, the most highly exposed population subgroup. While the Agency notes that the risk for children is slightly above a cPAD of 100%, given the exceptionally conservative nature of the exposure assessment detailed above, the Agency believes that actual risks are significantly lower and are not of concern.

3. *Aggregate cancer risk for U.S. population.* The Agency has not identified any concerns for carcinogenicity relating to NAPAAS.

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

V. Other Considerations

A. Analytical Enforcement Methodology

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

B. International Residue Limits

The Agency is not aware of any country requiring a tolerance for NAPAAS nor have any CODEX maximum residue levels been established for any food crops at this time.

VI. Conclusion

Therefore, an exemption from the requirement of a tolerance is established for residues of N-alkyl (C_8-C_{18}) primary amines and acetate salts where the alkyl group is linear and may be saturated and/or unsaturated when used as inert ingredients for pre-harvest uses under 40 CFR 180.920 at a maximum concentration in formulated end-use products of 10% by weight in herbicide products, 4% by weight in insecticide products, and 4% by weight in fungicide products.

VII. Statutory and Executive Order Reviews

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

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule,

the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

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

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

VIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: July 21, 2009.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR part 180 is amended as follows:

PART 180—[AMENDED]

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

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

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

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

* * * * *

Inert ingredients	Limits	Uses
* * *	* *	
N-alkyl (C_8-C_{18}) primary amines and their acetate salts where the alkyl group is linear and may be saturated and/or unsaturated (CAS Reg. Nos. 61790–57–6, 61790–58–7, 61790–59–8, 61790–60–1, 61788–46–3, 61790–33–8, 68155–38–4).	Concentration in formulated end-use products not to exceed 10% by weight in herbicide products, 4% by weight in insecticide products, and 4% by weight in fungicide products..	Surfactants, related adjuvants of surfactants
* * *	* *	

[FR Doc. E9–18076 Filed 7–28–09; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0098; FRL–8425–5]

Sodium Salts of N-alkyl (C_8-C_{18})-beta-iminodipropionic acid; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of sodium salts of N-alkyl (C_8-C_{18})-beta-iminodipropionic acid where the C_8-C_{18} is linear and may be saturated and/or unsaturated, herein referred to in this document as SSNAs when used as an inert ingredient for pre-harvest uses under 40 CFR 180.920 at a maximum of 30% by weight in pesticide formulations. The Joint Inerts Task Force (JITF), Cluster Support Team Number 14, submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of SSNAs.

DATES: This regulation is effective July 29, 2009. Objections and requests for hearings must be received on or before September 28, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0098. 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: Kerry Leifer, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8811; e-mail address: *leifer.kerry@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 those engaged in the following activities:

- 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 to provide 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 EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR cite at *http://www.gpoaccess.gov/ecfr*. To access the OPPTS Harmonized Guidelines referenced in this document, go directly to the guidelines at *http://www.epa.gov/opptsfrs/home/guidelin.htm*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0098 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before September 28, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2009–0098, by one of the following methods:

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

II. Background

In the **Federal Register** of April 15, 2009 (74 FR 17487) (FRL–8409–7), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9E7525) by The Joint Inerts Task Force, Cluster Support Team 14 (CST 14), c/o CropLife America, 1156 15th St., NW., Suite 400, Washington, DC, 20005. The petition requested that 40 CFR 180.920 be amended by establishing exemptions from the requirement of a tolerance for residues of the inert ingredient Sodium salts of N-alkyl (C_8-C_{18})-beta-iminodipropionic acid where the C_8-C_{18} is linear and may be saturated and/or unsaturated. That notice referenced a summary of the petition prepared by The Joint Inerts Task Force (JITF), Cluster Support Team Number 14 (CST 14), the petitioner, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has modified the exemption requested to by limiting SSNAs to a maximum of 30% by weight in pesticide formulations. This limitation is based on the Agency's risk assessment which can be found at *http://www.regulations.gov* in document "Sodium Salts of N-Alkyl (C_8-C_{18})-β-iminodipropionic Acid (SSNAs - JITF CST 14 Inert Ingredients). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations" in docket ID number EPA–HQ–OPP–2009–0098.

This petition was submitted in response to a final rule of August 9, 2006, (71 FR 45415) in which the Agency revoked, under section 408(e)(1) of the Federal Food, Drug, and Cosmetic Act (FFDCA), the existing exemptions from the requirement of a tolerance for residues of certain inert ingredients because of insufficient data to make the determination of safety required by FFDCA section 408(b)(2). The expiration date for the tolerance exemptions subject to revocation was August 9, 2008, which was later extended to August 9, 2009 (73 FR 45312) to allow for data to be submitted to support the establishment of tolerance exemptions for these inert ingredients prior to the effective date of the tolerance exemption revocation.

III. Inert Ingredient Definition

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

IV. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement of a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA

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

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for exemption from the requirement of a tolerance for residues of sodium salts of N-alkyl (C_8-C_{18})-beta-iminodipropionic acid where the C_8-C_{18} is linear and may be saturated and/or unsaturated provided that the concentration of the SSNA inerts is limited to no more than 30% by weight in pesticide formulations. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The available toxicity data indicate that the SSNAs have low acute oral and dermal toxicity, are potentially corrosive to the skin, and are also mild to moderate eye irritants. In the OPPTS Harmonized Guideline 870.3650 study with sodium coco β-iminodipropionate in rats, decreased food consumption and body weight gain in males and females at 160 and 600 miligrams/kilograms body weight day (mg/kg bw/day) were observed. Mean liver and kidney weights were increased at the high dose, while testis and epididymides were unaffected. Hypertrophy was found in the livers of males and/or females at the mid- and high-doses as well as renal histopathology in males, acanthosis of the non-glandular stomach in males and females, and inflammation of the glandular and non-glandular stomach in females. In the absence of any evidence of hepatic toxicity, liver hypertrophy was considered an adaptive effect and non-adverse.

No reproduction or developmental effects were noted in the database and there was no evidence of neurotoxicity.

In general, surfactants are surface-active materials that can damage the structural integrity of cellular membranes at high dose levels. Thus, surfactants are often corrosive and irritating in concentrated solutions. It is possible that some of the observed toxicity seen in the repeated studies, such as inflammation of the glandular stomach, can be attributed to the corrosive and irritating nature of these surfactants.

There are no published metabolism studies for this series of surfactants. The SSNA mammalian metabolism pathway is based on analogy to well-described pathways for tertiary amines and fatty acids. Overall it is anticipated that the various metabolites are not systemically toxic and would be rapidly conjugated and excreted.

The SSNA surfactants (mono and di-sodium propionates) may be conjugated and excreted directly. Alternatively, the tertiary amine dipropionate may be oxidized in the liver by monoamine oxidases to generate the intact tertiary amine dipropionate N-oxide which may either be conjugated and excreted or metabolically cleaved to a dipropionate oxime type metabolite that is conjugated and excreted. The linear fatty acid is metabolized via successive beta-oxidation cycles to release acetic acid and eventually carbon dioxide and water.

There are no chronic toxicity studies available for this series of nonionic surfactants. The Agency used a qualitative structure activity relationship (SAR) database, DEREK Version 11, to determine if there were structural alerts suggestive of carcinogenicity. No structural alerts were identified.

Specific information on the studies received and the nature of the adverse effects caused by the SSNAs, as well as, the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document "Sodium Salts of N-Alkyl (C_8-C_{18})-β-iminodipropionic Acid (SSNAs - JITF CST 14 Inert Ingredients). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations" pages 8-13 and 46-49 in docket ID number EPA–HQ–OPP–2009–0098.

B. Toxicological Endpoints

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

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

A summary of the toxicological endpoints for the SSNAs used for

human health risk assessment is shown in the Table 1 below:

TABLE 1.—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR THE SSNAS FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/Scenario	Point of Departure and Uncertainty/Safety Factors	RfD, PAD, LOC for Risk Assessment	Study and Toxicological Effects
Acute dietary	An effect attributable to a single exposure was not identified.		
Chronic dietary	NOAEL= 43 mg/kg/day UF_A = 10x UF_H = 10x $FQPA_{SF}$ = 1x	Chronic RfD =0.43 mg/kg/day cPAD = 0.43 mg/kg/day	Combined Repeated Dose Toxicity Study with the Reproduction Developmental Toxicity Screening Test-Rat OPPTS Harmonized Guideline 870.3650 (CAS Reg. No. 3655–00–3) Parental LOAEL= 160 mg/kg/day based on decreased body weight gain in males and females during the pre-mating period, and an increased incidence of microscopic lesions in the kidneys of males and acanthosis of the glandular and non-glandular stomachs of females. Reproductive/Developmental LOAEL was not observed.
Incidental Oral, Dermal and Inhalation (Short- and Intermediate-, and Long- Term)	NOAEL= 43 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF =1x 5 PCT dermal and 100 PCT inhalation absorption assumed	Residential LOC for MOE = 100	Combined Repeated Dose Toxicity Study with the Reproduction/Developmental Toxicity screening Test- Rat OPPTS Harmonized Guideline 870.3650 (Cas Reg. No. 3655-00-3). Parental LOAEL = 160 mg/kg/day based on decreased body weight gain in males and females during the pre-mating period and an increased incidence of microscopic lesions in the kidneys of males and acanthosis of the glandular and non-glandular stomachs of females. Reproductive/Developmental LOAEL was not observed.
Cancer (oral, dermal, inhalation)	Classification: No animal toxicity data available for an assessment. Based on SAR analysis, the SSNAs are not expected to be carcinogenic.		

Point of Departure (POD) = A data point or an estimated point that is derived from observed dose-response data and used to mark the beginning of extrapolation to determine risk associated with lower environmentally relevant human exposures. NOAEL = no observed adverse effect level. LOAEL = lowest observed adverse effect level. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). PAD = population adjusted dose (a=acute, c=chronic). FQPA SF = FQPA Safety Factor. RfD = reference dose. MOE = margin of exposure. LOC = level of concern. N/A = not applicable.

C. Exposure Assessment.

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to the SSNAs, EPA considered exposure under the petitioned-for exemption from the requirement of a tolerance. EPA assessed dietary exposures from SSNAs in food as follows:

i. *Acute exposure.* No adverse effects attributable to a single exposure of the SSNAs was seen in the toxicity databases; therefore, an acute exposure assessment for the SSNAs is not necessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment, EPA used food consumption information from the United States Department of Agriculture (USDA) (1994–1996 and 1998) Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, no residue data were submitted for SSNAs. In the absence of specific residue data, EPA has developed an approach which uses surrogate information to derive upper bound exposure estimates for the subject inert ingredient. Upper bound exposure estimates are based on the highest tolerance for a given commodity from a list of high-use insecticides, herbicides, and fungicides. A complete description of the general approach taken to assess inert ingredient risks in the absence of residue data is contained in the memorandum entitled "Alkyl Amines Polyalkoxylates (Cluster 4): Acute and Chronic Aggregate (Food and Drinking Water) Dietary Exposure and

Risk Assessments for the Inerts." (D361707, S. Piper, 2/25/09) and can be found at *http://www.regulations.gov* in docket ID number EPA–HQ–OPP–2008–0738.

In the dietary exposure assessment, the Agency assumed that the residue level of the inert ingredient would be no higher than the highest tolerance for a given commodity. Implicit in this assumption is that there would be similar rates of degradation (if any) between the active and inert ingredient and that the concentration of inert ingredient in the scenarios leading to these highest of tolerances would be no higher than the concentration of the active ingredient.

The Agency believes the assumptions used to estimate dietary exposures lead to an extremely conservative assessment of dietary risk due to a series of compounded conservatisms. First, assuming that the level of residue for an inert ingredient is equal to the level of residue for the active ingredient will overstate exposure. The concentrations of active ingredient in agricultural products is generally at least 50 percent of the product and often can be much higher. Further, pesticide products rarely have a single inert ingredient; rather there is generally a combination of different inert ingredients used which additionally reduces the concentration of any single inert ingredient in the pesticide product in relation to that of the active ingredient. In the case of the SSNAs, EPA made a specific adjustment to the dietary exposure assessment to account for the use limitations of the amount of SSNAs that may be in formulations (no more than 30% by weight in pesticide formulations) and assumed that the SSNAs are present at the maximum limitation rather than at equal quantities with the active ingredient. This remains a very conservative assumption because surfactants are generally used at levels far below this percentage.

Second, the conservatism of this methodology is compounded by EPA's decision to assume that, for each commodity, the active ingredient which will serve as a guide to the potential level of inert ingredient residues is the active ingredient with the highest tolerance level. This assumption overstates residue values because it would be highly unlikely, given the high number of inert ingredients, that a single inert ingredient or class of ingredients would be present at the level of the active ingredient in the highest tolerance for every commodity. Finally, a third compounding conservatism is EPA's assumption that all foods contain the inert ingredient at the highest tolerance level. In other words, EPA assumed 100% of all foods are treated with the inert ingredient at the rate and manner necessary to produce the highest residue legally possible for an active ingredient. In summary, EPA chose a very conservative method for estimating what level of inert residue could be on food, then used this methodology to choose the highest possible residue that could be found on food and assumed that all food contained this residue. No consideration was given to potential degradation between harvest and consumption even though monitoring data shows that tolerance level residues are typically one to two orders of magnitude higher than actual residues in food when distributed in commerce.

Accordingly, although sufficient information to quantify actual residue levels in food is not available, the compounding of these conservative assumptions will lead to a significant exaggeration of actual exposures. EPA does not believe that this approach underestimates exposure in the absence of residue data.

iii. *Cancer.* The Agency used a qualitative structure activity relationship (SAR) database, DEREK11, to determine if there were structural alerts suggestive of carcinogenicity. No structural alerts for carcinogenicity were identified. SSNAs are not expected to be carcinogenic. Therefore a cancer dietary exposure assessment is not necessary to assess cancer risk.

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for SSNAs. Tolerance level residues and/or 100% were assumed for all food commodities.

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

A screening level drinking water analysis, based on the Pesticide Root Zone Model /Exposure Analysis Modeling System (PRZM/EXAMS) was performed to calculate the estimated drinking water concentrations (EDWCs) of SSNAs. Modeling runs on four surrogate inert ingredients using a range of physical chemical properties that would bracket those of the SSNAs were conducted. Modeled acute drinking water values ranged from 0.001 ppb to 41 ppb. Modeled chronic drinking water values ranged from 0.0002 ppb to 19 ppb. Further details of this drinking water analysis can be found at *http://www.regulations.gov* in the document "Sodium Salts of N-Alkyl (C_8-C_{18})-β-iminodipropionic Acid (SSNAs - JITF CST 14 Inert Ingredients). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations" pages 13-14 and 51-53 in docket ID number EPA–HQ–OPP–2009–0098.

For the purpose of the screening level dietary risk assessment to support this request for an exemption from the requirement of a tolerance for the SSNAs, a conservative drinking water concentration value of 100 ppb based on screening level modeling was used to assess the contribution to drinking water for the chronic dietary risk assessments for parent compounds and for the metabolites of concern. These values were directly entered into the dietary exposure model.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). SSNAs may be used as inert ingredients in pesticide products that are registered for specific uses that may result in both indoor and outdoor residential exposures.

A screening level residential exposure and risk assessment was completed for products containing the SSNAs as inert ingredients. In this assessment, representative scenarios, based on end-use product application methods and labeled application rates, were selected. For each of the use scenarios, the Agency assessed residential handler (applicator) inhalation and dermal exposure for indoor and outdoor scenarios with high exposure potential (i.e., exposure scenarios with high end unit exposure values) to serve as a screening assessment for all potential residential pesticides containing SSNAs. Similarly, residential post application dermal and oral exposure assessments were also performed utilizing high end indoor and outdoor exposure scenarios. Further details of this residential exposure and risk analysis can be found at *http://www.regulations.gov* in the memorandum entitled "JITF Inert Ingredients. Residential and Occupational Exposure Assessment

Algorithms and Assumptions Appendix for the Human Health Risk Assessments to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations" (D364751, 5/7/09, Lloyd/LaMay in docket ID number EPA–HQ–OPP–2008–0710.

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

EPA has not found SSNAs to share a common mechanism of toxicity with any other substances, and SSNAs do not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that SSNAs do not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* The toxicology database is adequate to assess risk for the SSNAs when used as inert ingredients in pesticide formulations. The toxicity data available on the SSNAs consists of one OPPTS Harmonized Guideline 870.3650 combined repeated dose toxicity study with the reproduction/development toxicity screening test (rat) for the representative surfactant, sodium coco beta-iminodipropionate (CAS Reg. No. 3655–00–3). There was no evidence of increased sensitivity in young animals because no developmental or reproductive toxicity was observed in the OPPTS Harmonized Guideline 870.3650. No treatment related effects were observed on litter sizes or on the early development of pups.

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

i. The toxicity database for SSNAs is considered adequate for assessing the risks to infants and children (the available studies are described in Unit 4.D.2.

ii. No quantitative or qualitative increased susceptibility was demonstrated in the offspring in the OPPTS Harmonized Guideline 870.3650 combined repeated dose toxicity study with the reproduction/developmental toxicity screening test in rats following *in utero* and post-natal exposure.

iii. While there is no chronic toxicity data, the Agency has concluded that an additional uncertainty factor is not needed for the use of a subchronic study for a chronic exposure assessment based on the minor nature of effects which were seen only at the mid- and high-doses as well as the highly conservative nature of the exposure assessment. The conservative point of departure selected along with the standard uncertainty factor of 100X to account for inter- and intra-species variability is considered health protective.

iv. There are no neurotoxicity studies available for this series of nonionic surfactants. However a Functional Observation Battery (FOB) to evaluate neurotoxicity was performed in the Combined Repeated Dose/Developmental Screening study and only a minor decrease in temperature was observed in males at the mid and high doses. The effect was likely due to normal biological variation and; therefore, was not considered treatment-related. Thus, there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

v. There are no residual uncertainties identified in the exposure databases. The food and drinking water assessment is not likely to underestimate exposure to any subpopulation, including those comprised of infants and children. The food exposure assessments are considered to be highly conservative as they are based on the use of the highest tolerance level from the surrogate pesticides for every food and 100 PCT is assumed for all crops. EPA also made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to SSNAs in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by SSNAs.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* There was no hazard attributable to a single exposure seen in the toxicity database for SSNAs. Therefore, the SSNAs are not expected to pose an acute risk.

2. *Chronic risk.* A chronic aggregate risk assessment takes into account exposure estimates from chronic dietary consumption of food and drinking water using the exposure assumptions discussed in this unit for chronic exposure and the use limitations of not more than 30% by weight in pesticide formulations, the chronic dietary exposure from food and water to SSNAs is 27% of the cPAD for the U.S. population and 87% of the cPAD for children 1-2 yrs old, the most highly exposed population subgroup.

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

SSNAs are used as inert ingredients in pesticide products that are currently registered for uses that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to SSNAs. Using the exposure assumptions described in this unit, EPA has concluded that the combined short-term aggregated food, water, and residential exposures result in aggregate MOEs of 160 for both adult males and females

respectively. EPA has concluded the combined short-term aggregated food, water, and residential exposures result in an aggregate MOE of 100 for children. As the level of concern is for MOEs that are lower than 100, these MOEs are not of concern.

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

SSNAs are currently registered for uses that could result in intermediate -term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with intermediate-term residential exposures to SSNAs. Using the exposure assumptions described in this unit, EPA has concluded that the combined intermediate-term aggregated food, water, and residential exposures result in aggregate MOEs of 430 and 450, for adult males and females, respectively. EPA has concluded the combined intermediate-term aggregated food, water, and residential exposures result in an aggregate MOE of 110 for children. As the level of concern is for MOEs that are lower than 100, this MOE is not of concern.

5. *Aggregate cancer risk for U.S. population.* The Agency has not identified any concerns for carcinogenicity relating to SSNAs.

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

V. Other Considerations

A. Analytical Enforcement Methodology

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

B. International Residue Limits

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

VI. Conclusion

Therefore, an exemption from the requirement of a tolerance is established for residues of sodium salts of N-alkyl (C_8-C_{18})-beta-iminodipropionic acid where the C_8-C_{18} is linear and may be saturated and/or unsaturated when used as an inert ingredient for pre-harvest uses under 40 CFR 180.920 at a maximum of 30% by weight in pesticide formulations.

VII. Statutory and Executive Order Reviews

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

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

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

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

VIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: July 21, 2009.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

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

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

* * * * *

Inert Ingredients	Limits	Uses
* * *	* * * *	
sodium salts of N-alkyl (C8-C18)-beta-iminodipropionic acid where the C8-C18 is linear and may be saturated and/or unsaturated (CAS Reg. Nos. 3655-00-3, 61791-56-8, 14960-06-6, 26256-79-1, 90170-43-7, 91696-17-2, 97862-48-1)	Concentration in formulated end-use products not to exceed 30% by weight in pesticide formulations	Surfactants, related adjuvants of surfactants
* * *	* * * *	

[FR Doc. E9–18064 Filed 7–28–09; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0725; FRL–8426–8]

Sodium *N*-oleoyl-*N*-methyl taurine; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of sodium *N*-oleoyl-*N*-methyl taurine (MOTS), (CAS Reg. No. 137–20–2), herein referred to in this document as MOTS, when used as an inert ingredient in pesticide formulations for pre-harvest and post-harvest uses under 40 CFR 180.910, as well as for application to animals under 40 CFR 180.930. The Joint Inerts Task Force (JITF), Cluster Support Team (CST 24), submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of MOTS.

DATES: This regulation is effective July 29, 2009. Objections and requests for hearings must be received on or before September 28, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0725. 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: Kerry Leifer, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8811; e-mail address: *leifer.kerry@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 those engaged in the following activities:

- 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 to provide 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 EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR. To access the OPPTS Harmonized Guidelines referenced in this document, go directly to the guideline at *http://www.epa.gov/opptsfrs/home/guidelin.htm*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0725 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before September 28, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2008–0725, by one of the following methods:

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

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

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

II. Background

In the **Federal Register** of December 3, 2008 (73 FR 73644) (FRL–8386–9), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 8E742) by The JITF, CST 24, c/o CropLife America, 1156 15th Street, N.W., Suite 400, Washington, DC 20005. The petition was subsequently redesignated as PP 8E7423. The petition requested that 40 CFR 180.910 and 40 CFR 180.930 be amended by establishing exemptions from the requirement of a tolerance for residues of the inert ingredient MOTS. That notice referenced a summary of the petition prepared by the JITF, CST 24, the petitioner, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing..

This petition was submitted in response to a final rule of August 9, 2006, (71 FR 45415) in which the Agency revoked, under section 408(e)(1) of the Federal Food, Drug, and Cosmetic Act (FFDCA), the existing exemptions from the requirement of a tolerance for residues of certain inert ingredients because of insufficient data to make the determination of safety required by FFDCA section 408(b)(2). The expiration date for the tolerance exemptions subject to revocation was August 9, 2008, which was later extended to August 9, 2009 (73 FR 45312) to allow for data to be submitted to support the establishment of tolerance exemptions for these inert ingredients prior to the effective date of the tolerance exemption revocation.

III. Inert Ingredient Definition

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

IV. Aggregate Risk Assessment and Determination of Safety

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

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for exemption from the requirement of a tolerance for residues of MOTS when used as an inert ingredient in pesticide formulations for pre-harvest and post-harvest uses, as well as for application to animals. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The existing toxicology database for MOTS consists of one OPPTS Harmonized Guideline 870.3650 combined repeated dose toxicity study with the reproduction/developmental toxicity screening test in rats and several studies in the scientific literature on acute toxicity, mutagenicity and repeat dosing exposures.

The toxicology database is adequate to support the use of MOTS as an inert ingredient in pesticide formulations. MOTS has low acute oral and dermal toxicity, is not a skin irritant or dermal sensitizer, but is a mild to moderate eye irritant. MOTS was not mutagenic in an Ames test.

In OPPTS Harmonized Guideline 870.3650 study, there was no evidence of increased susceptibility. Parental toxicity was manifested as clinical signs, decreased body weight gain and microscopic stomach lesions at 300 miligrams/kilogram/day (mg/kg/day). However, these effects were considered to be due to the corrosive nature of the test material and were not considered appropriate for risk assessment. At higher doses of 1,000 mg/kg/day, the offspring effects include increased post-implantation loss, decreased viability and decreased body weight in male and female offspring, which occurred only in the presence of parental toxicity. There was no increased susceptibility to the offspring of rats to MOTS following *in utero* and post-natal exposure in the OPPTS Harmonized Guideline 870.3650 combined repeated dose toxicity study with the reproduction/developmental toxicity screening test. Thyroid effects were observed in the OPPTS Harmonized Guideline 870.3650 study only at the limit dose in male, but not female, rats. The increased thyroid follicular hypertrophy seen in the study is considered secondary to the enhanced liver cell metabolism also observed in males at the limit dose. Moreover, rats are known to be quantitatively more sensitive than humans in response to thyroid toxicity. Thus, regulating at a no

observed adverse effect level (NOAEL) of 300 mg/kg/day with effects seen at 1,000 mg/kg/day with a 100 fold uncertainty factor (UF_A=10X; UF_h=10X) provides an adequate margin of protection.

The Agency notes that surfactants are surface-active materials that can damage the structural integrity of cellular membranes at high dose levels. Thus, surfactants are often corrosive and irritating in concentrated solutions. It is possible that some of the observed toxicity seen in the repeated dose studies, such as microscopic stomach lesions or decreased body weight gain, can be attributed to the corrosive and irritating nature of these surfactants.

No metabolism studies were located in the literature. The registrant proposed a metabolic pathway based on analogy to accepted metabolic pathways for amide hydrolysis and fatty acid beta-oxidation. It has been proposed that the initial step involves hydrolysis of the amide linkage to generate oleic acid and sodium *N*-methyl taurine. The enzyme fatty acid amide hydrolase (FAAH) may be involved in hydrolysis, and is also a primary terminator of lipic oleoamides as well as for the *N*-acyl taurines. It is possible the anionic sulfonate, MOTS species, would be excreted in the urine or converted to a dianionic salt with glucuronic acid that is excreted. A secondary step would involve metabolism of the oleic acid by the fatty acid beta-oxidation pathway.

There is no evidence that MOTS is carcinogenic. The Agency used a qualitative structure activity relationship (SAR) database, DEREK Version 11, to determine if there were structural alerts. No structural alerts were identified. EPA has low concern that any of the postulated metabolites have greater toxicity than the parent compounds. Based on the negative response for mutagenicity, lack of any alerts in model predictions, and SAR analysis, the Agency concluded that MOTS is not likely to be carcinogenic.

Specific information on the studies received and the nature of the adverse effects caused by MOTS, as well as the NOAEL and the lowest observed adverse effect level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document *MOTS (JITF CST 24 Inert Ingredient). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide*, pages 8–12 and 47–52 in docket ID number EPA–HQ–OPP–2008–0725.

B. Toxicological Endpoints

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

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

A summary of the toxicological endpoints for MOTS used for human health risk assessment is shown in the following Table.

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR MOTS FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/Scenario	Point of Departure and Uncertainty/Safety Factors	RfD, PAD, LOC for Risk Assessment	Study and Toxicological Effects
Acute dietary (all populations)	An endpoint attributable to a single exposure was not seen in the database; therefore, a point of departure was not selected.		
Chronic dietary (all populations)	NOAEL= 300 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 3 mg/kg/day cPAD = 3 mg/kg/day	OPPTS Harmonized Guideline 870.3650 Combined Repeated Dose Toxicity Study with the Reproduction/Developmental Toxicity Screening Test in rats LOAEL = 1,000 mg/kg/day, based on thyroid histophathy in males and organ weight increases (adrenals and liver in both sexes; testes in males) Note that irritant effects seen in the forestomach of rats at 300 mg/kg/day were considered to be due to the corrosive nature of the test material and were not considered appropriate for risk assessment.

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR MOTS FOR USE IN HUMAN HEALTH RISK ASSESSMENT—Continued

Exposure/Scenario	Point of Departure and Uncertainty/Safety Factors	RfD, PAD, LOC for Risk Assessment	Study and Toxicological Effects
Incidental Oral, Dermal and Inhalation (Short-term and Intermediate-term)	NOAEL= 300 mg/kg/day Dermal absorption of 20% is considered upper end screening level; Inhalation exposure is assumed to be equivalent to oral exposureUF_A = 10x UF_H = 10x FQPA SF = 1x	Residential/Occupational LOC for MOE = 100	OPPTS Harmonized Guideline 870.3650 Combined Repeated Dose Toxicity Study with the Reproduction/Developmental Toxicity Screening Test in rats LOAEL = 1,000 mg/kg/day, based on thyroid histophathy in males and organ weight increases (adrenals and liver in both sexes; testes in males) Note that irritant effects seen in the forestomach of rats at 300 mg/kg/day were considered to be due to the corrosive nature of the test material and were not considered appropriate for risk assessment.
Cancer (oral, dermal, inhalation)	Classification: No animal toxicity data available for an assessment. Based on SAR analysis, MOTS is not expected to be carcinogenic.		

POD = A data point or an estimated point that is derived from observed dose-response data and used to mark the beginning of extrapolation to determine risk associated with lower environmentally relevant human exposures. NOAEL = no observed adverse effect level. LOAEL = lowest observed adverse effect level. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). PAD = population adjusted dose (a=acute, c=chronic). FQPA SF = FQPA Safety Factor. RfD = reference dose. MOE = margin of exposure. LOC = level of concern. N/A = not applicable.

C. Exposure Assessment

Very limited information is available for MOTS with respect to plant and animal metabolism or environmental degradation. The Agency relied collectively on information provided on the representative chemical structure, the submitted physicochemical EPI Suite™ data, SAR information, as well as information on other surfactants and chemicals of similar size and functionality to determine the residues of concern for this inert ingredient. The Agency has concluded that the parent compound MOTS is the residue of concern. Likely degradation in the environment would result in sodium *N*-methyl taurine and oleic acid (or shorter chain fatty acids). These compounds would likely be present in food and water at much lower concentrations than the parent compound, and since they are likely are less toxic than the parent, MOTS, are not of concern for risk assessment purposes. The Agency notes that taurine, synthesized by the liver, is important in bile acid metabolism.

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to MOTS, EPA considered exposure under the petitioned-for exemptions from the requirement of a tolerance. EPA assessed dietary exposures from MOTS in food as follows:

i. *Acute exposure.* No adverse effects attributable to a single exposure of MOTS was seen in the toxicity databases; Therefore, an acute dietary exposure assessments for MOTS is unnecessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, no residue data were submitted for MOTS. In the absence of specific residue data, EPA has developed an approach which uses surrogate information to derive upper bound exposure estimates for the subject inert ingredient. Upper bound exposure estimates are based on the highest tolerance for a given commodity from a list of high-use insecticides, herbicides, and fungicides. A complete description of the general approach taken to assess inert ingredient risks in the absence of residue data is contained in the memorandum entitled *Alkyl Amines Polyalkoxylates (Cluster 4): Acute and Chronic Aggregate (Food and Drinking Water) Dietary Exposure and Risk Assessments for the Inerts.* (D361707, S. Piper, 2/25/09) and can be found at *http://www.regulations.gov* in docket ID number EPA–HQ–OPP–2008–0738.

In the dietary exposure assessment, the Agency assumed that the residue level of the inert ingredient would be no higher than the highest tolerance for a given commodity. Implicit in this assumption is that there would be similar rates of degradation (if any) between the active and inert ingredient and that the concentration of inert ingredient in the scenarios leading to these highest of tolerances would be no higher than the concentration of the active ingredient.

The Agency believes the assumptions used to estimate dietary exposures lead to an extremely conservative assessment of dietary risk due to a series of compounded conservatisms. First, assuming that the level of residue for an inert ingredient is equal to the level of residue for the active ingredient will overstate exposure. The concentrations of active ingredient in agricultural products is generally at least 50 percent of the product and often can be much higher. Further, pesticide products rarely have a single inert ingredient; rather there is generally a combination of different inert ingredients used which additionally reduces the concentration of any single inert ingredient in the pesticide product in relation to that of the active ingredient.

Second, the conservatism of this methodology is compounded by EPA's decision to assume that, for each commodity, the active ingredient which will serve as a guide to the potential level of inert ingredient residues is the active ingredient with the highest tolerance level. This assumption overstates residue values because it would be highly unlikely, given the high number of inert ingredients, that a single inert ingredient or class of ingredients would be present at the level of the active ingredient in the highest tolerance for every commodity. Finally, a third compounding conservatism is EPA's assumption that all foods contain the inert ingredient at the highest tolerance level. In other words, EPA assumed 100% of all foods are treated with the inert ingredient at the rate and manner necessary to produce the highest residue legally possible for an active ingredient. In summary, EPA chose a very conservative method for estimating what level of inert residue could be on

food, then used this methodology to choose the highest possible residue that could be found on food and assumed that all food contained this residue. No consideration was given to potential degradation between harvest and consumption even though monitoring data shows that tolerance level residues are typically one to two orders of magnitude higher than actual residues in food when distributed in commerce.

Accordingly, although sufficient information to quantify actual residue levels in food is not available, the compounding of these conservative assumptions will lead to a significant exaggeration of actual exposures. EPA does not believe that this approach underestimates exposure in the absence of residue data.

iii. *Cancer.* The Agency used a qualitative SAR database, DEREK11, to determine if there were structural alerts suggestive of carcinogenicity. No structural alerts for carcinogenicity were identified. Based on the negative response for mutagenicity, the lack of any alerts in model predictions, and SAR analysis, the Agency concluded that MOTS is not likely to be carcinogenic. Since the Agency has not identified any concerns for carcinogenicity relating to MOTS, a cancer dietary exposure assessment was not performed.

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for MOTS. Tolerance level residues and/or 100 PCT were assumed for all food commodities.

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

A screening level drinking water analysis, based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) was performed to calculate the estimated drinking water concentrations (EDWCs) of MOTS. Modeling runs on four surrogate inert ingredients using a range of physical chemical properties that would bracket those of MOTS were conducted. Modeled acute drinking water values ranged from 0.001 ppb to 41 ppb. Modeled chronic drinking water values ranged from 0.0002 ppb to 19 ppb. Further details of this drinking water analysis can be found at *http://www.regulations.gov* in the document *MOTS (JITF CST 24 Inert Ingredient). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations,* pages 13 and 54–56 in docket ID number EPA–HQ–OPP–2008–0725.

For the purpose of the screening level dietary risk assessment to support this request for an exemption from the requirement of a tolerance for MOTS, a conservative drinking water concentration value of 100 parts per billion (ppb) based on screening level modeling was used to assess the contribution to drinking water for chronic dietary risk assessments for the parent compounds and for the metabolites of concern. These values were directly entered into the dietary exposure model.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). MOTS may be used as inert ingredients in pesticide products that are registered for specific uses that may result in both indoor and outdoor residential exposures. A screening level residential exposure and risk assessment was completed for products containing MOTS as inert ingredients. MOTS is used as a surfactant in pesticide formulations intended for use in agricultural settings as well as outdoor residential applications. Additionally, the petition indicates that this inert may also be used in household cleaners. The Agency selected representative scenarios, based on end-use product application methods and labeled application rates. The Agency conducted an assessment to represent worst-case residential exposure by assessing MOTS in pesticide formulations (outdoor scenarios) and MOTS in disinfectant-type uses (indoor scenarios). Based on information contained in the petition, MOTS can be present in consumer cleaning products. Therefore, the Agency assessed the disinfectant-type products containing MOTS using exposure scenarios used by OPP's Antimicrobials Division to represent worst-case residential handler exposure. Standard methodologies based on the Agency's Residential standard operating procedures (SOPs) were used to assess residential post application exposure to hard surface cleaners. Further details of this residential exposure and risk analysis can be found at *http://www.regulations.gov* in the memorandum entitled *JITF Inert Ingredients. Residential and Occupational Exposure Assessment Algorithms and Assumptions Appendix for the Human Health Risk Assessments to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations,* (D364751, 5/7/09, Lloyd/LaMay in docket ID number EPA–HQ–OPP–2008–0710.

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

EPA has not found MOTS to share a common mechanism of toxicity with any other substances, and MOTS does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that MOTS does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* The toxicology database for MOTS consists of one OPPTS Harmonized Guideline repeated dose toxicity study with the reproduction/developmental toxicity screening test in rats and several studies in the scientific literature on acute toxicity,

mutagenicity and repeat dosing exposures.

In the case of MOTS, there was no increased susceptibility to the offspring of rats following prenatal and postnatal exposure in the OPPTS Harmonized Guideline combined repeated dose toxicity study with the reproduction/developmental toxicity screening test. The offspring effects (increased post-implantation loss, decreased viability and decreased body weight in male and female offspring) occurred at 1,000 mg/kg/day in the presence of maternal toxicity, which was manifested as clinical signs, decreased body-weight gain, thyroid effects in male rats, and microscopic stomach lesions at doses of 300 mg/kg/day and 1,000 mg/kg/day. In an OPPTS Harmonized Guideline study, a slight decrease in body temperature was observed in males at doses of 300 and 1,000 mg/kg/day and in females at doses of 1,000 mg/kg/day. Since these decreases in body temperature were minimal, within biological variability, they were not considered to be toxicologically relevant. Therefore, the Agency concluded that there is no evidence of neurotoxicity in the database.

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

i. The toxicity database for MOTS is considered adequate for assessing the risks to infants and children (the available studies are described in Unit 4.D.2.

ii. No quantitative or qualitative increased susceptibility was demonstrated in the offspring in the OPPTS Harmonized Guideline combined repeated dose toxicity study with the reproduction/developmental toxicity screening test in rats following *in utero* and post-natal exposure.

iii. Although there is some evidence of thyroid toxicity in the OPPTS Harmonized Guideline study, this occurred in males at the highest dose tested (HDT) and males are known to be the more sensitive sex for thyroid effects. Rats are also known to be more senstitive to these effects than humans. Additionally, the increased thyroid follicular hypertrophy is considered secondary to the enhanced liver cell metabolism observed in males at the HDT. Regulating at a NOAEL of 300 mg/kg/day with effects seen at 1,000 mg/kg/day with a 100 fold uncertainty factor (UF_A= 10X; UF_H= 10X) provides an adequate margin of protection.

iv. There is no indication that MOTS is a neurotoxic chemical in the database and thus there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

v. While there is no chronic toxicity data, the Agency has concluded that an additional uncertainty factor is not needed for the use of a subchronic study for a chronic exposure assessment considering the lack of any alerts in model predictions, as well as, the highly conservative nature of the exposure assessment. The conservative point of departure selected along with the standard UF factor of 100X to account for inter- and intra-species variablitiy is considered health protective.

vi. There are no residual uncertainties identified in the exposure databases. The food and drinking water assessment is not likely to underestimate exposure to any subpopulation, including those comprised of infants and children. The food exposure assessments are considered to be highly conservative as they are based on the use of the highest tolerance level from the surrogate pesticides for every food and 100 PCT is assumed for all crops. EPA also made conservative (protective) assumptions in the ground water and surface water modeling used to assess exposure to MOTS in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by MOTS.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* There was no hazard attributable to a single exposure seen in the toxicity database for MOTS. Therefore, MOTS is not expected to pose an acute risk.

2. *Chronic risk.* A chronic aggregate risk assessment takes into account exposure estimates from chronic dietary consumption of food and drinking water. Using the exposure assumptions discussed in this unit for chronic exposure, the chronic dietary exposure from food and water to MOTS is 6% of the cPAD for the U.S. population and 21% of the cPAD for children 1–2 yrs old, the most highly exposed population subgroup.

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

MOTS is used as an inert ingredient in pesticide products that are currently registered for uses that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to MOTS. Using the exposure assumptions described in this unit, EPA has concluded that the combined short-term aggregated food, water, and residential exposures result in aggregate MOEs of 240, for both adult males and females, respectively. Adult residential exposure combines high end dermal and inhalation handler exposure with a high end post application dermal exposure. EPA has concluded that the combined short-term aggregated food, water, and residential exposures result in an aggregate MOE of 360 for children. Children's residential exposure combines outdoor and indoor dermal and hand-to-mouth exposures. As the level of concern is for MOEs that are lower than 100, these MOEs are not of concern.

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

MOTS is currently registered for uses that could result in intermediate-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with intermediate-term residential exposures to MOTS. Using the exposure assumptions described in this unit, EPA has concluded that the combined intermediate-term aggregated food, water, and residential exposures result in aggregate MOEs of 1,500 for both adult males and females, respectively. Adult residential exposure includes high end post application dermal exposure from contact with treated lawns. EPA has concluded that the combined intermediate-term aggregated food, water, and residential exposures result in an aggregate MOE of

410 for children. Children's residential exposure combines outdoor dermal and hand-to-mouth exposures. As the level of concern is for MOEs that are lower than 100, these MOEs are not of concern.

5. *Aggregate cancer risk for U.S. population.* The Agency has not identified any concerns for carcinogenicity relating to MOTS.

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

V. Other Considerations

A. Analytical Enforcement Methodology

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

B. International Residue Limits

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

VI. Conclusion

Therefore, an exemption from the requirement of a tolerance is established for residues of sodium *N*-Oleoyl-*N*-methyl taurine, when used as inert ingredients applied to crops pre-harvest and post-harvest, or to animals under 40 CFR 180.910 and 40 CFR 180.930.

VII. Statutory and Executive Order Reviews

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

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

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

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

VIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: July 21, 2009.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. In § 180.910, the table is amended by adding alphabetically the following inert ingredients to read as follows:

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

* * * * *

Inert Ingredients	Limits	Uses
* * * * *	* *	
Sodium *N*-oleoyl- *N*-methyl taurine (CAS Reg. No. 137–20–2)		Surfactants, related adjuvants of surfactants
* * * * *	* *	

3. In §180.930, the table is amended by adding alphabetically the following inert ingredients to read as follows:

§ 180.930 Inert ingredients applied to animals; exemptions from the requirement of a tolerance.

* * * * *

Inert Ingredients	Limits	Uses
* * * * * * *	*	
Sodium *N*-oleoyl-*N*-methyl taurine (CAS Reg. No. 137–20–2)		Surfactants, related adjuvants of surfactants
* * * * * * *	*	

[FR Doc. E9–17960 Filed 7–28–09; 8:45 am]
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0665; FRL–8421–7]

Sodium monoalkyl and dialkyl (C_6-C_{16}) phenoxybenzenedisulfonates and related acids; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of Sodium monoalkyl and dialkyl (C_6-C_{16}) phenoxybenzenedisulfonates and related acids, often known as the "alkyldiphenyl oxide sulfnates", herein referred to in this document as ADPOS, when used as inert ingredients at a maximum of 20% by weight in pesticide formulations for pre-harvest and post-harvest use under 40 CFR 180.910, as well as for application to animals under 40 CFR 180.930. Dow AgroSciences, LLC, submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of ADPOS.

DATES: This regulation is effective July 29, 2009. Objections and requests for hearings must be received on or before September 28, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0665. 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: Kerry Leifer, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8811; e-mail address: *leifer.kerry@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 those engaged in the following activities:

- 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 to provide 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 EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR cité at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0665 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before September 28, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2008–0665, by one of the following methods:

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

II. Background

In the **Federal Register** of October 8, 2008 (73 FR 58962) (FRL–8383-7), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 8E7372) by Dow AgroSciences, LLC, 9330 Zionsville Rd., Indianapolis, IN 46268. The petition requested that 40 CFR 180.910 and 40 CFR 180.930 be amended by establishing exemptions from the requirement of a tolerance for residues of the inert ingredient ADPOS at a maximum of 20% by weight in pesticide formulations. That notice referenced a summary of the petition prepared by Dow AgroSciences, LLC, the petitioner, which is available to the public in the docket, *http://www.regulations.gov.*

The Agency received only one comment in response to the notice of filing. One comment was received from a private citizen who opposed the authorization to sell any pesticide that leaves a residue on food. The Agency understands the commenter's concerns and recognizes that some individuals believe that no residue of pesticides should be allowed. However, under the existing legal framework provided by section 408 of the Federal Food, Drug and Cosmetic Act (FFDCA), EPA is authorized to establish pesticide tolerances or exemptions where persons seeking such tolerances or exemptions have demonstrated that the pesticide meets the safety standard imposed by that statute.

This petition was submitted in response to a final rule of August 9, 2006, (71 FR 45415) (FRL–8084–1) in which the Agency revoked, under section 408(e)(1) of the Federal Food, Drug, and Cosmetic Act (FFDCA), the existing exemptions from the requirement of a tolerance for residues of certain inert ingredients because of insufficient data to make the determination of safety required by FFDCA section 408(b)(2). The expiration date for the tolerance exemptions subject to revocation was August 9, 2008, which was later extended to August 9, 2009 (73 FR 45312) to allow for data to be submitted to support the establishment of tolerance exemptions for these inert ingredients prior to the effective date of the tolerance exemption revocation.

III. Inert Ingredient Definition

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

IV. Aggregate Risk Assessment and Determination of Safety

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

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for exemption from the requirement of a tolerance for residues of ADPOS when used as inert ingredients at a maximum of 20% by weight in pesticide formulations for pre-harvest and post-harvest use, as well as for application to animals. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The available mammalian toxicology database includes acute, subchronic repeat dose oral, reproductive/developmental screening tests, chronic rat and dog studies and mutagenicity data for four representative compounds of the C_6 to C_{16} ADPOS group. The Agency concluded that the four surrogate chemicals (CAS Reg. Nos. 147732–60–3, 39354–74–0, 119345–04–9 (alternate CAS Reg. No. 28519–02–0), and 70191-76-3) are representative of all the chemicals in the ADPOS cluster. Additionally, the Agency concluded that the currently available toxicity dataset is adequate to apply to the ADPOS inerts and to characterize these surfactants. Further, the Agency noted that there was sufficient bracketing of the range of molecular weights expected from the inerts in this grouping.

The ADPOS inerts are not acutely toxic by the oral, dermal, and inhalation routes of exposure, and are moderately irritating to the skin and eyes. Respiratory irritation is possible with mists. The ADPOS inerts, like all surfactants, are surface-active materials that can damage the structural integrity of cellular membranes at high dose levels. Thus, surfactants are often corrosive and irritating in concentrated solutions, as indicated by the acute toxicity studies for these inert materials. It is possible that some of the observed toxicity seen in the repeated studies, such as diarrhea, gastrointestinal tract effects or decreased body weight gain, can be attributed to the corrosive and irritating nature of these surfactants. The liver and possibly kidney appear to be the primary target organs. Following subchronic exposures to ADPOS inerts, the most sensitive effects include increased liver enzymes (alanine and aspartate aminotransferase), increased prothrombin time and soft/decreased feces in males and significant decreases in body weight gain in both sexes after 47–54 days of dosing at doses between 28 and 92 mg/kg/day. In comparison, in most of the other studies, no effects were observed in the range of 100 to 500

mg/kg/day, even following chronic exposures. There is some evidence of neurotoxicity in a 28–day rat study, including high-stepping gait, ataxia and salivation; however, these effects are seen at the highest dose tested (HDT). The Agency considered these effects to be the result of a high dose rather than a neurotoxic condition. No quantitative or qualitative increased susceptibility was demonstrated in the offspring in the two reproductive/developmental toxicity studies in rats following *in utero* and postnatal exposure. In one OPPTS Harmonized Guideline 870.3650 study there were no developmental effects at the HDT in the presence of maternal toxicity such as increased liver enzymes and prothrombin time. In a second OPPTS Harmonized Guideline 870.3650 study with test substance (CAS Reg. No. 147732–60–3) the developmental effects were manifested as statistically significantly decrease in body weight and clinical signs at 1,000 mg/kg which was in the presence severe maternal toxicity which manifested as mortality, clinical signs, and decrease in body weight were observed.

There is no evidence that the ADPOS inerts are mutagenic, but there is some evidence of potential clastogenicity for a C_6 inert formulation. *In vitro* data for genotoxicity are available for the range of alkyl chains of the lower (C_6) and upper (C_{16}) compounds in this group. The Ames tests were negative for the C_6 and C_{16} inerts. The C_{16} analogue was negative in the CHO/HGPRT forward mutation assay. In chromosomal aberration tests that evaluate clastogenicity, C_6 (CAS Reg. No. 147732–60–3) was clastogenic in human lymphocytes in the absence of metabolic activation (S9), but was negative in rat lymphocytes. The registrants attributed this positive response to peroxide as an unwanted constituent, and no longer use peroxide in the ADPOS process. C_{16} was negative in both human and rat lymphocytes, although the human lymphocyte study was not acceptable. *In vivo*, there was no evidence of a cytogenetic response in rat bone marrow cells for C_{16} (CAS Reg. No. 70191–76–3) in an unacceptable study that lacked positive controls, which limits the confidence of this finding. Based on these studies and the overall weight of the evidence, the Agency concluded that the ADPOS inerts are not likely to be mutagenic. There is no evidence of carcinogenicity in the chronic/carcinogenicity rat study at does up to 500 mg/kg/day. In addition, no tumors were observed in the two year toxicity study in dogs. Based on the negative response for carcinogenicity in the carcinogenicity study in rats and two year dog study, negative response for mutagenicity, lack of any alerts in model predictions, and SAR analysis, the Agency concluded that the ADPOS inerts are not likely to be carcinogenic.

Specific information on the studies received and the nature of the adverse effects caused by ADPOS as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document "Alkyl Diphenyl Oxide Sulfonates (JITF CST 18 Inert Ingredients). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations" pages 9-15 in docket ID number EPA–HQ–OPP–2008–0665.

B. Toxicological Endpoints

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

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

A summary of the toxicological endpoints for ADPOS used for human health risk assessment is shown in the Table of this unit.

TABLE —SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR ADPOS FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure Scenerio	Point of Departure and Uncertainty/Safety Factors	RfD, PAD, LOC for Risk Assesment	Study and Toxicological Effects
Acute Dietary (General Population, including Infants and Children)	NOAEL=115 milligrams/ kilograms/day (mg/kg/day) UF_A=10x UF_H=10x FQPA SF=1x	Acute RfD=1.15 mg/kg/day aPAD=1.15 mg/kg/day	28-day oral toxicity study- rats (CAS No. 70191-76-3) LOAEL= 367 mg/kg/day, based on Post-dosing salivation (day 1 post-dose in 3/5 male and 2/5 female rats; 2-28 all rats.)

TABLE —SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR ADPOS FOR USE IN HUMAN HEALTH RISK ASSESSMENT—Continued

Exposure Scenerio	Point of Departure and Uncertainty/Safety Factors	RfD, PAD, LOC for Risk Assesment	Study and Toxicological Effects
Chronic Dietary (all populations)	NOAEL=28 mg/kg/day UF_A=10x UF_H=10x FQPA SF=1x	Chronic RfD=0.28 mg/kg/day cPAD=0.28 mg/kg/day	Reproductive/developmental-rat(CAS No. 70191-76-3) LOAEL= 92 mg/kg/day, based on increasted ALT and AST in females, increased prothrombin time and soft/decrease feces in males and significant decreased feces in males and significant decreased in body weight gain in both sexes after 47-54 days of dosing.
Short-Term (1-30 days Incidental Oral/Dermal/Inhalation)	NOAEL=115 mg/kg/day UF_A=10x UF_H=10x FQPA SF=1x	Residential/Occupational LOC for MOE=100	28-day oral toxicity study-rats(CAS No. 70191-76-3) LOAEL= 367 mg/kg/day, based on ost-dosing salvation (day 1 post-dose in 3/5 male and 2/5 female rats; days 2-28 all rats).
Intermediate and Long-Term (1-6 months/≤6months Incidental Oral/Dermal/Inhalation	NOAEL=28 mg/kg/day UF_A=10x UF_H=10x FQPA SF=1x	Residential/Occupational LOC for MOE= 100	Reproductive/developmental-rat(CAS No. 70191-76-3) LOAEL= 92 mg/kg/day, based on increasted ALT and AST in females, increased prothrombin time and soft/decreased feces in males and significant decreased feces in males and significant decreased in body weight gain in both sexes after 47-54 days of dosing.
Cancer (oral, dermal, inhalation)	Classification: no edivence of carcinogenicity in available studies		

[1]The LOAEL of 367 mg/kg/day was used from MRID 46989217 and NOAEL of 115 mg/kg/day was used from MRID 46989216 due to artifact of dose selection. Point of Departure (POD) = A data point or an estimated point that is derived from observed dose-response data and used to mark the beginning of extrapolation to determine risk associated with lower environmentally relevant human exposures. NOAEL = no observed adverse effect level. LOAEL = lowest observed adverse effect level. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). PAD = population adjusted dose (a=acute, c=chronic). FQPA SF = FQPA Safety Factor. RfD = reference dose. MOE = margin of exposure. LOC = level of concern. N/A = not applicable.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to ADPOS, EPA considered exposure under the petitioned-for exemptions from the requirement of a tolerance. EPA assessed dietary exposures from ADPOS in food as follows:

i. *Acute and chronic exposure.* In conducting the acute and chronic dietary exposure assessments, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, no residue data were submitted for the ADPOS inert ingredients. In the absence of specific residue data, EPA has developed an approach which uses surrogate information to derive upper bound exposure estimates for the subject inert ingredients. Upper bound exposure estimates are based on the highest tolerance for a given commodity from a list of high-use insecticides, herbicides, and fungicides. A complete description of the general approach taken to assess inert ingredient risks in the absence of residue data is contained in the memorandum entitled "Alkyl Amines Polyalkoxylates (Cluster 4): Acute and Chronic Aggregate (Food and Drinking Water) Dietary Exposure and Risk Assessments for the Inerts." (D361707, S. Piper, 2/25/09) and can be found at *http://www.regulations.gov* in docket ID number EPA–HQ–OPP–2008–0738.

In the dietary exposure assessment, the Agency assumed that the residue level of the inert ingredient would be no higher than the highest tolerance for a given commodity. Implicit in this assumption is that there would be similar rates of degradation (if any) between the active and inert ingredient and that the concentration of inert ingredient in the scenarios leading to these highest of tolerances would be no higher than the concentration of the active ingredient.

The Agency believes the assumptions used to estimate dietary exposures lead to an extremely conservative assessment of dietary risk due to a series of compounded conservatisms. First, assuming that the level of residue for an inert ingredient is equal to the level of residue for the active ingredient will overstate exposure. The concentrations of active ingredient in agricultural products is generally at least 50 percent of the product and often can be much higher. Further, pesticide products rarely have a single inert ingredient; rather there is generally a combination of different inert ingredients used which additionally reduces the concentration of any single inert ingredient in the pesticide product in relation to that of the active ingredient. In the case of ADPOS, EPA made a specific adjustment to the dietary exposure assessment to account for the use limitations of the amount of ADPOS that

may be in formulations (no more than 20% by weight) and assumed that the ADPOS are present at the maximum limitations rather than at equal quantities with the active ingredient. This remains a very conservative assumption because surfactants are generally used at levels far below this percentage.

Second, the conservatism of this methodology is compounded by EPA's decision to assume that, for each commodity, the active ingredient which will serve as a guide to the potential level of inert ingredient residues is the active ingredient with the highest tolerance level. This assumption overstates residue values because it would be highly unlikely, given the high number of inert ingredients, that a single inert ingredient or class of ingredients would be present at the level of the active ingredient in the highest tolerance for every commodity. Finally, a third compounding conservatism is EPA's assumption that all foods contain the inert ingredient at the highest tolerance level. In other words, EPA assumed 100 percent of all foods are treated with the inert ingredient at the rate and manner necessary to produce the highest residue legally possible for an active ingredient. In summary, EPA chose a very conservative method for estimating what level of inert residue could be on food, then used this methodology to choose the highest possible residue that could be found on food and assumed that all food contained this residue. No consideration was given to potential degradation between harvest and consumption even though monitoring data shows that tolerance level residues are typically one to two orders of magnitude higher than actual residues in food when distributed in commerce.

Accordingly, although sufficient information to quantify actual residue levels in food is not available, the compounding of these conservative assumptions will lead to a significant exaggeration of actual exposures. EPA does not believe that this approach underestimates exposure in the absence of residue data.

ii. *Cancer.* The Agency used a qualitative structure activity relationship (SAR) database, DEREK11, to determine if there were structural alerts suggestive of carcinogenicity. No structural alerts for carcinogenicity were identified. There is no evidence of carcinogenicity in the chronic/carcinogenicity study in rats at doe up to 500 mg/kg/day. In addition, no tumors were observed in the two year toxicity study in dogs. Based on the negative response of the carcinogenicity study in rats and two year dog study, negative response for mutagenicity, lack of any alerts in model predictions, and SAR analysis, the Agency concluded that the ADPOS inerts are not likely to be carcinogenic. Since the Agency has not identified any concerns for carcinogenicity relating to the ADPOS inerts, a cancer dietary exposure assessment was not performed.

iii. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for ADPOS. Tolerance level residues and/or 100 PCT were assumed for all food commodities.

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

A screening level drinking water analysis, based on the Pesticide Root Zone Model /Exposure Analysis Modeling System (PRZM/EXAMS) was performed to calculate the estimated drinking water concentrations (EDWCs) of ADPOS. Modeling runs on four surrogate inert ingredients using a range of physical chemical properties that would bracket those of the ADPOS were conducted. Modeled acute drinking water values ranged from 0.001 parts per billion (ppb) to 41 ppb. Modeled chronic drinking water values ranged from 0.0002 ppb to 19 ppb. Further details of this drinking water analysis can be found at *http://www.regulations.gov* in document "Alkyl Diphenyl Oxide Sulfonates (JITF CST 18 Inert Ingredients). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations" pages 16 and 71-73 in docket ID number EPA–HQ–OPP–2008–0665.

For the purpose of the screening level dietary risk assessment to support this request for an exemption from the requirement of a tolerance for ADPOS, a conservative drinking water concentration value of 100 ppb based on screening level modeling was used to assess the contribution to drinking water for both the acute and chronic dietary risk assessments. These values were directly entered into the dietary exposure model.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). ADPOS may be used in inert ingredients in pesticide products that are registered for specific uses that may result in both indoor and outdoor residential exposures. A screening level residential exposure and risk assessment was completed for products containing ADPOS as inert ingredients. In this assessment, representative scenarios, based on end-use product application methods and labeled application rates, were selected.The ADPOS inerts are not added to any insecticidal products intended for pet use and are not likely to be used in personal care products. The Agency conducted an assessment to represent worst-case residential exposure by assessing ADPOS in pesticide formulations (outdoor scenarios) and ADPOS in disinfectant type uses (indoor scenarios). Based on information contained in the petition, the ADPOS inerts can be present in consumer cleaning products. Therefore, the Agency assessed the disinfectant-type products containing ADPOS using several anti-microbial scenarios to represent worst-case residential handler exposure. Standard methodologies based on the Agency's Residential SOPs were used to assess residential post application exposure to hard surfance cleaners.

Further details of this residential exposure and risk analysis can be found at *http://www.regulations.gov* in "Alkyl Diphenyl Oxide Sulfonates (JITF CST 18 Inert Ingredients). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations" pages 20-28 and 94-110 in docket ID number EPA–HQ–OPP–2008–0665.

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

EPA has not found ADPOS to share a common mechanism of toxicity with any other substances, and ADPOS do not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that ADPOS

do not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* The toxicity database consists of two rat reproductive/developmental screening studies. There was no increased susceptibility to the offspring of rats following *in utero* or postnatal exposure in the two reproductive/developmental toxicity screening tests, In one study, there were no adverse effects to offspring, while decreased pup body weight and clinical signs were noted in the presence of maternal/parental toxicity at the limit dose of 1,000 mg/kg/day in a second study.

There are no neurotoxicity studies available for the ADPOS, however, there is some evidence of neurotoxicity in a subchronic rat study at 367 mg inert/kg/day (1,000 mg product/kg/day), including high-stepping gait, ataxia and salivation. However, since the effects noted occurred at doses significantly higher than the current points of departure for risk assessment, additional neurotoxicity data is not required.

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

i. The toxicity database for ADPOS is considered adequate for assessing the risks to infants and children (the available studies are described in Unit iv.D.2.

ii. There is some evidence of neurotoxicity in a 28–day rat study, including high-stepping gait, ataxia and salivation; however, these effects are seen at the HDT. Since these effects occurred at dose levels significantly higher than the current points of departure used for regulation, the Agency determined that the points of departure selected for this risk assessment are protective of any neurotoxicity effects. Therefore, additional neurotoxicity data and other toxicity data are not required.

iii. No quantitative or qualitative increased susceptibility was demonstrated in the offspring in the two reproductive/developmental toxicity studies in rats following *in utero* and postnatal exposure.

iv. The Agency has concluded that an additional UF for extrapolation from subchronic toxicity study to a chronic exposure scenario would not be needed since toxicity is not expected to increase with a longer duration of exposure for the ADPOS inerts. This is because for the most sensitive endpoint, prothrombin time (PT), the clotting factor proteins evaluated by the PT test have short plasma half-lives, ranging from 4 hours for factor VII to a maximum of 96 hours for fibrinogen. The clotting factors are being continually synthesized by the liver and by 47 days of exposure would have reached steady state and further exposure is not expected to result in any further increase in prothrombin time. Therefore, the Agency concluded that the 10X interspecies and 10X intraspecies UF would be adequately protective.

v. There are no residual uncertainties identified in the exposure databases. The food and drinking water assessment is not likely to underestimate exposure to any subpopulation, including those comprised of infants and children. The food exposure assessments are considered to be highly conservative as they are based on the use of the highest tolerance level from the surrogate pesticides for every food and 100 PCT is assumed for all crops. EPA also made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to ADPOS in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by ADPOS.

E. Aggregate Risks and Determination of Safety

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

In conducting this aggregate risk assessment, the Agency has incorporated the petitioner's requested use limitations of ADPOS as inert ingredients in pesticide product formulations into its exposure assessment. Specifically, the petition includes a use limitation of ADPOS at not more than 20% by weight in pesticide formulations.

1. *Acute risk.* An acute aggregate risk assessment takes into account exposure estimates from acute dietary consumption of food and drinking water. Using the exposure assumptions discussed in this unit for acute exposure, and the use limitations of not more than 20% by weight in pesticide formulations, the acute dietary exposure from food and water to ADPOS at the 95th percentile for food and drinking water is 20% of the aPAD for the U.S. population and 55% of the aPAD for children 1-2 yrs old, the population group receiving the greatest exposure.

2. *Chronic risk.* A chronic aggregate risk assessment takes into account exposure estimates from chronic dietary consumption of food and drinking water using the exposure assumptions discussed in this unit for chronic exposure, and the use limitations of not more than 20% by weight in pesticide formulations, the chronic dietary exposure from food and water to ADPOS is 28% of the cPAD for the U.S. population and 90% of the cPAD for children 1-2 yrs old, the most highly exposed population subgroup.

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

ADPOS inerts are used as inert ingredients in pesticide products that are currently registered for uses that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to ADPOS. Using the exposure assumptions described in this

unit, EPA has concluded the combined short-term food, water, and residential exposures aggregated result in aggregate MOEs of 490 and 530, for adult males and females respectively, for a combined high end dermal and inhalation handler exposure with a high end post application dermal exposure and an aggregate MOE of 380 for children for a combined dermal exposure with hand-to-mouth exposure. As the level of concern is for MOEs that are lower than 100, these MOEs are not of concern.

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

ADPOS inerts are used as inert ingredients in pesticide products that are currently registered for uses that could result in intermediate -term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with intermediate-term residential exposures to ADPOS.

Using the exposure assumptions described in this unit, EPA has concluded the combined intermediate-term food, water, and residential exposures aggregated result in aggregate MOEs of 320 and 400, for adult males and females respectively, and an aggregate MOE of 100 for children. As the level of concern is for MOEs that are lower than 100, these MOEs are not of concern.

5. *Aggregate cancer risk for U.S. population.* The Agency has not identified any concerns for carcinogenicity relating to the ADPOS inerts.

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

V. Other Considerations

A. Analytical Enforcement Methodology

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

B. International Residue Limits

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

VI. Conclusion

Therefore, an exemption from the requirement of a tolerance is established for residues of sodium monoalkyl and dialkyl (C_6-C_{16}) phenoxybenzenedisulfonates and related acids, when used as inert ingredients at a maximum of 20% by weight in pesticide formulations applied to crops pre-harvest and post-harvest, or to animals.

VII. Statutory and Executive Order Reviews

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

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

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

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

VIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: July 21, 2009.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. In §180.910, the table is amended by adding alphabetically the following inert ingredients to read as follows:

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

* * * * *

Inert Ingredients	Limits	Uses
*	* * * *	
Sodium monoalkyl and dialkyl (C6-C16) phenoxy benzenedisulfonates and related acids (CAS Reg. Nos. 147732-59-0, 147732-60-3, 169662-22-0, 70191-75-2, 36445-71-3, 39354-74-0, 70146-13-3, 119345-03-8, 149119-20-0, 149119-19-7, 119345-04-9, 28519-02-0, 25167-32-2, 30260-73-2, 65143-89-7, 70191-76-3)	Not to exceed 20% in pesticide formulations	Surfactants, related adjuvants of surfactants
*	* * * *	

■ 3. In §180.930, the table is amended by adding alphabetically the following inert ingredients to read as follows:

§ 180.930 Inert ingredients applied to animals; exemptions from the requirement of a tolerance.

* * * * *

Inert Ingredients	Limits	Uses
*	* * * *	
Sodium monoalkyl and dialkyl (C6-C16) phenoxy benzenedisulfonates and related acids (CAS Reg. Nos. 147732-59-0, 147732-60-3, 169662-22-0, 70191-75-2, 36445-71-3, 39354-74-0, 70146-13-3, 119345-03-8, 149119-20-0, 149119-19-7, 119345-04-9, 28519-02-0, 25167-32-2, 30260-73-2, 65143-89-7, 70191-76-3)	Not to exceed 20% in pesticide formulations	Surfactants, related adjuvants of surfactants
*	* * * *	

[FR Doc. E9–17957 Filed 7–28–09; 8:45 am]
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0710; FRL–8425–7]

Ethylene oxide adducts of 2,4,7,9-tetramethyl-5-decynediol, the ethylene oxide content averages 3.5, 10, or 30 moles; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of ethylene oxide adducts of 2,4,7,9-tetramethyl-5-decynediol, the ethylene oxide content averages 3.5, 10, or 30 moles, herein referred to in this document as ethoxylated acetylenic diols, when used as inert ingredients in pesticide formulations for pre-harvest and post-harvest uses under 40 CFR 180.910, as well as for application to animals under 40 CFR 180.930. The Joint Inerts Task Force (JITF), Cluster Support Team Number 19, submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of the ethoxylated acetylenic diols.

DATES: This regulation is effective July 29, 2009. Objections and requests for hearings must be received on or before September 28, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0710. 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: Kerry Leifer, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8811; e-mail address: *leifer.kerry@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 those engaged in the following activities:

- 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 to provide 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 EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR cite at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0710 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before September 28, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2008–0710, by one of the following methods:

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

II. Background

In the **Federal Register** of December 3, 2008 (73 FR 73640) (FRL–8390–4), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 8E7374) by The Joint Inerts Task Force, Cluster Support Team 19 (CST 19), c/o CropLife America, 1156 15th Street, NW., Suite 400, Washington, DC 20005. The petition requested that 40 CFR 180.910 and 40 CFR 180.930 be amended by establishing exemptions from the requirement of a tolerance for residues of the inert ingredients ethoxylated acetylenic diols. That notice referenced a summary of the petition prepared by the Joint Inerts Task Force (JITF), Cluster Support Team Number 19 (CST 19), the petitioner, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

This petition was submitted in response to a final rule of August 9, 2006, (71 FR 45415) (FRL–8084–1), in which the Agency revoked, under section 408(e)(1) of the Federal Food, Drug, and Cosmetic Act (FFDCA), the existing exemptions from the requirement of a tolerance for residues of certain inert ingredients because of insufficient data to make the determination of safety required by FFDCA section 408(b)(2). The expiration date for the tolerance exemptions subject to revocation was August 9, 2008, which was later extended to August 9, 2009 (73 FR 45312) (FRL–8372–7), to allow for data to be submitted to support the establishment of tolerance exemptions for these inert ingredients prior to the effective date of the tolerance exemption revocation.

III. Inert Ingredient Definition

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

IV. Aggregate Risk Assessment and Determination of Safety

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

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for exemption from the requirement of a tolerance for residues of the ethoxylated acetylenic diols when used as inert ingredients in pesticide formulations for pre-harvest and post-harvest uses, as well as for application to animals. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The available mammalian toxicology database includes acute, subchronic (rat and dog) repeat dose, and reproductive toxicity studies (rat) via the oral route for a representative ethoxylated compound for the series of polyethoxylated 2,4,7,9-tetramethyl-5-decyne-4,7-diols and the proposed major unethoxylated metabolite, and mutagenicity data for the unethoxylated compound. The available toxicology data are adequate to support the requested exemption from the requirement of tolerance when used in pesticide formulations for these ethoxylated acetylenic diols. In addition to concern for the parent compounds, the Agency has identified the unethoxylated metabolite, 2,4,7,9-tetramethyl-5-decyne-4,7-diol, to be of concern. Unethoxylated and ethoxylated acetylenic diols are expected to follow a similar metabolic pathway. This would include hydrolytic or oxidative removal of the polyethoxylate chain to generate a common acetylenic diol primary metabolite and polyethoxylated moieties, which would vary in size depending on the extent of ethoxylation in the parent molecule. The primary acetylenic diol metabolite would be analogous to a related surfactant (CAS Reg. No. 126–86–3). Both the diol and polyethoxylate moieties would undergo rapid oxidative degradation and excretion likely as conjugates. The unethoxylated diol metabolite is of concern in food and water only. The Agency has concluded that the available data on the ethoxylated compound and unethoxylated metabolite (CAS Reg. Nos. 9014–85–1 and 126–86–3) are representative of the chemicals in the polyethoxylated 2,4,7,9-tetramethyl-5-decyne-4,7-diols cluster. Further, the Agency has concluded that the currently available toxicity dataset is adequate to apply to the cluster and to characterize the potential toxic effects of these surfactants.

The ethoxylated compounds are not acutely toxic by the oral, dermal and inhalation routes of exposure, but are slight to severe eye and mild skin irritants. The unethoxylated metabolite demonstrates low to medium acute toxicity by the oral and dermal routes of exposure, with the greatest concerns being eye and skin irritation. There is no evidence that the unethoxylated metabolite is mutagenic, and no increases in polyploidy or chromosome aberrations were observed in the presence and absence of metabolic activation.

There is no clear target organ identified for the ethoxylated compound or the unethoxylated metabolite, although increased liver weight (without histopathology) was a consistent finding. Following subchronic exposure to the ethoxylated compound, no specific target organ toxicity or neurotoxicity was observed in rats and dogs. In a 1–generation reproduction study, decreased pup body weights were observed at weaning following exposure to the ethoxylated and unethoxylated compounds at dose levels at and greater than the limit dose. Following subchronic exposure to the unethoxylated metabolite, compound-related neurological disturbances (convulsions and tremors) were observed in the dog. However, the concern for this finding is low based on the following considerations:

1. The clinical signs were sporadic.
2. There was no neuropathology at any dose.
3. No neurotoxic clinical signs were seen following subchronic exposures to the parent compound.
4. This endpoint is used as the point of departure in conjunction with highly conservative exposure inputs for assessing chronic dietary risks for the diol metabolite.
5. There was no evidence with either the parent or metabolite of neurotoxicity in rats, the species of choice for conducting neurotoxicity studies.

There was evidence of increased susceptibility following pre- and post-natal exposures to rats for 1–generation where decreases in body weights of the offspring were seen at high doses (1,000 or 2,000 milligrams/kilogram/day (mg/kg/day)) that did not cause any parental/systemic toxicity. It should be noted that the offspring effects were seen at and above the limit dose. Similarly, following exposure to the unethoxylated compound, there was a decrease in pup body weight at dose levels of 1,000 and 2,000 mg/kg/day, whereas the parental animals displayed body-weight effects only at the 2,000 mg/kg/day dose level. Based on the fact that the effect (decreased body weight) was observed only at the limit dose and above and there is a clear NOAEL, there is no residual concern for this finding.

There are no chronic toxicity studies available for this series of nonionic surfactants. The Agency used a qualitative structure activity relationship (SAR) database, DEREK Version 11, to determine if there were structural alerts suggestive of carcinogenicity. No structural alerts were identified. Based on the negative response for mutagenicity, the fact that no specific target organs have been identified in the rat and dog subchronic studies at the limit dose, the lack of any alerts in model predictions, and SAR analysis, the Agency concluded that the ethoxylated acetylenic diol inerts or their unethoxylated diol metabolite are not likely to be carcinogenic.

Specific information on the studies received and the nature of the adverse effects caused by ethoxylated acetylenic diols or the unethoxylated diol metabolite as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document "Ethoxylated Acetylenic Diols (JITF CST 19 Inert Ingredients). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations", pages 10–15 and pages 50–57 in docket ID number EPA–HQ–OPP–2008–0710.

B. Toxicological Endpoints

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

exposure to the POD to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded. This latter value is referred to as the Level of Concern (LOC).

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

A summary of the toxicological endpoints for ethoxylated acetylenic diols used for human health risk assessment is shown in Table 1 of this unit.

TABLE 1.—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR ETHOXYLATED ACETYLENIC DIOLS FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/Scenario	Point of Departure and Uncertainty/ Safety Factors	RfD, PAD, LOC for Risk Assessment	Study and Toxicological Effects
Acute dietary (all populations) Parent and Diol Metabolite	No appropriate endpoints were identified for acute dietary risk assessment.		
Chronic dietary (all populations) Parent Compound	NOAEL= 500 mg inert/kg/day UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 5 mg/kg/ daycPAD = 5 mg/kg/day	1–generation reproduction/subchronic oral toxicity study - rat (CAS Reg. No. 9014–85–1) Offspring LOAEL = 1,000 mg/kg/day, based on decreased pup body weight (11% lower than control) at weaning (only time assessed); BW decreased 21–22% lower than control at 2,000 mg/dg/day.
Chronic Dietary (all populations) Diol Metabolite	NOAEL = 200 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 2 mg/kg/ daycPAD = 2 mg/kg/day	Subchronic oral toxicity study - dog (CAS Reg. No. 126–86–3) LOAEL = 250 mg/kg/day, based on sporadic compound-related neurological disturbances (convulsions and tremors; time of occurrence unknown)
Incidental Oral Short- and Intermediate Term Dermal and Inhalation (All Durations) Parent Compound	NOAEL= 500 mg/kg/day UF_A = 10 x UF_H = 10 x FQPA SF = 1x (20% Dermal absorption; inhalation and oral toxicity assumed equivalent)	Residential/Occupational LOC for MOE = 100	1–generation reproduction/subchronic oral toxicity study - rat (CAS Reg. No. 9014–85–1) Offspring LOAEL = 1,000 mg/kg/day, based on decreased pup body weight (11% lower than control) at weaning (only time assessed); BW decreased 21–22% lower than control at 2,000 mg/kg/day.
Cancer (oral, dermal, inhalation) Parent and Diol Metabolite	Classification: No animal toxicitydata available for an assessment. Based on SAR analysis, the ethoxylated acetylenic diols and the diol metabolite are not expected to be carcinogenic.		

Point of Departure (POD) = A data point or an estimated point that is derived from observed dose-response data and used to mark the beginning of extrapolation to determine risk associated with lower environmentally relevant human exposures. NOAEL = no observed adverse effect level. LOAEL = lowest observed adverse effect level. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). PAD = population adjusted dose (a=acute, c=chronic). FQPA SF = FQPA Safety Factor. RfD = reference dose. MOE = margin of exposure. LOC = level of concern. N/A = not applicable.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to the ethoxylated acetylenic diols and the unethoxylated diol metabolite, EPA considered exposure under the petitioned-for exemptions from the requirement of a tolerance. EPA assessed dietary exposures from ethoxylated acetylenic diols in food as follows:

i. *Acute exposure.* No adverse effects attributable to a single exposure of ether the parent ethoxylated acetylenic diol inerts or the unethoxylated diol metabolite were seen in the toxicity databases; Therefore, acute dietary risk assessments for the parent compound and the unethoxylated diol metabolite are not necessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, no residue data were submitted for the ethoxylated acetylenic diol inert ingredients or the unethoxylated diol metabolite. In the absence of specific residue data, EPA has developed an approach which uses surrogate information to derive upper bound exposure estimates for the subject inert ingredients. Upper bound exposure estimates are based on the highest tolerance for a given commodity from a list of high-use insecticides, herbicides, and fungicides. A complete description of the general approach taken to assess inert ingredient risks in the absence of residue data is contained in the memorandum entitled "Alkyl Amines Polyalkoxylates (Cluster 4): Acute and Chronic Aggregate (Food and Drinking Water) Dietary Exposure and Risk Assessments for the Inerts." (D361707, S. Piper, 2/25/09) and can be found at *http://www.regulations.gov* in

docket ID number EPA–HQ–OPP–2008–0738.

In the dietary exposure assessment, the Agency assumed that the residue level of the inert ingredient would be no higher than the highest tolerance for a given commodity. Implicit in this assumption is that there would be similar rates of degradation (if any) between the active and inert ingredient and that the concentration of inert ingredient in the scenarios leading to these highest of tolerances would be no higher than the concentration of the active ingredient.

The Agency believes the assumptions used to estimate dietary exposures lead to an extremely conservative assessment of dietary risk due to a series of compounded conservatisms. First, assuming that the level of residue for an inert ingredient is equal to the level of residue for the active ingredient will overstate exposure. The concentrations of active ingredient in agricultural products is generally at least 50 percent of the product and often can be much higher. Further, pesticide products rarely have a single inert ingredient; rather there is generally a combination of different inert ingredients used which additionally reduces the concentration of any single inert ingredient in the pesticide product in relation to that of the active ingredient. In the case of ethoxylated acetylenic diols, a conservative screening level chronic dietary (food and water) assessment was conducted for both the parent ethoxylated acetylenic diol inerts and for the 2,4,7,9-tetramethyl-5-decyne-4,7-diol metabolite.

Second, the conservatism of this methodology is compounded by EPA's decision to assume that, for each commodity, the active ingredient which will serve as a guide to the potential level of inert ingredient residues is the active ingredient with the highest tolerance level. This assumption overstates residue values because it would be highly unlikely, given the high number of inert ingredients, that a single inert ingredient or class of ingredients would be present at the level of the active ingredient in the highest tolerance for every commodity. Finally, a third compounding conservatism is EPA's assumption that all foods contain the inert ingredient at the highest tolerance level. In other words, EPA assumed 100 percent of all foods are treated with the inert ingredient at the rate and manner necessary to produce the highest residue legally possible for an active ingredient. In summary, EPA chose a very conservative method for estimating what level of inert residue could be on food, then used this methodology to choose the highest possible residue that could be found on food and assumed that all food contained this residue. No consideration was given to potential degradation between harvest and consumption even though monitoring data shows that tolerance level residues are typically one to two orders of magnitude higher than actual residues in food when distributed in commerce.

Accordingly, although sufficient information to quantify actual residue levels in food is not available, the compounding of these conservative assumptions will lead to a significant exaggeration of actual exposures. EPA does not believe that this approach underestimates exposure in the absence of residue data.

iii. *Cancer.* The Agency used a qualitative structure activity relationship (SAR) database, DEREK11, to determine if there were structural alerts suggestive of carcinogenicity. No structural alerts for carcinogenicity were identified. Based on the negative response for mutagenicity, the fact that no specific target organs have been identified in the rat and dog subchronic studies at the limit dose, the lack of any alerts in model predictions, and SAR analysis, the Agency concluded that the ethoxylated acetylenic diol inerts or their unethoxylated diol metabolite are not likely to be carcinogenic. Since the Agency has not identified any concerns for carcinogenicity relating to the ethoxylated acetylenic diol inerts or their unethoxylated diol metabolite, a cancer dietary exposure assessment was not performed.

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for the ethoxylated acetylenic diols or their unethoxylated diol metabolite. Tolerance level residues and/or 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for the ethoxylated acetylenic diols and unethoxylated diol metabolite in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of the ethoxylated acetylenic diols and unethoxylated diol metabolite. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

A screening level drinking water analysis, based on the Pesticide Root Zone Model /Exposure Analysis Modeling System (PRZM/EXAMS) was performed to calculate the estimated drinking water concentrations (EDWCs) of the ethoxylated acetylenic diols and unethoxylated diol metabolite. Modeling runs on four surrogate inert ingredients using a range of physical chemical properties that would bracket those of the the ethoxylated acetylenic diols and unethoxylated diol metabolite were conducted. Modeled acute drinking water values ranged from 0.001 parts per billion (ppb) to 41 ppb. Modeled chronic drinking water values ranged from 0.0002 ppb to 19 ppb. Further details of this drinking water analysis can be found at *http://www.regulations.gov* in document "Ethoxylated Acetylenic Diols (JITF CST 19 Inert Ingredients). Human Health Risk Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide", at pages 15–16 and 59–61 in docket ID number EPA–HQ–OPP–2008–0710.

For the purpose of the screening level dietary risk assessment to support this request for an exemption from the requirement of a tolerance for the ethoxylated acetylenic diols and unethoxylated diol metabolite, a conservative drinking water concentration value of 100 ppb based on screening level modeling was used to assess the contribution to drinking water for the chronic dietary risk assessments for the parent compounds and for the metabolite of concern. These values were directly entered into the dietary exposure model.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). The ethoxylated acetylenic diols may be used in inert ingredients in pesticide products that are registered for specific uses that may result in both indoor and outdoor residential exposures. The ethoxylated acetylenic diol inerts are used in pesticide formulations that may be used around the home. In addition, these inerts may be used in pesticide products applied to pets as dust formulations and aerosol sprays intended for flea control on carpeted surfaces and bedding. Lastly, these inert surfactants may be present in home cleaning products. The ethoxylated acetylenic diols inerts do not have utility in personal care products. A screening level residential exposure and risk assessment was completed for products containing ethoxylated acetylenic diols as inert ingredients. In

this assessment, representative scenarios, based on end-use product application methods and labeled application rates, were selected. The Agency conducted an assessment to represent worst-case residential exposure by assessing ethoxylated acetylenic diols in pesticide formulations (Outdoor Scenarios); ethoxylated acetylenic diols in disinfectant-type uses; (Indoor Scenarios) and ethoxylated acetylenic diols in pet products; (Pet Product Scenarios). Further details of this residential exposure and risk analysis can be found at *http://www.regulations.gov* in the memorandum entitled "JITF Inert Ingredients. Residential and Occupational Exposure Assessment Algorithms and Assumptions Appendix for the Human Health Risk Assessments to Support Proposed Exemption from the Requirement of a Tolerance When Used as Inert Ingredients in Pesticide Formulations", (D364751, 5/7/09, Lloyd/LaMay in docket ID number EPA–HQ–OPP–2008–0710.

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

EPA has not found ethoxylated acetylenic diols to share a common mechanism of toxicity with any other substances, and ethoxylated acetylenic diols do not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that ethoxylated acetylenic diols do not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* The toxicity database consists of a 1–generation reproductive toxicity study on the ethoxylated compound and a 1–generation reproductive toxicity study on the unethoxylated compound.

The Agency performed a Degree of Concern Analysis because the rat reproduction studies provided evidence of increased susceptibility in the offspring relative to the parents. The purpose of the Degree of Concern analysis was:

i. To determine the level of concern for the effects observed when considered in the context of all available toxicity data; and

ii. Identify any residual uncertainties after establishing toxicity endpoints and traditional uncertainty factors to be used in the risk assessment.

In the case of the ethoxylated acetylenic diols and unethoxylated diol metabolite, there was evidence of increased susceptibility in the 1–generation reproduction toxicity studies in rats. Although there is some increased susceptibility in the rat reproductive toxicity studies (where the offspring NOAEL of 500 mg/kg/day was lower than the paternal NOAELs of 1,000 and 2,000 mg/kg/day), the effects (decreased body weight) were observed only at the limit and twice the limit dose. The dose-response for this effect has been adequately characterized, and the NOAEL selected as a point of departure for the chronic dietary, dermal and inhalation risk assessment is protective of the adverse offspring effects. Thus, there are no residual concerns.

There was some evidence of clinical signs indicative of neurotoxicity following subchronic exposures to the diol metabolite in dogs. However, the concern for this finding is low based on the following considerations:

a. The clinical signs were sporadic;

b. There was no neuropathology at any dose;

c. No neurotoxic clinical signs were seen following subchronic exposures to the parent compound;

d. This endpoint is used as the point of departure in conjunction with highly conservative exposure inputs for assessing chronic dietary risks for the diol metabolite; and

e. There was no evidence with either the parent or metabolite of neurotoxicity in rats, the species of choice for conducting neurotoxicity studies. Therefore, additional neurotoxicity data, including developmental neurotoxicity studies are not required.

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

i. The toxicity database for the ethoxylated acetylenic diols and unethoxylated diol metabolite is considered adequate for assessing the risks to infants and children (the available studies are described in Unit IV.D.2.).

ii. There are no concerns or residual uncertainties concerning pre- and postnatal toxicity for the reasons given in this Unit.

iii. No additional neurotoxicity data are required.

iv. While there is no chronic toxicity study, the Agency has concluded that based on the very conservative exposure assessment and the fact that the toxicity endpoint is also very conservative (effects were only seen at and above the limit dose), the 10X interspecies and 10X intraspecies uncertainty factor would be adequately protective, and no additional uncertainty factor is needed for extrapolating from subchronic to chronic exposure.

v. There are no residual uncertainties identified in the exposure databases. The food and drinking water assessment is not likely to underestimate exposure to any subpopulation, including those comprised of infants and children. The food exposure assessments are considered to be highly conservative as they are based on the use of the highest tolerance level from the surrogate pesticides for every food and 100 PCT is assumed for all crops. EPA also made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to the ethoxylated acetylenic diols or their diol metabolite in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by the ethoxylated acetylenic diols.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. The aPAD and cPAD represent the highest safe exposures, taking into account all

appropriate SFs. EPA calculates the aPAD and cPAD by dividing the POD by all applicable UFs. For linear cancer risks, EPA calculates the probability of additional cancer cases given the estimated aggregate exposure. Short-term, intermediate-term, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the POD to ensure that the MOE called for by the product of all applicable UFs is not exceeded.

The Agency has conducted aggregate risk assessments to support the proposed uses of the ethoxylated acetylenic diols as inert ingredients in pesticide formulations. As noted previously, the ethoxylated acetylenic diols assessment includes not only parent compounds, but also 2,4,7,9-tetramethyl-5-decyne-4,7-diol. The Agency notes that concern for this degradate is for residues in food and water only. Additionally, the Agency has selected endpoints and doses for risk assessment separately for the parent compound and diol metabolite. Therefore, separate parent compound and diol metabolite aggregate risk assessments are appropriate. The aggregate risk assessment for the diol metabolite includes residues in food and water only.

1. *Acute risk.* There was no hazard attributable to a single dietary exposure seen in the toxicity database for the parent ethoxylated acetylenic diols or the unethoxylated diol metabolite. Therefore, the parent ethoxylated acetylenic diols or the unethoxylated diol metabolite are not expected to pose an acute risk.

2. *Chronic risk.* A chronic aggregate risk assessment takes into account exposure estimates from chronic dietary consumption of food and drinking water. Using the exposure assumptions discussed in this unit for chronic exposure, the chronic dietary exposure from food and water to the parent ethoxylated acetylenic diol is 4% of the cPAD for the U.S. population and 13% of the cPAD for children 1–2 yrs old, the most highly exposed population subgroup. The chronic dietary (food and water) exposure for the unethoxylated diol metabolite resulted in a risk estimate of 10% of the cPAD for the U.S. population and 31% of the cPAD for children 1–2 yrs old, the most highly exposured population subgroup.

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

Ethoxylated acetylenic diol inerts are used as inert ingredients in pesticide products that are currently registered for uses that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to the ethoxylated acetylenic diols. Using the exposure assumptions described in this unit, EPA has concluded that the combined short-term aggregated food, water, and residential exposures result in aggregate MOEs of 670, for both adult males and females, respectively. Adult residential exposure combines high end dermal and inhalation handler exposure from indoor hand wiping with a high end post application dermal exposure from contact with treated lawns. EPA has concluded the combined short-term aggregated food, water, and residential exposures result in an aggregate MOE of 600 for children. Children's residential exposure includes total exposures associated with contact with treated lawns (dermal and hand-to-mouth exposures). As the LOC is for MOEs that are lower than 100, these MOEs are not of concern.

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

Ethoxylated acetylenic diol inerts are used as inert ingredients in pesticide products that are currently registered for uses that could result in intermediate -term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with intermediate-term residential exposures to ethoxylated acetylenic diols. Using the exposure assumptions described in this unit, EPA has concluded that the combined intermediate-term aggregated food, water, and residential exposures result in aggregate MOEs of 2,500 for both adult males and females respectively. Adult residential exposure includes high end post application dermal exposure from contact with treated lawns. EPA has concluded that the combined intermediate-term aggregated food, water, and residential exposures result in an aggregate MOE of 690 for children. Children's residential exposure includes total exposures associated with contact with treated lawns (dermal and hand-to-mouth exposures). As the LOC is for MOEs that are lower than 100, these MOEs are not of concern.

5. *Aggregate cancer risk for U.S. population.* The Agency has not identified any concerns for carcinogenicity relating to the parent ethoxylated acetylenic diol inerts or the degradate of concern.

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

V. Other Considerations

A. Analytical Enforcement Methodology

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

B. International Residue Limits

The Agency is not aware of any country requiring a tolerance for the ethoxylated acetylenic diol inerts nor have any CODEX Maximum Residue Levels been established for any food crops at this time.

VI. Conclusion

Therefore, an exemption from the requirement of a tolerance is established for residues of Ethylene oxide adducts of 2,4,7,9-tetramethyl-5-decynediol, the ethylene oxide content averages 3.5, 10, or 30 moles, when used as inert ingredients applied to crops pre-harvest and post-harvest, or to animals.

VII. Statutory and Executive Order Reviews

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

Populations (59 FR 7629, February 16, 1994).

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

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

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

VIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: July 21, 2009.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. In § 180.910, the table is amended by adding alphabetically the following inert ingredients to read as follows:

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

* * * * *

Inert Ingredients	Limits	Uses
* * *	* *	* *
Ethylene oxide adducts of 2,4,7,9-tetramethyl-5-decynediol, the ethylene oxide content averages 3.5, 10 or 30 moles (CAS Reg. No. 9014–85–1)	.....	Surfactants, related adjuvants of surfactants
* * *	* *	* *

* * * * *

■ 3. In §180.930, the table is amended by adding alphabetically the following inert ingredients to read as follows:

§ 180.930 Inert ingredients applied to animals; exemptions from the requirement of a tolerance.

* * * * *

Inert Ingredients	Limits	Uses
* * *	* *	* *
Ethylene oxide adducts of 2,4,7,9-tetramethyl-5-decynediol, the ethylene oxide content averages 3.5, 10 or 30 moles (CAS Reg. No. 9014–85–1)	.....	Surfactants, related adjuvants of surfactants
* * *	* *	* *

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[FR Doc. E9–17958 Filed 7–28–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0556; FRL–8420–6]

Fenpyroximate; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for combined residues of fenpyroximate in or on raw agricultural commodities (RAC): Vegetables, fruiting, group 8 at 0.20 ppm; okra at 0.20 ppm; melon subgroup 9A at 0.10 ppm; and cucumber at 0.10 ppm. The Interregional Research Project Number 4 (IR-4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective July 29, 2009. Objections and requests for hearings must be received on or before September 28, 2009, and must be filed in accordance with the instructions

provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0556. 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: Sidney Jackson, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–7610; e-mail address: *jackson.sidney@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 those engaged in the following activities:

- 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 to provide 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 EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR cite at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0556 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before September 28, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2008–0556, by one of the following methods:

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

II. Petition for Tolerance

In the **Federal Register** of August 13, 2008 (73 FR 47186) (FRL–8375–8), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 8E7365) by IR-4, 500 College Road East, Suite 201 W, Princeton, NJ 08540. The petition requested that 40 CFR 180.566 be amended by establishing tolerances for residues of the insecticide fenpyroximate, (E)-1,1-dimethylethyl 4-[[[[(1,3-dimethyl-5-phenoxy-1H-pyrazol-4-yl) methylene] amino]oxy]methyl] benzoate and its Z-isomer, (Z)-1,1-dimethylethyl 4-[[[[(1,3-dimethyl-5-phenoxy-1H-pyrazol-4-yl)methylene] amino]oxy] methyl] benzoate in or on food commodities vegetables, fruiting, group 08 at 0.20 ppm; okra at 0.20 ppm; melon subgroup 09A at 0.03 ppm; and cucumber at 0.05 ppm. That notice referenced a summary of the petition prepared by Nichino America, Inc., of Wilmington, DE 19808, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of available field trial residue data supporting the petition, EPA determined that the proposed tolerance levels for certain crops should be revised as follows: Melon subgroup 9A increased from 0.03 ppm to 0.10 ppm and cucumber increased from 0.05 ppm to 0.10 ppm. The reasons for these changes are explained in Unit IV.D.

III. Aggregate Risk Assessment and Determination of Safety

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

result to infants and children from aggregate exposure to the pesticide chemical residue...."

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for combined residues of fenpyroximate and its Z-isomer in or on food commodities vegetables, fruiting, group 8 at 0.20 ppm; okra at 0.20 ppm; melon subgroup 9A at 0.10 ppm; and cucumber at 0.10 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Fenpyroximate has moderate oral and inhalation toxicity. It has low dermal toxicity and is not an eye or skin irritant. Fenpyroximate is a slight to moderate skin sensitizer by the maximization test method.

Subchronic oral toxicity studies in the rat show the primary effects included decreased body-weight and weight gain at the lowest observed adverse effect level (LOAEL) while there were hematological effects at higher doses. In the 21–day dermal toxicity study in rats, there were clinical signs in the females (including red nose/mouth/nasal discharge); decreased body-weights, body-weight gains, and food consumption in males and females; and increased liver weights and hepatocellular necrosis in the females. In the subchronic oral dog study, there was bradycardia observed at the LOAEL. This effect was present at 6 weeks (first time point measured) and did not appear to increase in severity with time. Also observed at this dose level were diarrhea, decreased body-weight, body-weight gain, and food consumption. At higher doses, there was also emesis. The highest dose resulted in first- and second-degree heart block, increased urea concentration, decreased glucose and altered plasma electrolyte levels among other signs of toxicity.

In the chronic oral rat and mouse studies, signs of toxicity were similar to those in the oral subchronic rat study. The chronic dog study also revealed signs of toxicity including bradycardia, diarrhea, decreased body-weight gain, and food consumption.

The 2-generation reproductive toxicity study indicated that maternal (decreased body-weight) and offspring toxicity (decreased lactational weight gain) occurred at the same dose, suggesting no evidence of sensitivity or susceptibility. Reproductive parameters were not affected in this 2-generation reproduction study. The rat and rabbit developmental toxicity studies were tested at doses that produced minimal maternal toxicity.

There are no neurotoxicity studies other than a negative delayed acute neurotoxicity study in the hen. There was no indication of neurotoxicity present in any of the existing subchronic or chronic toxicity studies.

There was no concern for mutagenic activity in several studies including: *Salmonella, E. Coli, in vitro* mammalian cell gene mutation assay at the HGPRT locus, mammalian cell chromosome aberration assay, *in vivo* mouse bone marrow micronucleus assay, DNA repair disk diffusion assay, and an unscheduled DNA synthesis assay.

There was no evidence of carcinogenic potential in either the rat or mouse study.

Specific information on the studies received and the nature of the adverse effects caused by fenpyroximate as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document *Fenpyroximate. Petition for the Establishment of Permanent Tolerances for Residues on Fruiting Vegetable (crop Group 8), Okra. Human Health Risk Assessment, dated 12/23/2008*, page 14 in docket ID number EPA–HQ–OPP–2008–0556–0004.

B. Toxicological Endpoints

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

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

A summary of the toxicological endpoints for fenpyroximate used for human risk assessment can be found at *http://www.regulations.gov* in document *Fenpyroximate. Petition for the Establishment of Permanent Tolerances for Residues on Fruiting Vegetable (Crop Group 8), Okra. Human Health Risk Assessment, dated 12/23/2008*, page 12 in docket ID number EPA–HQ–OPP–2008–0556–0004.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to fenpyroximate, EPA considered exposure under the petitioned-for tolerances as well as all existing fenpyroximate tolerances in (40 CFR 180.566). EPA assessed dietary exposures from fenpyroximate in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure. An acute dietary-exposure assessment was conducted for females 13–49 years old. Since an effect of concern attributable to a single dose in toxicity studies was not identified for the general U.S. population, an acute dietary-exposure assessment was not

performed for subgroups other than females 13–49 years old.

In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA conducted acute dietary analysis for fenpyroximate assuming 100 percent crop treated (PCT) and existing and proposed tolerance-level residues for all commodities. DEEM (ver. 7.81) default processing factors were assumed for all commodities excluding apple, pear, and grape juice (0.11x); grape, raisin (2.7x); orange, grapefruit, tangerine, lemon and lime juice (0.06x); tomato paste (1.0x) and puree (1.0x); and peppermint and spearmint oil (0.08x). The petitioner submitted adequate tomato processing data indicating that residues of fenpyroximate *per se* did not concentrate in tomato paste or puree as all processing factors were <1.0x. Residues of the Z-isomer did not concentrate in tomato puree; however, residues of Z-isomer concentrated slightly in tomato paste. When residues are combined, the average processing factors were <0.89x for tomato paste and <0.57x for tomato puree. Default processing factor of 1.0x was assumed for both tomato paste and tomato puree. Available data support processing factors presented in Unit C.1. for stated commodities.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA assumed 100 PCT and existing and proposed tolerance-level residues for all commodities. DEEM (ver. 7.81) default processing factors were assumed with the exceptions listed in Unit C.1.

iii. *Cancer.* Fenpyroximate is classified as "not likely to be a human carcinogen." There was no evidence of carcinogencity in mice studies or in combined chronic/carcinogenicity studies in the rat. In addition, bacterial reverse mutation and *in vitro* mammalian cell gene mutation studies showed no mutagenic effects. Therefore, a cancer dietary exposure assessment was not performed.

The assumption of 100 PCT and tolerance level residues was made for all registered and proposed commodity uses of fenpyroximate.

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

The nature of fenpyroximate residues in plants and animals is understood. The residues of concern for plants are fenpyroximate and its Z-isomer (also referred to as M-1). The residues of concern for livestock milk, fat, meat and meat by-products are parent and multiple metabolites. Livestock residues, however, are not relevant to this petition. EPA determined that the residues in plants and livestock raw agricultural commodities for the purposes of tolerance enforcement and risk assessment are the parent compound, fenpyroximate, plus its Z-isomer and metabolites and that parent, Z-isomer and metabolite M-3 should be considered as residues of concern in drinking water. Based on the proposed application rates and the environmental fate properties of fenpyroximate, some surface and ground water contamination may occur. However, the risk of water contamination from parent compound is relatively low, based on its high sorption potential. Unlike parent compound, the sorption of the M-3 metabolite is much less, and it may move into water resources more readily. Environmental fate data indicate that parent and its Z-isomer are stable to photolysis in soil and immobile in soil. Major degradates formed in the aqueous layer were M-3 (50%), M-8 (36%), M-16 (4-hydroxymethylbenzoic acid, 58%) and M-11 (25 to 30%), and M-3 (>10%), M-11 (25 to 30%) and M8 (16 to 19%) in the soil. However, data from a field dissipation study showed M3 (32%) being the only significant degradate found in the field. Based on the structural similarity between parent and M-3, the Agency concluded that parent and M-3 should be included in the risk assessment.

The EDWCs were Tier 1 estimates for ground water using the Screening Concentration in Ground Water (SCI-GROW) model and surface water using the First Index Reservoir Screening Tool (FIRST) model for fenpyroximate and its metabolites. The models utilized an application rate of 0.2 lb ai/A with 2 applications per season.

Based on the FIRST, and SCI-GROW models, the EDWCs of fenpyroximate for acute exposures are estimated to be 8.74 parts per billion (ppb) for surface water and 0.001 ppb for ground water. For chronic exposures for non-cancer assessments are estimated to be 0.51 ppb for surface water and 0.001 ppb for ground water. Parent, Z-isomer and metabolite M-3 are of concern in water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 8.74 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment, the water concentration of value 0.51 ppb was used to assess the contribution to drinking water.

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

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

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

EPA has not found fenpyroximate to share a common mechanism of toxicity with any other substances, and fenpyroximate does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that fenpyroximate does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

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

data are available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* There is no concern for pre- and/or post-natal toxicity resulting from exposure to fenpyroximate. There is no evidence (qualitative or quantitative) of increased susceptibility following pre- and post-natal exposure in adequate developmental toxicity studies in the rat and rabbit and a two-generation reproduction study in the rat.

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

i. The toxicity database for fenpyroximate is adequate to characterize potential pre-natal and post-natal risk for infants and children. Acceptable/guideline studies for developmental toxicity in rats and rabbits and reproduction toxicity in rats are available for FQPA assessment.

EPA began requiring functional immunotoxicity testing of all food and non-food use pesticides on December 26, 2007. Since this requirement went into effect relatively recently, these studies are not yet available for fenpyroximate. In the absence of specific immunotoxicity studies, EPA has evaluated the available fenpyroximate toxicity database to determine whether an additional database uncertainty factor is needed to account for potential immunotoxicity. No evidence of immunotoxicity was found. Due to the lack of evidence of immunotoxicity for fenpyroximate, EPA does not believe that conducting immunotoxicity testing will result in a NOAEL less than the cRfD NOAEL of 0.97 mg/kg bw/day already established for fenpyroximate, and an additional factor (UF_{DB}) for database uncertainties is not needed to account for potential immunotoxicity.

Acute and subchronic neurotoxocity testing in rats is also required as a result of changes made to the pesticide data requirements in December of 2007. Although neurotoxicity studies in rats have not yet been submitted, there is no evidence of neurotoxicity in any study in the toxicity database for fenpyroximate. Therefore, EPA has concluded that an additional uncertainty factor is not needed to account for the lack of these data.

The residue chemistry and environmental fate databases are complete.

ii. There is no indication that fenpyroximate is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

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

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues for existing and proposed uses. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to fenpyroximate in drinking water. These assessments will not underestimate the exposure and risks posed by fenpyroximate.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* An acute aggregate risk assessment takes into account exposure estimates from acute dietary consumption of food and drinking water. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to fenpyroximate will occupy 6.6% of the aPAD for (females 13–49 years) the only population group of interest.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to fenpyroximate from food and water will utilize 38% of the cPAD for (children 1–2 years old) the population group receiving the greatest exposure. There are no residential uses for fenpyroximate.

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

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

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

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

5. *Aggregate cancer risk for U.S. population.* Fenpyroximate is classified as not likely to be carcinogenic to humans. Therefore, fenproximate is not expected to pose a cancer risk.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

An adequate enforcement method is available for determination of fenpyroximate residues of concern in plants. A gas chromatography method with nitrogen/phosphorus detection (GC/NPD), Method S19, has passed an Agency validation. Method S19 has a limit of quantitation of 0.10 ppm for the combined residues of fenpyroximate and its Z-isomer.

Adequate enforcement methodology (gas chromatography (GC/NPD) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov.*

B. International Residue Limits

Codex and Mexican maximum residue limits (MRLs) are established for residues of fenpyroximate *per se* in/on several crop commodities but not for the crops requested. Harmonization with the other Codex and Mexican MRLs is not possible because the U.S. tolerance expressions include additional metabolites/isomers. There are currently no established Canadian MRLs.

C. Revisions to Petitioned-For Tolerances

Based upon available data supporting petitioned-for tolerances, the Agency revised and/or modified the petitions as proposed in the notice of filing, as follows:

1. Proposed tolerance level for melon subgroup 9A at 0.03 ppm was increased to 0.10 ppm. Available residue data for cantaloupe, the representative crop, are adequate to fulfill data requirements. The number and locations of field trials conducted are in accordance with EPA Guideline 860.1500, and the trials reflect the proposed use pattern. The residue data were not entered into the Agency's tolerance spreadsheet because all treated samples bore combined residues below the limit of quantitation (LOQ) of <0.10 ppm. The available data for cantaloupe will support a tolerance of 0.10 ppm (the combined LOQs of the enforcement method for the parent compound and the Z-isomer) for fenpyroximate residues in/on melon subgroup 9A.

2. The Agency modified the proposed tolerance for residues in/on cucumber from 0.05 ppm to 0.10 ppm based on available residue data. Residue data include field trials where a single foliar application of fenpyroximate at maximum proposed seasonal rate was made. Results show that the maximum combined residues of fenpyroximate and its Z-isomer in/on cucumbers was <0.03 ppm at 7–day PHI.

These data were entered into the Agency's tolerance spreadsheet as specified by the Guidance for Setting Pesticide Tolerances Based on Field Trial Data SOP to determine an appropriate tolerance level. The Agency determined that the appropriate RAC tolerance for cucumber is 0.10 ppm (the combined LOQs of the enforcement method for the parent compound and the Z-isomer).

V. Conclusion

Therefore, tolerances are established for combined residues of fenpyroximate, (E)-1,1-dimethylethyl 4-[[[[(1,3-dimethyl-5-phenoxy-1H-pyrazol-4-yl) methylene] amino]oxy]methyl] benzoate and its Z-isomer, (Z)-1,1-dimethylethyl 4-[[[[(1,3-dimethyl-5-phenoxy-1H-pyrazol-4-yl)methylene] amino]oxy] methyl] benzoate in or on food commodities: vegetables, fruiting, group 8 at 0.20 ppm; okra at 0.20 ppm; melon subgroup 9A at 0.10 ppm; and cucumber at 0.10 ppm.

VI. Statutory and Executive Order Reviews

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

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

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

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

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 to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: July 20, 2009.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. Section 180.566 is amended by revising the term "residues" to read "combined residues" in introductory paragraphs (a)(1), (a)(2) and (a)(3); and by alphabetically adding the following commodities to the table in paragraph (a)(1) to read as follows:

§180.566 Fenpyroximate; tolerances for residues.

(a) *General.* (1) * * *

Commodity	Parts per million
* * * *	*
Cucumber	0.10
* * * *	*
Melon subgroup 9A	0.10
* * * *	*
Okra	0.20
* * * *	*
Vegetable, fruiting, group 8	0.20

* * * * *

[FR Doc. E9–17942 Filed 7–28–09; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0189; FRL–8427–3]

S-Abscisic Acid; Temporary Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a temporary exemption from the requirement of a tolerance for residues of the biochemical pesticide *S*-Abscisic Acid, (*S*)-5-(1-hydroxy-2,6,6-trimethyl-4-oxo-1-cyclohex-2-enyl)-3-methyl-penta-(2*Z*,4*E*)-dienoic Acid in or on leafy vegetables, herbs and spices, pome fruit, stone fruit, grapes and pineapples when applied/used as a plant regulator in accordance with the terms of Experimental Use Permit (EUP) 73049–EUP–7. Valent BioSciences Corporation submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting the temporary tolerance exemption. This regulation eliminates the need to establish a maximum permissible level for residues of *S*-Abscisic Acid, (*S*)-5-(1-hydroxy-2,6,6-trimethyl-4-oxo-1-cyclohex-2-enyl)-3-methyl-penta-(2*Z*,4*E*)-dienoic Acid for the uses permitted under EUP 73049–EUP–7. The temporary tolerance exemption expires on August 7, 2012.

DATES: This regulation is effective July 29, 2009. Objections and requests for hearings must be received on or before September 28, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0189. 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: Chris Pfeifer, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0031; e-mail address: *pfeifer.chris@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

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

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

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0189 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before September 28, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2009–0189, by one of the following methods.

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

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

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

II. Background and Statutory Findings

In the **Federal Register** of April 8, 2009 (74 FR 15969) (FRL–8407–6), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 9G7532) by Valent BioSciences Corporation, 870 Technology Way, Libertyville, IL 60048. The petition requested that 40 CFR part 180 be amended by establishing a temporary exemption from the requirement of a tolerance for residues of *S*-Abscisic Acid, (*S*)-5-(1-hydroxy-2,6,6-trimethyl-4-oxo-1-cyclohex-2-enyl)-3-methyl-penta-(2*Z*,4*E*)-dienoic Acid in or on leafy vegetables, herbs and spices, pome fruit, stone fruit, grapes and pineapples. This notice included a summary of the petition prepared by the petitioner, Valent BioSciences Corporation, which is included in the docket for this rule. In that summary, Valent BioSciences Corporation requested an expansion of the temporary exemption of a requirement for tolerance for *S*-Abscisic Acid (commonly abbreviated as ABA) to extend to leafy vegetables, herbs and spices; pome fruit, stone fruit, grapes and pineapples pursuant to the issuance of EPA EUP Number 73049–EUP–7. This EUP is designed to test ABA for its ability to aid in fruit thinning, growth control, crop stress reduction and crop quality improvement, and proposes a maximum rate of 2,000 parts per million (ppm) per acre to be applied up to four times annually. The EUP proposes to study ABA over 3 years (until August 7, 2012) and would cover a sum total of 6,913 acres. There were no comments received in response to the notice of filing.

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is "safe." Section 408(c)(2)(A)(ii) of FFDCA defines "safe " to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Pursuant to section 408(c)(2)(B) of FFDCA, in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in section 408(b)(2)(C) of FFDCA, which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue...." Additionally, section 408(b)(2)(D) of FFDCA requires that the Agency consider "available information concerning the cumulative effects of a particular pesticide's residues" and "other substances that have a common mechanism of toxicity."

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

III. Toxicological Profile

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

S-Abscisic Acid is a plant regulator present in all vascular plants, algae and some fungi. Its name derives from its purported role in abscission - the shedding of leaves, fruits, flowers and seeds. As a plant hormone, *S*-Abscisic Acid is known to be a strong actor in regulating plant growth by aiding in stress resistance, fruit set, ripening, and senescence. It is naturally present in fruits and vegetables at various levels, generally not in excess of 10 ppm, and has always been a component of any diet containing plant materials. To date, no toxic effects to humans have been associated with the consumption of ABA in fruits and vegetables.

S-Abscisic Acid, (*S*)-5-(1-hydroxy-2,6,6-trimethyl-4-oxo-1-cyclohex-2-enyl)-3-methyl-penta-(2*Z*,4*E*)-dienoic Acid is virtually non-toxic with regard to acute toxicity. The lethal dose (LD_{50}) for acute oral toxicity using the rat was greater than 5,000 milligrams/kilogram (mg/kg) of body weight in female rats, so it is classified as a Toxicity Category IV for acute oral toxicity. The LD_{50} for acute dermal toxicity using the rat was greater than 5,000 mg/kg body weight in male and female rats, so it is classified as a Toxicity Category IV for acute dermal toxicity. The lethal concentration (LC_{50}) for acute inhalation toxicity was greater than 2.06 mg/liter (L) in male and female rats, so it is classified as a Toxicity Category IV for acute inhalation toxicity. Primary eye irritation, tested in rabbits, showed mild irritation to the eye (Toxicity Category III). Iritis and conjunctivitis cleared after 24 hours. Primary skin irritation, tested in the rabbit, showed this material to be slightly irritating. This irritation cleared within 24 hours after treatment. ABA was tested for Sensitization in the Guinea Pig and found not to be a skin sensitizer.

1. *Genotoxicity*. Three mutagenicity studies (an Ames test, a mouse micronucleus assay, and an unscheduled DNA synthesis assay in the rat) determined that ABA was not mutagenic.

2. *Developmental toxicity and Subchronic toxicity*. The Agency does not believe that there is any development toxicity or subchronic toxicity concern associated with ABA for several reasons. Public literature indicates that there are no grounds for concern with regard to the developmental toxicity or subchronic toxicity of ABA. Because of the extremely short half-life and dissipation qualities of ABA, the Agency expects treated food to return to background levels within 5 days of application; therefore, there is a lack of potential oral exposure. Moreover, ABA is virtually non-toxic through the oral route of exposure. Finally, because of the pre-existing ubiquity of ABA in our diet without issue, developmental toxicity and subchronic toxicity are not considered to be of concern.

IV. Aggregate Exposures

In examining aggregate exposure, section 408 of FFDCA directs EPA to consider available information

concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

A. Dietary Exposure

ABA is a plant regulator present in all vascular plants, algae and some fungi. It is naturally present in fruits and vegetables at various levels, generally not in excess of 10 ppm, and has always been a component of any diet containing plant materials. Because of the rapid degradation of ABA, the proposed uses of this product are not expected to result in dietary residues in or on leafy vegetables, herbs and spices, pome fruit, stone fruit, grapes and pineapples, above the natural background levels.

1. *Food.* Residues of ABA applied to leafy vegetables, herbs and spices, pome fruit, stone fruit, grapes and pineapples can be expected to rapidly dissipate to levels consistent with those observed naturally. Data submitted by the registrant confirm ABA's dissipation through rapid metabolism, photo-isomerization, and rapid degradation. Because of its ability to dissipate rapidly, ABA, when used in accordance with the terms of EUP 73049–EUP–7, is not expected to result in residues in or on leafy vegetables, herbs and spices, pome fruit, stone fruit, grapes and pineapples, above the natural background levels typically found in other commonly consumed fruits or vegetables. As mentioned above, it is noted that ABA is already commonly consumed. It is naturally present in fruits and vegetables at various levels (up to 10 ppm) and has always been a component of any diet containing plant materials.

2. *Drinking water exposure.* Pursuant to the terms of EUP 73049–EUP–7, applications are expected to be made to leafy vegetables, herbs and spices, pome fruit, stone fruit, grapes and pineapples using a maximum application rate of 2,000 ppm per acre (using a maximum of 200 gallons). Due to the low concentration and volume of application solution, leaching into groundwater is unlikely. Applications are made directly to leafy vegetables, herbs and spices, pome fruit, stone fruit, grapes and pineapples; therefore, accidental application to lakes or steams is unlikely. However, even if ABA leached into groundwater, data show that ABA is rapidly metabolized and photo-isomerized, further diminishing the likelihood of any extra-normal ABA residues being transferred to water. Data submitted to the Agency show ABA is also naturally present in water. The Agency therefore concludes that any residues resulting from the application of ABA to leafy vegetables, herbs and spices, pome fruit, stone fruit, grapes and pineapples are not expected to result in any significant drinking water exposure beyond natural background levels of ABA already present in water.

B. Other Non-Occupational Exposure

Potential non-occupational exposure is considered unlikely for this distinctly agricultural use pattern.

1. *Dermal exposure.* Non-occupational dermal exposures to ABA when used as a pesticide are expected to be negligible because it is limited to an agricultural use under this EUP.

2. *Inhalation exposure.* Non-occupational inhalation exposures to ABA when used as a pesticide are expected to be negligible because it is limited to an agricultural use under this EUP.

V. Cumulative Effects

Section 408(b)(2)(D)(v) of FFDCA requires the Agency, when considering whether to establish, modify, or revoke a tolerance, to consider "available information" concerning the cumulative effects of pesticide residues and "other substances that have a common mechanism of toxicity." These considerations include the cumulative effects of such residues on infants and children. Because there is no indication of mammalian toxicity from ABA, the Agency concludes that ABA does not share a common mechanism of toxicity with other substances. Therefore, section 408(b)(2)(D)(v) does not apply.

VI. Determination of Safety for U.S. Population, Infants and Children

1. *U.S. population.* The Agency has determined that there is a reasonable certainty that no harm will result from aggregate exposure to residues of ABA to the U.S. population. This includes all anticipated dietary exposures and other non-occupational exposures for which there is reliable information. The Agency arrived at this conclusion based on the relatively low levels of mammalian dietary toxicity associated with ABA, the natural ubiquity of ABA in our foodstuffs, and data indicating that the pesticidal use of ABA results in residues that approximate natural background levels. For these reasons, the Agency has determined that ABA residues on leafy vegetables, herbs and spices, pome fruit, stone fruit, grapes and pineapples will be safe, i.e., there is a reasonable certainty that no harm will result from aggregate exposure to residues of ABA when used in accordance with the terms of EUP 73049–EUP–7.

2. *Infants and children.* FFDCA section 408 provides that EPA shall apply an additional tenfold margin of exposure (safety) for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database unless the EPA determines that a different margin of exposure (safety) will be safe for infants and children. Based on all the reliable available information the Agency reviewed on ABA, the Agency concludes that there are no residual uncertainties for prenatal/postnatal toxicity resulting from ABA and that ABA has relatively low toxicity to mammals from a dietary standpoint, including infants and children. Accordingly, there are no threshold effects of concern and an additional margin of safety is not necessary to protect infants and children.

VII. Other Considerations

A. Endocrine Disruptors

Based on available data, no endocrine system-related effects have been identified with the consumption of *S*-Abscisic Acid, (*S*)-5-(1-hydroxy-2,6,6-trimethyl-4-oxo-1-cyclohex-2-enyl)-3-methyl-penta-(2*Z*,4*E*)-dienoic Acid.

B. Analytical Method(s)

Through this action, the Agency proposes a temporary exemption from the requirement of a tolerance of ABA when used on leafy vegetables, herbs and spices, pome fruit, stone fruit, and pineapples without any numerical limitations for residues. It has determined that residues resulting from the pesticidal uses of *S*-Abscisic Acid, (*S*)-5-(1-hydroxy-2,6,6-trimethyl-4-oxo-1-cyclohex-2-enyl)-3-methyl-penta-(2*Z*,4*E*)-dienoic Acid, would be so low as to be indistinguishable from natural background levels. As a result, the Agency has concluded that an analytical method is not required for enforcement purposes for this use of ABA.

C. Codex Maximum Residue Level

There are no Codex Maximum Residue Levels established for residues of *S*-Abscisic Acid, (*S*)-5-(1-hydroxy-2,6,6-trimethyl-4-oxo-1-cyclohex-2-enyl)-3-methyl-penta-(2*Z*,4*E*)-dienoic Acid.

VIII. Statutory and Executive Order Reviews

This final rule establishes a temporary exemption from the requirement of a tolerance under section 408(d) of

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

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

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

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

IX. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: July 20, 2009.

W. Michael McDavit,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. Section 180.1281 is revised to read as as follows:

§ 180.1281 S-Abscisic Acid; Temporary Exemption From the Requirement of a Tolerance.

(a) *S*-Abscisic Acid, (*S*)-5-(1-hydroxy-2,6,6-trimethyl-4-oxo-1-cyclohex-2-enyl)-3-methyl-penta-(2*Z*,4*E*)-dienoic Acid is temporarily exempt from the requirement of a tolerance when used as a plant regulator in or on grape in accordance with the Experimental Use Permit 73049–EUP–4. This temporary exemption from tolerance will expire October 1, 2010.

(b) A temporary exemption from the requirement of a tolerance is established for the residues of *S*-Abscisic Acid, (*S*)-5-(1-hydroxy-2,6,6-trimethyl-4-oxo-1-cyclohex-2-enyl)-3-methyl-penta-(2*Z*,4*E*)-dienoic Acid when used as a plant regulator in or on grape, herbs and spices, leafy vegetables, pineapple, pome fruit, and stone fruit in accordance with the Experimental Use Permit 73049–EUP–7. This temporary exemption from tolerance will expire August 7, 2012.

[FR Doc. E9–17839 Filed 7–28–09; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2005–0477; FRL–8422–2]

Dichlormid; Time-Limited Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation extends time-limited tolerances for residues of dichlormid in or on field corn (forage, grain, stover); pop corn (grain, stover); and sweet corn (forage, kernel plus cob with husks removed, stover). DowAgroSciences LLC requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA). The time-limited tolerances expired on December 31, 2008.

DATES: This regulation is effective July 29, 2009. Objections and requests for hearings must be received on or before September 28, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2005–0477. 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: Keri Grinstead, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8373; e-mail address: *grinstead.keri@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**.

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C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2005–0477 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before September 28, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2005–0477, by one of the following methods:

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

II. Petition for Tolerances

In the **Federal Register** of March 4, 2009 (74 FR 9397) (FRL–8401–8), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9E7517) by DowAgroSciences LLC, 9930 Zionsville Road, Indianapolis, IN 46268. The petition requested that 40 CFR 180.469 be amended by extending the expiration date of the time-limited tolerances for residues of the herbicide safener dichlormid; (acetamide, 2,2-dichloro-*N,N*-di-2-propenyl-)-)(CAS Reg. No. 37764–25–3) in or on field corn (forage, grain, stover), pop corn (grain, stover), and sweet corn (forage, kernel plus cob with husks removed, stover) at 0.05 part per million (ppm) to December 31, 2010. That notice referenced a summary of the petition prepared by DowAgroSciences LLC, the petitioner, which is available to the public in the docket, *http://www.regulations.gov*. There were no substantive comments received in response to the notice of filing.

III. Aggregate Risk Assessment and Determination of Safety

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

Consistent with the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for residues of dichlormid; (acetamide, 2,2-dichloro-*N,N*-di-2-propenyl-)-)(CAS Reg. No. 37764–25–3) in or on field corn (forage, grain, stover), pop corn (grain, stover), and sweet corn (forage, kernel plus cob with husks removed, stover) at 0.05 ppm. EPA's assessment of exposures and risks associated with re-establishing these tolerances follows.

In a Final Rule published in the **Federal Register** on March 27, 2000 (65 FR 16143) (FRL–6498–7), EPA established time-limited tolerances under 40 CFR 180.469 for residues of dichlormid in or on field corn (forage, grain, stover), and pop corn (grain, stover) at 0.05 ppm. On September 30, 2004, EPA published a final rule (69 FR 58285) (FRL–7680–8) amending 40 CFR 180.469 by establishing time-limited tolerances for residues of dichlormid in or on sweet corn (forage, kernel plus cob with husks removed, stover) at 0.05 ppm. In a Final Rule published in the **Federal Register** on December 28, 2005 (70 FR 76697) (FRL–7753–9), the Agency extended the 40 CFR 180.469 time-limited tolerances for residues of

dichlormid in or on field corn (forage, grain, stover), pop corn (grain, stover), and sweet corn (forage, kernel plus cob with husks removed, stover) at 0.05 ppm to December 31, 2008.

In June 2008 the Agency received additional information from the petitioner addressing the adequacy of the residue chemistry and toxicology databases to support permanent tolerances. In order to allow time for the Agency to review this additional information, the current time-limited tolerances in 40 CFR 180.469 for residues of dichlormid on field corn (forage, grain, stover), pop corn (grain, stover), and sweet corn (forage, kernel plus cob with husks removed, stover) at 0.05 ppm are being extended to December 31, 2010. EPA concluded in the Final Rules listed above in this Unit, for the field, pop, and sweet corn time-limited tolerances that all risks were below the Agency's level of concern and there was a reasonable certainty that no harm would result to the general population and to infants and children from aggregate exposure to residues of dichlormid on corn. Based on the data and information considered, the Agency reaffirms that adequate information for the extension of the time-limited tolerances will continue to meet the requirements of section 408(b)(2)(A)(i) of FFDCA and that extending the tolerances will not change the estimated aggregate risks resulting from the use of dichlormid, as discussed in Final Rules of March 27, 2000 (65 FR 16143) (FRL–6498–7) and September 30, 2004, (69 FR 58285) (FRL–7680–8). Refer to the above listed **Federal Register** documents for a detailed discussion of the aggregate risk assessments and determination of safety. EPA relies upon those risk assessments and the findings made in the **Federal Register** documents in support of this action.

Based on this information, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to dichlormid residues.

IV. Conclusion

Therefore, the expiration/revocation dates of the time-limited tolerances under 40 CFR 180.469 are extended to December 31, 2010 for residues of dichlormid; (acetamide, 2,2-dichloro-*N*,*N*-di-2-propenyl-)(CAS Reg. No. 37764–25–3) in or on field corn (forage, grain, stover), pop corn (grain, stover), and sweet corn (forage, kernel plus cob with husks removed, stover) at 0.05 ppm.

V. Statutory and Executive Order Reviews

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

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

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

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

VI. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: July 20, 2009.

G. Jeffrey Herndon,

Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

§ 180.469 [Amended]

■ 2. Section 180.469 is amended by revising the Expiration/revocation dates "12/31/08" for all commodity entries in the table in paragraph (a) to read "12/31/2010".

[FR Doc. E9–17940 Filed 7–28–09; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WC Docket No. 04–36, CG Docket No. 03–123, WT Docket No. 96–198 and CC Docket No. 92–105; DA 09–1461]

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

AGENCY: Federal Communications Commission.

ACTION: Final rule; extension of waiver.

SUMMARY: In this document, the Commission, via the Consumer and Governmental Affairs Bureau, extends the limited waiver granted in *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Order (*2009 TRS 711 Waiver Order*), of the requirement that traditional telecommunications relay service (TRS) providers (those providing relay service via the public switched telephone network and a text telephone (TTY)) must automatically and immediately call an appropriate Public Safety Answering Point (PSAP) when receiving an emergency 711-dialed call placed by an interconnected voice over Internet Protocol (VoIP) user.

DATES: Effective June 26, 2009. Traditional TRS providers are granted a waiver until June 29, 2010.

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

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's document DA 09–1461, adopted and released on June 26, 2009. The full text of this document and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document and copies of subsequently filed documents in this matter may also be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact the Commission's duplicating contractor at their Web site: *http://www.bcpiweb.com* or call 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document can also be downloaded in Word or Portable Document Format (PDF) at: *http://www.fcc.gov/cgb/dro.*

Synopsis

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

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

3. In the *2008 TRS 711 Waiver Order,* released on April 4, 2008, published at 73 FR 28057, May 15, 2008, WC Docket No. 04–36, CG Docket No. 03–123, WT Docket No. 96–198 and CC Docket No. 92–105, DA 07–4178, the Commission, via the Consumer and Governmental Affairs Bureau, granted interconnected VoIP providers an extension of time, until March 31, 2009, to route 711-dialed calls to an appropriate relay center, in the context of 711-dialed calls in which the calling party is using a non-geographically relevant telephone number or a nomadic interconnected VoIP service. Traditional TRS providers also were granted an extension of time, until March 31, 2009, to fulfill their obligation to implement a system to automatically and immediately call an appropriate PSAP when receiving an emergency 711-dialed call via an interconnected VoIP service.

4. In the *2009 TRS 711 Waiver Order,* released on April 1, 2009, published at 74 FR 20892, May 6, 2009, WC Docket No. 04–36, CG Docket No. 03–123, WT Docket No. 96–198 and CC Docket No. 92–105, DA 09–749, the Commission, via the Consumer and Governmental Affairs Bureau, extended for 90 days (until June 29, 2009) the limited waiver granted to traditional TRS providers in the *2008 TRS 711 Waiver Order.* In taking this action, the Commission granted, to the extent provided therein, a petition for extension of waiver filed by AT&T and Sprint from the requirement of § 64.604(a)(4) with respect to traditional TRS providers' duty to automatically and immediately route emergency 711 calls that originate on the network of an interconnected VoIP provider. In view of the continued technical and operational challenges presented by this requirement, the Commission found good cause to grant traditional TRS providers an extension of the waiver of § 64.604(a)(4) until June 29, 2009. The Commission allowed the waiver relief previously granted to interconnected VoIP providers to expire, however, noting that progress had been made toward resolving technical difficulties previously associated with the routing of 711-dialed calls by interconnected VoIP providers.

6. In the *Notice* accompanying the *2009 TRS 711 Waiver Order,* published at 74 FR 21364, May 7, 2009, WC Docket No. 04–36, CG Docket No. 03–123, WT

Docket No. 96–198 and CC Docket No. 92–105, DA 09–749, the Commission, via the Consumer and Governmental Affairs Bureau, sought comment on any remaining compliance issues that currently prevent traditional TRS providers from reliably identifying the appropriate PSAP to call when receiving an emergency call via 711 and an interconnected VoIP service. In addition, the Commission sought comment on: (1) The total number of interconnected VoIP-originated 711 TRS calls that are processed annually by interconnected VoIP and traditional TRS providers, and the proportion of those calls that are of an emergency nature; (2) the continuing need, from the consumer's perspective, to be able to dial 711 via TRS in an emergency, rather than dialing 911 directly; (3) any impediments consumers have encountered in attempting to dial 911 directly; (4) the effectiveness of providers' outreach efforts in educating consumers about the importance of dialing 911 directly in an emergency when using a TTY and an interconnected VoIP service; and (5) the continuing use of TTYs by individuals with hearing or speech disabilities and, in particular, the use of TTYs with an interconnected VoIP service.

7. On June 11, 2009, AT&T filed a petition seeking an indefinite extension of the waiver of § 64.604(a)(4), asserting that traditional TRS providers "still cannot determine the appropriate PSAP to route a VoIP-originated 711 emergency call due to the inaccessibility of registered location information." *See Implementation of Sections 255 and 251 (a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Service for Individuals with Hearing and Speech Disabilities,* WC Docket No. 04–36, WT Docket No. 96–198, CG Docket No. 03–123 & CC Docket No. 92–105, Petition for Extension of Wavier at 2 (filed June 11, 2009).

8. In this document, the Commission, via the Consumer and Governmental Affairs Bureau, extends until June 29, 2010, the current limited waiver of § 64.604(a)(4) of the Commission's rules, to the extent it applies to traditional TRS providers' obligation to automatically and immediately route the outbound leg of an interconnected VoIP-originated emergency 711 call to an appropriate PSAP. Notwithstanding this action, the Commission notes that if a caller using a TTY connected to an interconnected VoIP service calls a PSAP directly as a 911-dialed emergency call (as a text-to-text, or TTY-to-TTY call), the 911-dialed call will be routed automatically and immediately through the selective router over the wireline E911 network to the PSAP that serves the caller's Registered Location, just as it would be for a hearing caller via an interconnected VoIP service.

9. The record reflects that the remaining technical and operational challenges of compliance with this requirement are formidable and that a comprehensive resolution of these issues will require significant, ongoing collaboration among a variety of industry stakeholders. At the same time, the comments suggest that the increasing popularity and availability of Internet-based forms of TRS have significantly reduced the number of consumers with broadband Internet access who communicate via a TTY and an interconnected VoIP service, rather than via an Internet-based form of TRS. Moreover, the introduction of more forward-looking solutions, such as the "real-time text" solution described in the record, is likely to diminish further the incidence of TTY use with an interconnected VoIP service. Taken together, these findings lead to the conclusion that, while TTY use by interconnected VoIP consumers may be on the decline, there remain deaf and hard of hearing consumers who continue to rely on TTYs. Therefore, while the Commission finds good cause to extend for an additional year the limited waiver previously granted to traditional TRS providers, in light of the continuing technical and operational challenges described in the record, the Commission declines to extend the waiver indefinitely.

10. Finally, the Commission concludes that, during the period of this waiver, any traditional TRS provider that cannot automatically and immediately route to an appropriate PSAP the outbound leg of an interconnected VoIP-originated emergency 711 call, as required by § 64.604(a)(4) of the Commission's rules, must maintain a system for doing so, to the extent feasible, that accomplishes the proper routing of emergency 711 calls as quickly and efficiently as possible. This waiver is, therefore, conditioned on continued compliance with that requirement. Further, during this period, TRS providers and interconnected VoIP providers must continue to undertake consumer education and outreach designed to remind individuals with hearing or speech disabilities to dial 911 directly (as a text-to-text, TTY-to-TTY call) in an emergency. The Commission also expects TRS providers to continue their collaboration with interconnected VoIP providers and other industry stakeholders in order to resolve any remaining compliance issues associated with the processing and routing of interconnected VoIP-originated 711 emergency calls.

Ordering Clauses

Pursuant to Sections 1, 2, and 225 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, and 225, and Sections 0.141, 0.361, and 1.3 of the Commission's rules, 47 CFR 0.141, 0.316 and 1.3, document DA 09–1461 is adopted.

Section 64.604(a)(4) of the Commission's rules, 47 CFR 64.604(a)(4), to the extent that it requires traditional TRS providers to implement a system to automatically and immediately call an appropriate PSAP when receiving an emergency 711-dialed call via an interconnected VoIP service, is waived until June 29, 2010.

Federal Communications Commission.

Suzanne M. Tetreault,

Acting Chief, Consumer and Governmental Affairs Bureau.

[FR Doc. E9–18008 Filed 7–28–09; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 201, 207, 215, and 237

RIN 0750–AG28

Defense Federal Acquisition Regulation Supplement; Peer Reviews of Contracts (DFARS Case 2008–D035)

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

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address requirements for Peer Reviews of DoD solicitations and contracts. Such reviews will promote quality and consistency in DoD contracting.

DATES: *Effective Date:* July 29, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Cassandra Freeman, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC

20301–3062. Telephone 703–602–8383; facsimile 703–602–7887. Please cite DFARS Case 2008–D035.

SUPPLEMENTARY INFORMATION:

A. Background

The objective of Peer Reviews of solicitations and contracts is to ensure consistent policy implementation, to improve the quality of contracting processes, and to facilitate cross-sharing of best practices and lessons learned throughout DoD. This final rule specifies that the Office of the Director, Defense Procurement and Acquisition Policy, will organize teams of reviewers and will facilitate Peer Reviews for all solicitations valued at $1 billion or more and for all contracts for services valued at $1 billion or more. In addition, the rule requires the military departments, defense agencies, and DoD field activities to establish procedures for pre-award Peer Review of solicitations valued at less than $1 billion, and post-award Peer Review of contracts for services valued at less than $1 billion.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

This rule will not have a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of DoD. Therefore, publication for public comment under 41 U.S.C. 418b is not required. However, DoD will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 2008–D035.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Parts 201, 207, 215, and 237

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Parts 201, 207, 215, and 237 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 201, 207, 215, and 237 continues to read as follows:

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

PART 201—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. Section 201.170 is added to read as follows:

201.170 Peer Reviews.

(a) *Acquisitions valued at $1 billion or more.*

(1) The Office of the Director, Defense Procurement and Acquisition Policy, will organize teams of reviewers and facilitate Peer Reviews for solicitations and contracts valued at $1 billion or more, as follows:

(i) Pre-award Peer Reviews will be conducted for all solicitations valued at $1 billion or more (including options).

(ii) Post-award Peer Reviews will be conducted for all contracts for services valued at $1 billion or more (including options).

(iii) Reviews will be conducted using the procedures at PGI 201.170.

(2) To facilitate planning for Peer Reviews, the military departments, defense agencies, and DoD field activities shall provide a rolling annual forecast of acquisitions with an anticipated value of $1 billion or more (including options) at the end of each quarter (*i.e.*, March 31; June 30; September 30; December 31), to the Deputy Director, Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), 3060 Defense Pentagon, Washington, DC 20301–3060.

(b) *Acquisitions valued at less than $1 billion.* The military departments, defense agencies, and DoD field activities shall establish procedures for—

(1) Pre-award Peer Reviews of solicitations valued at less than $1 billion; and

(2) Post-award Peer Reviews of contracts for services valued at less than $1 billion.

PART 207—ACQUISITION PLANNING

■ 3. Section 207.104 is added to read as follows:

207.104 General procedures.

In developing an acquisition plan, agency officials shall take into account the requirement for scheduling and conducting a Peer Review in accordance with 201.170.

PART 215—CONTRACTING BY NEGOTIATION

■ 4. Section 215.270 is added to read as follows:

215.270 Peer Reviews.

Agency officials shall conduct Peer Reviews in accordance with 201.170.

PART 237—SERVICE CONTRACTING

■ 5. Section 237.102 is amended by adding paragraph (e) to read as follows:

237.102 Policy.

* * * * *

(e) Program officials shall obtain assistance from contracting officials through the Peer Review process at 201.170.

[FR Doc. E9–17953 Filed 7–28–09; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 202, 212, 225, and 252

RIN 0750–AF95

Defense Federal Acquisition Regulation Supplement; Restriction on Acquisition of Specialty Metals (DFARS Case 2008–D003)

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

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address statutory restrictions on the acquisition of specialty metals not melted or produced in the United States. The rule implements Section 842 of the National Defense Authorization Act for Fiscal Year 2007 and Sections 804 and 884 of the National Defense Authorization Act for Fiscal Year 2008.

DATES: *Effective Date:* July 29, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–0328; facsimile 703–602–7887. Please cite DFARS Case 2008–D003.

SUPPLEMENTARY INFORMATION:

A. Background

Section 842 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364) added new provisions at 10 U.S.C. 2533b, to address requirements for the purchase of specialty metals from domestic sources. Section 804 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181) made amendments to 10 U.S.C. 2533b with regard to its applicability to commercial items,

electronic components, items containing minimal amounts of specialty metals, items necessary in the interest of national security, and items not available domestically in the required form. In addition, Section 884 of the National Defense Authorization Act for Fiscal Year 2008 added a requirement for DoD to publish a notice on the Federal Business Opportunities Web site before making a domestic nonavailability determination that would apply to more than one contract.

DoD published a proposed rule at 73 FR 42300 on July 21, 2008. Sixteen sources submitted comments on the proposed rule. A discussion of the comments is provided below.

1. Definition of Commercially Available Off-the-Shelf (COTS) Item

Comments: Five respondents stated that the definition of COTS item in the proposed rule was too broad, was inconsistent with the intent of Congress, and would allow modifications to occur at the next higher tier in the supply chain. One respondent stated that allowing modifications at the next higher tier in the supply chain would negatively affect the high performance magnet industry and would allow abuse of this exception.

Several respondents were concerned that an item could be substantially modified by downstream contractors prior to delivery to the Government. One respondent recommended that DoD change the definition to state that anything contained in a COTS end item, as well as subcontracts for COTS subassemblies used in non-COTS end items, would be exempt, but non-exempted COTS items, such as mill products, forgings and castings, high performance magnets, and fasteners, that go directly into non-COTS end items or non-COTS assemblies would not be exempt. Another respondent requested that DoD allow only modifications that are incidental to installation, joining, or incorporation into the non-commercial end item. Some of these respondents cited language from the House Armed Services Committee report, which states that the exception for COTS items and components generally applies to items incorporated into non-commercial end items. The Committee report also states that, if a contractor is using COTS items with more substantial modifications, it must use the de minimis or commercial derivative military article exceptions.

One respondent provided a few examples where the rule might lead to an increased use of foreign specialty metals and might allow substantial modification. In one example, a mill product in the form of bar or plate might be machined, rolled, and cut into a blank form by a subcontractor in Russia or China, but would still be considered a COTS item, and then might be used in military unique compressor blades. The blank would undergo substantial modification that altered the dimensions and metallurgy of the metal to meet military specifications before being offered to the Government.

Several respondents wanted DoD to further clarify the difference between COTS and "commercially available" for suppliers to which the flowdown requirement applies.

DoD Response: Section 804 of Public Law 110–181 clearly denies use of the COTS item exception for mill products and high performance magnets under any circumstances, and also for fasteners, castings, and forgings unless certain conditions are met. There is no reason for concern about the treatment of "blanks" as COTS items, because 10 U.S.C. 2533b(h)(2)(A) specifically requires application of the restriction to contracts or subcontracts for the acquisition of specialty metals * * * that have not been incorporated into end items, subsystems, assemblies, or components. Blanks clearly fall into this category. Therefore, even if the blank is considered to be a COTS item, there would be no waiver of the specialty metals restrictions for the blank. The military-unique blade could not be made from a blank from China unless another exception applies.

Other than those groupings of items specifically restricted, it is reasonable to view COTS items that are provided from the global supply chain to the next higher tier supplier, without any modifications, to be delivered to the Government by those suppliers without modification. If DoD were not to view such items in this way, these COTS suppliers would not be able to provide globally available COTS items to the Government without burdensome investigations to discover whether or not a particular item could be used. This would force COTS suppliers to track not only the sale of the particular COTS item, but also the eventual use of the COTS item to the end of the final assembly. Nowhere in the manufacturing or distribution chain of COTS items does such a rule exist, and it is unreasonable to require COTS suppliers to create one. The advantages to the taxpayer are evident. DoD's maximum use of COTS items results in cheaper, faster, and sufficient availability of such items, at satisfactory quality. Additionally, most DoD production programs have specifically been designed and developed with a growing reliance on non-developmental items to reduce costs to the taxpayer, with great effort not to rely on unique DoD solutions wherever possible. This benefits DoD, and also the taxpayer, by providing a reliable source of items at reasonable prices.

The rule provides a clear definition of COTS items. This definition is flowed down with the clause to subcontractors at all tiers. The definition contains two additional criteria for a COTS item beyond the requirement for the item to be a commercial item.

Comments: Several respondents stated that the COTS definition was too restrictive. One respondent stated that it is wasteful and costly to require sub-tier COTS suppliers to provide COTS items without modification to the next higher tier. The respondent stated that, in some cases, the modifications that occur after the next higher tier must be incorporated in the assembly process earlier, which requires disassembling, testing, and then reassembling of the COTS item under the rule's definition. The respondent stated that DoD should reconsider the need to accept the COTS items separately before allowing modifications, because it is wasteful and costly to require a serial approach.

DoD Response: It is not possible to revise the rule as requested by these respondents and still be in compliance with the statutory definition of a COTS item and the statutory restrictions on the use of the COTS item exception. The law requires that a COTS item be offered to the Government without modification.

2. Definition of Component

Comments: One respondent noted that the language in DoD Class Deviation 2008–O0002 states that items that are not incorporated in the six major end items are not considered to be components. The deviation states that items such as test equipment and ground support equipment are excluded from specialty metals restrictions. The respondent found this language critically important. Although it may be possible to infer these exclusions, the respondent recommended adding this language from the deviation explicitly to the rule, especially since, prior to the creation of 10 U.S.C. 2533b, items such as test equipment and ground support equipment were required to be compliant with the specialty metal restrictions.

DoD Response: According to the principles set forth at DFARS 201.301, the DFARS contains—

(i) Requirements of law;

(ii) DoD-wide policies;

(iii) Delegations of FAR authorities;

(iv) Deviations from FAR requirements; and

(v) Policies/procedures that have a significant effect beyond the internal operating procedures of DoD or a significant cost or administrative impact on contractors or offerors.

Relevant procedures, guidance, and information that do not meet these criteria are issued in the DFARS companion resource, Procedures, Guidance, and Information (PGI).

Definition of the term "component" is a requirement of law. "Component" is explicitly defined in the rule as "any item supplied to the Government as part of an end item or of another component." Therefore, any items that are not incorporated into any of the items listed in DFARS 225.7003–2(a) are not components of those items. Because test equipment, ground support equipment, and shipping containers are just examples of items that may not be components of the missile system, these items are listed as examples in PGI 225.7003–2(a).

3. Definition of Electronic Component

The proposed rule defined "electronic component" as "an item that operates by controlling the flow of electrons or other electrically charged particles in circuits, using interconnections of electrical devices such as resistors, inductors, capacitors, diodes, switches, transistors, or integrated circuits. The term does not include structural or mechanical parts of an assembly containing an electronic component."

Comments: One respondent stated that the rule's definition does a good job of defining the exclusion of the housing materials. Another respondent recommended use of the exact words from the Section 804 report, which stated that the term "electronic component" does not include any assembly, such as a radar, that incorporates structural or mechanical parts.

DoD Response: DoD maintains its interpretation of the Congressional report language as stated in the rule. DoD interprets the report language as stating that the whole radar assembly, including the structural or mechanical parts, cannot be considered an electronic component and, therefore, cannot be exempted in its entirety from the specialty metals restrictions. This should not be interpreted to imply that none of the components within the radar assembly can be considered to be electronic components. Components that otherwise meet the definition of "electronic component" within the radar assembly, other than structural and mechanical parts, are electronic components.

Comments: One respondent stated that, because magnets control the flow of electrons and charged particles—

- A high performance magnet could easily be interpreted as an electronic component; or
- A larger assembly, comprised of many electrical devices as listed in the rule "interconnected" with one another, including high performance magnets, could be considered to be an electronic component.

The respondent recommended clarification of the definition to avoid total exclusion of high performance magnets from the specialty metals restrictions, under the exception for electronic components.

DoD Response: DoD concurs with this recommendation. While high performance magnets are almost always used in conjunction with electronic components, DoD concludes that the exception for electronic components should not exempt all high performance magnets from the specialty metals restrictions. Congressional intent on this point is clear, given the special treatment of high performance magnets in the COTS exception at 10 U.S.C. 2533b(h)(2)(c) and the minimum content exception at 10 U.S.C. 2533b(i)(2). Therefore, for purposes of this regulation, the definition of "electronic component" has been clarified to specifically exclude high performance magnets.

4. Definition of High Performance Magnet

Comments: Three respondents had concerns on technical grounds with the rule's definition of high performance magnets as permanent magnets that obtain a majority of their properties from rare earth materials.

- One respondent stated that all alloying elements are important to magnetic properties and, since there is more cobalt than samarium in samarium-cobalt magnets, it is difficult to establish that a majority of the magnetic properties result from a magnet's samarium content.
- Several respondents stated that magnetic performance is not the only criterion used for defining high performance magnets. They also cited induction and coercivity as measures of magnetic properties and consider thermal properties of magnetic materials to be key measures of a magnet's ultimate performance in an application. One respondent recommended that the rule's definition provide a clear and objective meaning for the definition of high performance magnet—providing specific standards to be met. The respondent disagreed with DoD's Background statement that magnets containing rare earth elements are technologically superior in magnetic performance to other types of magnets, because the technological superiority of one magnet over another is ultimately driven by the requirements of the application where it is used. The respondent also stated that, in addition to maximum energy product, parameters such as temperature stability, temperature range, resistance to demagnetization, corrosion resistance, mechanical toughness, and machinability contribute to the decision as to which type of magnet to use for a military application.

These respondents were also concerned that limiting the definition to rare earth (such as samarium-cobalt) magnets and excluding alnico magnets would increase dependency on Chinese magnets and threaten national security. For example, one respondent expressed concern that, if alnico magnets are not included in the definition, alnico magnets that are COTS items will be exempt from the specialty metals restriction.

Several respondents suggested that DoD use the definition from the Conference Report (H.R. 110–477), which provides that "high performance magnet" means permanent magnets containing 10 or more percent by weight of materials such as cobalt, samarium, or nickel.

DoD Response: With regard to whether it is meaningful to define "high performance magnet" as a permanent magnet that obtains a majority of its magnetic properties from rare earth metals: Cobalt, iron, and nickel are the three primary ferromagnetic metals and, therefore, are present in most, if not all, permanent magnets. However, it is the very strong magneto-crystalline anisotropy (the property of being directionally dependent) of certain rare earth elements that produces the exceptional magnetic behavior in the materials to which they are added. The partially filled 4f electron subshells in rare earths lead to magnetic properties in a manner similar to the partially filled 3d electron subshells in transition elements such as cobalt, iron, and nickel. However, the magnetic moment of a rare earth material is typically an order of magnitude greater than that in a transition element; and rare earths exhibit a large anisotropy due to dipolar interactions. In summary, rare earths possess very unique electron structures that produce extreme anisotropy in their magnetic properties.

DoD technical experts have concluded that there is no industry standard definition for high performance magnets. However, magnet performance is measured using magnetic properties and temperature capability.

○ Magnetic properties are summarized using maximum energy product. DoD technical experts reviewed various references that place heavy emphasis on the maximum energy product of a magnet as "the figure of merit" by which permanent-magnet materials are judged. The greater the maximum energy product of a permanent magnetic material, the more powerful the magnet, and the smaller the volume (and typically the weight) of the magnet required for a given application. The maximum energy products for rare earth magnets are significantly higher than those for ferrite and alnico materials, thus supporting their designation as "high performance magnets."

○ Temperature stability is measured using maximum operating and Curie temperatures (the temperature below which there is a spontaneous magnetization in the absence of an externally applied magnetic field). Although alnico magnetic materials rank well on maximum use temperature and Curie temperature, this does not overcome the substantially lower maximum energy product.

The maximum energy product ranking of various magnetic materials and temperature stability measurements are as follows:

Magnetic material	Maximum energy product (kJ/m^3)	Maximum energy product (MGOe)	Max. use temp. (°C)	Curie temp. (°C)
Steel	< 2	low	< 100	
Co-Steels	1–8	< 1	100	
Ferrites	8–32	1–4	300	450
Alnico (AlNiCo)	11–72	1–9	550	860
Samarium-Cobalt ($SmCo_5$)	130–210	16–25	300	750
Samarium-Cobalt (Sm_2Co_{17})	160–260	20–32	550	825
Neodymium-Iron-Boron ($Nd_2Fe_{14}B$)	200–450	25–50	150	315

(Data from MMPA Standard No. 0100–00).

Of today's permanent magnets containing specialty metals, only samarium cobalt magnet materials possess the combination of properties necessary to be considered "high performance magnets." The only other permanent magnets today that obtain a majority of their magnetic properties from rare earths are neodymium-iron-boron magnets. Neodymium-iron-boron magnets are high performance magnets, but normally do not contain specialty metals. Ferrites are not high performance magnets (as was erroneously stated in the preamble to the proposed rule), nor do they contain specialty metals.

Representatives from permanent magnet suppliers asserted in discussions with DoD engineers that alnico magnets possessed superior toughness and calibration sensitivity qualities, and those qualities supported designating alnico magnets as high performance magnets. DoD engineers considered, but ultimately did not accept, that rationale.

○ Mechanical strength and toughness generally are not employed as measures of merit for permanent magnets, because all permanent magnetic materials of interest (ferrites, rare-earths, and alnico) are hard and brittle. Section I, subsection 6.0, of Magnetic Materials Producers Association Standard No. 0100–00, Standard Specifications for Permanent Magnet Materials, states that most permanent magnet materials lack ductility and are inherently brittle. Such materials should not be utilized as structural components in a circuit. Measurement of properties such as hardness and tensile strength are not feasible on commercial materials with these inherent characteristics. Therefore, specifications of these properties are not acceptable.

○ Finally, calibration sensitivity is an indication of precision but not of high performance.

DoD technical experts agree that, in addition to maximum energy product, parameters such as temperature stability, temperature range, resistance to demagnetization, corrosion resistance, mechanical toughness, and machinability contribute to the decision as to which type of magnet to use for a military application. However, just because a particular magnetic material is most appropriate for a particular application does not mean that it is a high performance magnet. Not every application requires the use of a high performance magnet.

Although DoD does not consider alnico magnets to be high performance magnets, regardless of the impact of this decision on the industry, DoD notes that representatives from permanent magnet suppliers further established in discussions with DoD technical experts that virtually all alnico and samarium cobalt magnets are made to unique customer specifications and are not COTS items. Accordingly, direct DoD purchase of such permanent magnets almost certainly would involve non-COTS magnets, which must comply with specialty metals provisions, whether or not the magnets are judged to be high performance magnets. With respect to permanent magnets incorporated into COTS subsystems or end items, such magnets, whether COTS or non-COTS, high performance or not high performance, are by statute not required to utilize specialty metals melted or produced in the United States. Therefore, the definition of high performance magnet makes a difference only with regard to the 2 percent minimum content exception and has no significant impact on the use of alnico magnets for defense applications.

To define "high performance magnets" as "permanent magnets containing 10 percent or more by weight of materials such as cobalt, samarium, or nickel" would be technically unsound and open-ended. Cobalt and nickel have been primary alloying elements for permanent magnet materials since exploration of these materials began over 100 years ago. By this unbounded definition, almost all magnets would be covered.

Therefore, no change has been made to the definition of high performance magnet.

Comments: One respondent recommended a single, consistent, and narrow definition for high performance magnets. This respondent stated that it should mean only magnets that contain samarium cobalt. The respondent stated that the proposed rule used inconsistent definitions in the clause at 252.225–70X2 (now 252.225–7009) and in section 4.d. of the Background of the proposed rule. According to the respondent, section 4.d. stated that the restriction on acquisition of specialty

metals only impacts the acquisition of samarium cobalt high performance magnets; this is inconsistent with the clause, which provides an expanded definition of a high performance magnet as a permanent magnet that obtains a majority of its magnetic properties from rare earth metals (such as samarium).

DoD Response: There is no inconsistency between the preamble to the proposed rule and the definition in the clause. Section 4.d. of the preamble clearly stated that the proposed rule defined "high performance magnet" to mean a permanent magnet that obtains a majority of its magnetic properties from rare earth metals (such as samarium). It then explained that, although the definition of "high performance magnet" includes various types of permanent magnets, samarium cobalt magnets are the only high performance magnets composed of specialty metal.

The definition of "high performance magnet" is independent of the restriction on specialty metals. Therefore, it would be inappropriate to exclude neodymium-iron-boron magnets from the definition of high performance magnet because they do not consist of a specialty metal and are not impacted by this rule.

5. Definition of Produce

Comments: Eight respondents expressed concern with the definition of "produce" in the proposed rule.

○ Numerous respondents opposed the inclusion of any process other than melting, or its equivalent, in the definition of "produce," especially as applied to armor plate. One respondent stated that gas atomization, sputtering, and powder consolidation are production processes; the respondent did not object to their inclusion in the definition of "produce," but the respondent would object to finishing processes, such as rolling, annealing, quenching, or tempering in the United States as sufficient to constitute production of titanium products in the United States (these processes apply only to armor plate in the proposed definition). Likewise, another manufacturer of titanium agreed that gas atomization, sputtering, or consolidation from powder using non-melt technology are the equivalent of production, but the definition should not be further expanded to secondary processes such as rolling and finishing processes.

○ One respondent stated that the definition is contrary to law, indicating that the 1973 Specialty Metals Amendment required that specialty metals be melted in the United States. The respondent cited court cases that recognize a reasonable basis in the law for the DoD requirement that all specialty metals be melted in the United States.

○ Various respondents stated that the words "melted or produced" in the statute were not intended to apply to secondary finishing processes such as quenching or tempering, which require a small percentage of the estimated investment for armor steel plate overall.

○ One respondent stated that the definition is inappropriate because the processes of high performance magnets are completely unaddressed in the definition.

○ Various respondents saw this as a dangerous precedent. Several respondents stated that the proposed rule's definition would encourage the use of foreign metals while discouraging investment in domestic industry. One respondent stated that, without a return to the emphasis on melting, this rule will be used to circumvent the intent of the law, importing melted products including high performance magnets, and conducting late-stage low-value finishing processes, such as magnetization, which the respondent considers to be a minor operation requiring little skill.

○ Several respondents cited the additional restriction on armor plate in DFARS 252.225–7030, which requires armor plate to be melted and rolled in the United States. One respondent recommended that the rule define "produce" as melted or an equivalent process.

○ While acknowledging DoD's critical need for armor steel plate for Mine Resistant Ambush Protection (MRAP) vehicles, several respondents suggested that DoD use other exceptions in the law, such as the availability or national security exception to procure armor steel plate. Several respondents stated that there is sufficient domestic capacity of armor steel plate melted, rolled and quenched, and tempered in the United States to meet DoD's demand.

One respondent supported the inclusion of quenching and tempering in the definition of "produce." This respondent stated that it converts slabs of alloy steel from Mexico to armored steel plates in the United States by altering the physical characteristics of the alloy steel through quenching and tempering.

DoD Response: The law has never provided a definition of "produce" with regard to the requirement to acquire domestic specialty metals. The 1973 DoD Appropriations Act (Pub. L. 92–570) added specialty metals to the annual Berry Amendment restrictions, requiring that restricted items be "grown, reprocessed, reused, or produced in the United States." The Secretary of Defense at that time (Melvin Laird), in a memorandum setting forth DoD planned implementation of this restriction, interpreted this requirement to mean "melted" when applied to specialty metals, and the reasonableness of this interpretation was upheld in the courts. This does not mean that this is the only possible interpretation. When Congress created the new 10 U.S.C. 2533b, while following the Laird memo traditions in many respects, it reinstated "or produced," allowing that melting was not the only acceptable process for creation of domestic specialty metal.

According to DoD technical experts, quenching and tempering is not an insignificant process. Melting is only one stage in a multi-step process that is used to produce an item with properties that meet the requirements of an application, i.e., specifications. Melting for most metals accounts for about one third of the final price of a wrought product. Manufacturers have stated that the operations associated with forming and heat treating account for more than one-half of the price of a mill product such as plate. (The prices for mill products used by the military are typically higher than for commercial products due to more stringent military requirements.) Although alloying elements are added during "melting," the primary casting (ingot, slab, bloom, etc.) does not possess the microstructures and/or phases that are required to produce desired properties. Using steel as an example, after primary casting, the metal is shaped and then heat treated to produce the desired properties in the final product. This is true for plate, wire, sheet, etc. Steel's versatility is primarily due to its extraordinary response to heat treatment. Heat treatment is used to control the microstructure and thus the properties of the steel. Different iron-carbon phases form at critical temperatures, and it is the combination and concentration of these phases that produce the desired mechanical properties in the steel. DoD experts believe that heat treatment may be the single most important stage in metals processing for DoD applications. The final properties of the metal are determined by the heat treat schedule. This is true for most if not all metals and their alloys. Heat treatment results in a product with properties that meet the specified requirements. The specifications for a material typically include not just chemistry but also the

mechanical and physical properties as well as the condition of the product, *i.e.*, surface finish, flatness, waviness. Forming and heat treatment processes are very important to producing an item that meets the requirements of an application. It is after heat treatment that the item possesses all of the attributes that are needed for the required application.

The concern that magnetization can be considered production under this rule is unfounded. The definition of "produce" has not been left to open-ended interpretation. It has narrowly specified what processes other than melting are included, and does not include magnetization. DoD does not see any impact on the high performance magnet industry from the definition of "produce," because tempering and quenching processes are specifically restricted to the production of steel plate, and gas atomization and sputtering are restricted to the production of titanium.

DoD acknowledges the additional restriction on armor plate in DFARS 252.225–7030, which requires that armor plate be melted and rolled in the United States. Therefore, any acquisition of armor plate by DoD must satisfy both statutory restrictions.

DoD performed an industrial capabilities assessment in 2007 to support rapid production of the MRAP vehicles and other important defense programs relying on protective armor. The assessment found that availability of thin gauge MIL–A grade steel armor was the limiting factor in domestic production. The industrial capabilities assessment identified a total of four North American steel mills collectively capable of producing up to 12,000 tons per month of thin gauge armor steel plate. All four reported that quench and temper operations (not steel melting capacity or ingot/slab availability) were the limiting factor in their ability to produce the thin gauge armor needed to meet U.S. military demand. In contrast to the demonstrated maximum North American MIL–A grade thin gauge armor steel plate production capacity of 12,000 tons per month, the American Iron and Steel Institute (via its Web site) asserts that domestic raw steel melt production per week is usually in excess of 2 million tons (8 million tons per month). To meet peak MRAP and other DoD requirements, the four mills made capital investments and process improvements that enabled a 100 percent increase (to 24,000 tons per month) in thin gauge armor steel plate production capacity. However, two of the mills rely on ingot/slab melted outside the United States. If these mills had been excluded from participation, the sustained MRAP production rate would have been limited to about 600 vehicles per month (instead of the actual sustained rate of 1,100 vehicles per month); and it would have taken twice as long to deploy MRAP vehicles into Iraq and Afghanistan.

DoD also notes that the specialty steel industry does not object to the other expansions DoD provided in the definition of "produce," such as gas atomization, sputtering of titanium, or titanium alloy powder. None of these processes are melting processes. It is inconsistent to accept some non-melt processes, but not others.

DoD considered processing a domestic nonavailability determination under the nonavailability exception or the national security exception, but both avenues represented significant obstacles, and were rejected as unsuitable options. A national security exception requires that the contractor become compliant. The availability exception was determined to be impracticable, time-consuming, and inefficient.

6. Exception for Electronic Components

Comments: One respondent especially applauded DoD efforts to revise the domestic source exceptions for electronic components. Another respondent, while supporting DoD's application of the electronic component exception, was concerned that, in practice, it will be applied by the supply chain more broadly than intended. For example, the respondent has seen the item applied to higher level electronic subsystems, consisting of dozens of sub-components or elements such as alternators, pumps, and motors, which are not primarily "electronic components" like circuit cards or arrays of solid state devices.

DoD Response: The definition of electronic component clearly excludes structural or mechanical parts of an assembly containing an electronic component.

7. Exception for COTS Items

Comments: One respondent applauded DoD's efforts to revise the domestic source exceptions for COTS items. Another respondent stated that deconstruction of major equipment, such as green aircraft, should not be allowed under the COTS exception. In that instance, the respondent recommended use of the commercial derivative military article exception.

DoD Response: DoD disagrees that green aircraft must be considered under the commercial derivative military article exception. Funding constraints on major defense programs require DoD to acquire items at best value. DoD uses a best value approach to competition, meaning that DoD sets the performance requirements, but does not dictate specifications. If a prime contractor chooses to start with a COTS end item in order to save development time and the costs associated with that development, that is a benefit of which DoD would like to take advantage. DoD does not think it is reasonable to force COTS suppliers of items to change their procurement systems for DoD if the items they provide to DoD prime contractors are truly COTS items at the point of purchase.

Comments: Another respondent was concerned that the rule made the COTS exception inapplicable to large classes of COTS products unless they are incorporated into a higher level COTS end item, subsystem, assembly, or component. The respondent stated that the House Armed Services Committee endorsed a broader definition by stating that this exception applies to all COTS products incorporated in non-commercial end items.

DoD Response: The law places certain restrictions on application of the COTS item exception to fasteners, high performance magnets, and castings and forgings, versus other COTS items. The rule implements these statutory restrictions.

8. Exception for Fasteners—50 Percent Market-Basket Rule

Comments: One respondent expressed support of the rule with respect to fasteners, stating that the rule would provide fastener manufacturers and distributors with the needed flexibilities to provide compliant fasteners and remain globally competitive.

Several other respondents believed that the rule does not provide enough flexibility and should be streamlined. These respondents stated that—

- The rule should be liberalized with respect to commercial item fasteners and should allow contractors to provide metals according to the new statute's language regarding "melted or produced."
- It is a source of concern that the fastener exceptions apply to specialty metals melted domestically and do not appear to extend to specialty metals from qualifying countries.
- The rule requires daunting recordkeeping and is difficult to enforce.
- The rule is unclear with respect to whether the 50 percent applies to weight, volume, or dollars.
- The law was flawed with respect to its intention to apply the Buy American

restriction to the component level of major defense projects and remains a primary obstacle to the completion of projects.

○ DoD should add a dollar threshold for applicability of the clause.

DoD Response: Although the statute does not include "or produced" with regard to the specific exception for fasteners or the commercial derivative military article market-basket approaches, DoD interprets the statute to include "or produced." For some titanium items, melting is not even part of the production process. This interpretation was reflected in section 225.7003–3(b)(3) of the proposed rule. The words "or produced" were erroneously omitted from the corresponding contract clause in the proposed rule, but have been added in the final rule at 252.225–7009(c)(3).

The statute specifically requires that the metals be domestically melted. It does not provide an exception for metals from qualifying countries in the market-basket approach provided for commercial fasteners.

The rule applies the 50 percent fastener market-basket rule based on the precise language in the statute, while providing flexibility for prime contractors and sub-tier suppliers to develop their own certification process and to determine whether to apply the 50 percent by weight, dollars, or volume. The responsibility for ensuring compliance rests with industry, specifically with the prime contractor to monitor compliance throughout its supply chain.

It is the responsibility of DoD to implement the law as written. The law does not allow application of the simplified acquisition threshold exception beyond the prime contract level.

9. Exception for Qualifying Countries

Comments: One respondent stated that the qualifying country exception disfavors U.S. industry by allowing DoD to purchase products containing specialty metals that were melted in qualifying countries, while prohibiting U.S. manufacturers from doing the same.

Another respondent stated that DoD should expand the definition of "produce" in DFARS 252.225–70X2(a) (now 252.225–7009(a)) to eliminate the "qualifying country" exception and to make explicit that the "qualifying country loophole" at DFARS 225.7003–3(b)(4) has been eliminated. The respondent suggested that the expanded scope of 10 U.S.C. 2533b, permitting the purchase of specialty metals or products containing specialty metals that are melted or produced in the United States, may be sufficiently broad to level the playing field between industry in the United States and in qualifying countries.

DoD Response: A U.S. contractor or subcontractor may rely on the qualifying country exception to the extent that the contractor or subcontractor is buying an item containing specialty metals that is manufactured in a qualifying country. This exception to the restrictions of 10 U.S.C. 2533b(a)(1) is provided at 10 U.S.C. 2533b(d), where the acquisition furthers a reciprocal procurement agreement with a foreign government.

An "uneven playing field" is created only with regard to use of specialty metals not melted or produced in the United States or a qualifying country. Items manufactured in a qualifying country can include specialty metals melted or produced in non-qualifying countries, whereas U.S. manufacturers cannot include metals melted or produced in a non-qualifying country, unless another exception applies.

Except when using the market-basket approach for fasteners or commercial derivative military article, the only instance where a U.S. prime contractor cannot use the qualifying country exception to purchase specialty metals melted or produced in a qualifying country is when the acquisition is subject to the restriction at 10 U.S.C. 2533b(a)(2) (*i.e.*, the acquisition of the specialty metal, such as raw bar stock, is to be provided to the Government as the end product), in which case DoD also cannot directly acquire such items using the qualifying country exception. This is because the exception for qualifying countries does not apply to the restriction at 10 U.S.C. 2533b(a)(2).

There is nothing in the definition of "produce" that applies to the qualifying country exception. However, the words "or produced" were erroneously omitted from the qualifying country exception in section 225.7003–3(b)(4) of the proposed rule. This omission has been corrected in the final rule.

10. Domestic Nonavailability Determinations (DNADs)

Comments: Various respondents stated that the final rule should allow reliance on the Fastener DNAD, approved by the Under Secretary of Defense (Acquisition, Technology, and Logistics) on April 10, 2007, in cases where a supplier, at any tier, procured fasteners prior to July 26, 2008, even if the DoD contract is awarded after that date. One respondent stated that many contractors purchased fasteners pursuant to the DNAD in good faith in order to fulfill existing and anticipated contracts and contract modifications. The respondents stated that this approach would allow use of current inventories without the need to segregate and track separately while ensuring no interruption in supply to DoD.

DoD Response: The Fastener DNAD, along with three other broad DNADs approved by the Under Secretary of Defense (Acquisition, Technology, and Logistics) expired for use on new contracts after July 26, 2008, in accordance with DoD Class Deviation 2008–O0002 dated January 29, 2008. The decision to cancel these DNADs was based on the requirement in Section 804(h) of the Fiscal Year 2008 National Defense Authorization Act that, by July 26, 2008, any domestic nonavailability determination made under 10 U.S.C. 2533b must be reviewed and amended as necessary to comply with the changes made by Section 804.

DoD performed market research and found sufficient quantity and satisfactory quality of fasteners of all types available that complied with the new exception.

Additionally, in discussions with industry associations, DoD found consensus that Section 804 provided enough flexibilities, as noted in the comments received to this rule, including the fastener exception based on a commingling approach, the COTS item exception applicable to fasteners delivered in COTS items, the commercial derivative military article exception, and the minimum content exception, to suggest that the previous high concern regarding fasteners was no longer an issue. DoD asked industry to identify any items that were not available, but none were identified. Therefore, a determination was made to allow reliance on the DNADs until the expiration of the time period specified in the statute. DoD sees no evidence to delay the expiration of the fastener DNAD. Any contract awarded prior to July 26, 2008, that relied on the fastener DNAD can continue to rely upon it until the contract is complete.

DoD notes that, based on the new definition of "required form" provided in Section 804, it is more difficult to justify nonavailability of an item such as a fastener, since the nonavailability of the specialty metal itself must be justified. Unless a fastener manufacturer or distributor can confirm the nonavailability of a specialty metal, a DNAD can no longer be approved under this exception.

11. Fair and Reasonable Price Criterion

Comments: Two respondents stated that the "fair and reasonable price"

criterion, included in section 225.7003–3(b)(5) of the proposed rule, was not supported by the statute; has the potential of distorting the market place; and was not the intent of Congress, because Congress eliminated the price criterion from the statute in the Fiscal Year 2007 National Defense Authorization Act.

DoD Response: DoD recognizes that the language in the availability exception at 10 U.S.C. 2533b(b) does not address price reasonableness; however, this does not eliminate the need for DoD to make fiscally prudent decisions. Section 15.402 of the Federal Acquisition Regulation establishes a fundamental requirement for the Government to purchase supplies at fair and reasonable prices. In the event that DoD found itself in a position where the cost of acquiring domestic specialty metal was deemed to be excessive when compared with the alternative, and all reasonable alternatives were researched and found to be unacceptable technically or otherwise, the fair and reasonable price criterion at 225.7003–3(b)(5) reminds contracting officers of their responsibility to be prudent with taxpayer money. This DFARS policy is provided with the understanding that some additional cost may be necessary when acquiring domestic specialty metals versus foreign; however, DoD cannot ignore its fiduciary responsibility entirely.

12. Minimum Content Exception

Comments: One respondent noted appreciation for the recognition of the specialty metals minimum content exception. Another respondent was concerned that determining whether the minimum content exception in the proposed rule at 225.7003–3(b)(6) and 252.225–70X2(c)(6) (now 252.225–7009(c)(6)) applies will be a time-consuming process. The respondent requested detailed guidance on how companies should determine whether they qualify for this exception. Several respondents believed that the proposed rule was unclear with respect to flowdown of the minimum content requirement.

DoD Response: DoD concurs that implementation of the exception will be difficult. Therefore, the rule allows contractors to make a good faith estimate. DoD considers it preferable to provide contractors the flexibility to develop the methodology best suited to their own processes. The proposed rule provided for optional inclusion of the clause at 252.225–70X2 (now 252.225–7009) in subcontracts. The final rule requires contractors to include the substance of the clause in subcontracts for items containing specialty metals, to the extent necessary to ensure compliance of the end products that the contractor will deliver to the Government. Since the prime contractor is ultimately responsible for compliance with the specialty metals restriction, the language in the final rule was constructed to allow the prime contractor flexibility in applying and controlling the minimum content exception. The prime contractor may need to retain control of the application of the 2 percent threshold in the event some sub-tier parts exceed that threshold. Alternatively, the prime contractor may choose to flow down control of this exception to every level in its supply chain so that no supplier can exceed the 2 percent threshold. Regardless of which path the prime contractor chooses, the end product cannot exceed the 2 percent minimum content threshold at the end product level when relying on that exception.

Comments: Several respondents recommended the following changes for consistency with the language at 10 U.S.C. 2533b(i):

- Revision of the initial phrase of the exception, from "A minimal amount of otherwise noncompliant specialty metals * * *." to "Items containing a minimal amount of otherwise noncompliant specialty metals * * *"
- Revision of the statement "This exception does not apply to the specialty metals in high performance magnets" to "This exception does not apply to high performance magnets containing specialty metals."

In addition, these respondents recommended revision of the parenthetical at 225.7003–6(b)(6), from "(* * * specialty metals not melted or produced in the United States, that * * *)" to "(* * * specialty metals not melted or produced in the United States, an outlying area, or a qualifying country, that * * *)" for consistency with the wording at 252.225–70X2(c)(6) (now 252.225–7009(c)(6)).

DoD Response: DoD has revised the exceptions at 225.7003–3(b)(6) and 252.225–7009(c)(6) to begin with the phrase "End items containing a minimal amount of otherwise noncompliant specialty metals * * *." The law makes it clear that the exception is for an item to be delivered to DoD. The 2 percent minimum content threshold is based on the total specialty metal in the end item.

In addition, DoD has revised the statement regarding high performance magnets at 225.7003–3(b)(6) and 252.225–7009(c)(6) to read "This exception does not apply to high performance magnets containing specialty metals."

DoD did not adopt the recommendation to revise the wording at 225.7003–3(b)(6) to address outlying areas and qualifying countries. The term "United States," as used within DFARS Part 225, includes outlying areas, in accordance with the definition of "United States" at FAR 25.003. Further, at 225.7003–3, specialty metals melted or produced in a qualifying country is an exception covered in paragraph (b)(4); whereas in the clause at 252.225–7009, the exception for specialty metals melted or produced in a qualifying country has been built into the restriction in paragraph (b).

13. Commercial Derivative Military Article Market-Basket Approach

Comments: Two respondents found the implementation of the commercial derivative military article exception impractical or unclear. One respondent requested additional guidance in either DFARS or the PGI on how to apply the 50 percent and 120 percent thresholds. Another respondent recommended alternative language for the regulation and the clause, because it was unlikely that a prime contractor and all of its subcontractors would or could enter into the agreements required by this provision due to the complexity and number of subcontractors involved on these major systems. The following is the recommended alternative language:

DFARS 225.7003–3(c)(1)(i): "The offeror must demonstrate that a sufficient quantity of domestic specialty metals has been or will be purchased by the combination of offeror and subcontracts as provided in offeror's certification".

DFARS 252.225–70X3(c) (now 252.225–7010)(c)): "The offeror and its subcontractor(s) will demonstrate that individually or collectively they have entered into agreements to purchase an amount of domestic metals."

DoD Response: DoD has revised the commercial derivative military article exception based on the respondents' recommendations. However, DoD has retained the requirement for the offeror to certify that the offeror and its subcontractor(s) will enter into a contractual agreement or agreements to purchase a sufficient quantity of domestically melted or produced specialty metal, consistent with 10 U.S.C. 2533b(j)(1)(B). The rule does not include specific procedures for application of this exception, to provide maximum flexibility for prime contractors.

14. National Security Waiver and One-Time Waiver

One respondent stated appreciation for the national security waiver and codification of the one-time waiver.

15. Contingency Operations

10 U.S.C. 2533b(c) contains an exception to the specialty metals restrictions for procurements outside the United States in support of combat or contingency operations. The proposed rule implemented this exception as two separate exceptions for—

○ Acquisitions outside the United States in support of combat operations; and

○ Acquisitions in support of contingency operations.

Comments: One respondent considered this interpretation of the law to be grammatically incorrect and in conflict with the underlying logic of the exception. The respondent stated that—

○ Grammatically, the prepositional phrase "outside the United States" contained in the statute follows immediately after the noun "procurement" and so modifies the noun with respect to both of the subsequent prepositional phrases.

○ The logic of the exception is to make it easier for DoD to acquire supplies locally when it is operating outside the United States. The same logic would not support an exception for contingency operations conducted in the United States.

DoD Response: While acknowledging that grammatically the law could be read as recommended by the respondent, DoD notes that the exceptions for acquisitions outside the United States in support of combat operations and acquisitions in support of contingency operations are pre-existing exceptions implemented at DFARS 225.7002–2(d) and (f)(1). These exceptions are consistent with the exception at 10 U.S.C. 2533a(d)(1) which, prior to the establishment of 10 U.S.C. 2533b, applied to specialty metals as well as food and hand or measuring tools, and was worded as follows: "Procurements outside the United States in support of combat operations or procurements of any item listed in subsection (b)(1)(A) [*food*], (b)(2) [*specialty metals*], or (b)(3) [*hand or measuring tools*] in support of contingency operations." Although the new exception for specialty metals at 10 U.S.C. 2533b does not repeat the words "procurements of", there is no indication of any intent by Congress to change the exception for contingencies to apply only outside the United States. Urgent requirements for contingency operations exist both inside and outside the United States.

16. Prescription for Clause at DFARS 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals

Comments: One respondent questioned why the clause prescription limits the exceptions to use of the clause to those specified at 225.7003–3(a) and (d), rather than all exceptions in 225.7003–3(a) through (d).

Another respondent stated that the clause should not be included in contracts for electronic components, since the Defense Priorities and Allocations System (DPAS) rating DO–A7 applies to orders for electronic and communications equipment.

DoD Response: DoD concluded that the exceptions at 225.7003–3(a) and (d) describe situations that would apply to the entire acquisition; therefore, inclusion of the clause would be unnecessary. The exceptions in paragraph 225.7003–3(b) are more likely to apply only to certain items or components of items within an acquisition. Electronic or communications equipment would likely include parts that were not covered by the narrow definition of electronic component at 252.225–7009; therefore, the clause would be applicable to those parts. With regard to exclusion of the clause from all contracts rated DO–A7, there is no statutory basis for such as exception.

The clause at 252.225–7009 is applicable to acquisitions that use the exception at 225.7003–3(c) for commercial derivative military articles, as the procedures for use of this exception are addressed within the clause in paragraph (d).

17. Flowdown of the Clause at 252.225–70X2 (Now 252.225–7009)

Paragraph (e) of the clause at 252.225–70X2 in the proposed rule permitted, but did not require, inclusion of the clause in subcontracts for items containing specialty metals.

Comments: A number of respondents were concerned with the lack of mandatory flowdown of the clause to subcontracts.

○ One respondent stated that the lack of mandatory flowdown would essentially remove the requirements of the specialty metals provisions for high performance magnets, due to the fact that high performance magnets are typically supplies in tier three to tier six.

○ One respondent stated that, while prime contractors generally prefer flexibility in their subcontracts, in this instance, it is preferable to have a mandatory flowdown to help all parties comply and ensure greater consistency.

○ Another respondent stated that subcontractors may refuse to accept the clause since flowdown is not mandatory.

○ One respondent found it unclear as to when the clause is to be included in subcontracts. This respondent stated that if the prime contractor is delivering an item that meets an exception in paragraph (c)(1) of the clause, the clause should not be required in subcontracts with lower tier subcontractors.

○ One respondent recommended that the clause only flow down to subcontracts for components exceeding a certain dollar value.

DoD Response: It is incorrect to assume that the specialty metals requirements will not apply to high performance magnets at lower tiers if the clause does not flow down to subcontracts. It is always the responsibility of the prime contractor to comply with the requirements imposed by the Government in the contract. However, DoD has reworded paragraph (e) of the clause at 252.225–7009 to make it clear that flowdown is required to the extent necessary to comply with contract requirements. In addition, paragraph (e) has been amended to direct the contractor to modify paragraph (c)(6) of the clause as necessary for subcontracts, to facilitate management of the 2 percent minimum content exception addressed in paragraph (c)(6). Only the contractor can determine the application of the 2 percent minimum content exception, because it applies to the end product. Therefore, the contractor will determine what percentage a subcontractor must meet to satisfy contract requirements.

Likewise, if the contractor, or a subcontractor, is providing an item that meets an exception in (c)(1) (*e.g.*, manufactured in a qualifying country), the clause should not be flowed down beyond that point. Lower tier subcontractors would not need to comply if a higher tier subcontractor was going to use their items in a product manufactured in a qualifying country. Therefore, in such circumstances, the contractor or subcontractor does not need to flow down the clause to meet the contractual requirement and should not do so.

Limiting flowdown to components that exceed a certain dollar threshold would not meet the statutory requirement, which specifies application to all components of any of the 6 major product categories.

18. Contractor Reporting Requirement

Comments: Four respondents described the proposed implementation of the statutory reporting requirement at 225.7003–3(b)(2)(iii) and 252.225–70X4 (now 252.225–7029) as unnecessary and burdensome and suggested deletion or simplification. The respondents stated the following:

○ The information is already available to DoD and any unavailable data needed can be obtained through an industry survey.

○ A dollar threshold should be provided to make it more manageable, such as an exemption for items with a unit cost of less than $100.

○ It is unclear whether commercial fasteners acquired under the rules of DoD Class Deviation 2008–O0002 are excluded.

○ The contract-by-contract reporting requirement should be eliminated.

○ The statute does not require reporting of the dollar value of the non-commercial item or the dollar value of the COTS item to which the exception applies.

○ The statute does not require reporting the NAICS code.

○ The rule should clarify that the reporting requirement applies only to prime contractors, because fastener manufacturers and distributors would not know whether the fastener was going to be provided in a COTS item (and therefore would be excepted), or whether it would be provided directly into a noncommercial end item.

One respondent pointed out that the **Federal Register** notice was incorrect in stating that the law required reporting of information regarding the acquisition of noncommercial end items incorporating COTS items containing non-domestic specialty metal. The respondent stated that neither the statute, nor the proposed DFARS text, require the reporting of the type of specialty metal in COTS items incorporated into a non-COTS end item (*i.e.*, no requirement to identify only those COTS items with non-domestic specialty metal).

DoD Response: The intent of the clause at 252.225–7029 is to obtain information on COTS items incorporated into noncommercial end products, only if those COTS items were acquired using the exception authority provided at 10 U.S.C. 2533b(h) (as implemented in paragraph (c)(2) of the clause at DFARS 252.225–7009). It would not be necessary to use this exception if a COTS item is known to contain specialty metals melted or produced in the United States. However, the exception could be used if the source of the specialty metals in a COTS item is known to be non-domestic or is unknown.

The report required by the clause at 252.225–7029 is designed to collect consistent data on the description of the types of items being acquired as COTS items under the exception in paragraph (c)(2) of the clause at DFARS 252.225–7009. To alleviate the burden on prime contractors, who are ultimately responsible for reporting this information to DoD, and to ensure consistency in the data reported, a point and click reporting tool is provided for reporting this data at: *http://www.acwq.osd.mil/dpap/cpic/ic/restrictions_on_specialty_metals_10_usc_2533b.html.*

DoD cannot eliminate the contractor reporting requirement, because DoD has no other way to obtain meaningful information to prepare the report to Congress required by Section 804(i) of Public Law 110–181. An industry survey is not possible in the time allowed for this report.

After reviewing the comments, DoD has amended the reporting requirement as follows:

○ Inclusion of a threshold of $100 per item value. Although the statute does not provide a dollar threshold, inclusion of a threshold eliminating the requirement to report COTS items of $100 or less appears to be a reasonable interpretation of the requirement.

○ Clarification that commercial fasteners acquired under a domestic non-availability determination, or any exception other than COTS, need not be reported.

○ Elimination of the collection of the information on a contract-by-contract basis.

○ Elimination of the requirement for contractors to provide dollar values, recognizing that this requirement was not specified by statute and could be a burden to contractors and subcontractors.

DoD did not eliminate the use of NAICS codes, as their use permits organization of the data and allows DoD to provide a point-and-click Web reporting system that requires the contractor to make limited choices from a menu of finite options.

DoD agrees that the prime contractor is responsible for this reporting requirement. This is clear in that the clause at 252.225–7029 does not include any flowdown requirement. The report applies to any COTS items incorporated in non-commercial items when the COTS exception was relied upon. Implicit in this requirement is the prime contractor's responsibility to work with its supply chain as necessary to determine which items are relying on this exception.

19. Internal DoD Reporting Requirement

Comment: One respondent opposed the requirement for DoD buying activities to report use of the exception for COTS end items valued at $5 million or more per COTS item.

DoD Response: DoD wants to ensure that the COTS item exception is used only where appropriate and, therefore, has adopted this internal reporting requirement to monitor its use.

20. Procedures, Guidance, and Information (PGI)

Comment: One respondent stated that the PGI sections that accompany proposed rules should be published, even though the PGI does not require public comment.

DoD Response: The draft PGI coverage associated with a proposed rule is available in the corresponding change notice published on the DPAP Web site at *http://www.acq.osd.mil/dpap/dars/change_notices.html.*

Note: The amendments to the clause at 252.212–7001, that add 252.247–7003 and revise the dates of 252.225–7021 and 252.225–7036, are shown with the amendments to this rule for administrative purposes only. The addition of 252.247–7003 to 252.212–7001 is part of the interim rule for DFARS Case 2008–D040 published elsewhere in this edition of the **Federal Register**. The revision of the dates of 252.225–7021 and 252.225–7036 is part of the interim rule for DFARS Case 2008–D046 also published elsewhere in this edition of the **Federal Register**. Revision of the date of 252.225–7036, Alternate I, is a result of a DFARS technical amendment published elsewhere in this edition of the **Federal Register**.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD has prepared a final regulatory flexibility analysis consistent with 5 U.S.C. 604. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

This final rule amends the Defense Federal Acquisition Regulation Supplement to implement 10 U.S.C. 2533b, as established by Section 842 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364) and Sections 804 and 884 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181). 10 U.S.C. 2533b places restrictions on DoD acquisition of specialty metals not melted or produced in the United States. Two respondents disagreed with

the statement in the Initial Regulatory Flexibility Analysis that producers of specialty metals are generally large businesses. One of the two respondents stated that specialty metals manufacturers are often small businesses that are employee or family owned. The second respondent stated that "our entire industry employs less than 600 people, yet it remains a competitive and critical member of the DoD supply-chain." However, these respondents are magnet producers, not specialty metals producers. According to information available to DoD, most specialty metals producers are large businesses. There is a high capitalization requirement to establish a business that can melt or produce specialty metals. The small business size standard for primary metal manufacturing ranges from 500 to 1,000 employees. All the specialty metals producers reviewed by DoD had more than 1,000 employees. The rule provides special protection for high performance magnets containing domestic specialty metals, as provided in the law.

C. Paperwork Reduction Act

The provision at 252.225–7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, and the clause at 252.225–7029, Reporting of Commercially Available Off-the-Shelf Items that Contain Specialty Metals and are Incorporated into Noncommercial End Items, contain new information collection requirements. The Office of Management and Budget has approved the information collection requirements for use through June 30, 2012, under Control Number 0704–0459.

List of Subjects in 48 CFR Parts 202, 212, 225, and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Parts 202, 212, 225, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 202, 212, 225, and 252 continues to read as follows:

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

PART 202—DEFINITIONS OF WORDS AND TERMS

202.101 [Amended]

■ 2. Section 202.101 is amended by removing the definition of "Commercially available off-the-shelf item".

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Section 212.301 is amended by adding paragraph (f)(xiii) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) * * *

(xiii) Use the provision at 252.225–7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, as prescribed in 225.7003–5(b).

■ 4. Section 212.570 is revised to read as follows:

212.570 Applicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf items.

Paragraph (a)(1) of 10 U.S.C. 2533b, Requirement to buy strategic materials critical to national security from American sources, is not applicable to contracts and subcontracts for the acquisition of commercially available off-the-shelf items, except as provided at 225.7003–3(b)(2)(i).

PART 225—FOREIGN ACQUISITION

■ 5. Section 225.7001 is amended by revising paragraph (b) and removing paragraph (d). The revised text reads as follows:

225.7001 Definitions.

* * * * *

(b) *Component* is defined in the clauses at 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals; 252.225–7012, Preference for Certain Domestic Commodities; and 252.225–7016, Restriction on Acquisition of Ball and Roller Bearings.

* * * * *

■ 6. Section 225.7002 is added to read as follows:

225.7002 Restrictions on food, clothing, fabrics, and hand or measuring tools.

225.7002–1 [Amended]

■ 7. Section 225.7002–1 is amended by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

■ 8. Section 225.7002–2 is amended as follows:

■ a. In paragraph (b), in the first sentence, by removing "or (b)";

■ b. By adding paragraph (b)(1)(v);

■ c. By revising paragraphs (b)(3) and (b)(4);

■ d. By removing paragraph (b)(5);

■ e. In paragraph (f) introductory text, by removing ", specialty metals,";

■ f. By removing paragraphs (m) and (n);

■ g. By redesignating paragraphs (o) and (p) as paragraphs (m) and (n) respectively; and

■ h. By removing paragraph (q). The added and revised text reads as follows:

225.7002–2 Exceptions.

* * * * *

(b) * * *

(1) * * *

(v) The Director of the Defense Logistics Agency.

* * * * *

(3) Defense agencies other than the Defense Logistics Agency shall follow the procedures at PGI 225.7002–2(b)(3) when submitting a request for a domestic nonavailability determination.

(4) Follow the procedures at PGI 225.7002–2(b)(4) for reciprocal use of domestic nonavailability determinations.

* * * * *

225.7002–3 [Amended]

■ 9. Section 225.7002–3 is amended by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

■ 10. Section 225.7003 is revised to read as follows:

225.7003 Restrictions on acquisition of specialty metals.

■ 11. Sections 225.7003–1 through 225.7003–5 are added to read as follows:

225.7003–1 Definitions.

As used in this section—

(a) *Assembly, commercial derivative military article, commercially available off-the-shelf item, component, electronic component, end item, high performance magnet, required form,* and *subsystem* are defined in the clause at 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals.

(b) *Automotive item*—

(1) Means a self-propelled military transport tactical vehicle, primarily intended for use by military personnel or for carrying cargo, such as—

(i) A high-mobility multipurpose wheeled vehicle;

(ii) An armored personnel carrier; or

(iii) A troop/cargo-carrying truckcar, truck, or van; and

(2) Does not include—

(i) A commercially available off-the-shelf vehicle; or

(ii) Construction equipment (such as bulldozers, excavators, lifts, or loaders) or other self-propelled equipment (such as cranes or aircraft ground support equipment).

(c) *Produce* and *specialty metal* are defined in the clauses at 252.225–7008,

Restriction on Acquisition of Specialty Metals, and 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals.

225.7003–2 Restrictions.

The following restrictions implement 10 U.S.C. 2533b. Except as provided in 225.7003–3—

(a) Do not acquire the following items, or any components of the following items, unless any specialty metals contained in the items or components are melted or produced in the United States (also see guidance at PGI 225.7003–2(a)):

(1) Aircraft.

(2) Missile or space systems.

(3) Ships.

(4) Tank or automotive items.

(5) Weapon systems.

(6) Ammunition.

(b) Do not acquire a specialty metal (e.g., raw stock, including bar, billet, slab, wire, plate, and sheet; castings; and forgings) as an end item, unless the specialty metal is melted or produced in the United States. This restriction applies to specialty metal acquired by a contractor for delivery to DoD as an end item, in addition to specialty metal acquired by DoD directly from the entity that melted or produced the specialty metal.

225.7003–3 Exceptions.

Procedures for submitting requests to the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) for a determination or approval as required in paragraph (b)(5), (c), or (d) of this subsection are at PGI 225.7003–3.

(a) Acquisitions in the following categories are not subject to the restrictions in 225.7003–2:

(1) Acquisitions at or below the simplified acquisition threshold.

(2) Acquisitions outside the United States in support of combat operations.

(3) Acquisitions in support of contingency operations.

(4) Acquisitions for which the use of other than competitive procedures has been approved on the basis of unusual and compelling urgency in accordance with FAR 6.302–2.

(5) Acquisitions of items specifically for commissary resale.

(6) Acquisitions of items for test and evaluation under the foreign comparative testing program (10 U.S.C. 2350a(g)). However, this exception does not apply to any acquisitions under follow-on production contracts.

(b) One or more of the following exceptions may apply to an end item or component that includes any of the following, under a prime contract or subcontract at any tier. The restrictions in 225.7003–2 do not apply to the following:

(1) Electronic components, unless the Secretary of Defense, upon the recommendation of the Strategic Materials Protection Board pursuant to 10 U.S.C. 187, determines that the domestic availability of a particular electronic component is critical to national security.

(2)(i) Commercially available off-the-shelf (COTS) items containing specialty metals, except the restrictions do apply to contracts or subcontracts for the acquisition of—

(A) Specialty metal mill products, such as bar, billet, slab, wire, plate, and sheet, that have not been incorporated into end items, subsystems, assemblies, or components. Specialty metal supply contracts issued by COTS producers are not subcontracts for the purposes of this exception;

(B) Forgings or castings of specialty metals, unless the forgings or castings are incorporated into COTS end items, subsystems, or assemblies;

(C) Commercially available high performance magnets that contain specialty metal, unless such high performance magnets are incorporated into COTS end items or subsystems (see PGI 225.7003–3(b)(6) for a table of applicability of specialty metals restrictions to magnets); and

(D) COTS fasteners, unless—

(1) The fasteners are incorporated into COTS end items, subsystems, or assemblies; or

(2) The fasteners qualify for the commercial item exception in paragraph (b)(3) of this subsection.

(ii) If this exception is used for an acquisition of COTS end items valued at $5 million or more per item, the acquiring department or agency shall submit an annual report to the Director, Defense Procurement and Acquisition Policy, in accordance with the procedures at PGI 225.7003–3(b)(2).

(iii) During fiscal year 2009, contractors are required to report use of this exception to acquire COTS items containing specialty metal that are incorporated into a noncommercial end item (see 252.225–7029).

(3) Fasteners that are commercial items and are acquired under a contract or subcontract with a manufacturer of such fasteners, if the manufacturer has certified that it will purchase, during the relevant calendar year, an amount of domestically melted or produced specialty metal, in the required form, for use in the production of fasteners for sale to DoD and other customers, that is not less than 50 percent of the total amount of the specialty metal that the manufacturer will purchase to carry out the production of such fasteners for all customers.

(4) Items listed in 225.7003–2(a), manufactured in a qualifying country or containing specialty metals melted or produced in a qualifying country.

(5) Specialty metal in any of the items listed in 225.7003–2 if the USD(AT&L), or an official authorized in accordance with paragraph (b)(5)(i) of this subsection, determines that specialty metal melted or produced in the United States cannot be acquired as and when needed at a fair and reasonable price in a satisfactory quality, a sufficient quantity, and the required form (*i.e.*, a domestic nonavailability determination). See guidance in PGI 225.7003–3(b)(5).

(i) The Secretary of the military department concerned is authorized, without power of redelegation, to make a domestic nonavailability determination that applies to only one contract.

The supporting documentation for the determination shall include—

(A) An analysis of alternatives that would not require a domestic nonavailability determination; and

(B) Written documentation by the requiring activity, with specificity, why such alternatives are unacceptable.

(ii) A domestic nonavailability determination that applies to more than one contract (*i.e.*, a class domestic nonavailability determination), requires the approval of the USD(AT&L).

(A) At least 30 days before making a domestic nonavailability determination that would apply to more than one contract, the USD(AT&L) will, to the maximum extent practicable, and in a manner consistent with the protection of national security and confidential business information—

(1) Publish a notice on the Federal Business Opportunities Web site (*http://www.FedBizOpps.gov* or any successor site) of the intent to make the domestic nonavailability determination; and

(2) Solicit information relevant to such notice from interested parties, including producers of specialty metal mill products.

(B) The USD(AT&L)—

(1) Will take into consideration all information submitted in response to the notice in making a class domestic nonavailability determination;

(2) May consider other relevant information that cannot be made part of the public record consistent with the protection of national security information and confidential business information; and

(3) Will ensure that any such domestic nonavailability determination and the rationale for the determination are made publicly available to the maximum extent consistent with the protection of national security and confidential business information.

(6) End items containing a minimal amount of otherwise noncompliant specialty metals (*i.e.*, specialty metals not melted or produced in the United States that are not covered by another exception listed in this paragraph (b)), if the total weight of noncompliant specialty metal does not exceed 2 percent of the total weight of all specialty metal in the end item. This exception does not apply to high performance magnets containing specialty metals. See PGI 225.7003–3(b)(6) for a table of applicability of specialty metals restrictions to magnets.

(c) *Compliance for commercial derivative military articles.* The restrictions at 225.7003–2(a) do not apply to an item acquired under a prime contract if—

(1) The offeror has certified, and subsequently demonstrates, that the offeror and its subcontractor(s) will individually or collectively enter into a contractual agreement or agreements to purchase a sufficient quantity of domestically melted or produced specialty metal in accordance with the provision at 252.225–7010; and

(2) The USD(AT&L), or the Secretary of the military department concerned, determines that the item is a commercial derivative military article (defense agencies see procedures at PGI 225.7003–3). The contracting officer shall submit the offeror's certification and a request for a determination to the appropriate official, through agency channels, and shall notify the offeror when a decision has been made.

(d) *National security waiver.* The USD(AT&L) may waive the restrictions at 225.7003–2 if the USD(AT&L) determines in writing that acceptance of the item is necessary to the national security interests of the United States (*see* procedures at PGI 225.7003–3). This authority may not be delegated.

(1) The written determination of the USD(AT&L)—

(i) Shall specify the quantity of end items to which the national security waiver applies;

(ii) Shall specify the time period over which the national security waiver applies; and

(iii) Shall be provided to the congressional defense committees before the determination is executed, except that in the case of an urgent national security requirement, the determination may be provided to the congressional defense committees up to 7 days after it is executed.

(2) After making such a determination, the USD(AT&L) will—

(i) Ensure that the contractor or subcontractor responsible for the noncompliant specialty metal develops and implements an effective plan to ensure future compliance; and

(ii) Determine whether or not the noncompliance was knowing and willful. If the USD(AT&L) determines that the noncompliance was knowing and willful, the appropriate debarring and suspending official shall consider suspending or debarring the contractor or subcontractor until such time as the contractor or subcontractor has effectively addressed the issues that led to the noncompliance.

(3) Because national security waivers will only be granted when the acquisition in question is necessary to the national security interests of the United States, the requirement for a plan will be applied as a condition subsequent, and not a condition precedent, to the granting of a waiver.

225.7003–4 One-time waiver.

DoD may accept articles containing specialty metals that are not in compliance with the specialty metals clause of the contract if—

(a) Final acceptance takes place before September 30, 2010;

(b) The specialty metals were incorporated into items (whether end items or components) produced, manufactured, or assembled in the United States before October 17, 2006;

(c) The contracting officer determines in writing that—

(1) It would not be practical or economical to remove or replace the specialty metals incorporated in such items or to substitute items containing compliant materials;

(2) The contractor and any subcontractor responsible for providing items containing non-compliant specialty metals have in place an effective plan to ensure compliance with the specialty metals clause of the contract for future items produced, manufactured, or assembled in the United States; and

(3) The non-compliance was not knowing or willful;

(d) The determination is approved by—

(1) The USD(AT&L); or

(2) The service acquisition executive of the military department concerned; and

(e) Not later than 15 days after approval of the determination, the contracting officer posts a notice on the Federal Business Opportunities Web site at *http://www.FedBizOpps.gov*, stating that a waiver for the contract has been granted under Section 842(b) of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364).

225.7003–5 Solicitation provision and contract clauses.

(a) Unless the acquisition is wholly exempt from the specialty metals restrictions at 225.7003–2 because the acquisition is covered by an exception in 225.7003–3(a) or (d) (but see paragraph (d) of this subsection)—

(1) Use the clause at 252.225–7008, Restriction on Acquisition of Specialty Metals, in solicitations and contracts that—

(i) Exceed the simplified acquisition threshold; and

(ii) Require the delivery of specialty metals as end items.

(2) Use the clause at 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals, in solicitations and contracts that—

(i) Exceed the simplified acquisition threshold; and

(ii) Require delivery of any of the following items, or components of the following items, if such items or components contain specialty metal:

(A) Aircraft.

(B) Missile or space systems.

(C) Ships.

(D) Tank or automotive items.

(E) Weapon systems.

(F) Ammunition.

(b) Use the provision at 252.225–7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, in solicitations—

(1) That contain the clause at 252.225–7009; and

(2) For which the contracting officer anticipates that one or more offers of commercial derivative military articles may be received.

(c) Use the clause at 252.225–7029, Reporting of Commercially Available Off-the-Shelf Items that Contain Specialty Metals and are Incorporated into Noncommercial End Items, in solicitations and contracts that—

(1) Contain the clause at 252.225–7009;

(2) Are for the acquisition of noncommercial end items; and

(3) Are awarded in fiscal year 2009.

(d) If an agency cannot reasonably determine at time of acquisition whether some or all of the items will be used in support of combat operations or in support of contingency operations, the contracting officer should not rely on the exception at 225.7003–3(a)(2) or (3), but should include the appropriate specialty metals clause or provision in the solicitation and contract.

(e) If the solicitation and contract require delivery of a variety of contract line items containing specialty metals, but only some of the items are subject to domestic specialty metals restrictions, identify in the Schedule those items that are subject to the restrictions.

225.7004–4 [Amended]

■ 12. Section 225.7004–4 is amended by removing "225.7003" and adding in its place "225.7008".

225.7005–3 [Amended]

■ 13. Section 225.7005–3 is amended by removing "225.7003" and adding in its place "225.7008".

225.7006–3 [Amended]

■ 14. Section 225.7006–3 is amended in paragraph (a), and in the second sentence of paragraph (b), by removing "225.7003" and adding in its place "225.7008".

■ 15. Section 225.7008 is added to read as follows:

225.7008 Waiver of restrictions of 10 U.S.C. 2534.

(a) When specifically authorized by reference elsewhere in this subpart, the restrictions on certain foreign purchases under 10 U.S.C. 2534(a) may be waived as follows:

(1)(i) The Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)), without power of delegation, may waive a restriction for a particular item for a particular foreign country upon determination that—

(A) United States producers of the item would not be jeopardized by competition from a foreign country, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country; or

(B) Application of the restriction would impede cooperative programs entered into between DoD and a foreign country, or would impede the reciprocal procurement of defense items under a memorandum of understanding providing for reciprocal procurement of defense items under 225.872, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

(ii) A notice of the determination to exercise the waiver authority shall be published in the **Federal Register** and submitted to the congressional defense committees at least 15 days before the effective date of the waiver.

(iii) The effective period of the waiver shall not exceed 1 year.

(iv) For contracts entered into prior to the effective date of a waiver, provided adequate consideration is received to modify the contract, the waiver shall be applied as directed or authorized in the waiver to—

(A) Subcontracts entered into on or after the effective date of the waiver; and

(B) Options for the procurement of items that are exercised after the effective date of the waiver, if the option prices are adjusted for any reason other than the application of the waiver.

(2) The head of the contracting activity may waive a restriction on a case-by-case basis upon execution of a determination and findings that any of the following applies:

(i) The restriction would cause unreasonable delays.

(ii) Satisfactory quality items manufactured in the United States or Canada are not available.

(iii) Application of the restriction would result in the existence of only one source for the item in the United States or Canada.

(iv) Application of the restriction is not in the national security interests of the United States.

(v) Application of the restriction would adversely affect a U.S. company.

(3) A restriction is waived when it would cause unreasonable costs. The cost of an item of U.S. or Canadian origin is unreasonable if it exceeds 150 percent of the offered price, inclusive of duty, of items that are not of U.S. or Canadian origin.

(b) In accordance with the provisions of paragraphs (a)(1)(i) through (iii) of this section, the USD(AT&L) has waived the restrictions of 10 U.S.C. 2534(a) for certain items manufactured in the United Kingdom, including air circuit breakers for naval vessels (*see* 225.7006). This waiver applies to—

(1) Procurements under solicitations issued on or after August 4, 1998; and

(2) Subcontracts and options under contracts entered into prior to August 4, 1998, under the conditions described in paragraph (a)(1)(iv) of this section.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 16. Section 252.212–7001 is amended as follows:

■ a. By revising the clause date to read "(JUL 2009)";

■ b. By removing paragraph (b)(7);

■ c. By redesignating paragraphs (b)(6), (b)(8) through (20), (b)(21), and (b)(22), as paragraphs (b)(8), (b)(9) through (21), (b)(23), and (b)(24), respectively;

■ d. By adding new paragraphs (b)(6), (b)(7), and (b)(22);

■ e. In newly designated paragraph (b)(11) by removing "(NOV 2008)" and adding in its place "(JUL 2009)";

■ f. In newly designated paragraph (b)(14)(i) by removing "(JAN 2009)" and adding in its place "(JUL 2009)";

■ g. In newly designated paragraph (b)(14)(ii) by removing "(OCT 2006)" and adding in its place "(JUL 2009)";

■ h. By removing paragraph (c)(1);

■ i. By redesignating paragraph (c)(2) as paragraph (c)(1); and

■ j. By adding a new paragraph (c)(2) to read as follows:

252.212–7001 Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items.

* * * * *

(b) * * *

(6) _____ 252.225–7008, Restriction on Acquisition of Specialty Metals (JUL 2009) (10 U.S.C. 2533b).

(7) _____ 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals (JUL 2009) (10 U.S.C. 2533b).

* * * * *

(22) _____ 252.247–7003, Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer (JUL 2009) (Section 884 of Public Law 110–417).

* * * * *

(c) * * *

(2) 252.247–7003, Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer (JUL 2009) (Section 884 of Public Law 110–417).

* * * * *

■ 17. Sections 252.225–7008, 252.225–7009, and 252.225–7010 are added to read as follows:

252.225–7008 Restriction on Acquisition of Specialty Metals.

As prescribed in 225.7003–5(a)(1), use the following clause:

RESTRICTION ON ACQUISITION OF SPECIALTY METALS (JUL 2009)

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

(1) *Alloy* means a metal consisting of a mixture of a basic metallic element and one or more metallic, or non-metallic, alloying elements.

(i) For alloys named by a single metallic element (*e.g.*, titanium alloy), it means that the alloy contains 50 percent or more of the named metal (by mass).

(ii) If two metals are specified in the name (*e.g.*, nickel-iron alloy), those metals are the two predominant elements in the alloy, and together they constitute 50 percent or more of the alloy (by mass).

(2) *Produce* means the application of forces or processes to a specialty metal to create the

desired physical properties through quenching or tempering of steel plate, gas atomization or sputtering of titanium, or final consolidation of non-melt derived titanium powder or titanium alloy powder.

(3) *Specialty metal* means—

(i) Steel—

(A) With a maximum alloy content exceeding one or more of the following limits: Manganese, 1.65 percent; silicon, 0.60 percent; or copper, 0.60 percent; or

(B) Containing more than 0.25 percent of any of the following elements: Aluminum, chromium, cobalt, molybdenum, nickel, niobium (columbium), titanium, tungsten, or vanadium;

(ii) Metal alloys consisting of—

(A) Nickel or iron-nickel alloys that contain a total of alloying metals other than nickel and iron in excess of 10 percent; or

(B) Cobalt alloys that contain a total of alloying metals other than cobalt and iron in excess of 10 percent;

(iii) Titanium and titanium alloys; or

(iv) Zirconium and zirconium alloys.

(4) *Steel* means an iron alloy that includes between .02 and 2 percent carbon and may include other elements.

(b) Any specialty metal delivered under this contract shall be melted or produced in the United States or its outlying areas.

(End of clause)

252.225–7009 Restriction on Acquisition of Certain Articles Containing Specialty Metals.

As prescribed in 225.7003–5(a)(2), use the following clause:

Restriction on Acquisition of Certain Articles Containing Specialty Metals (Jul 2009)

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

(1) *Alloy* means a metal consisting of a mixture of a basic metallic element and one or more metallic, or non-metallic, alloying elements.

(i) For alloys named by a single metallic element (e.g., titanium alloy), it means that the alloy contains 50 percent or more of the named metal (by mass).

(ii) If two metals are specified in the name (e.g., nickel-iron alloy), those metals are the two predominant elements in the alloy, and together they constitute 50 percent or more of the alloy (by mass).

(2) *Assembly* means an item forming a portion of a system or subsystem that—

(i) Can be provisioned and replaced as an entity; and

(ii) Incorporates multiple, replaceable parts.

(3) *Commercial derivative military article* means an item acquired by the Department of Defense that is or will be produced using the same production facilities, a common supply chain, and the same or similar production processes that are used for the production of articles predominantly used by the general public or by nongovernmental entities for purposes other than governmental purposes.

(4) *Commercially available off-the-shelf item*—

(i) Means any item of supply that is—

(A) A commercial item (as defined in paragraph (1) of the definition of "commercial item" in section 2.101 of the Federal Acquisition Regulation);

(B) Sold in substantial quantities in the commercial marketplace; and

(C) Offered to the Government, under this contract or a subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(ii) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App 1702), such as agricultural products and petroleum products.

(5) *Component* means any item supplied to the Government as part of an end item or of another component.

(6) *Electronic component* means an item that operates by controlling the flow of electrons or other electrically charged particles in circuits, using interconnections of electrical devices such as resistors, inductors, capacitors, diodes, switches, transistors, or integrated circuits. The term does not include structural or mechanical parts of an assembly containing an electronic component, and does not include any high performance magnets that may be used in the electronic component.

(7) *End item* means the final production product when assembled or completed and ready for delivery under a line item of this contract.

(8) *High performance magnet* means a permanent magnet that obtains a majority of its magnetic properties from rare earth metals (such as samarium).

(9) *Produce* means the application of forces or processes to a specialty metal to create the desired physical properties through quenching or tempering of steel plate, gas atomization or sputtering of titanium, or final consolidation of non-melt derived titanium powder or titanium alloy powder.

(10) *Qualifying country* means any country listed in section 225.003(9) of the Defense Federal Acquisition Regulation Supplement (DFARS).

(11) *Required form* means in the form of mill product, such as bar, billet, wire, slab, plate, or sheet, and in the grade appropriate for the production of—

(i) A finished end item to be delivered to the Government under this contract; or

(ii) A finished component assembled into an end item to be delivered to the Government under this contract.

(12) *Specialty metal* means—

(i) Steel—

(A) With a maximum alloy content exceeding one or more of the following limits: Manganese, 1.65 percent; silicon, 0.60 percent; or copper, 0.60 percent; or

(B) Containing more than 0.25 percent of any of the following elements: Aluminum, chromium, cobalt, molybdenum, nickel, niobium (columbium), titanium, tungsten, or vanadium;

(ii) Metal alloys consisting of—

(A) Nickel or iron-nickel alloys that contain a total of alloying metals other than nickel and iron in excess of 10 percent; or

(B) Cobalt alloys that contain a total of alloying metals other than cobalt and iron in excess of 10 percent;

(iii) Titanium and titanium alloys; or

(iv) Zirconium and zirconium alloys.

(13) *Steel* means an iron alloy that includes between .02 and 2 percent carbon and may include other elements.

(14) *Subsystem* means a functional grouping of items that combine to perform a major function within an end item, such as electrical power, attitude control, and propulsion.

(b) *Restriction.* Except as provided in paragraph (c) of this clause, any specialty metals incorporated in items delivered under this contract shall be melted or produced in the United States, its outlying areas, or a qualifying country.

(c) *Exceptions.* The restriction in paragraph (b) of this clause does not apply to—

(1) Electronic components.

(2)(i) Commercially available off-the-shelf (COTS) items, other than—

(A) Specialty metal mill products, such as bar, billet, slab, wire, plate, or sheet, that have not been incorporated into COTS end items, subsystems, assemblies, or components;

(B) Forgings or castings of specialty metals, unless the forgings or castings are incorporated into COTS end items, subsystems, or assemblies;

(C) Commercially available high performance magnets that contain specialty metal, unless such high performance magnets are incorporated into COTS end items or subsystems; and

(D) COTS fasteners, unless—

(1) The fasteners are incorporated into COTS end items, subsystems, assemblies, or components; or

(2) The fasteners qualify for the commercial item exception in paragraph (c)(3) of this clause.

(ii) A COTS item is considered to be "without modification" if it is not modified prior to contractual acceptance by the next higher tier in the supply chain.

(A) Specialty metals in a COTS item that was accepted without modification by the next higher tier are excepted from the restriction in paragraph (b) of this clause, and remain excepted, even if a piece of the COTS item subsequently is removed (*e.g.,* the end is removed from a COTS screw or an extra hole is drilled in a COTS bracket).

(B) Specialty metals that were not contained in a COTS item upon acceptance, but are added to the COTS item after acceptance, are subject to the restriction in paragraph (b) of this clause (*e.g.,* a special reinforced handle made of specialty metal is added to a COTS item).

(C) If two or more COTS items are combined in such a way that the resultant item is not a COTS item, only the specialty metals involved in joining the COTS items together are subject to the restriction in paragraph (b) of this clause (*e.g.,* a COTS aircraft is outfitted with a COTS engine that is not the COTS engine normally provided with the aircraft).

(D) For COTS items that are normally sold in the commercial marketplace with various options, items that include such options are also COTS items. However, if a COTS item is offered to the Government with an option that is not normally offered in the commercial marketplace, that option is

subject to the restriction in paragraph (b) of this clause (*e.g.*—An aircraft is normally sold to the public with an option for installation kits. The Department of Defense requests a military-unique kit. The aircraft is still a COTS item, but the military-unique kit is not a COTS item and must comply with the restriction in paragraph (b) of this clause unless another exception applies).

(3) Fasteners that are commercial items, if the manufacturer of the fasteners certifies it will purchase, during the relevant calendar year, an amount of domestically melted or produced specialty metal, in the required form, for use in the production of fasteners for sale to the Department of Defense and other customers, that is not less than 50 percent of the total amount of the specialty metal that it will purchase to carry out the production of such fasteners for all customers.

(4) Items manufactured in a qualifying country.

(5) Specialty metals for which the Government has determined in accordance with DFARS 225.7003–3 that specialty metal melted or produced in the United States, its outlying areas, or a qualifying country cannot be acquired as and when needed in—

(i) A satisfactory quality;

(ii) A sufficient quantity; and

(iii) The required form.

(6) End items containing a minimal amount of otherwise noncompliant specialty metals (*i.e.*, specialty metals not melted or produced in the United States, an outlying area, or a qualifying country, that are not covered by one of the other exceptions in this paragraph (c)), if the total weight of such noncompliant metals does not exceed 2 percent of the total weight of all specialty metals in the end item, as estimated in good faith by the Contractor. This exception does not apply to high performance magnets containing specialty metals.

(d) *Compliance for commercial derivative military articles.*

(1) As an alternative to the compliance required in paragraph (b) of this clause, the Contractor may purchase an amount of domestically melted or produced specialty metals in the required form, for use during the period of contract performance in the production of the commercial derivative military article and the related commercial article, if—

(i) The Contracting Officer has notified the Contractor of the items to be delivered under this contract that have been determined by the Government to meet the definition of "commercial derivative military article"; and

(ii) For each item that has been determined by the Government to meet the definition of "commercial derivative military article," the Contractor has certified, as specified in the provision of the solicitation entitled "Commercial Derivative Military Article—Specialty Metals Compliance Certificate" (DFARS 252.225–7010), that the Contractor and its subcontractor(s) will enter into a contractual agreement or agreements to purchase an amount of domestically melted or produced specialty metal in the required form, for use during the period of contract performance in the production of each commercial derivative military article and the related commercial article, that is not less than the Contractor's good faith estimate of the greater of—

(A) An amount equivalent to 120 percent of the amount of specialty metal that is required to carry out the production of the commercial derivative military article (including the work performed under each subcontract); or

(B) An amount equivalent to 50 percent of the amount of specialty metal that will be purchased by the Contractor and its subcontractors for use during such period in the production of the commercial derivative military article and the related commercial article.

(2) For the purposes of this alternative, the amount of specialty metal that is required to carry out production of the commercial derivative military article includes specialty metal contained in any item, including COTS items.

(e) *Subcontracts.* The Contractor shall insert the substance of this clause in subcontracts for items containing specialty metals, to the extent necessary to ensure compliance of the end products that the Contractor will deliver to the Government. When inserting the substance of this clause in subcontracts, the Contractor shall—

(1) Modify paragraph (c)(6) of this clause as necessary to facilitate management of the minimal content exception;

(2) Exclude paragraph (d) of this clause; and

(3) Include this paragraph (e).

(End of clause)

252.225–7010 Commercial Derivative Military Article—Specialty Metals Compliance Certificate.

As prescribed in 225.7003–5(b), use the following provision:

Commercial Derivative Military Article—Specialty Metals Compliance Certificate (Jul 2009)

(a) *Definitions. Commercial derivative military article, commercially available off-the-shelf item, produce, required form,* and *specialty metal,* as used in this provision, have the meanings given in the clause of this solicitation entitled "Restriction on Acquisition of Certain Articles Containing Specialty Metals" (DFARS 252.225–7009).

(b) The offeror shall list in this paragraph any commercial derivative military articles it intends to deliver under any contract resulting from this solicitation using the alternative compliance for commercial derivative military articles, as specified in paragraph (d) of the clause of this solicitation entitled "Restriction on Acquisition of Certain Articles Containing Specialty Metals" (DFARS 252.225–7009). The offeror's designation of an item as a "commercial derivative military article" will be subject to Government review and approval.

(c) If the offeror has listed any commercial derivative military articles in paragraph (b) of this provision, the offeror certifies that, if awarded a contract as a result of this solicitation, and if the Government approves the designation of the listed item(s) as commercial derivative military articles, the offeror and its subcontractor(s) will demonstrate that individually or collectively they have entered into a contractual agreement or agreements to purchase an amount of domestically melted or produced specialty metal in the required form, for use during the period of contract performance in the production of each commercial derivative military article and the related commercial article, that is not less than the Contractor's good faith estimate of the greater of—

(1) An amount equivalent to 120 percent of the amount of specialty metal that is required to carry out the production of the commercial derivative military article (including the work performed under each subcontract); or

(2) An amount equivalent to 50 percent of the amount of specialty metal that will be purchased by the Contractor and its subcontractors for use during such period in the production of the commercial derivative military article and the related commercial article.

(d) For the purposes of this provision, the amount of specialty metal that is required to carry out the production of the commercial derivative military article includes specialty metal contained in any item, including commercially available off-the-shelf items, incorporated into such commercial derivative military articles.

(End of provision)

252.225–7014 [Removed and Reserved]

■ 18. Section 252.225–7014 is removed and reserved.

252.225–7015 [Amended]

■ 19. Section 252.225–7015 is amended in the introductory text by removing "225.7002–3(c)" and adding in its place "225.7002–3(b)".

■ 20. Section 252.225–7029 is added to read as follows:

252.225–7029 Reporting of Commercially Available Off-the-Shelf Items that Contain Specialty Metals and are Incorporated Into Noncommercial End Items.

As prescribed in 225.7003–5(c), use the following clause:

Reporting of Commercially Available Off-the-Shelf Items that Contain Specialty Metals and Are Incorporated Into Noncommercial End Items (Jul 2009)

(a) *Definitions. Commercially available off-the-shelf item,* and *specialty metal,* as used in this clause, have the meanings given in the clause of this solicitation entitled "Restriction on Acquisition of Certain Articles Containing Specialty Metals" (DFARS 252.225–7009).

(b) If the exception in paragraph (c)(2) of the clause at DFARS 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals, is used for a commercially available off-the-shelf (COTS) item, valued at more than $100 per item, to be incorporated into a noncommercial end

item to be delivered under this contract, the Contractor shall—

(1) Follow the instructions on the Defense Procurement and Acquisition Policy Web site at *http://www.acq.osd.mil/dpap/cpic/ic/restrictions_on_specialty_metals_10_usc_2533b.html* to report information required by the contract as follows:

Contract awarded	Report by
Before July 31, 2009	August 31, 2009.
August 1–31, 2009	September 30, 2009.
September 1–30, 2009.	October 31, 2009.

(2) In accordance with the procedures specified at the Web site, provide the following information:

(i) Company Name.

(ii) Product category of acquisition (*i.e.*, Aircraft, Missiles and Space Systems, Ships, Tank—Automotive, Weapon Systems, or Ammunition).

(iii) The 6-digit North American Industry Classification System (NAICS) code of the COTS item, contained in the non-commercial deliverable item, to which the exception applies.

(c) The Contractor shall not report COTS items that are incorporated into the end product under an exception other than paragraph (c)(2) of the clause at DFARS 252.225–7009, such as electronic components, commercial item fasteners, qualifying country, non-availability, or minimal amounts of specialty metal.

(End of clause)

[FR Doc. E9–17967 Filed 7–28–09; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 202 and 252

Defense Federal Acquisition Regulation Supplement; Technical Amendments

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

ACTION: Final rule.

SUMMARY: DoD is making technical amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) to update the list of Air Force contracting activities and paragraph numbering.

DATES: *Effective Date:* July 29, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Michele Peterson, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–0311; facsimile 703–602–7887.

SUPPLEMENTARY INFORMATION: This final rule amends DFARS text as follows:

○ *202.101.* Updates the list of Air Force contracting activities.

○ *252.225–7036.* Updates a paragraph designation in Alternate I for consistency with the corresponding paragraph in the basic clause.

List of Subjects in 48 CFR Parts 202 and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 202 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 202 and 252 continues to read as follows:

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

PART 202—DEFINITIONS OF WORDS AND TERMS

■ 2. Section 202.101 is amended in the definition of "Contracting activity" by revising the list with the heading "AIR FORCE" to read as follows:

202.101 Definitions.

* * * * *

Contracting activity * * *

AIR FORCE

Office of the Assistant Secretary of the Air Force (Acquisition)
Office of the Deputy Assistant Secretary (Contracting)
Air Force Materiel Command
Air Force Reserve Command
Air Combat Command
Air Mobility Command
Air Education and Training Command
Pacific Air Forces
United States Air Forces in Europe
Air Force Space Command
Air Force District of Washington
Air Force Operational Test & Evaluation Center
Air Force Special Operations Command
United States Air Force Academy
Aeronautical Systems Center
Air Armament Center
Electronic Systems Center
Space and Missile Systems Center

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.225–7036 [Amended]

■ 3. Section 252.225–7036 is amended as follows:

■ a. By revising the Alternate I date to read "(JUL 2009)";

■ b. In Alternate I introductory text by removing "(a)(4) and (c) for paragraphs (a)(4)" and adding in its place "(a)(8) and (c) for paragraphs (a)(8)"; and

■ c. In Alternate I by redesignating paragraph (a)(4) as paragraph (a)(8).

[FR Doc. E9–17948 Filed 7–28–09; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204 and 217

RIN 0750–AG05

Defense Federal Acquisition Regulation Supplement; Clarification of Central Contractor Registration and Procurement Instrument Identification Data Requirements (DFARS Case 2008–D010)

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

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address requirements for ensuring the accuracy of contractor information in the Central Contractor Registration (CCR) database and in contract documents. Additionally, the rule clarifies requirements for proper assignment of procurement instrument identification numbers.

DATES: *Effective Date:* July 29, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Julian Thrash, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–0310; facsimile 703–602–7887. Please cite DFARS Case 2008–D010.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule reinforces requirements for use and maintenance of accurate contractor information, to permit proper identification and tracking of contract data through DoD's business processes. The DFARS changes address requirements for—

○ Ensuring that contract documents contain contractor information that is accurate and consistent with the information in the CCR database; and

○ Proper assignment of procurement instrument identification numbers.

DoD published a proposed rule at 73 FR 62239 on October 20, 2008. Three

sources submitted comments on the proposed rule. A discussion of the comments is provided below.

1. *Comment:* The proposed change to positions 7 and 8 of the procurement instrument identification number, from "the last two digits of the fiscal year in which the PII number was assigned" to "the last two digits of the fiscal year in which the procurement instrument is awarded" does not recognize that procurement instrument identification numbers are used for preaward solicitation actions as well as contract awards.

DoD Response: To provide for the use of procurement instrument identification numbers for solicitations as well as contract awards, the final rule specifies that the seventh and eighth positions of the PIIN will be the last two digits of the fiscal year in which the procurement instrument is issued or awarded.

2. *Comment:* The proposed language at 204.1103(1)(ii)(B), which requires that a contracting officer exercise an option or issue a contract modification only after obsolete or incorrect CCR information has been updated, should not be adopted. Such delays in the exercise of options or issuance of modifications could result in the loss of funds or an undesired interruption of services.

DoD Response: The final rule permits exercise of an option or issuance of a modification (other than a unilateral modification making an administrative change) only after determining that the contractor's information in the Central Contractor Registration database is active and the contractor's Data Universal Numbering System number, Commercial and Government Entity code, name, and physical address are accurately reflected in the contract document. Contractors already are required to enter and maintain their information in the CCR database as a condition of contract award. Therefore, DoD does not expect the requirements of this rule to prevent timely execution of contract actions.

3. *Comment:* DFARS 204.1103 should specifically state that contract documents include the contractor's physical address as the official address. CCR maintains three addresses: physical address, mailing address, and remittance address. Use of the contractor's physical address is necessary to ensure assignment of the appropriate Defense Contract Management Agency contract administration office.

DoD Response: The rule has been amended to require use of the contractor's physical address on contract documents.

4. *Comment:* The rule should clearly state that the contract will be awarded to the Commercial and Government Entity (CAGE) code location from which the company will be managing the contract, *i.e.,* the physical location from which the company will make executive decisions regarding the contract, including, but not limited to, signing the contract and modifications. The contract administration office should be that responsible for the physical location from which the prime contractor will manage its contract, not from the place of performance.

DoD Response: The rule requires that contract documents contain the contractor's legal or "doing business as" name, physical address, and CAGE code information as specified in the CCR database at the time of contract award. This may or may not be the location where the contractor manages the contract. To permit flexibility in Government contract management and oversight, the regulations do not direct the use of a specific contract administration office.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule reinforces existing requirements for accuracy of contract information.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Parts 204 and 217

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Parts 204 and 217 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 204 and 217 continues to read as follows:

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

PART 204—ADMINISTRATIVE MATTERS

■ 2. Section 204.1103 is revised to read as follows:

204.1103 Procedures.

(1) On contract award documents, use the contractor's legal or "doing business as" name and physical address information as recorded in the Central Contractor Registration (CCR) database at the time of award.

(2) When making a determination to exercise an option, or at any other time before issuing a modification other than a unilateral modification making an administrative change, ensure that—

(i) The contractor's record is active in the CCR database; and

(ii) The contractor's Data Universal Numbering System (DUNS) number, Commercial and Government Entity (CAGE) code, name, and physical address are accurately reflected in the contract document.

(3) At any time, if the DUNS number, CAGE code, contractor name, or physical address on a contract no longer matches the information on the contractor's record in the CCR database, the contracting officer shall process a novation or change-of-name agreement, or an address change, as appropriate.

(4) See PGI 204.1103 for additional requirements relating to use of information in the CCR database.

(5) On contractual documents transmitted to the payment office, provide the CAGE code, instead of the DUNS number or DUNS+4 number, in accordance with agency procedures.

■ 3. Section 204.7003 is amended by revising paragraphs (a)(2), (a)(3)(iii), (a)(3)(viii), and (b) to read as follows:

204.7003 Basic PII number.

(a) * * *

(2) *Positions 7 through 8.* The seventh and eighth positions are the last two digits of the fiscal year in which the procurement instrument is issued or awarded.

(3) * * *

(iii) Contracts of all types except indefinite delivery contracts, facilities contracts, sales contracts, and contracts placed with or through other Government departments or agencies or against contracts placed by such departments or agencies outside the DoD. Do not use this code for contracts or agreements with provisions for orders or calls—C

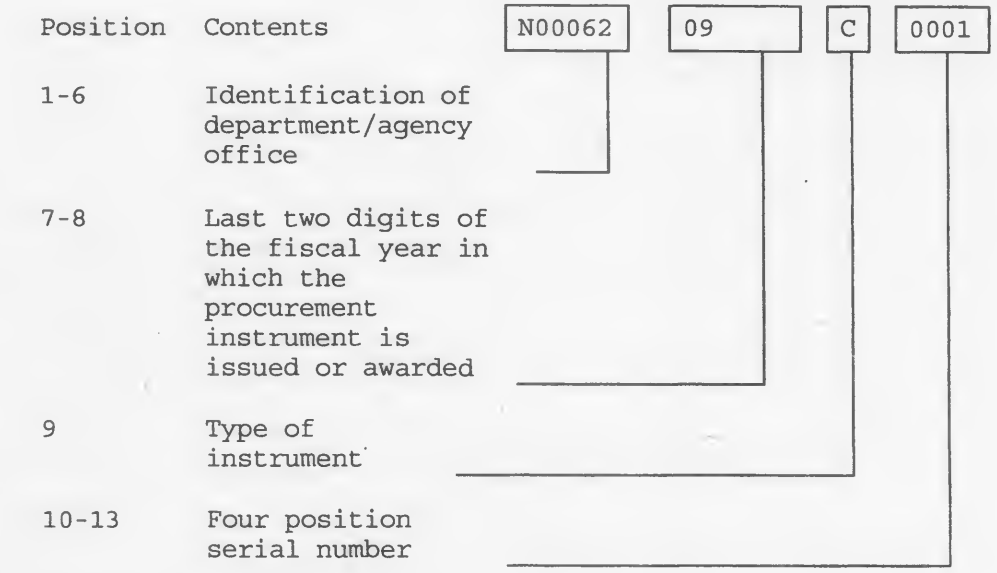
* * * * *

(viii) Agreements, including basic agreements and loan agreements, but excluding blanket purchase agreements, basic ordering agreements, and leases.

Do not use this code for contracts or agreements with provisions for orders or calls—H

* * * * *

(b) *Illustration of PII number.* The following illustrates a properly configured PII number:



PART 217—SPECIAL CONTRACTING METHODS

■ 4. Section 217.207 is added to read as follows:

217.207 Exercise of options.

(c) In addition to the requirements at FAR 17.207(c), exercise an option only after determining that the contractor's record in the Central Contractor Registration database is active and the contractor's Data Universal Numbering System (DUNS) number, Commercial and Government Entity (CAGE) code, name, and physical address are accurately reflected in the contract document.

[FR Doc. E9–17952 Filed 7–28–09; 8:45 am]
BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 219, and 253

RIN 0750–AF77

Defense Federal Acquisition Regulation Supplement; Contract Reporting (DFARS Case 2007–D006)

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

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address DoD requirements for reporting of contract actions in the Federal Procurement Data System.

DATES: *Effective Date:* July 29, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Julian Thrash, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–0310; facsimile 703–602–7887. Please cite DFARS Case 2007–D006.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Procurement Data System (FPDS) provides a comprehensive Web-based tool for Federal agencies to report contract actions. General reporting requirements for FPDS are in Subpart 4.6 of the Federal Acquisition Regulation. This final rule updates DFARS text addressing reporting of contract actions, to remove references to obsolete reporting form DD 350, and to address current DoD procedures for reporting of contract actions in FPDS.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

This rule will not have a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of DoD. Therefore, publication for public comment under 41 U.S.C. 418b is not required. However, DoD will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 2007–D006.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Parts 204, 219, and 253

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Parts 204, 219, and 253 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 204, 219, and 253 continues to read as follows:

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

PART 204—ADMINISTRATIVE MATTERS

■ 2. Sections 204.602, 204.604, and 204.606 are added to read as follows:

204.602 General.

See PGI 204.602 for additional information on the Federal Procurement Data System (FPDS) and procedures for resolving technical or policy issues relating to FPDS.

204.604 Responsibilities.

(1) The process for reporting contract actions to FPDS should, where possible, be automated by incorporating it into contract writing systems.

(2) Data in FPDS is stored indefinitely and is electronically retrievable. Therefore, the contracting officer may reference the contract action report (CAR) approval date in the associated Government contract file instead of including a paper copy of the electronically submitted CAR in the file. Such reference satisfies contract file documentation requirements of FAR 4.803(a).

(3) By December 15th of each year, the chief acquisition officer of each DoD component required to report its contract actions shall submit to the Director, Defense Procurement and Acquisition Policy, its annual certification and data validation results for the preceding fiscal year in accordance with the DoD Data Improvement Plan requirements at *http://www.acq.osd.mil/dpap/pdi/eb.* The Director, Defense Procurement and Acquisition Policy, will submit a consolidated DoD annual certification to the Office of Management and Budget by January 5th of each year.

204.606 Reporting data.

In addition to FAR 4.606, follow the procedures at PGI 204.606 for reporting data to FPDS.

204.670 [Removed]

■ 3. Section 204.670 is removed.

■ 4. Section 204.902 is revised to read as follows:

204.902 General.

(b) DoD uses the Federal Procurement Data System (FPDS) to meet these reporting requirements.

204.7203 [Amended]

■ 5. Section 204.7203 is amended by removing paragraph (c).

PART 219—SMALL BUSINESS PROGRAMS

■ 6. Section 219.001 is amended by revising paragraph (2)(iv) to read as follows:

219.001 Definitions.

* * * * *

(2) * * *

(iv) Reporting contract actions with SDB concerns in the Federal Procurement Data System (FPDS).

■ 7. Section 219.202–5 is amended by revising the introductory text to read as follows:

219.202–5 Data collection and reporting requirements.

Determine the premium percentage to be entered in the Federal Procurement Data System (FPDS) as follows:

* * * * *

PART 253—FORMS

253.204 and 253.204–70 [Removed]

■ 8. Sections 253.204 and 253.204–70 are removed.

[FR Doc. E9–17946 Filed 7–28–09; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 236, 237, 239, 245, and 252

RIN 0750–AF92

Defense Federal Acquisition Regulation Supplement; Government Property (DFARS Case 2007–D020)

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

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to update text addressing management of Government property in the possession of contractors. The DFARS changes are consistent with changes made to the Federal Acquisition Regulation (FAR).

DATES: *Effective Date:* July 29, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–0302; facsimile 703–602–7887. Please cite DFARS Case 2007–D020.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule updates and reorganizes DFARS Subparts 245.1, 245.3, 245.4, and 245.5 for consistency with FAR changes addressing management of government property in the possession of contractors, published at 72 FR 27364 on May 15, 2007. Related changes are made in Parts 204, 236, 237, 239, and 252. The following table summarizes the DFARS changes in this rule:

DFARS citation	Changes made by this rule
204.7003	Removed "facilities contracts" from the list of contract types, consistent with the removal of references to facilities contracts from the FAR.
237.7003	Updated the reference to the applicable FAR Government Property clause.
239.7402	Updated and clarified the text in paragraphs (b)(3) and (4).
245.104	Updated and relocated the text to 245.105.
245.301	(1) Updated the definition of "facilities project" and relocated it to 237.7501. (2) Relocated the definition of "mapping, charting, and geodesy" to 245.101 without change. (3) Removed the definition of "provide," since this term is now defined in FAR 45.101. (4) Removed the definitions of "agency-peculiar property," "industrial plant equipment," and "other plant equipment," as they are no longer considered necessary.
245.302–1(a)	Revised to eliminate text addressing responsibilities for approval of facilities projects, as these responsibilities are addressed DoD Directive 4275.5. The remaining text is relocated to 237.7502, with cross-references added at 236.275 and 245.102(3).
245.302–1(b) and DD Form 1419	Removed. The specified equipment screening procedures have become obsolete.
245.302–2 and 245.302–7	Removed. The separate procedures for facilities contracts are no longer necessary.
245.303–2	Updated and relocated to 245.102(2).
245.307–2	Removed. The corresponding FAR text has been removed.

DFARS citation	Changes made by this rule
245.310	Updated and relocated to 245.102(1).
245.310–70	Relocated to 245.107–70.
245.401	Removed as unnecessary.
245.403	Relocated to 245.302(2).
245.405	Updated and relocated to 245.302(1) and (3).
245.407	Removed as unnecessary.
Subpart 245.5	Removed as unnecessary.
Part 252	Updated references and clause titles.

DoD published a proposed rule at 73 FR 55007 on September 24, 2008, to address the DFARS changes. Three sources submitted comments on the proposed rule. A discussion of the comments is provided below.

1. *Comment:* One respondent recommended retaining the definition of "agency peculiar property".

DoD Response: The term "agency peculiar property" is no longer used in DFARS Part 245. Therefore, the definition has been excluded from the final rule.

2. *Comment:* One respondent recommended that the term "facilities" be defined and included within DFARS Part 245.

DoD Response: The term "facilities" is defined in DoD Directive 4275.5, Acquisition and Management of Industrial Resources. The rule contains a reference to Directive 4275.5 in Subpart 237.75.

3. *Comment:* One respondent suggested the addition of text at 245.105 to specify that the administrative contracting officer will perform property administration in the absence of an assigned property administrator.

DoD Response: DoD considers the additional text unnecessary, since the performance of contract property administration is already a contracting officer function listed in FAR 42.302(26). However, for clarity, the term "property administrator" has been revised to "assigned property administrator" at 245.105.

4. *Comment:* One respondent stated that the proposed text at 245.301(2) elevates the level of approval required for certain non-Government use of Government-owned equipment beyond that specified in the FAR, since FAR 45.301 assigns this responsibility to the head of the contracting activity whereas the proposed DFARS rule requires assistant Secretary or agency head approval.

DoD Response: This text has been excluded from the final rule. FAR 45.301 adequately addresses use and rental policy.

5. *Comment:* One respondent suggested the phrase "only if" be replaced with the term "provided" at DFARS 245.302(1)(i), with regard to the conditions placed on contracting officer approval of contractor use of Government property on work for foreign governments or international organizations.

DoD Response: The text at DFARS 245.302(1)(i) has been revised to replace the term "only if" with the term "provided." Additionally, to preserve contracting officer flexibility, the word "shall" has been replaced with the word "may" in that same paragraph.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule makes no significant change to DoD policy regarding the management of Government property in the possession of contractors.

C. Paperwork Reduction Act

The information collection requirements of DFARS Part 245 have been approved by the Office of Management and Budget under Control Number 0704–0246.

List of Subjects in 48 CFR Parts 204, 236, 237, 239, 245, and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 204, 236, 237, 239, 245, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 204, 236, 237, 239, 245, and 252 continues to read as follows:

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

PART 204—ADMINISTRATIVE MATTERS

■ 2. Section 204.7003 is amended as follows:

■ a. In paragraph (a)(3)(iii) by removing "facilities contracts,"; and

■ b. By revising paragraph (a)(3)(v) to read as follows:

204.7003 Basic PII number.

(a) * * *

(3) * * *

(v) Reserved—E

* * * * *

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

■ 3. Section 236.275 is added to read as follows:

236.275 Construction of industrial resources.

See Subpart 237.75 for policy relating to facilities projects.

PART 237—SERVICE CONTRACTING

■ 4. Section 237.7003 is amended by revising paragraph (c) to read as follows:

237.7003 Solicitation provisions and contract clauses.

* * * * *

(c) Use the clause at FAR 52.245–1, Government Property, with its Alternate I, in solicitations and contracts that include port of entry requirements.

■ 5. Subpart 237.75 is added to read as follows:

Subpart 237.75—Acquisition and Management of Industrial Resources

Sec.

237.7501 Definition.

237.7502 Policy.

Subpart 237.75—Acquisition and Management of Industrial Resources

237.7501 Definition.

Facilities project, as used in this subpart, means a Government project to provide, modernize, or replace real property for use by a contractor in performing a Government contract or subcontract.

237.7502 Policy.

(a) Comply with DoD Directive 4275.5, Acquisition and Management of Industrial Resources, in processing requests for facilities projects.

(b) Departments and agencies shall submit reports of facilities projects to the House and Senate Armed Services Committees—

(1) At least 30 days before starting facilities projects involving real property (10 U.S.C. 2662); and

(2) In advance of starting construction for a facilities project regardless of cost. Use DD Form 1391, FY__ Military Construction Project Data, to notify congressional committees of projects that are not included in the annual budget.

PART 239—ACQUISITION OF INFORMATION TECHNOLOGY

■ 6. Section 239.7402 is amended by revising paragraphs (b)(3) and (4) to read as follows:

239.7402 Policy.

* * * * *

(b) * * *

(3) Except as provided in paragraph (b)(4) of this section, contractors and subcontractors shall normally provide all required property, to include telecommunications security equipment or related devices, in accordance with FAR 45.102. In some cases, such as for communications security (COMSEC) equipment designated as controlled cryptographic item (CCI), contractors or subcontractors must also meet ownership eligibility conditions.

(4) The head of the agency may authorize provision of the necessary property as Government-furnished property or acquisition as contractor-acquired property, as long as conditions of FAR 45.102(b) are met.

* * * * *

PART 245—GOVERNMENT PROPERTY

■ 7. Subparts 245.1 and 245.3 are revised to read as follows:

Subpart 245.1—General

Sec.

245.101 Definitions.
245.102 Policy.
245.105 Contractor's property management system compliance.
245.107–70 Contract clause.

Subpart 245.1—General

245.101 Definitions.

Mapping, charting, and geodesy property, as used in this subpart, is defined in the clause at 252.245–7000, Government-Furnished Mapping, Charting, and Geodesy Property.

245.102 Policy.

(1) *Mapping, charting, and geodesy property.* All Government-furnished mapping, charting, and geodesy (MC&G) property is under the control of the Director, National Geospatial Intelligence Agency.

(i) MC&G property shall not be duplicated, copied, or otherwise reproduced for purposes other than those necessary for contract performance.

(ii) Upon completion of contract performance, the contracting officer shall—

(A) Contact the Director, National Geospatial Intelligence Agency, 4600 Sangamore Road, Bethesda, MD 20816–5003, for disposition instructions;

(B) Direct the contractor to destroy or return all Government-furnished MC&G property not consumed during contract performance; and

(C) Specify the destination and means of shipment for property to be returned to the Government.

(2) *Government supply sources.* When a contractor will be responsible for preparing requisitioning documentation to acquire Government-furnished property from Government supply sources, include in the contract the requirement to prepare the documentation in accordance with DoD 4000.25–1–M, Military Standard Requisitioning and Issue Procedures (MILSTRIP). Copies are available from the address cited at PGI 251.102.

(3) *Acquisition and management of industrial resources.* See Subpart 237.75 for policy relating to facilities projects.

245.105 Contractor's property management system compliance.

The assigned property administrator shall perform property administration in accordance with department or agency procedures.

245.107–70 Contract clause.

Use the clause at 252.245–7000, Government-Furnished Mapping, Charting, and Geodesy Property, in solicitations and contracts when mapping, charting, and geodesy property is to be furnished.

Subpart 245.3—Authorizing the Use and Rental of Government Property

245.302 Contracts with foreign governments or international organizations.

(1) *General.*

(i) *Approval.* A contractor may use Government property on work for foreign governments and international organizations only when approved in writing by the contracting officer having cognizance of the property. The contracting officer may grant approval, provided—

(A) The use will not interfere with foreseeable requirements of the United States;

(B) The work is undertaken as a DoD foreign military sale; or

(C) For a direct commercial sale, the foreign country or international organization would be authorized to contract with the department concerned under the Arms Export Control Act.

(ii) *Use charges.*

(A) The Use and Charges clause is applicable on direct commercial sales to foreign governments or international organizations.

(B) When a particular foreign government or international organization has funded the acquisition of property, do not assess the foreign government or international organization rental charges or nonrecurring recoupments for the use of such property.

(2) *Special tooling and special test equipment.*

(i) DoD normally recovers a fair share of nonrecurring costs of special tooling and special test equipment by including these costs in its calculation of the nonrecurring cost recoupment charge when major defense equipment is sold by foreign military sales or direct commercial sales to foreign governments or international organizations. "Major defense equipment" is defined in DoD Directive 2140.2, Recoupment of Nonrecurring Costs on Sales of U.S. Items, as any item of significant military equipment on the United States Munitions List having a nonrecurring research, development, test, and evaluation cost of more than $50 million or a total production cost of more than $200 million.

(ii) When the cost thresholds in paragraph (2)(i) of this section are not met, the contracting officer shall assess rental charges for use of special tooling and special test equipment pursuant to the Use and Charges clause if administratively practicable.

(3) *Waivers.*

(i) Rental charges for use of U.S. production and research property on commercial sales transactions to the Government of Canada are waived for all commercial contracts. This waiver is based on an understanding wherein the Government of Canada has agreed to waive its rental charges.

(ii) Requests for waiver or reduction of charges for the use of Government property on work for foreign governments or international organizations shall be submitted to the contracting officer, who shall refer the matter through contracting channels. In response to these requests, approvals may be granted only by the Director, Defense Security Cooperation Agency, for particular sales that are consistent with paragraph (1)(i)(C) of this section.

Subparts 245.4 and 245.5 [Removed]

■ 8. Subparts 245.4 and 245.5 are removed.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.217–7005 [Amended]

■ 9. Section 252.217–7005 is amended as follows:
■ a. By revising the clause date to read "(JUL 2009)"; and
■ b. In paragraph (e)(7) by removing "(Fixed-Price Contracts)".

252.217–7010 [Amended]

■ 10. Section 252.217–7010 is amended as follows:
■ a. By revising the clause date to read "(JUL 2009)"; and
■ b. In paragraph (c)(3) by removing "(Fixed Price Contracts)".

252.242–7004 [Amended]

■ 11. Section 252.242–7004 is amended as follows:
■ a. By revising the clause date to read "(JUL 2009)"; and
■ b. In paragraph (e)(9) introductory text, in the first sentence, by removing "Regardless of the provisions of FAR 45.505–3(f)(1)(ii), have" and adding in its place "Have".

252.245–7000 [Amended]

■ 12. Section 252.245–7000 is amended in the introductory text by removing "245.310–70" and adding in its place "245.107–70".

[FR Doc. E9–17954 Filed 7–28–09; 8:45 am]
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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 207, 235, and 252

RIN 0750–AF96

Defense Federal Acquisition Regulation Supplement; Protection of Human Subjects in Research Projects (DFARS Case 2007–D008)

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

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address requirements for the protection of human subjects involved in research projects. The rule contains a clause for use in contracts that include or may include research involving human subjects.

DATES: *Effective Date:* July 29, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–0302; facsimile 703–602–7887. Please cite DFARS Case 2007–D008.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule adds DFARS policy addressing statutory and regulatory requirements for the ethical treatment of human subjects involved in research projects. The rule contains a clause for use in contracts involving human subjects in research, to inform contractors of their responsibilities for compliance with 32 CFR Part 219; DoD Directive 3216.02; applicable DoD component policies; 10 U.S.C. 980; and, when applicable, Food and Drug Administration policies and regulations.

DoD published a proposed rule at 73 FR 63666 on October 27, 2008. DoD received no comments on the proposed rule. Therefore, DoD has adopted the proposed rule as a final rule without change.

This rule was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule is a reinforcement of existing requirements and obligations that apply with regard to the protection of human subjects involved in research projects.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not contain any new information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 207, 235, and 252

Government procurement.

Michele P. Peterson,
Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 207, 235, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 207, 235, and 252 continues to read as follows:

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

PART 207—ACQUISITION PLANNING

■ 2. Section 207.172 is added to read as follows:

207.172 Human research.

Any DoD component sponsoring research involving human subjects—

(a) Is responsible for oversight of compliance with 32 CFR Part 219, Protection of Human Subjects; and

(b) Must have a Human Research Protection Official, as defined in the clause at 252.235–7004, Protection of Human Subjects, and identified in the DoD component's Human Research Protection Management Plan. This official is responsible for the oversight and execution of the requirements of the clause at 252.235–7004 and shall be identified in acquisition planning.

PART 235—RESEARCH AND DEVELOPMENT CONTRACTING

■ 3. Section 235.072 is amended by adding paragraph (e) to read as follows:

235.072 Additional contract clauses.

* * * * *

(e) Use the clause at 252.235–7004, Protection of Human Subjects, in solicitations and contracts that include or may include research involving human subjects in accordance with 32 CFR Part 219, DoD Directive 3216.02, and 10 U.S.C. 980, including research that meets exemption criteria under 32 CFR 219.101(b). The clause—

(1) Applies to solicitations and contracts awarded by any DoD component, regardless of mission or funding Program Element Code; and

(2) Does not apply to use of cadaver materials alone, which are not directly regulated by 32 CFR Part 219 or DoD Directive 3216.02, and which are governed by other DoD policies and applicable State and local laws.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Section 252.235–7004 is added to read as follows:

252.235–7004 Protection of Human Subjects.

As prescribed in 235.072(e), use the following clause:

PROTECTION OF HUMAN SUBJECTS (JUL 2009)

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

(1) *Assurance of compliance* means a written assurance that an institution will comply with requirements of 32 CFR Part 219, as well as the terms of the assurance, which the Human Research Protection Official determines to be appropriate for the research supported by the Department of Defense (DoD) component (32 CFR 219.103).

(2) *Human Research Protection Official (HRPO)* means the individual designated by the head of the applicable DoD component and identified in the component's Human Research Protection Management Plan as the official who is responsible for the oversight and execution of the requirements of this clause, although some DoD components may use a different title for this position.

(3) *Human subject* means a living individual about whom an investigator (whether professional or student) conducting research obtains data through intervention or interaction with the individual, or identifiable private information (32 CFR 219.102(f)). For example, this could include the use of human organs, tissue, and body fluids from individually identifiable living human subjects as well as graphic, written, or recorded information derived from individually identifiable living human subjects.

(4) *Institution* means any public or private entity or agency (32 CFR 219.102(b)).

(5) *Institutional Review Board (IRB)* means a board established for the purposes expressed in 32 CFR Part 219 (32 CFR 219.102(g)).

(6) *IRB approval* means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and Federal requirements (32 CFR 219.102(h)).

(7) *Research* means a systematic investigation, including research, development, testing, and evaluation, designed to develop or contribute to generalizable knowledge. Activities that meet this definition constitute research for purposes of 32 CFR Part 219, whether or not they are conducted or supported under a program that is considered research for other purposes. For example, some demonstration and service programs may include research activities (32 CFR 219.102(d)).

(b) The Contractor shall oversee the execution of the research to ensure compliance with this clause. The Contractor shall comply fully with 32 CFR Part 219 and DoD Directive 3216.02, applicable DoD component policies, 10 U.S.C. 980, and, when applicable, Food and Drug Administration policies and regulations.

(c) The Contractor shall not commence performance of research involving human subjects that is covered under 32 CFR Part 219 or that meets exemption criteria under 32 CFR 219.101(b), or expend funding on such effort, until and unless the conditions of either the following paragraph (c)(1) or (c)(2) have been met:

(1) The Contractor furnishes to the HRPO, with a copy to the Contracting Officer, an assurance of compliance and IRB approval and receives notification from the Contracting Officer that the HRPO has approved the assurance as appropriate for the research under the Statement of Work and also that the HRPO has reviewed the protocol and accepted the IRB approval for compliance with the DoD component policies. The Contractor may furnish evidence of an existing assurance of compliance for acceptance by the HRPO, if an appropriate assurance has been approved in connection with previous research. The Contractor shall notify the Contracting Officer immediately of any suspensions or terminations of the assurance.

(2) The Contractor furnishes to the HRPO, with a copy to the Contracting Officer, a determination that the human research proposed meets exemption criteria in 32 CFR 219.101(b) and receives written notification from the Contracting Officer that the exemption is determined acceptable. The determination shall include citation of the exemption category under 32 CFR 219.101(b) and a rationale statement. In the event of a disagreement regarding the Contractor's furnished exemption determination, the HRPO retains final judgment on what research activities or classes of research are covered or are exempt under the contract.

(d) DoD staff, consultants, and advisory groups may independently review and inspect the Contractor's research and research procedures involving human subjects and, based on such findings, DoD may prohibit research that presents unacceptable hazards or otherwise fails to comply with DoD procedures.

(e) Failure of the Contractor to comply with the requirements of this clause will result in the issuance of a stop-work order under Federal Acquisition Regulation clause 52.242–15 to immediately suspend, in whole or in part, work and further payment under this contract, or will result in other issuance of suspension of work and further payment for as long as determined necessary at the discretion of the Contracting Officer.

(f) The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts that may include research involving human subjects in accordance with 32 CFR Part 219, DoD Directive 3216.02, and 10 U.S.C. 980, including research that meets exemption criteria under 32 CFR 219.101(b). This clause does not apply to subcontracts that involve only the use of cadaver materials.

(End of clause)

[FR Doc. E9–17949 Filed 7–28–09; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 217 and 252

RIN 0750–AG29

Defense Federal Acquisition Regulation Supplement; Requirements Applicable to Undefinitized Contract Actions (DFARS Case 2008–D029)

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

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address requirements for DoD management and oversight of undefinitized contract actions, consistent with the provisions of Section 809 of the National Defense Authorization Act for Fiscal Year 2008.

DATES: *Effective Date:* July 29, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Cassandra Freeman, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–8383; facsimile 703–602–7887. Please cite DFARS Case 2008–D029.

SUPPLEMENTARY INFORMATION:

A. Background

Section 809 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181) required DoD to issue guidance to ensure the implementation and enforcement of requirements applicable to undefinitized contract actions. On August 29, 2008, the Director, Defense Procurement and Acquisition Policy, issued a memorandum to DoD departments and agencies as required by Section 809 of Public Law 110–181. This final rule amends the DFARS to address the requirements of the August 29, 2008 memorandum, specifically, requirements for DoD departments and agencies to submit semi-annual reports regarding undefinitized contract actions exceeding $5 million; for obligation of funds for the undefinitized period consistent with the contractor's proposal for that period; and for compliance with existing DFARS policy relating to profit computation for undefinitized contract actions.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

This rule will not have a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of DoD. Therefore, publication for public comment under 41 U.S.C. 418b is not required. However, DoD will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 2008–D029.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Parts 217 and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 217 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 217 and 252 continues to read as follows:

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

PART 217—SPECIAL CONTRACTING METHODS

■ 2. Section 217.7404–4 is amended by designating the existing text as paragraph (a) and adding paragraph (b) to read as follows:

217.7404–4 Limitations on obligations.

* * * * *

(b) In determining the appropriate amount to obligate, the contracting officer shall assess the contractor's proposal for the undefinitized period and shall obligate funds only in an amount consistent with the contractor's requirements for the undefinitized period.

■ 3. Section 217.7404–6 is revised to read as follows:

217.7404–6 Allowable profit.

When the final price of a UCA is negotiated after a substantial portion of the required performance has been completed, the head of the contracting activity shall ensure the profit allowed reflects—

(a) Any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final price;

(b) The contractor's reduced cost risk for costs incurred during performance of the remainder of the contract; and

(c) The requirements at 215.404–71–3(d)(2). The risk assessment shall be documented in the contract file.

217.7405 [Redesignated as 217.7406]

■ 4. Section 217.7405 is redesignated as section 217.7406.

■ 5. A new section 217.7405 is added to read as follows:

217.7405 Plans and reports.

(a) To provide for enhanced management and oversight of UCAs, departments and agencies shall—

(1) Prepare and maintain a Consolidated UCA Management Plan; and

(2) Prepare semi-annual Consolidated UCA Management Reports addressing each UCA with an estimated value exceeding $5 million.

(b) Consolidated UCA Management Reports and Consolidated UCA Management Plan updates shall be submitted to the Office of the Director, Defense Procurement and Acquisition Policy, by October 31 and April 30 of each year in accordance with the procedures at PGI 217.7405.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.217–7027 [Amended]

■ 6. Section 252.217–7027 is amended in the introductory text by removing "217.7405" and adding in its place "217.7406".

[FR Doc. E9–17947 Filed 7–28–09; 8:45 am]
BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225 and 252

RIN 0750–AG31

Defense Federal Acquisition Regulation Supplement; Trade Agreements—Costa Rica and Peru (DFARS Case 2008–D046)

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

ACTION: Interim rule with request for comments.

SUMMARY: DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the Dominican Republic-Central America-United States Free Trade Agreement with respect to Costa Rica, and the United States-Peru Trade Promotion Agreement. The trade agreements waive the applicability of the Buy American Act for some foreign supplies and construction materials and specify procurement procedures designed to ensure fairness.

DATES: *Effective date:* July 29, 2009.

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before September 28, 2009, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2008–D046, using any of the following methods:

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

○ *E-mail: dfars@osd.mil.* Include DFARS Case 2008–D046 in the subject line of the message.

○ *Fax:* 703–602–7887.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD (AT&L) DPAP (DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062.

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

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, 703–602–0328.

SUPPLEMENTARY INFORMATION

A. Background

This interim rule amends trade agreement provisions and clauses in DFARS Part 252 to implement the Dominican Republic-Central America-United States Free Trade Agreement with respect to Costa Rica, and the United States-Peru Trade Promotion Agreement. Congress approved these trade agreements in the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. 109–53) and the United States-Peru Trade Promotion Agreement Implementation Act (Pub. L. 110–138) (19 U.S.C. 3805 note). Presidential proclamations were published in the **Federal Register** on December 30, 2008, with regard to Costa Rica (73 FR 79585) and on January 22, 2009, with regard to Peru (74 FR 4105). The corresponding determinations by the Office of the United States Trade Representative were published in the **Federal Register** on January 6, 2009 (74 FR 472), and

January 23, 2009 (74 FR 4264), respectively. The trade agreements waive the applicability of the Buy American Act for DoD acquisition of some foreign supplies and construction materials from Costa Rica and Peru and specify procurement procedures designed to ensure fairness.

In addition, this rule amends DFARS 225.003 to exclude Oman from the definition of "Free Trade Agreement country" for purposes of DoD acquisitions. Oman was added to the Federal Acquisition Regulation definition of "Free Trade Agreement country" to implement the United States-Oman Free Trade Agreement. However, the government procurement obligations in the United States-Oman Free Trade Agreement do not apply to DoD.

For administrative purposes only, the corresponding amendments to DFARS 252.212–7001, to update the dates of listed clauses affected by this rule, are shown with the amendments to DFARS Case 2008–D003 published elsewhere in this edition of the **Federal Register**.

This rule was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Although the rule opens up DoD procurement to the products of Costa Rica and Peru, DoD does not believe there will be a significant economic impact on U.S. small businesses. DoD applies the trade agreements to only those non-defense items listed at DFARS 225.401–70, and acquisitions that are set aside for small businesses are exempt from application of the trade agreements. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2008–D046.

C. Paperwork Reduction Act

This interim rule affects the certification and information collection requirements in the provisions at DFARS 252.225–7020 and 252.225–7035, currently approved under Office of Management and Budget Control Number 0704–0229. The impact, however, is negligible.

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements the Dominican Republic-Central America-United States Free Trade Agreement with respect to Costa Rica and the United States-Peru Trade Promotion Agreement, as approved by Congress in Public Laws 109–53 and 110–138. The trade agreement with Costa Rica took effect on January 1, 2009, and the trade agreement with Peru took effect on February 1, 2009. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 225 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 225 and 252 continues to read as follows:

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

PART 225—FOREIGN ACQUISITION

■ 2. Section 225.003 is amended as follows:

■ a. By redesignating paragraphs (7) through (12) as paragraphs (8) through (13) respectively; and

■ b. By adding a new paragraph (7) to read as follows:

225.003 Definitions.

* * * * *

(7) *Free Trade Agreement country* does not include Oman.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Section 252.225–7021 is amended as follows:

■ a. By revising the clause date and paragraph (a)(3)(ii); and

■ b. In paragraph (a)(3)(iv) by removing "Costa Rica,". The revised text reads as follows:

252.225–7021 Trade Agreements.

* * * * *

TRADE AGREEMENTS (JUL 2009)

(a) * * *

(3) * * *

(ii) A Free Trade Agreement country (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Peru, or Singapore);

* * * * *

■ 4. Section 252.225–7036 is amended by revising the clause date and paragraph (a)(7) to read as follows:

252.225–7036 Buy American Act—Free Trade Agreements—Balance of Payments Program.

* * * * * *

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—BALANCE OF PAYMENTS PROGRAM (JUL 2009)

(a) * * *

(7) *Free Trade Agreement country* means Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Peru, or Singapore;

* * * * *

■ 5. Section 252.225–7045 is amended as follows:

■ a. By revising the clause date;

■ b. In paragraph (a), in the definition of "Designated country", by revising paragraph (2); and

■ c. In paragraph (a), in the definition of "Designated country", paragraph (4), by removing "Costa Rica,".

The revised text reads as follows:

252.225–7045 Balance of Payments Program—Construction Material Under Trade Agreements.

* * * * *

BALANCE OF PAYMENTS PROGRAM—CONSTRUCTION MATERIAL UNDER TRADE AGREEMENTS (JUL 2009)

(a) * * *

Designated country means—

* * * * *

(2) A Free Trade Agreement country (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Peru, or Singapore);

* * * * *

[FR Doc. E9–17950 Filed 7–28–09; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 247 and 252

RIN 0750–AG30

Defense Federal Acquisition Regulation Supplement; Motor Carrier Fuel Surcharge (DFARS Case 2008–D040)

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

ACTION: Interim rule with request for comments.

SUMMARY: DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 884 of the National Defense Authorization Act for Fiscal Year 2009. Section 884 requires DoD to ensure that fuel-related adjustments in contracts for carriage are passed through to the person bearing the cost of the fuel to which the adjustment relates.

DATES: *Effective date:* July 29, 2009.

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before September 28, 2009, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2008–D040, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: dfars@osd.mil.* Include DFARS Case 2008–D040 in the subject line of the message.
- *Fax:* 703–602–7887.
- *Mail:* Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD(AT&L)DPAP(DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062.
- *Hand Delivery/Courier:* Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided.

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

SUPPLEMENTARY INFORMATION

A. Background

Section 884 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417) requires DoD to take appropriate actions to ensure that, to the maximum extent practicable, in all carriage contracts that provide for a fuel-related adjustment, any such adjustment is passed through to the person who bears the cost of the fuel to which the adjustment relates. These actions include the insertion of a clause, with appropriate flow-down requirements, in all contracts with motor carriers, brokers, or freight forwarders providing or arranging truck transportation or services providing for a fuel-related adjustment. This interim rule adds a contract clause at DFARS 252.247–7003 to implement the statutory requirement. The interim rule also adds this new clause to paragraphs (b) and (c) of DFARS 252.212–7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items. For administrative purposes only, this addition to 252.212–7001 is shown with the amendments to 252.212–7001 made by DFARS Case 2008–D003, published elsewhere in this edition of the **Federal Register**.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

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

The objective of the rule is to establish a DoD contract clause addressing the statutory requirement for fuel-related contract adjustments to be passed to the entity bearing the cost of the fuel. The legal basis for the rule is Section 884 of Public Law 110–417. The rule will apply to motor carriers, brokers, and freight forwarders providing or arranging truck transportation services under DoD contracts and subcontracts. The number of small entities to which the rule will apply is unknown at this time. However, DoD anticipates that the rule will benefit small entities by ensuring that fuel-related contract adjustments are passed to the appropriate party.

DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2008–D040.

C. Paperwork Reduction Act

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

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 884 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417). Section 884 requires DoD to take appropriate actions to ensure that, to the maximum extent practicable, any fuel-related adjustment in a contract for carriage is passed through to the person who bears the cost of the fuel to which the adjustment relates. These actions include the use of a clause, with appropriate flow-down requirements, in all contracts with motor carriers, brokers, or freight forwarders providing or arranging truck transportation or services providing for a fuel-related adjustment. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 247 and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Parts 247 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 247 and 252 continues to read as follows:

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

PART 247—TRANSPORTATION

■ 2. Section 247.207 is added to read as follows:

247.207 Solicitation provisions, contract clauses, and special requirements.

Use the clause at 252.247–7003, Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer, in solicitations and contracts for carriage in which a motor carrier, broker, or freight forwarder will provide or arrange truck transportation services that provide for a fuel-related adjustment. This clause implements Section 884 of the National Defense

Authorization Act for Fiscal Year 2009 (Pub. L. 110–417).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Section 252.247–7003 is added to read as follows:

252.247–7003 Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer.

As prescribed in 247.207, use the following clause:

PASS-THROUGH OF MOTOR CARRIER FUEL SURCHARGE ADJUSTMENT TO THE COST BEARER (JUL 2009)

(a) The Contractor shall pass through any motor carrier fuel-related surcharge adjustments to the person, corporation, or entity that directly bears the cost of fuel for shipment(s) transported under this contract.

(b) The Contractor shall insert the substance of this clause, including this paragraph (b), in all subcontracts with motor carriers, brokers, or freight forwarders.

(End of clause)

[FR Doc. E9–17951 Filed 7–28–09; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 390

Regulatory Guidance on the Definition of "Principal Place of Business"

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

ACTION: Notice of regulatory guidance.

SUMMARY: The FMCSA announces regulatory guidance concerning its definition of "principal place of business." The regulatory guidance is presented in a question-and-answer format and is generally applicable to motor carrier operations subject to the Federal Motor Carrier Safety Regulations. No prior interpretations or regulatory guidance concerning the term "principal place of business," whether published or unpublished may be relied upon as authoritative if they are inconsistent with the guidance published today. This guidance will provide the motor carrier industry and Federal, State and local law enforcement officials with uniform information for use in determining which locations may be designated by a motor carrier as its principal place of business.

DATES: *Effective Date:* This regulatory guidance is effective on August 12, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Bill Mahorney, Chief, Enforcement and Compliance Division, (202) 493–0001. Federal Motor Carrier Safety Administration, Department of Transportation, 1200 New Jersey Ave., SE., Washington, DC 20590. Office hours are from 9 a.m. to 5:30 p.m. EST, Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION:

Legal Basis

The Motor Carrier Safety Act of 1984 (Pub. L. 98–554, Title II, 98 Stat. 2832, October 30, 1984) (the 1984 Act) provides authority to regulate drivers, motor carriers, and vehicle equipment. It requires the Secretary of Transportation to prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles. At a minimum, the regulations shall ensure that—(1) Commercial motor vehicles are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely; and (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators. (49 U.S.C. 31136(a)). Section 211 of the 1984 Act also grants the Secretary broad power, in carrying out motor carrier safety statutes and regulations, to "prescribe recordkeeping and reporting requirements" and to "perform other acts the Secretary considers appropriate." (49 U.S.C. 31133(a)(8) and (10)).

The Administrator of FMCSA has been delegated authority under 49 CFR 1.73(g) to carry out the functions vested in the Secretary of Transportation by 49 U.S.C. chapter 311, subchapters I and III, relating to commercial motor vehicle programs and safety regulation.

This document provides regulatory guidance to the public with respect to the definition of "principal place of business" in 49 CFR 390.5 of the Federal Motor Carrier Safety Regulations (FMCSRs).

Members of the motor carrier industry and other interested parties may also access the guidance in this document through the FMCSA's Internet site at: *http://www.fmcsa.dot.gov.*

Specific questions addressing any of the interpretive material published in this document should be directed to the contact person listed above or the FMCSA Division Office in each State.

Basis for This Guidance

The regulatory guidance in this notice responds to recurring questions FMCSA has received concerning the definition of "principal place of business" in 49 CFR 390.5: What location may a motor carrier designate as its principal place of business?

Section 390.5 defines principal place of business as "the single location designated by the motor carrier, normally its headquarters, for purposes of identification under this subchapter. The motor carrier must make records required by parts 382, 387, 390, 391, 395, 396, and 397 of this subchapter available for inspection at this location within 48 hours (Saturdays, Sundays, and Federal holidays excluded) after a request has been made by a special agent or authorized representative of the Federal Motor Carrier Safety Administration."

The original definition of "principal place of business" in § 390.5 required that the motor carrier designate a single location where records required by Parts 387, 391, 394, 395, and 396 would be maintained. However, other provisions of the regulations permitted certain records to be maintained at other locations. (53 FR 18054). In 1993, the definition was revised to remove part 394 from the regulatory text and to add part 390. (58 FR 33777). In 1995, the definition was revised again. However, it still required that the location designated by the carrier be a location where records were maintained and available for inspection. (60 FR 38744). The current definition of "principal place of business" was adopted in 1998 in order to allow motor carriers with multiple terminals and business locations to maintain records, such as driver records of duty status or vehicle maintenance records, at a location where activity related to the records took place rather than at a company's headquarters. The definition was revised to accompany a new § 390.29 allowing motor carriers with multiple terminals or offices to maintain all records required by Subchapter B at regional offices, driver work reporting stations or the principal place of business. Nonetheless, it was still anticipated that in most cases the "principal place of business" would also be the company headquarters. (63 FR 33254).

It has been the position of FMCSA and its predecessor agencies that a

motor carrier's principal place of business is a physical location where the motor carrier conducts a significant portion of its business and maintains company records and where management reports to work. In many instances, the principal place of business identified by a motor carrier will be the location where FMCSA conducts a safety audit or compliance review pursuant to part 385. For this reason, it is necessary to emphasize that the definition of "principal place of business" has always required that a motor carrier designate a single physical location operated, controlled, or owned by the motor carrier where the carrier conducts operations relating to the transportation of persons or property and where some if not all of the records required by parts 382, 387, 390, 391, 395, 396 and 397 are regularly maintained. It has long been understood that the principal place of business is the location designated by the motor carrier for the purpose of managing and administering its safety and regulatory compliance programs. Activities conducted at the principal place of business include oversight, retention, and retrieval of records required to be maintained by the FMCSRs.

Regulatory Guidance

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

Sections Interpreted

Section 390.5 Definitions

Question: What location may a motor carrier designate as its "principal place of business"?

Guidance: In instances where a motor carrier has more than one terminal or office, the regulations do not explicitly place a restriction on which location a motor carrier may designate as its principal place of business. The definition states that such a location is "normally" the carrier's headquarters; the rule does not require motor carriers to use the company's corporate headquarters as its principal place of business. However, motor carriers are limited to using an actual place of business of the motor carrier. Moreover, a motor carrier may designate as its principal place of business only locations that contain offices of the motor carrier's senior-most management executives, management officials or employees responsible for the administration, management and oversight of safety operations and compliance with the FMCSRs and Hazardous Materials Regulations. In determining its principal place of business a motor carrier must consider the following factors: (a) The relative importance of the activities performed at each location, and, if this factor is not determinative, then (b) time spent at each location by motor carrier management or corporate officers.

FMCSA authorized representatives will use the above two factors in determining whether a motor carrier has designated an appropriate location as its principal place of business. In addition, FMCSA may also consider whether the location is operated, controlled or owned by the motor carrier, whether operations relating to the transportation of persons or property regularly take place at the designated location, whether any of the employees of the motor carrier regularly report to the location for duty, whether any leased or owned vehicles of the company are maintained on the premises, and whether any of the records required by parts 382, 387, 390, 391, 395, 396 and 397 are maintained on the premises. In the event a carrier does not designate a qualifying location as its principal place of business, FMCSA may initiate appropriate enforcement action or take action regarding the carrier's USDOT registration.

A motor carrier with multiple business locations may maintain some records at locations of the motor carrier other than, or in addition to, its principal place of business. However, after a request has been made by an FMCSA authorized representative, a motor carrier with multiple business locations must make records required by parts 382, 387, 390, 391, 395, 396 and 397 available for inspection at the principal place of business or other location specified by the special agent or authorized representative within 48 hours. Pursuant to § 390.29, "Saturdays, Sundays, and Federal holidays are excluded from the computation of the 48-hour period of time." A motor carrier with a single business location must make records required by parts 382, 387, 390, 391, 395, 396 and 397 available upon request.

A motor carrier may not designate as its principal place of business any location where the motor carrier is not engaged in business operations related to the transportation of persons or property. For example, post office box centers or commercial courier service establishments that receive and hold mail or packages for third party pickup may not be designated a "principal place of business" (other than by the courier service provider itself). A motor carrier may not designate the office of a consultant, service agent, or attorney as the motor carrier's principal place of business if the motor carrier is not engaged in operations related to the transportation of persons or property at that location.

Question: May a motor carrier with a single business location, including a private residence, designate a different location as its "principal place of business"?

Guidance: No. The definition of "principal place of business" in 49 CFR 390.5 allows a carrier with multiple terminals or offices to designate a single terminal or office as its primary business location for identification purposes. Consistent with this definition, a motor carrier with a single place of business may designate only its actual place of business as the "principal place of business." Notwithstanding this restriction, a motor carrier and an authorized representative of FMCSA may agree that a compliance review or other investigation of a motor carrier will be conducted at a mutually acceptable location other than the motor carrier's principal place of business.

Issued on: July 24, 2009.

Terry Shelton,

Acting Chief Safety Officer.

[FR Doc. E9–18142 Filed 7–28–09; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 09100091344–9056–02]

RIN 0648–XQ57

Fisheries of the Exclusive Economic Zone Off Alaska; Shortraker Rockfish in the Western Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting retention of shortraker rockfish in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary because the 2009 total allowable catch (TAC) of shortraker rockfish in the Western Regulatory Area of the GOA has been reached.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 26, 2009, through 2400 hrs, A.l.t., December 31, 2009.

FOR FURTHER INFORMATION CONTACT: Patty Britza, 907–586–7376.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (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 2009 TAC of shortraker rockfish in the Western Regulatory Area of the GOA is 120 metric tons (mt) as established by the final 2009 and 2010 harvest specifications for groundfish of the GOA (74 FR 7333, February 17, 2009).

In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2009 TAC of shortraker rockfish in the Western Regulatory Area of the GOA has been reached. Therefore, NMFS is requiring that shortraker rockfish caught in the Western Regulatory Area of the GOA be treated as prohibited species in accordance with § 679.21(b).

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 prohibition of retention of shortraker rockfish in the Western Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 23, 2009.

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 § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: July 24, 2009.

Alan D. Risenhoover,

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

[FR Doc. E9–18065 Filed 7–24–09; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0910091344–9056–02]

RIN 0648–XQ58

Fisheries of the Exclusive Economic Zone Off Alaska; Northern Rockfish and Pelagic Shelf Rockfish for Trawl Catcher Vessels Participating in the Entry Level Rockfish Fishery in the Central Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for northern rockfish and pelagic shelf rockfish (PSR) for trawl catcher vessels participating in the entry level rockfish fishery in the Central Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2009 allocation of northern rockfish and PSR allocated to trawl catcher vessels participating in the entry level rockfish fishery in the Central Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 24, 2009, through 1200 hrs, A.l.t., September 1, 2009.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7269.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (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 2009 allocations of northern rockfish and PSR for vessels participating in the entry level trawl fishery Central District of the GOA are 0 metric tons as established by the final 2009 and 2010 harvest specifications for groundfish in the GOA (74 FR 7333, February 17, 2009).

Consequently, in accordance with § 679.83(a)(3), the Administrator, Alaska Region, NMFS, deems it appropriate for conservation and management purposes to not open directed fishing for northern rockfish and PSR for trawl catcher vessels participating in the entry level rockfish fishery in the Central Regulatory Area of the GOA, because there is no available allocation for a directed fishery.

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. Notice and comment is unnecessary because there is no available fish for an allocation and therefore the Regional Administrator has no discretion for any action other than to prohibit directed fishing.

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 § 679.20 and § 679.83 and is exempt from review under Executive Order 12866.

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

Dated: July 24, 2009.

Alan D. Risenhoover,

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

[FR Doc. E9–18066 Filed 7–24–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 09100091344–9056–02]

RIN 0648–XQ59

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch for Catcher Processors Participating in the Rockfish Limited Access Fishery in the Central Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific ocean perch by catcher processors participating in the rockfish limited access fishery in the Central Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2009 total allowable catch (TAC) of Pacific ocean perch allocated to catcher processors participating in the rockfish limited access fishery in the Central Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 24, 2009, through 2400 hrs, A.l.t., December 31, 2009.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7269.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (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 2009 TAC of Pacific ocean perch allocated to catcher processors participating in the rockfish limited access fishery in the Central GOA is 1,403 metric tons (mt) as established by the final 2009 and 2010 harvest specifications for groundfish of the GOA (74 FR 7333, February 17, 2009), and as posted as the 2009 Rockfish Program Allocations at *http://www.alaskafisheries.noaa.gov/sustainablefisheries/goarat/default.htm.*

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2009 TAC of Pacific ocean perch allocated to catcher processors participating in the rockfish limited access fishery in the Central GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 1,273 mt, and is setting aside the remaining 130 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific ocean perch by catcher processors participating in the rockfish limited access fishery in the Central GOA.

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 Pacific ocean perch by catcher processors participating in the rockfish limited access fishery in the Central GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 23, 2009.

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 § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: July 24, 2009.

Alan D. Risenhoover,

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

[FR Doc. E9–18063 Filed 7–24–09; 4:15 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 74, No. 144
Wednesday, July 29, 2009

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0657; Directorate Identifier 2009–NM–048–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–600, –700, –700C, –800, –900, and –900ER Series 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 737–600, –700, –700C, –800, –900, and –900ER series airplanes. This proposed AD would require replacing the engine fuel shutoff valves for the left and right main tanks. This proposed AD results from a report of a failed engine start, which was caused by an internally fractured engine fuel shutoff valve. We are issuing this AD to prevent the failure of the valve in the closed position, open position, or partially open position, which could result in engine fuel flow problems and possible uncontrolled fuel leak or fire.

DATES: We must receive comments on this proposed AD by September 14, 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 proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com*; Internet *https://www.myboeingfleet.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket 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 Spitzer, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6510; 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–2009–0657; Directorate Identifier 2009–NM–048–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 of a failed engine start which was caused by a fracture within the engine fuel shutoff valve, also known as the spar valve. Examination of the valve showed a fracture between the splined shaft and the disk portion of the valve. This condition results in an inability to control the valve and could cause the spar valve to position itself in the closed position, open position, or partially open position. If the disc fails in the closed position, engine start problems could result, as only fuel downstream of the valve is available to the engine. If the disk fails in the open or partially open position, the condition is latent, as full thrust can still be achieved and the valve actuator functions and reports to the cockpit normally. Additionally, if the valve fails while partially open, the pressure drop across the valve could affect takeoff suction feed performance if the fuel pumps fail. A failed open or partially open valve cannot shut off fuel flow if there are fuel leakage conditions on the engine side of the valve. This condition could result in engine fuel flow problems and possible uncontrolled fuel leak or fire.

Relevant Service Information

We have reviewed Boeing Service Bulletin 737–28–1272, dated October 31, 2008. The service bulletin describes procedures for replacing the engine fuel spar valves for the left and right main tanks with valves that have a stronger and more wear-resistant splined shaft on the disc portion of the valve.

The service bulletin refers to ITT Aerospace Controls Service Bulletin 125334D–28–02, dated August 27, 2008, as an additional source of service information for modifying the valve body assembly.

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 same type design. This proposed AD would require accomplishing the actions

specified in the service information described previously.

Costs of Compliance

We estimate that this proposed AD would affect 883 airplanes of U.S. registry. We also estimate that it would take 26 work-hours per product to comply with this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost up to $8,496 per product. Based on these figures, we estimate the cost of this proposed AD to the U.S. operators to be up to $9,338,608, or $10,576 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:

Boeing: Docket No. FAA–2009–0657; Directorate Identifier 2009–NM–048–AD.

Comments Due Date

(a) We must receive comments by September 14, 2009.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes, certificated in any category; as identified in Boeing Service Bulletin 737–28–1272, dated October 31, 2008.

Subject

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

Unsafe Condition

(e) This AD requires replacing engine fuel shutoff valves for the left and right main tanks. This AD results from a report of a failed engine start, which was caused by an internally fractured engine fuel shutoff valve. We are issuing this AD to prevent the failure of the valve in the closed position, open position, or partially open position, which could result in engine fuel flow problems and possible uncontrolled fuel leak or fire.

Compliance

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

Replacement of the Engine Fuel Spar Valve Body of the Left and Right Wing Main Tanks

(g) Within 60 months after the effective date of this AD: Replace the engine fuel spar valve bodies of the left and right wing main tanks in accordance with the Accomplishment Instructions of Boeing Service Bulletin 737–28–1272, dated October 31, 2008.

Note 1: Boeing Service Bulletin 737–28–1272, dated October 31, 2008, refers to ITT Aerospace Controls Service Bulletin 125334D–28–02, dated August 27, 2008, as an additional source of service information for modifying the valve body assembly.

Parts Installation

(h) As of the effective date of this AD, no person may install any engine fuel shutoff valve with ITT Aerospace Controls part number 125334D–1 (Boeing part number S343T003–40) on any airplane at the spar valve location. A valve that has been modified in accordance with Boeing Service Bulletin 737–28–1272, dated October 31, 2008, to the new ITT 125334D–2 part number (Boeing part number S343T003–67) may be installed at the spar valve location.

(i) As of the effective date of this AD, no valve with ITT Aerospace Controls part number 125334D–1 (Boeing part number S343T003–40) that has been removed from the spar location may be reinstalled on any airplane in any location unless it has been modified in accordance with Boeing Service Bulletin 737–28–1272, dated October 31, 2008, to the new ITT 125334D–2 part number (Boeing part number S343T003–67).

Alternative Methods of Compliance (AMOCs)

(j)(1) The Manager, Seattle Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Samuel Spitzer, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6510; fax (425) 917–6590. Or, e-mail information to *9–ANM–Seattle-ACO–AMOC–Requests@faa.gov.*

(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 principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

Issued in Renton, Washington, on July 13, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–17932 Filed 7–28–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 284

[Docket No. RM09–2–000]

Contract Reporting Requirements of Intrastate Natural Gas Companies

Issued July 16, 2009.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is proposing to revise its contract reporting requirements for those natural gas pipelines that fall under the Commission's jurisdiction pursuant to section 311 of the Natural Gas Policy Act or section 1(c) of the Natural Gas Act. The Commission is proposing to require the existing annual § 284.126(b) transactional reports to be filed on a quarterly basis, require that the reports include certain additional types of information and cover storage transactions as well as transportation transactions, establish a procedure for the § 284.126(b) reports to be filed in a uniform electronic format and posted on the Commission's Web site, and hold that those reports must be public and may not be filed with information redacted as privileged.

DATES: Comments are due October 27, 2009.

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

- *Agency Web Site: http://www.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.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Comment Procedures Section of this document.

FOR FURTHER INFORMATION CONTACT:

Vince Mareino (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6167, *Vince.Mareino@ferc.gov.*

Julie Parsons (Technical Information), Office of Energy Markets Regulation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8298, *Julie.Parsons@ferc.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

Notice of Proposed Rulemaking

Issued July 16, 2009.

1. The Commission is proposing to modify its contract reporting requirements for (1) intrastate pipelines providing interstate services pursuant to section 311 of the Natural Gas Policy Act of 1978 (NGPA) [1] and (2) Hinshaw pipelines providing interstate services subject to the Commission's Natural Gas Act (NGA) jurisdiction pursuant to blanket certificates issued under § 284.224 of the Commission's regulations.[2] First, the Commission proposes to require intrastate and Hinshaw pipelines to file quarterly reports of all transportation and storage transactions. Second, the Commission proposes to require that the reports include certain additional types of information not currently reported. Third, the Commission proposes to establish a procedure for the reports to be filed in a uniform electronic format and posted on the Commission's Web site. Fourth, the Commission proposes to require that reports be public and not filed with information redacted as privileged. These proposals are intended to improve market transparency, without making it unduly burdensome for intrastate and Hinshaw pipelines to participate in interstate markets.

Background

A. Current Regulations

2. NGPA section 311 authorizes the Commission to allow intrastate pipelines to transport natural gas "on behalf of" interstate pipelines or local distribution companies served by interstate pipelines "under such terms and conditions as the Commission may prescribe." [3] NGPA § 601(a)(2) exempts transportation service authorized under NGPA section 311 from the Commission's NGA jurisdiction. Congress adopted these provisions in order to eliminate the regulatory barriers between the intrastate and interstate markets and to promote the entry of intrastate pipelines into the interstate market. Such entry eliminates the need for duplication of facilities between interstate and intrastate pipelines.[4] Shortly after the adoption of the NGPA, the Commission authorized Hinshaw pipelines to apply for NGA section 7 certificates authorizing them to transport natural gas in interstate commerce in the same manner as intrastate pipelines may do under NGPA section 311.[5]

[1] 15 U.S.C. 3372.

[2] Section 1(c) of the NGA exempts from the Commission's NGA jurisdiction pipelines which transport gas in interstate commerce if (1) they receive natural gas at or within the boundary of a State, (2) all the gas is consumed within that State, and (3) the pipeline is regulated by a State Commission. This exemption is referred to as the Hinshaw exemption after the Congressman who introduced the bill amending the NGA to include § 1(c). *See ANR Pipeline Co.* v. *Federal Energy Regulatory Comm'n*, 71 F.3d 897, 898 (1995) (briefly summarizing the history of the Hinshaw exemption).

[3] 15 U.S.C. 3371(c).

[4] *EPGT Texas Pipeline*, 99 FERC ¶ 61,295, at 62,252–62,253 (2002).

[5] *Certain Transportation, Sales, and Assignments by Pipeline Companies not Subject to Commission Jurisdiction Under Section 1(c) of the Natural Gas Act*, Order No. 63, FERC Stats. & Regs. ¶ 30,118, at 30,824–25 (1980).

3. Subpart C of the Commission's Part 284 open access regulations (18 CFR 284.121–126) implements the provisions of NGPA section 311 concerning transportation by intrastate pipelines. Section 284.224 of the regulations provides for the issuance of blanket certificates to Hinshaw pipelines to provide open access transportation service "to the same extent that, and in the same manner" as intrastate pipelines are authorized to perform such service by Subpart C. The Part 284, Subpart C, regulations require that intrastate pipelines performing interstate service under NGPA section 311 must do so on an open access basis.[6] However, consistent with the NGPA's goal of encouraging intrastate pipelines to provide interstate service, the Commission has not imposed on intrastate pipelines all of the Part 284 requirements imposed on interstate pipelines.[7] For example, when the Commission first adopted the Part 284 open access regulations in Order No. 436, the Commission exempted intrastate pipelines from the requirement that they offer open access service on a firm basis.[8] The Commission found that requiring intrastate pipelines to offer firm service to out-of-state shippers could discourage them from providing any interstate service, because such a requirement could progressively turn the intrastate pipeline into an interstate pipeline against its will and against the will of the responsible State authorities. Similarly, Order No. 636–B exempted intrastate pipelines from the requirements of Order No. 636.[9] Those requirements included capacity release, electronic bulletin boards (now Internet Web sites), and flexible receipt and delivery points.

4. The Commission currently has less stringent transactional reporting requirements for NGPA section 311 intrastate pipelines and Hinshaw pipelines, than for interstate pipelines. In Order No. 637,[10] the Commission revised the reporting requirements for interstate pipelines in order to provide more transparent pricing information and to permit more effective monitoring for the exercise of market power and undue discrimination. As adopted by Order No. 637, § 284.13(b) requires interstate pipelines to post on their Internet Web sites basic information on each transportation and storage transaction with individual shippers, including revisions to a contract, no later than the first nomination under a transaction. This information includes:

- The name of the shipper;
- The contract number (for firm service);
- The rate charged;
- The maximum rate;
- The duration (for firm service);
- The receipt and delivery points and zones covered;
- The quantity of natural gas covered;
- Any special terms or details, such as any deviations from the tariff;
- Whether any affiliate relationship exists.

5. Section 284.13(c) of the Commission's regulations also requires interstate pipelines to file with the Commission on the first business day of each calendar quarter an index of its firm transportation and storage customers and to publish the same information on their Web sites. The information required to be included in the Index of Customers does not include the rates paid by the customers. Section 284.13(e) requires interstate pipelines to file semi-annual reports of their storage injection and withdrawal activities, including the identities of the customers, the volumes injected into and withdrawn from storage for each customer and the unit charge and total revenues received.

6. Order No. 637 did not modify the reporting requirements for NGPA section 311 intrastate pipelines and Hinshaw pipelines provided in § 284.126(c) of the Commission's regulations. Section 284.126(b) of the regulations requires NGPA section 311 and Hinshaw pipelines to file with the Commission annual reports of their transportation transactions, but not their storage transactions. Those reports must include the following information:

- The name of the shipper receiving transportation service;
- The type of service performed (i.e., firm or interruptible);
- The total volumes transported for the shipper, including for firm service a separate statement of reservation and usage quantities;
- Total revenues received for the shipper, including for firm service a separate statement of reservation and usage revenues.

7. Unlike § 284.13(b), § 284.126(b) does not require intrastate pipelines to include in these reports the rate charged under each contract, the duration of the contract, the receipt and delivery points and zones or segments covered by each contract, whether the contract includes any special terms and conditions, and whether there is an affiliate relationship between the pipeline and the shipper.

8. Section 284.126(c) requires section 311 intrastate pipelines and Hinshaw pipelines to file a semi-annual report of their storage activity within 30 days of the end of each complete storage and injection season. This requirement is substantially the same as the § 284.13(e) requirement that interstate pipelines file such semi-annual reports of their storage activity.

B. Petition and Notice of Inquiry

9. In September 2008, an interstate storage provider with market-based rates, SG Resources Mississippi, L.L.C. (SGRM) filed a request for waiver of the §§ 284.13(b)(1)(iii) and (b)(2)(ii) requirements that interstate pipelines post the rates charged in firm and interruptible transactions no later than first nomination for service. SGRM requested the waiver for both itself and all interstate storage providers with market-based rates. It contended that the mandatory disclosure of commercially sensitive pricing information provides prospective customers and competitors, such as NGPA section 311 intrastate storage providers that are only subject to semi-annual reporting requirements, with an unfair competitive advantage. SGRM also stated that a number of the NGPA section 311 storage providers submit their semi-annual storage reports subject to a request for privileged treatment pursuant to § 388.112 of the Commission's regulations.

10. In response, in November 2008 the Commission issued an order denying the request for waiver and the alternative petition for a rulemaking proceeding. The *SGRM* order held that the existing posting requirements for interstate pipelines are necessary to provide shippers with the price transparency they need to make informed decisions, and the ability to

[6] *See* 18 CFR 284.7(b), 284.9(b) and 284.122.

[7] *Associated Gas Distributors* v. *FERC*, 824 F.2d 981, 1002–1003 (D.C. Cir. 1987) (*AGD*); *Mustang Energy Corp.* v. *Federal Energy Regulatory Comm'n*, 859 F.2d 1447, 1457 (10th Cir. 1988), *cert. denied*, 490 U.S. 1019 (1988); *see also EPGT Texas Pipeline*, 99 FERC ¶ 61,295 (2002).

[8] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs. ¶ 30,665, at 31,502 (1985).

[9] *Pipeline Service Obligations, and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations; Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636–B, 61 FERC ¶ 61,272, at 61,992 n.26 (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–C, 78 FERC ¶ 61,186 (1997).

[10] *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, *clarified*, Order No. 637–A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied*, Order No. 637–B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America* v. *FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh'g*, 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n* v. *FERC*, 428 F.3d 255 (D.C. Cir. 2005).

monitor transactions for undue discrimination and preference.[11] The Commission also found that the requested exemption would be contrary to NGA section 4(c)'s requirement that "every natural gas company * * * keep open * * * for public inspection * * * all rates."[12]

11. Contemporaneously with the *SGRM* order, the Commission issued a Notice of Inquiry (NOI), requesting comments on whether the Commission should impose additional reporting requirements on NGPA section 311 intrastate pipelines and on Hinshaw pipelines.[13] The NOI stated that the Commission was interested in exploring (1) whether the disparate reporting requirements for interstate and NGPA section 311 and Hinshaw pipelines have an adverse competitive effect on the interstate pipelines and (2) if so, whether the Commission should modify the posting requirements for section 311 intrastate pipelines and Hinshaw pipelines in order to make them more comparable to the § 284.13(b) posting requirements for interstate pipelines. Accordingly, the Commission sought comments to assist it in evaluating whether changes in the Commission's posting requirements should be considered in order to remove any competitive disadvantage for interstate pipelines, as compared to intrastate pipelines providing interstate transportation and storage services under section 311 of the NGPA and to Hinshaw pipelines providing such service pursuant to a § 284.224 blanket certificate.

C. Industry Comments on Notice of Inquiry

12. A total of eighteen parties filed comments on the NOI. Fourteen of those represented NGPA section 311 or Hinshaw pipelines or their advocacy associations.

13. Seven of the section 311 and Hinshaw pipelines, along with the Gas Processors Association (GPA) and the Texas Pipeline Association (TPA), completely oppose any change in the existing reporting requirements.[14] They argue that imposing additional burdensome reporting requirements on section 311 and Hinshaw pipelines would be inconsistent with Congress' intent of allowing intrastate pipelines to participate in the interstate pipeline grid without unduly burdensome regulatory requirements. For example, they argue that the intrastate and Hinshaw pipelines would have to invest in additional information technology and personnel in order to comply with the § 284.13 requirement that pipelines post the information on an Internet Web site in downloadable file formats. They also maintain they already file enough information with other State and Federal agencies. Any further filings, they claim, would place them at a competitive disadvantage against intrastate-only pipelines, who are often allowed to keep confidential the identity of their shippers and the agreed-upon prices.[15] Moreover, they state that they generally do not compete for the same customers as interstate pipelines, arguing that they generally feed into interstate pipelines, rather than running parallel and competing with them. The GPA also suggested that the Commission lacks jurisdiction to reform the reporting requirements.[16]

14. The remaining section 311 and Hinshaw commenters, including the American Gas Association (AGA), also oppose changing the current reporting requirements, and make many of the same arguments as are summarized above.[17] However, these commenters suggested that, if the Commission believes increased reporting is necessary, it could consider increasing the frequency of the existing reports to quarterly and to hold such reports to be fully public. This more limited change in the current reporting requirements would address perhaps their primary concern: the cost of having to upgrade their existing information technology systems in order to maintain the necessary Internet Web site. If the Commission were to require reports more frequently than quarterly, these commenters support an exemption for smaller intrastate and Hinshaw pipelines. Several commenters propose such an exemption apply to intrastate and Hinshaw pipelines whose average natural gas deliveries over the previous three years did not exceed 50 million MMBtu, consistent with the exemption from the Order No. 720 requirement that non-NGA pipelines report scheduled gas flows.[18]

15. The other four commenters were an interstate pipeline (Tres Palacios), a company owning both interstate and NGPA section 311 intrastate storage providers (Enstor), a producer/marketer (Apache), and the American Public Gas Association (APGA). They contend that the Commission should extend the § 284.13 interstate pipeline reporting requirements to intrastate and Hinshaw pipelines. They assert that applying the same reporting requirements to all pipelines performing interstate service is both a matter of fairness and a practical solution to the discrimination and anti-competitive practices currently afflicting the market. Enstor states that in order to fully equalize the reporting requirements for interstate pipelines and intrastate and Hinshaw pipelines, the Commission must impose tariff filing requirements on intrastate and Hinshaw pipelines comparable to those currently imposed on interstate pipelines. Enstor points out that §§ 284.13(b)(1)(viii) and 284.13(b)(2)(vi) require interstate pipelines to post all aspects in which a service agreement deviates from the pipeline's tariff. Enstor states that, while interstate pipelines are required to file tariffs in a prescribed format, there is no similar requirement for intrastate and Hinshaw pipelines, and this would complicate any requirement for those pipelines to post how particular contracts deviate from their tariff.

II. Discussion

16. Based upon a review of the comments received in response to the NOI, the Commission is proposing to revise its transactional reporting requirements for intrastate and Hinshaw pipelines in order to increase market transparency, without imposing unduly burdensome requirements on those pipelines. Transactional information provides price transparency so shippers can make informed purchasing decisions, and also permits both shippers and the Commission to monitor actual transactions for evidence of possible abuse of market power or undue discrimination. The Commission is proposing to increase the availability and usefulness of the transactional information reported by intrastate and Hinshaw pipelines by requiring that: (1) The existing annual § 284.126(b) transactional reports be filed on a quarterly basis, (2) the quarterly reports

[11] *SG Resources Mississippi, L.L.C.*, 125 FERC ¶ 61,191 (2008) (*SGRM*).

[12] 15 U.S.C. § 717c(c).

[13] *Contract Reporting Requirements of Intrastate Natural Gas Companies, Notice of Inquiry*, FERC Stats & Regs. ¶ 35,559 (2008).

[14] *See, e.g.*, Comments of Arkansas Oklahoma Gas Corporation (AOG), Atmos Pipeline Texas (Atmos), Copano Energy, LLC (Copano), Cranberry Pipeline Corporation (Cranberry), DCP Midstream, LLC (DCP), Enogex LLC (Enogex), GPA, Jefferson Island Storage & Hub (Jefferson), and TPA.

[15] *See, e.g.*, Comments of Atmos, DCP, Jefferson, Niska Gas Storage LLC (Niska), and the TPA.

[16] *See* GPA Comments at 2–5.

[17] *See, e.g.*, Comments of the AGA, Duke Energy Ohio/Duke Energy Kentucky (Duke), Niska, Northwest Natural Gas Company (NW Natural), and Pacific Gas and Electric Company (PG&E).

[18] *Pipeline Posting Requirements under Section 23 of the Natural Gas Act*, Order No. 720, 73 FR 73494 (December 2, 2008) FERC Stats & Regs. ¶ 31,283 (2008).

include certain additional types of information and cover storage transactions as well as transportation transactions, (3) the quarterly reports be filed in a uniform electronic format and posted on the Commission's Web site, and (4) those reports must be public and may not be filed with information redacted as privileged.

17. The Commission is not proposing to impose on intrastate and Hinshaw pipelines the same reporting requirements as it imposes on interstate pipelines. For example, the Commission in this rulemaking will not require the intrastate and Hinshaw pipelines to make daily postings of transactional information on their own Web sites. As discussed below, the Commission believes that the revised reporting requirements proposed in this NOPR appropriately balance the need for increased transparency of intrastate and Hinshaw pipeline transactions, while avoiding unduly burdensome requirements that might discourage such pipelines from participating in the interstate market.

A. Report Frequency and Content

18. Increasing the frequency of the § 284.126(b) transactional reports by intrastate and Hinshaw pipelines from annual to quarterly and requiring additional information in those reports will provide shippers and the Commission with both more timely and more useful information concerning the transactions entered into by section 311 and Hinshaw pipelines. Specifically, the Commission proposes that the transactional reports to be filed on a quarterly basis include the following additional information not currently required by § 284.126(b).

19. First, the Commission proposes to amend § 284.126(b) to require the quarterly reports to include certain additional information about each transaction not currently required by § 284.126(b). This information will include: (1) The rate charged under each contract, including a separate statement of each rate component, (2) the duration of the contract, (3) the primary receipt and delivery points covered by the contract, (4) the quantity of natural gas the shipper is entitled to transport, store, or deliver, and (5) whether there is an affiliate relationship between the pipeline and the shipper. The purpose of these reports is to allow shippers and others, including the Commission, to monitor transactions for undue discrimination and preference. This additional information is necessary to enable such entities to determine the extent to which particular transactions are comparable to one another. For example, contracts for service on different parts of a pipeline system or with different durations may not be comparable to one another. In addition, the requirement that affiliate relationships between the pipeline and its shippers be reported will allow the Commission and interested parties to monitor whether the pipeline is favoring its affiliates.

20. Requiring section 311 intrastate and Hinshaw pipelines to report this additional information concerning each transaction will make the reporting requirements for those pipelines more comparable to the transactional posting requirements for interstate pipelines. Section 284.13(b)(1) requires interstate pipelines to post similar information concerning contract rates, duration, receipt and delivery points, entitlements to service, and affiliate relationships.[19] Most of the remaining information which § 284.13(b) requires interstate pipelines to post, but the Commission is not proposing to require section 311 and Hinshaw pipelines to report, relates to capacity release, which section 311 and Hinshaw pipelines are not required to permit.

21. Second, the Commission proposes to require that the proposed § 284.126(b) quarterly reports include all storage transactions in addition to transportation transactions. Currently, § 284.126(b) only requires section 311 and Hinshaw pipelines to report information with respect to transportation transactions. The only information the Commission currently requires those pipelines to report with respect to storage transactions is the information included in the § 284.126(c) semi-annual storage activity report. Aside from the fact the storage activity report is only filed on a semi-annual, rather than a quarterly basis, it also does not include all of the information that we are proposing to require to be included in the quarterly reports under revised § 284.126(b). For example, § 284.126(c) does not require section 311 and Hinshaw pipelines to report the rates provided for in each contract, the duration of each contract, or whether there is an affiliate relationship between the storage provider and its customer. In order to assure that section 311 and Hinshaw pipelines report the same information about storage transactions as transportation transactions and on the same schedule, the Commission proposes to revise section 284.126(b) to cover both transportation and storage transactions. Clearly, there is just as great a need for transparency of storage transactions as of transportation transactions.

22. While we are proposing to revise § 284.126(b) to include storage transactions, we will continue to require section 311 and Hinshaw pipelines to make the semi-annual storage activity reports currently required by § 284.126(c). Those reports include information that will not be contained in the proposed quarterly transactional reports. Specifically, § 284.126(c) requires section 311 and Hinshaw pipelines to report total volumes injected into storage during each complete storage injection season and total volumes withdrawn from storage during each complete storage withdrawal season. Such seasonal information will not be captured by the § 284.126(b) quarterly transactional reports, because those reports will not correlate with the typical five-month withdrawal and seven-month injection seasons. Moreover, retaining the § 284.126(c) semi-annual storage activity report for section 311 and Hinshaw pipelines is consistent with the Commission's existing requirement, in § 284.13(e), that interstate pipelines also make such semi-annual storage activity reports in addition to posting transactional information pursuant to § 284.13(c).

23. In proposing to require section 311 and Hinshaw pipelines to make quarterly transactional reports containing similar information to that reported by interstate pipelines, the Commission has sought to balance the benefits of increased transparency of intrastate and Hinshaw pipeline transactions with the interest in avoiding unduly burdensome requirements for those pipelines. Under the Commission's proposal, one primary difference will remain between the reporting requirements for interstate pipelines and the section 311 and Hinshaw pipelines: interstate pipelines will post transactional information daily on their Web sites, while section 311 and Hinshaw pipelines will submit this information in a quarterly report to the Commission. Four commenters[20] requested that the Commission extend the § 284.13(b) daily interstate pipeline posting requirements to intrastate and Hinshaw pipelines. They asserted that this would address the concern that intrastate and Hinshaw pipelines have an unfair competitive advantage over interstate pipelines because of the disparate reporting requirement for the two sets of pipelines, and it would provide a greater ability to monitor the

[19] *See* 18 CFR 284.13(b)(1)(ii), (iv), (v), and (vii) and (2)(iv), (v), (vi), and (ix).

[20] *See, e.g.*, Comments of Tres Palacios, Enstor, Apache, and APGA.

market for potential discrimination. However, the Commission is not proposing at this time to impose the full interstate pipeline posting requirements on intrastate and Hinshaw pipelines for several reasons.

24. First, one purpose of the NGPA was to induce intrastate pipelines to participate in the interstate market by ensuring that it would not be unduly burdensome to do so.[21] This participation by intrastate pipelines eliminates the need for duplication of facilities between interstate and intrastate pipelines.[22] Thus, as the court has stated, "Congress intended that intrastate pipelines should be able to compete in the transportation market without bearing the burden of full regulation by FERC under the Natural Gas Act."[23] AGA and several other intrastate and Hinshaw pipeline commenters indicated that they could make these reports on a quarterly basis, without incurring undue hardship.[24] For example, AGA states, "a quarterly filing requirement would strike an appropriate balance between any added transparency to the wholesale, interstate natural gas markets and the burden on LDCs and the markets in producing additional contract information."[25]

25. However, if the Commission were to require all intrastate and Hinshaw pipelines to post transactional information on a daily basis, all those pipelines would have to maintain their own Web sites for this purpose. Such daily postings of information about individual transactions could be significantly more burdensome than the quarterly reporting requirement the Commission is proposing. The cost of maintaining a Web site in compliance with NAESB standards appears to be the primary concern of many intrastate and Hinshaw pipelines. The TPA notes that NAESB compliance "would require section 311 and Hinshaw pipelines to invest in additional information technology hardware and personnel,"[26] and notes that the Commission recently avoided requiring NAESB compliance for section 311 and Hinshaw pipelines in Order No. 720.[27] Other pipelines expressed similar concerns about the cost of NAESB standards.[28] Notably, Cranberry expressed doubt that it would be able to afford even an electronic bulletin board, given the small size of its staff.[29] Further, as the AGA and others note, "a daily reporting requirement would be unduly burdensome in light of the information that would be obtained," from the typical service provider, whose transactions often do not change on a day-to-day basis.[30] Based on these comments, the Commission is concerned that a daily Internet posting requirement could discourage section 311 and Hinshaw pipelines from performing interstate service.

26. Second, only two interstate pipelines filed comments claiming that daily posting by intrastate and Hinshaw pipelines is necessary to avoid adverse competitive effects on interstate pipelines. It thus does not appear that there is widespread concern among interstate pipelines that the disparate reporting requirements will cause significant adverse competitive effects. Moreover, our proposal to increase the frequency of intrastate and Hinshaw pipeline transactional reports and increase the information included in those reports will reduce the disparity in the reporting requirements for the two sets of pipelines. We recognize that some of the commenters have raised concerns about the ability of shippers and others to obtain access to the transactional reports filed by section 311 and Hinshaw pipelines with the Commission. For this reason, as discussed in the next two sections, the Commission is also proposing to take several actions to increase the accessibility of these reports, including providing for them to be posted in a standardized format on the Commission's Web site. This increased accessibility of the reports will also serve to improve market transparency, while minimizing additional burdens on section 311 and Hinshaw pipelines.

27. We conclude that the comments in response to the NOI do not demonstrate a need to impose on section 311 and Hinshaw pipelines the increased burden of complying with the daily § 284.13 transactional posting requirements. In these circumstances, the interest in avoiding unduly burdensome requirements that could discourage intrastate and Hinshaw pipelines from participating in the interstate market, contrary to the goal of the NGPA, provides a "reasonable justification for excluding" the intrastate and Hinshaw pipelines from the daily posting requirements.[31]

B. Online Posting

28. In order to make the proposed quarterly reports filed with the Commission more accessible to the public, the Commission proposes requiring that the reports be filed in an electronic standardized format to be developed by the Commission staff. The Commission proposes the data be publicly available, and not filed on a redacted basis. This method will enhance the posting of quarterly reports on the Commission's Web site and facilitate easy access to the information by the public. At the same time, this procedure will avoid the costs of requiring intrastate pipelines to maintain a NAESB-compliant Web site, discussed above.

29. In Order No. 720, the Commission "clarifie[d] that the pipeline posting regulations do not impose NAESB requirements on non-interstate pipelines," but that rather, "posting pipelines need only comply with the *manner of posting* outlined in" the new regulation.[32] The Commission proposes a similar approach here. Rather than place the burden of Web site maintenance and standards compliance on individual pipelines, the Commission would take on that responsibility, with the pipelines only being responsible for collecting and filing the information with the Commission. Under the current rules, the Commission encourages parties to file intrastate reports using FERC–537 Semi-Annual Storage Report for Activity under Section 284.122 and FERC–549, Annual Transportation Report. Standardized formats have proven to be an effective way to increase practical access both for industry members and the Commission's own staff. Currently, FERC–549 and FERC–537 filers are not required to use a standardized format; consequently the data collection has been inconsistent. The Commission therefore proposes to require section 311 and Hinshaw companies to submit their reports in a standardized electronic format. The Commission is currently in the process of developing a

[21] *AGD*, 824 F.2d at 1001–1003.

[22] *EPGT Texas Pipeline, L.P.*, 99 FERC ¶ 61,295 at 62,252.

[23] *Mustang Energy Corp.* v. *Federal Energy Regulatory Comm'n*, 859 F.2d 1447, 1457 (10th Cir. 1988), *cert. denied*, 490 U.S. 1019 (1988); *see also EPGT Texas Pipeline*, 99 FERC ¶ 61,295 (2002).

[24] *See, e.g.*, AGA Comments at 1–2, 9, 13, 16, 18–19; Duke Comments at 9; Niska Comments at 15; NW Natural Comments at 9, 11, 13, 14; and PG&E Comments at 6, 10.

[25] AGA Comments at 2.

[26] TPA Comments at 21.

[27] While Order No. 720 does require daily Internet postings of certain scheduled flow information, that requirement is only applicable to major non-interstate pipelines and does not require posting of information about individual transactions. By contrast, the reporting requirement proposed here will require all section 311 and Hinshaw pipelines to report information about each customer contract.

[28] *See* AGA Comments at 2, 11, 15, 18; Copano Comments at 7; DCP Comments at 10; Enogex Comments at 3, 8, 13.

[29] Cranberry Comments at 6–8.

[30] AGA Comments at 12–13; *see also* Duke Comments at 8; NW Natural at 14; PG&E Comments at 2, 5, 10.

[31] *Cf. ANR* v. *FERC*, 71 F.3d at 902.

[32] Order No. 720 at P 98.

standardized electronic format for making the reports proposed in this NOPR. Once that process is complete, the Commission will make the standardized format available for public comment.

C. Confidentiality Policy

30. Finally, the Commission proposes to require such reports be posted without any information redacted as privileged. Currently, when a report is filed subject to a request for privileged treatment, any person desiring to see the report must file a formal request, pursuant to the Freedom of Information Act (FOIA) and § 385.1112 of the Commission's Rules of Practice and Procedure,[33] that the Commission make the report public. Due to the expense and delay caused by this additional step, in practice these requests have been infrequent. Further, as the APGA argues in its comments, allowing pricing information to be confidential undermines the Commission's goals of preventing undue discrimination and promoting price transparency. Adopting a prohibition on the confidential treatment of § 284.126(b) reports furthers all of these policy goals. Accordingly, the proposed standardized reporting form will include a statement that the report will be public.

31. While several parties expressed concern about the commercial sensitivity of the information to be reported, the AGA comments, "a quarterly reporting requirement should allay any concerns regarding the commercial sensitivity of contract data." [34] The Commission concurs with this assessment, and finds that the public benefits of increasing the availability of market information far outweigh the risks posted by the commercial sensitivity of data from a previous quarter.

32. In addition to the above policy considerations, the Commission finds that its governing statutes support public treatment of data reported both by Hinshaw pipelines and by NPGA section 311 pipelines. The Commission regulates interstate service performed by Hinshaw pipelines pursuant to the NGA.[35] Therefore, NGA section 4(c)'s requirement that interstate pipelines publicly disclose contracts under such rules as the Commission may prescribe applies to the interstate services performed by Hinshaw pipelines pursuant to their § 284.224 blanket certificates. Furthermore, NGA section 23(a)(1) directs the Commission "to facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate commerce." [36] While the NGPA does not contain an express public disclosure provision similar to NGA section 4(c), section 311(c) of the NGPA authorizes the Commission to prescribe the "terms and conditions" under which intrastate pipelines perform interstate service. Requiring public disclosure of transactional information for the purpose of allowing shippers and others to monitor NGPA section 311 transactions for undue discrimination is well within the Commission's broad conditioning authority under § 311(c).[37]

D. Miscellaneous Issues

33. The Commission is proposing that the quarterly reports required by this NOPR include not only the full legal name, but also the "identification number" of each shipper.[38] The Commission is also proposing that the reports include the "industry common code" for each receipt and delivery point.[39] The Commission is proposing to require that the reports include a shipper identification number, in order to simplify recordkeeping and minimize the ambiguity and confusion that can be caused by shippers whose names have changed, or whose names are similar to the names of other shippers. Similarly, the Commission is proposing to require that the reports include an industry common code for receipt and delivery points to minimize any ambiguity as to what receipt and delivery points are being reported and to ensure that all reporting pipelines identify such points in a consistent manner.

34. While the Commission is aware of some shipper identification standards and receipt and delivery point codes that are used in the natural gas industry (for example, Dun & Bradstreet, Inc.'s D–U–N–S identification numbers for shippers), it is reluctant to choose any particular standard without input as to that standard's cost-effectiveness and usefulness. Accordingly, the Commission seeks comments from interested parties on two related questions: (1) What sort of shipper identification numbers and receipt and delivery point common industry codes are currently used or readily available to section 311 and Hinshaw pipelines?; and (2) Which shipper identification standard or standards and receipt and delivery point codes, if any, should be used?

III. Regulatory Requirements

A. Information Collection Statement

35. The Office of Management and Budget (OMB) regulations require that OMB approve certain reporting, record keeping, and public disclosure requirements (collections of information) imposed by an agency.[40] Therefore, the Commission is providing notice of its proposed information collections to OMB for review in accordance with section 3507(d) of the Paperwork Reduction Act of 1995.[41] Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date.

36. The Commission estimates that on an annual basis the burden to comply with this proposed rule will be as follows:

Data collection	Number of respondents	Number of responses	Hours per response	Total hours
FERC–549D	125	4	3.5	1,750

Total Annual Hours for Collection: 1,750 hours.

These are mandatory information collection requirements.

Information Collection Costs: Because of the various staffing levels that will be involved in preparing the

[33] 18 CFR 385.1112.

[34] AGA Comments at 19.

[35] *See Consumers Energy Co.* v. *FERC*, 226 F.3d 777 (6th Cir. 2000) (finding that the Commission must act under NGA section 5 in order to require Hinshaw pipelines to change their rates).

[36] 15 U.S.C. 717t–2(a)(1). *See* Energy Policy Act of 2005, Pub. L. No. 109–58, § 316 ("Natural Gas Market Transparency Rules"), 119 Stat. 594 (2005).

[37] *See, e.g., AGD*, 824 F.2d at 1015–1018 (D.C. Cir. 1987) (affirming the Commission's use of section 311(c) to require intrastate pipelines to permit their interstate sales customers to convert to transportation-only service).

[38] 18 CFR 284.126(b)(1)(i) of the proposed regulations.

[39] 18 CFR 284.126(b)(1)(iv) of the proposed regulations.

[40] 5 CFR 1320.11.

[41] 44 U.S.C. 3507(d).

documentation (legal, technical and support) the Commission is using an hourly rate of $150 to estimate the costs for filing and other administrative processes (reviewing instructions, searching data sources, completing and transmitting the collection of information). The estimated cost is anticipated to be $262,500.

Title: FERC–549D.

Action: Proposed Data Collection.

OMB Control No.: To be determined.

Respondents: Natural gas pipeline companies.

Frequency of Responses: On occasion.

Necessity of Information: This proposed rule will improve the usefulness and transparency of market transactions. The increased frequency of transactional reporting will help the Commission identify and evaluate emerging trends and business conditions affecting reporting entities, including undue discrimination and preference. Additionally, the information contained in the quarterly reports will identify the economic effects of significant transactions and events, allow more timely evaluations of the adequacy of existing rates and aid in the development of needed changes to existing regulatory initiatives. Finally, more frequent and transparent reporting resulting from this proposed rule will help the Commission achieve its goal of vigilant oversight over reporting entities.

37. The Commission requests comments on the utility of the proposed information collection, the accuracy of the burden estimates, how the quality, quantity, and clarity of the information to be collected might be enhanced, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques. Interested persons may obtain information on the reporting requirements or submit comments by contacting the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 (Attention: Michael Miller, Office of the Executive Director, 202–502–8415 or e-mail *michael.miller@ferc.gov*). Comments may also be sent to the Office of Management and Budget (Attention: Desk Officer for the Federal Energy Regulatory Commission, fax: 202–395–7285 or e-mail: *oira_submission@omb.eop.gov*).

B. Environmental Analysis

38. 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.[42] The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.[43] The actions proposed to be taken here fall within categorical exclusions in the Commission's regulations for rules that are corrective, clarifying or procedural, for information gathering, analysis, and dissemination, and for sales, exchange, and transportation of natural gas that requires no construction of facilities.[44] Therefore an environmental review is unnecessary and has not been prepared in this rulemaking.

IV. Regulatory Flexibility Act [Analysis or Certification]

39. The Regulatory Flexibility Act of 1980 (RFA)[45] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The Commission is not required to make such analysis if proposed regulations would not have such an effect.

40. Most of the natural gas companies regulated by the Commission do not fall within the RFA's definition of a small entity.[46] Approximately 125 natural gas companies are potential respondents subject to the requirements adopted by this rule. For the year 2008 (the most recent year for which information is available), 4 companies had annual revenues of less than $7 million. This represents 3.2 percent of the total universe of potential respondents or only a very few entities that may have a significant burden imposed on them. In view of these considerations, the Commission certifies that this proposed rule's amendments to the regulations will not have a significant impact on a substantial number of small entities.

V. Comment Procedures

41. 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 October 27, 2009. Comments must refer to Docket No. RM09–2–001, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

42. 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.

43. 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.

44. 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.

VI. Document Availability

45. 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.

46. 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.

47. User assistance is available for eLibrary and the FERC'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

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[42] Order No. 486, *Regulations Implementing National Environmental Policy Act*, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,783 (1987).

[43] 18 CFR 380.4.

[44] *See* 18 CFR 380.4(a)(2)(ii), 380.4(a)(5) and 380.4(a)(27).

[45] 5 U.S.C. 601–612.

[46] *See* 5 U.S.C. 601(3), citing section 3 of the Small Business Act, 15 U.S.C. 623. Section 3 of the SBA defines a "small business concern" as a business which is independently owned and operated and which is not dominant in its field of operation. The Small Business Size Standards component of the North American Industry Classification System defines a small natural gas pipeline company as one that transports natural gas and whose annual receipts (total income plus cost of goods sold) did not exceed $7 million for the previous year.

Public Reference Room at *public.referenceroom@ferc.gov*.

List of Subjects in 18 CFR Part 284

Incorporation by reference, Natural gas, Reporting and recordkeeping requirements.

By direction of the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

In consideration of the foregoing, the Commission proposes to amend part 284, Chapter I, Title 18, *Code of Federal Regulations*, as follows:

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

1. The authority citation for part 284 continues to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7101–7352; 43 U.S.C. 1331–1356

2. In § 284.126, paragraph (b) is revised to read as follows:

§ 284.126 Reporting requirements.

* * * * *

(b) *Quarterly report.*

(1) Each intrastate pipeline must file a quarterly report with the Commission and the appropriate State regulatory agency that contains, for each transportation and storage service provided during the preceding calendar quarter under § 284.122, the following information:

(i) The full legal name, and identification number, of the shipper receiving the service, including whether there is an affiliate relationship between the pipeline and the shipper;

(ii) The type of service performed (*i.e.*, firm or interruptible transportation, storage, or other service);

(iii) The rate charged under each contract, specifying the rate schedule/name of service and docket where the rates were approved. The report should separately state each rate component set forth in the contract (*i.e.*, reservation, usage, and any other charges);

(iv) The primary receipt and delivery points covered by the contract, including the industry common code for each point;

(v) The quantity of natural gas the shipper is entitled to transport, store, or deliver under each contract;

(vi) The duration of the contract, specifying the beginning and ending month and year of the current agreement;

(vii) Total volumes transported, stored, injected or withdrawn for the shipper; and

(viii) Total revenues received for the shipper. The report should separately State revenues received under each rate component;

(2) The quarterly report for the period January 1 through March 31 must be filed on or before May 1. The quarterly report for the period April 1 through June 30 must be filed on or before August 1. The quarterly report for the period July 1 through September 30 must be filed on or before November 1. The quarterly report for the period October 1 through December 31 must be filed on or before February 1.

(3) Each report must be filed as prescribed in § 385.2011 of this chapter as indicated in the General Instructions set out in the quarterly reporting form. Each report must be prepared in conformance with the Commission's software and reporting guidance, so as to be posted and available for downloading from the FERC Web site (*http://www.ferc.gov*). One copy of the report must be retained by the respondent in its files.

* * * * *

[FR Doc. E9–17623 Filed 7–28–09; 8:45 am]

BILLING CODE 6717–01–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4001, 4022

RIN 1212–AB19

USERRA Benefits Under Title IV of ERISA

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Proposed rule.

SUMMARY: The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") provides that an individual who leaves his or her job to serve in the uniformed services is generally entitled to reemployment by his or her previous employer and, upon reemployment, to receive credit for benefits, including employee pension plan benefits, that would have accrued but for the employee's absence due to the military service. This proposed rule would amend PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022) to address a narrow but important issue regarding PBGC's guarantee of benefits for participants who are serving in the uniformed services at the time that their pension plan terminates. Under PBGC's existing regulations, a benefit is guaranteed only if the participant satisfies the conditions for entitlement to the benefit on or before the plan's termination date. PBGC proposes to provide an exception to this rule in the unique circumstances of persons serving in the uniformed services as of the plan's termination date, consistent with USERRA's statutory mandate to treat such persons, upon reemployment, as if they had never left the employ of their former employer. This proposed rule would provide that so long as a service member is reemployed within the time limits set by USERRA, even if the reemployment occurs after the plan's termination date, PBGC would treat the participant as having satisfied the reemployment condition as of the termination date. This would ensure that the pension benefits of reemployed service members, like those of other employees, would generally be guaranteed for periods up to the plan's termination date.

DATES: Comments must be received on or before September 28, 2009

ADDRESSES: Comments, identified by RIN 1212–AB19 may be submitted by any of the following methods:

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

- *E-mail: reg.comments@pbgc.gov.*
- *Fax:* 202–326–4224.
- *Mail or Hand Delivery:* Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026.

All submissions must include the Regulatory Information Number for this rulemaking (RIN 1212–AB19). Comments received, including personal information provided, will be posted to *http://www.pbgc.gov*.

Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corp., 1200 K Street, NW, Washington, DC 20005–4026 or calling 202–326–4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4040.)

FOR FURTHER INFORMATION CONTACT: John H. Hanley, Director, or Constance Markakis, Attorney, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, Suite 12300, 1200 K Street, NW., Washington, DC 20005–4026, 202–326–4024. (TTY and TTD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION:

Background

Pension Benefit Guaranty Corporation ("PBGC") administers the single-employer pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"). When a covered plan terminates in either a distress termination under section 4041(c) of ERISA, or an involuntary termination (one initiated by PBGC) under section 4042 of ERISA, PBGC typically becomes statutory trustee of the plan with responsibility for paying benefits in accordance with the provisions of Title IV.

The amount of benefits paid by PBGC under a terminated, trusteed plan is generally determined as of the plan's termination date.[1] Under section 4022(a) of ERISA, PBGC guarantees the payment of nonforfeitable benefits under the plan, subject to the limitations of section 4022(b), as of the date the plan terminates. Under § 4022.3 of PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans, PBGC guarantees the amount, as of the termination date, of a benefit provided under the plan (subject to certain limitations) if "the benefit is, on the termination date, a nonforfeitable benefit." To be guaranteed, the benefit must also qualify as a pension benefit as defined in § 4022.2, and the participant must be entitled to the benefit under § 4022.4. The amount of any additional nonguaranteed benefits payable from the plan's assets under section 4044 or PBGC's recoveries under section 4022(c) of ERISA is also determined as of the termination date.

Section 4001(a)(8) of ERISA and § 4001.2 define a "nonforfeitable benefit" with respect to a plan as:

> a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this Act (other than the submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit which returns all or a portion of a participant's accumulated mandatory employee contributions upon the participant's death), whether or not the benefit may subsequently be reduced or suspended by a plan amendment, an occurrence of any condition, or operation of this Act or the Internal Revenue Code of 1986.

Guaranteed benefits under Title IV of ERISA are benefits with respect to which a participant has satisfied the conditions for entitlement under the plan as of the termination date. Therefore, plan benefits such as an early retirement subsidy or disability retirement benefit with respect to which a participant has not satisfied the conditions for entitlement (e.g., a years-of-service requirement or the onset of disability) as of the termination date are not guaranteed.[2]

This proposed rule addresses the interaction of Title IV's requirement that benefits be nonforfeitable on the termination date in order to be guaranteed with the rights of reemployed service members in their employee pension benefit plans under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), Public Law 103–353 (October 13, 1994).

Congress enacted USERRA to protect certain rights and benefits of employees who voluntarily or involuntarily leave civilian employment to serve in the uniformed services.[3] Under USERRA, returning service members are generally entitled to reemployment in their pre-service positions, with the status, pay, and benefits to which they would have been entitled had they not served in the uniformed services. The stated purposes of USERRA are—

- To encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service,
- To minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service under honorable conditions, and
- To prohibit discrimination against persons because of their service in the uniformed services.

38 U.S.C. 4301. The provisions of USERRA are generally effective with respect to reemployments initiated on or after December 12, 1994.

The Department of Labor ("DOL") issued a final rule on USERRA, 70 FR 75246 (Dec. 19, 2005). The preamble to that rule states that, in construing USERRA and its implementing regulations, DOL intends to "apply with full force and effect" the interpretive maxim of the Supreme Court in *Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 285 (1946), that legislation on reemployment rights for service members "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. * * *" 70 FR 75246.

DOL's final regulation on USERRA, codified at 20 CFR part 1002, covers various types of military training and service. Section 1002.6 provides:

> USERRA's definition of "service in the uniformed services" covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. Although most often understood as applying to National Guard and reserve military personnel, USERRA also applies to persons serving in the active components of the Armed Forces. Certain types of service specified in 42 U.S.C. 300hh–11 by members of the National Disaster Medical System are covered by USERRA.

USERRA establishes specific rights for reemployed service members in their employee pension benefit plans. Each period of service performed by an individual in the uniformed services is deemed, upon reemployment, to constitute service with the employer(s) maintaining the plan for purposes of determining participation, vesting, and accrual of benefits under the plan. 38 U.S.C. 4318(a)(2)(A) and (B); 20 CFR 1002.259. As explained in the preamble to DOL's final rule implementing USERRA, the reemployed service member is treated for pension purposes under the plan as though he or she had remained continuously employed. 70 FR at 75280.[4]

[1] Section 404 of the Pension Protection Act of 2006 ("PPA 2006"), Public Law 109–280, amended sections 4022(g) and 4044(e) of ERISA, which provide that, when an underfunded plan terminates during the bankruptcy of the plan sponsor, the date the sponsor's bankruptcy petition was filed is treated as the termination date of the plan for purposes of determining the amount of benefits PBGC guarantees and the amount of benefits in priority category 3 in the section 4044 asset allocation. These changes apply to plan terminations that occur during the bankruptcy of the plan sponsor if the bankruptcy filing date is on or after September 16, 2006. See PBGC proposed rule on Bankruptcy Filing Date Treated as Plan Termination Date for Certain Purposes, 73 FR 37390 (Jul. 1, 2008). For convenience, this preamble generally will refer to the plan's termination date, although in many cases this reference will instead apply to the bankruptcy filing date.

[2] ERISA section 4022(e) provides that a qualified preretirement survivor annuity under a single-employer plan is not treated as forfeitable solely because the participant has not died as of the termination date.

[3] Terms used in this proposed rule, such as "service in the uniformed services," are intended to have the meaning provided under USERRA and the Department of Labor regulations implementing USERRA. For convenience, this preamble sometimes uses the term "military service" as shorthand for "service in the uniformed services."

[4] Consistent with this principle of treating a reemployed service member as if his or her employment had not been interrupted by military service, DOL's final rule requires that any preparation time before entering military service or recuperation time (or period of hospitalization or convalescence) after completing service before reporting back to work, to the extent permitted by USERRA, be treated as continuous service with the employer upon reemployment for purposes of determining the employee's pension entitlement. 20 CFR 1002.259; see 70 FR at 75276.

Entitlement to pension credit arises only where the returning service member is reemployed by his or her pre-service employer.[5] There is no entitlement to pension credit in cases in which an employee permanently and lawfully loses reemployment rights—for example, where an employee dies during the period of military service (however, see recent changes to the Internal Revenue Code),[6] where an employer is excused from its reemployment obligations based on a statutory defense, or where an employee elects not to seek reemployment within the specified time frame.[7] 38 U.S.C. 4312(d)(1); see 70 FR at 75280. Plan termination, however, is not identified as a circumstance that results in a permanent and lawful loss of reemployment rights for purposes of computing an employee's pension entitlement.

In the case of a standard termination, under ERISA section 4041(b)(1)(D) and § 4041.28(a) of PBGC's regulation on Termination of Single-Employer Plans, plan assets must satisfy all plan benefits through priority category 6 under section 4044 of ERISA. Priority category 6 includes benefits that, as of the termination date, are conditioned on a future event. Accordingly, even without the proposed rule, a plan terminating in a standard termination must provide benefits relating to periods of military service through the termination date for participants who become reemployed in accordance with USERRA provisions, even if such reemployment occurs after the plan's termination date.[8]

Section 4312(f) of USERRA describes the information that a service member must submit to an employer in order to establish that the individual meets the statutory requirement for reemployment, including information establishing that the individual's application for reemployment is timely; that he or she has not exceeded the five-year military service limitation; and that the type of separation from military service does not disqualify the individual from reemployment.

Proposed Regulatory Changes

Under USERRA, an individual who is reemployed following military service is entitled to the pension benefits that he or she would have earned if he or she had remained continuously employed. As noted above, Title IV of ERISA provides that, for a benefit to be nonforfeitable, the conditions for entitlement to the benefit must be satisfied on or before the plan's termination date. In order to harmonize the significant federal mandate to protect service members' rights and benefits under USERRA with Title IV's rules on nonforfeitable benefits, PBGC is proposing to amend its regulation on Benefits Payable in Terminated Single-Employer Plans. This amendment would provide that a participant would be deemed to have satisfied the reemployment condition for entitlement to the benefit as of the plan's termination date, for purposes of PBGC's guarantee, if PBGC determines, based on a demonstration by the participant or otherwise, that he or she became reemployed and entitled to the restoration of the pension benefit pursuant to USERRA, even if the reemployment occurred after the plan's termination date. Thus, for example, if a participant had 14 years of pension service at the time he or she entered military service, and had spent one year in the military as of the plan's termination date, the participant would be considered to have 15 years of service, for guarantee purposes, so long as he or she returns to his or her former employment within the bounds set by USERRA.

When a plan termination occurs during the bankruptcy of the plan sponsor, PBGC treats the bankruptcy filing date as the plan's termination date for certain purposes (see note 1). Proposed new § 4022.11 includes a provision that applies this concept to USERRA benefits. For example, if a participant is performing military service as of the bankruptcy filing date, any benefit relating to the period of military service that is accrued and vested through the bankruptcy filing date would be considered nonforfeitable if the participant becomes reemployed pursuant to USERRA after the bankruptcy filing date.

PBGC will provide guidance on how individuals can establish, for purposes of their Title IV benefit, their entitlement to benefits under USERRA. Persons with questions about these benefits should contact PBGC's Benefits Administration and Payment Department.

PBGC emphasizes that the changes that would be made by this amendment to PBGC's regulations are very narrow, applying only to the unique circumstances presented by federal statutes affording special protection to the men and women serving the nation in the uniformed services. Except as would be provided in this amendment, a benefit will be treated as nonforfeitable only if all conditions for entitlement to the benefit have been satisfied on or before the termination date. This includes benefits such as disability benefits, subsidized early retirement benefits (e.g., "30 and out" benefits), and benefits that may be similar in certain respects to the benefits covered by this amendment, such as a benefit conditioned on an employee's being reemployed after a period of layoff.

Applicability

The amendments made by this proposed rule would apply to reemployments under USERRA initiated on or after December 12, 1994.

Compliance With Rulemaking Guidelines

PBGC has determined, in consultation with the Office of Management and Budget, that this proposed rule is not a "significant regulatory action" under Executive Order 12866.

Regulatory Flexibility Act

PBGC certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the amendments in this proposed rule would not have a significant economic impact on a substantial number of small entities. The amendments harmonize the requirements of USERRA with the nonforfeitable benefits requirements of Title IV of ERISA. Virtually all of the amendments affect only PBGC and persons who receive benefits from PBGC. Accordingly, as provided in

[5] A service member who meets five eligibility criteria is entitled to be reemployed: the employee is absent from employment by reason of service in the uniformed services; the employee gives advance notice of the service; the employee has five years or less of cumulative service in the uniformed services with respect to the employment relationship with the employer; the service member makes a timely return to, or application for reinstatement in, his or her employment after completing service; and the employee receives an honorable discharge from service. 38 U.S.C. 4312(a)–(c). There are three statutory defenses that an employer may assert against a claim for USERRA benefits; the employer bears the burden of proving these defenses. 38 U.S.C. 4312(d).

[6] The Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART") amended the Internal Revenue Code with respect to the provision of certain benefits under an employee pension benefit plan for participants who die or become disabled while performing qualified military service. 26 U.S.C. 401(a)(37); 26 U.S.C. 414(u)(9). PBGC may provide additional guidance in the future regarding HEART provisions under Title IV.

[7] USERRA contains a broad prohibition against waivers of statutory rights. The preamble provides that an employee cannot waive USERRA's right to reemployment until that right has matured, i.e., until the period of service is completed. 70 FR at 75257.

[8] Under the proposed rule, as explained below, such benefits would be in priority category 4 (covering guaranteed benefits) if the reemployment occurs after the plan's termination date and if all other conditions are met. These benefits thus would continue to be part of benefit liabilities that would have to be provided in a standard termination.

section 605 of the Regulatory Flexibility Act, sections 603 and 604 do not apply.

List of Subjects

29 CFR Part 4001

Pensions.

29 CFR Part 4022

Pension insurance, Pensions.

For the reasons given above, PBGC proposes to amend 29 CFR parts 4001 and 4022 as follows.

PART 4001—TERMINOLOGY

1. The authority citation for part 4001 continues to read as follows:

Authority: 29 U.S.C. 1301, 1302(b)(3).

2. In § 4001.2, add a new definition in alphabetical order to read as follows:

§ 4001.2 Definitions

* * * * *

PPA 2006 bankruptcy termination means a plan termination to which section 404 of the Pension Protection Act of 2006 applies. Section 404 of the Pension Protection Act of 2006 applies to any plan termination in which the termination date occurs while bankruptcy proceedings are pending with respect to the contributing sponsor of the plan, if the bankruptcy proceedings were initiated on or after September 16, 2006. Bankruptcy proceedings are pending, for this purpose, if a contributing sponsor has filed or has had filed against it a petition seeking liquidation or reorganization in a case under title 11, United States Code, or under any similar Federal law or law of a State or political subdivision, and the case has not been dismissed as of the termination date of the plan.

* * * * *

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

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

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

4. In § 4022.2, amend the first paragraph by removing the words "plan year, proposed termination date, substantial owner" and adding in their place "plan year, PPA 2006 bankruptcy termination, proposed termination date, statutory hybrid plan, substantial owner."

5. Add new § 4022.11 to subpart A to read as follows:

§ 4022.11 Guarantee of benefits relating to uniformed service.

This section applies to a benefit of a participant who becomes reemployed after service in the uniformed services that is covered by the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

(a) A benefit described in paragraph (b) of this section that would satisfy the requirements of § 4022.3(a) and (c) (together with any benefit earned for the period preceding military service) except for the fact that the participant was not reemployed on or before the termination date will be deemed to satisfy those requirements if PBGC determines, based upon a demonstration by the participant or otherwise, that he or she became reemployed after the termination date and entitled to the benefit under USERRA.

(b) A benefit described in this paragraph (b) is a benefit attributable to a period of service commencing before the termination date and ending on the termination date during which the participant was serving in the uniformed services as defined in 38 U.S.C. 4303(13) (or was in a subsequent reemployment eligibility period) and to which the participant is entitled under USERRA.

(c) Example: A plan's vesting requirement is 5 years of service with the employer. A participant has completed 4 years of service when he leaves employment for uniformed service. The plan terminates while the participant is in military service. As of the termination date, the participant would have had 5 years of service and 5 years of benefit accruals if he had remained continuously employed. Upon reemployment after the termination date but within the time limits set by USERRA, the participant would have had 6 years of service under the plan for vesting and benefit accrual purposes, if the plan had not terminated. PBGC would treat the participant as having a vested, nonforfeitable plan benefit with 5 years of vesting service and benefit accruals as of the termination date.

(d) In the case of a PPA 2006 bankruptcy termination, "bankruptcy filing date" is substituted for "termination date" each place that "termination date" appears in this section.

Issued in Washington, DC, this 24th day of July 2009.

Vincent K. Snowbarger,

Acting Director, Pension Benefit Guaranty Corporation.

[FR Doc. E9–18074 Filed 7–28–09; 8:45 am]

BILLING CODE 7709–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 217, and 243

RIN 0750–AG27

Defense Federal Acquisition Regulation Supplement; Management of Unpriced Change Orders (DFARS Case 2008–D034)

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

ACTION: Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to address requirements for DoD management and oversight of unpriced change orders in a manner consistent with the management and oversight requirements that apply to other undefinitized contract actions.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before September 28, 2009, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2008–D034, using any of the following methods:

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

E-mail: dfars@osd.mil. Include DFARS Case 2008–D034 in the subject line of the message.

Fax: 703–602–7887.

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

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

Comments received generally will be posted without change to *http://www.regulations.gov*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Cassandra Freeman, 703–602–8383.

SUPPLEMENTARY INFORMATION:

A. Background

DFARS Subpart 217.74 prescribes policies and procedures for the management and oversight of undefinitized contract actions. Unpriced change orders, issued in accordance with FAR Part 43 and DFARS Part 243, are presently excluded from the scope of

DFARS Subpart 217.74. In recognition of the need for full accountability of unpriced change orders, this proposed rule adds policy addressing management, oversight, and limitations on the use of unpriced change orders, similar to the policy that applies to other undefinitized contract actions.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the proposed rule reinforces existing requirements for appropriate management and timely definitization of contract actions. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2008–D034.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 215, 217, and 243

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR Parts 215, 217, and 243 as follows:

1. The authority citation for 48 CFR Parts 215, 217, and 243 continues to read as follows:

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

PART 215—CONTRACTING BY NEGOTIATION

215.404–71–3 [Amended]

2. Section 215.404–71–3 is amended in paragraph (d)(2), in the first sentence, by revising the parenthetical to read "(*also see* 217.7404–6(a) and 243.204–70–6)".

PART 217—SPECIAL CONTRACTING METHODS

3. Section 217.7401 is amended in paragraph (a)(2) by adding a second sentence and in paragraph (d) by adding a third sentence to read as follows:

217.7401 Definitions.

* * * * *

(a) * * *

(2) * * * For policy relating to definitization of change orders, see 243.204–70.

* * * * *

(d) * * * For policy relating to definitization of change orders, see 243.204–70.

4. Section 217.7402 is revised to read as follows:

217.7402 Exceptions.

(a) The following undefinitized contract actions (UCAs) are not subject to this subpart. However, the contracting officer shall apply the policy and procedures to them to the maximum extent practicable (*also see* paragraph (b) of this section):

(1) UCAs for foreign military sales.

(2) Purchases at or below the simplified acquisition threshold.

(3) Special access programs.

(4) Congressionally mandated long-lead procurement contracts.

(b) If the contracting officer determines that it is impracticable to adhere to the policy and procedures of this subpart for a particular contract action in one of the categories in paragraph (a)(1), (3), or (4) of this section, the contracting officer shall provide prior notice, through agency channels, to the Deputy Director, Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), 3060 Defense Pentagon, Washington, DC 20301–3060.

PART 243—CONTRACT MODIFICATIONS

5. Section 243.204 is revised to read as follows:

243.204 Administration.

Follow the procedures at PGI 243.204 for administration of change orders.

243.204–70 [Redesignated as 243.204–71]

6. Section 243.204–70 is redesignated as section 243.204–71.

7. A new section 243.204–70 is added to read as follows:

243.204–70 Definitization of change orders.

8. Sections 243.204–70–1 through 243.204–70–7 are added to read as follows:

243.204–70–1 Scope.

(a) This subsection applies to unpriced change orders with an estimated value exceeding $5 million.

(b) Unpriced change orders for foreign military sales and special access programs are not subject to this subsection, but the contracting officer shall apply the policy and procedures to them to the maximum extent practicable. If the contracting officer determines that it is impracticable to adhere to the policy and procedures of this subsection for an unpriced change order for a foreign military sale or a special access program, the contracting officer shall provide prior notice, through agency channels, to the Deputy Director, Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), 3060 Defense Pentagon, Washington, DC 20301–3060.

243.204–70–2 Price ceiling.

Unpriced change orders shall include a not-to-exceed price.

243.204–70–3 Definitization schedule.

(a) Unpriced change orders shall contain definitization schedules that provide for definitization by the earlier of—

(1) The date that is 180 days after issuance of the change order (this date may be extended but may not exceed the date that is 180 days after the contractor submits a qualifying proposal); or

(2) The date on which the amount of funds obligated under the change order is equal to more than 50 percent of the not-to-exceed price.

(b) Submission of a qualifying proposal in accordance with the definitization schedule is a material element of the contract. If the contractor does not submit a timely qualifying proposal, the contacting officer may suspend or reduce progress payments under FAR 32.503–6, or take other appropriate action.

243.204–70–4 Limitations on obligations.

(a) The Government shall not obligate more than 50 percent of the not-to-exceed price before definitization. However, if a contractor submits a qualifying proposal before 50 percent of the not-to-exceed price has been obligated by the Government, the limitation on obligations before definitization may be increased to no more than 75 percent (*see* 232.102–70 for coverage on provisional delivery payments).

(b) Obligations should be consistent with the contractor's requirements for the undefinitized period.

243.204–70–5 Exceptions.

(a) The limitations in 243.204–70–2, 243.204–70–3, and 243.204–70–4 do not apply to unpriced change orders for the purchase of initial spares.

(b) The head of the agency may waive the limitations in 243.204–70–2, 243.204–70–3, and 243.204–70–4 for unpriced change orders if the head of the agency determines that the waiver is necessary to support—

(1) A contingency operation; or

(2) A humanitarian or peacekeeping operation.

243.204–70–6 Allowable profit.

When the final price of an unpriced change order is negotiated after a substantial portion of the required performance has been completed, the head of the contracting activity shall ensure the profit allowed reflects—

(a) Any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final price;

(b) The contractor's reduced cost risk for costs incurred during performance of the remainder of the contract; and

(c) The extent to which costs have been incurred prior to definitization of the contract action (*see* 215.404–71–3(d)(2)). The risk assessment shall be documented in the contract file.

243.204–70–7 Plans and reports.

To provide for enhanced management and oversight of unpriced change orders, departments and agencies shall—

(a) Include in the Consolidated Undefinitized Contract Action (UCA) Management Plan required by 217.7405, the actions planned and taken to ensure that unpriced change orders are definitized in accordance with this subsection; and

(b) Include in the Consolidated UCA Management Report required by 217.7405, each unpriced change order with an estimated value exceeding $5 million.

[FR Doc. E9–17955 Filed 7–28–09; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 0906221082–91083–01]

RIN 0648–XQ03

Listing Endangered and Threatened Species and Designating Critical Habitat: Notice of Finding on a Petition To List the Largetooth Sawfish (Pristis perotteti) as an Endangered or Threatened Species Under the Endangered Species Act

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

ACTION: Notice of finding, request for information, and initiation of status review

SUMMARY: We, NMFS, announce a 90 day finding on a petition to list largetooth sawfish (*Pristis perotteti*) as endangered or threatened under the Endangered Species Act (ESA). We find that the petition presents substantial scientific and commercial information indicating the petitioned action may be warranted. We will conduct a status review of largetooth sawfish to determine if the petitioned action is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial data regarding this species (see below).

DATES: Information and comments on the subject action must be received by September 28, 2009.

ADDRESSES: You may submit comments, identified by the code 0648–XQ03, addressed to: Shelley Norton, Natural Resource Specialist, by any of the following methods:

- *Electronic Submissions:* Submit all electronic comments via the Federal eRulemaking Portal *http://www.regulations.gov*
- *Facsimile (fax):* 727–824–5309
- *Mail:* NMFS, Southeast Regional Office, 263 13th Avenue South, St Petersburg, FL 33701
- *Hand delivery:* You may hand deliver written comments to our office during normal business hours at the street address given above.

Instructions: All comments received are a part of the public record and may be posted to *http://www.regulations.gov* without change. All personally identifiable information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, Corel WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Shelley Norton, NMFS, Southeast Region, (727) 824–5312; or Sean Ledwin, NMFS, Office of Protected Resources, (301) 713–1401.

SUPPLEMENTARY INFORMATION:

Background

On April 24th, 2009, we received a petition from WildEarth Guardians requesting that the Secretary of Commerce (Secretary) list largetooth sawfish (*P. perotteti*) as endangered or threatened throughout its range and designate critical habitat concurrent with listing. We identified largetooth sawfish as a candidate species under the ESA on June 23, 1999 (64 FR 33466). On November 30, 1999, we received a petition from the Center for Marine Conservation (now the Ocean Conservancy) requesting that we list the North American populations of largetooth and smalltooth sawfish (*P. pectinata*) as endangered. On March 10, 2000 (65 FR 12959), we found that there was not substantial evidence to warrant initiation of a status review of North American populations of largetooth sawfish, on the basis that the petition did not contain substantial scientific or commercial information to indicate the present existence of such a population eligible for listing. WildEarth Guardians' current petition also requests that the Secretary re-examine and reverse the March 10, 2000, negative 90–day finding to list the North American population of largetooth sawfish as endangered. We will consider the petitioner's request as a request to consider a North American Distinct Population Segment (DPS), should we determine that a 90–day "may be warranted" finding regarding the species throughout its range is not warranted.

ESA Statutory Provisions and Policy Considerations

Section 4(b)(3)(A) of the ESA (16 U.S.C. 1533(b)(3)(A)) requires that we make a finding as to whether a petition to list, delist, or reclassify a species "presents substantial scientific or commercial information indicating the petitioned action may be warranted." ESA implementing regulations define substantial information as the "amount

of information that would lead a reasonable person to believe the measure proposed in the petition may be warranted" (50 CFR 424.14(b)(1)). In determining whether substantial information exists to support a petition to list a species, we take into account several factors, including information submitted with, and referenced in, the petition and all other information readily available in our files. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition (16 U.S.C. 1533(b)(3)(A)), and the finding is to be published promptly in the **Federal Register**. If we find that a petition presents substantial information indicating that the requested action may be warranted, section 4 (b)(3)(A) of the ESA requires that the Secretary conduct a status review of the species. Section 4 (b)(3)(B) requires the Secretary to make a finding as to whether or not the petitioned action is warranted within 12 months of the receipt of the petition. The Secretary has delegated the authority for these actions to the NOAA Assistant Administrator for Fisheries. Under the ESA, a listing determination can address a species, subspecies, or a DPS of a vertebrate species (16 U.S.C. 1532 (16)). In 1996, the U.S. Fish and Wildlife Service and NMFS published the Policy on the Recognition of a Distinct Vertebrate Population Segments under the Endangered Species Act (61 FR 4722; February 7, 1996).

The ESA defines an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range" (ESA Section 3(6)). A threatened species is defined as a species that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range" (ESA Section 3(19)). Under section 4(a)(1) of the ESA, a species may be determined to be threatened or endangered as a result of any one of the following factors: (1) present or threatened destruction, modification, or curtailment of habitat or range; (2) over-utilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence. Listing determinations are made solely on the basis of the best scientific and commercial data available, after conducting a review of the status of the species and taking into account efforts made by any state or foreign nation to protect such species.

Distribution and Life History of Largetooth Sawfish

Largetooth sawfish historically inhabited warm temperate to tropical marine waters in the Atlantic, Caribbean, and eastern Pacific. In the western Atlantic the species occurred from the Caribbean and Gulf of Mexico south through Brazil. In the United States, largetooth sawfish were reported in the Gulf of Mexico mainly along the Texas coast and east into Florida waters (Burgess and Curtis, 2003). In the eastern Atlantic largetooth sawfish historically occurred from Spain through Angola. The eastern Pacific historic range of the species was from Mazatlan, Mexico to Guayaquil, Ecuador (Cook *et al.*, 2005) or possibly Tumbes, Peru (Chirichigo and Cornejo, 2001).

Largetooth and smalltooth sawfish occur in many of the same areas in the Atlantic and may be morphologically distinguished from each other by the number of pairs of rostral teeth, the placement of the pectoral fins relative to the pelvic fins, and the shape of their caudal fin (Bigelow and Schroeder, 1953). Despite these differences there were problems differentiating the species in a few early accounts, so some records of distribution and abundance are uncertain. To confuse matters further, the current species *P. perotteti* has been variously referred to in the literature over part or all of its range as *P. antiquorum* (Visschen, 1919; as cited in Bigelow and Schroeder, 1953), *P. zephyreus* (Beebe and Tee-Van, 1941; Compango and Last, 1999), *P. pristis* (McEachran and Fechhelm, 1998), or *P. microdon* (Garman, 1913; Fowler, 1941; Compango and Last, 1999; Chirichigo and Cornejo, 2001; Vakily *et al.*, 2002). *Pristis microdon* is still considered valid taxa; some authors consider the eastern Pacific populations to be part of the species *P. microdon* (Garman, 1913; Fowler, 1941; Chirichigo and Cornejo, 2001) while others consider the eastern Pacific populations to be *P. perotteti* (Jordan and Evermann, 1896; refs. in Beebe and Tee-Van, 1941; Compagno and Cook, 1995; Camhi *et al.*, 1998; Cook *et al.*, 2005). The International Union for the Conservation of Nature (IUCN) "Red List" notes the controversy, but bases its assessment only on the Atlantic populations (Charvet-Almeida *et al.*, 2007). We tentatively regard the eastern Pacific populations as being included in *P. perotteti* for the purposes of this analysis. The taxonomic relationships of largetooth sawfish and related sawfishes clearly need further examination (Compagno and Cook, 1995; Cook *et al.*, 2005; Wueringer *et al.*, 2009).

Largetooth sawfish are thought to presently occur in freshwater habitats in Central and South America and Africa. In Atlantic drainages, largetooth sawtooth have been found in freshwater at least 833 miles (1,340 km) from the ocean in the Amazon River system (Manacapuru, Brazil), as well as in Lake Nicaragua and the San Juan River and other east coast Nicaraguan rivers; the Rio Coco, on the border of Nicaragua and Honduras; Rio Patuca, Honduras; Lago de Izabal, Rio Motagua, and Rio Dulce, Guatemala; the Belize River, Belize; Mexican streams that flow into the Gulf of Mexico; Las Lagunas Del Tortuguero, Rio Parismina, Rio Pacuare, and Rio Matina, Costa Rica; Rio San Juan and the Magdalena River, Columbia; the Falm River in Mali and Senegal; the Saloum River, Senegal; coastal rivers in Gambia; and the Geba River, Guinea-Bissau (Thorson, 1974; 1982b; Castro-Augiree, 1978 as cited in Thorson, 1982b; Compagno and Cook, 1995; C. Scharpf and M. McDavitt, pers. comm., as cited in Cook *et al.*, 2005). In the eastern Pacific the species has been reported in freshwater in the Tuyra, Culebra, Tilapa, Chucunaque, Bayeno, and Rio Sambu Rivers, and at the Balboa and Miraflores locks in the Panama Canal, Panama; Rio San Juan, Columbia; and in the Rio Goascoran, along the border of El Salvador and Honduras (Boulenger, 1909; Fowler, 1936; 1941; Beebe and Tee-Van, 1941; Bigelow and Schroeder, 1953; Gunter, 1957; Thorson *et al.*, 1966; Dahl, 1971; Thorson, 1974; 1976; 1980; 1982a; 1982b, 1987; Vasquez-Montoya and Thorson 1982a, 1982b; Daget, 1984; Compagno and Cook, 1995; all as cited in Cook *et al.*, 2005).

Largetooth sawfish, like other members of their family, are characterized by a toothy snout projecting well forward of the head and mouth. Approximately 2.5 ft (0.76m) long at birth, largetooth sawfish can reach lengths of up to 21.3 feet (6.5m) and weights of up to 1300 pounds (600 kg) (Thorson, 1976). Studies of largetooth sawfish in Lake Nicaragua report litter sizes of 1 to 13 individuals, with an average of 7.3 individuals (Thorson, 1976). The gestation period for largetooth sawfish is approximately 5 months, and females likely produce litters every second year. Given that largetooth sawfish are long lived, slow growing, late maturing, ovoviviparous, and produce few young, the species has a very low intrinsic rate of increase. Simpfendorfer (2000) estimated the intrinsic rate of increase for largetooth sawfish was from 0.05 to 0.07 per year, and population doubling time was

between 10.3 and 13.6 years. Musick *et al.* (2000) noted that intrinsic rates of increase less than ten percent (0.1) were low and make a species particularly vulnerable to excessive mortalities and rapid population declines, after which recovery may take decades.

Largetooth sawfish are generally restricted to shallow (<33 feet or 10 m) coastal, estuarine, and fresh waters, although they have been found at depths of up to 400 ft (122 m) in Lake Nicaragua. Largetooth sawfish are often found in brackish water near river mouths and large embayments, preferring partially enclosed waters, lying in deeper holes and on bottoms of mud or muddy sand (Bigelow and Schroeder, 1953). While it is thought that they spend most of their time on the bottom, they are commonly observed swimming near the surface in the wild and in aquaria (Cook *et al.*, 2005). Largetooth sawfish move among salinity gradients freely and appear to have more physiological tolerance of freshwater than smalltooth sawfish (Bigelow and Schroeder, 1953; Dahl, 1971; Thorson, 1974; 1976; all as cited in Thorson, 1982b). The rostral "saw" is used in feeding to stir up prey items in the benthos and may be used to stun schooling fish.

Analysis of Petition

We evaluated the information referenced in the petition and all other information readily available in our files to determine if the petition presents substantial scientific and/or commercial information indicating that the species may be "threatened" or "endangered" throughout all or a significant portion of their range. The current petition differs from the 1999 petition by seeking the listing of the entire species wherever it is found. The petition resubmits biological, distributional, and historical information from the 1999 petition and 2000 finding and provides additional information including the International Union for the Conservation of Nature (IUCN) "Red List" assessment (Charvet-Almeida *et al.*, 2007), reports on the Brazilian population (Menni and Stehmann, 2000; Charvet-Almeida, 2002), a report on the international sawfish trade (McDavitt and Charvet-Almeida, 2004), and a summary paper on the global population of largetooth sawfish (Cook *et al.*, 2005). The petition also addresses the five factors in section 4(a)(1) of the ESA as they pertain to listing of the species. The petitioner stresses information related to range contraction and local extirpations, declines in abundance, and specific details about threats to the species. We summarize our analysis regarding specific factors affecting the species' risk of extinction below.

Range Contraction

There is evidence from throughout the species range that largetooth sawfish have been extirpated and/or no longer occur in some locations. These locations include the U. S. portion of the Gulf of Mexico and the southeastern coast of Brazil (Menni and Stehmann, 2000). The last known U.S. sightings were in 1941 in Florida and 1943 in Texas (Burgess and Curtis, 2003). In addition, the IUCN considers populations in Benin, Cameroon, Equatorial Guinea, Gabon, Ghana, Gibraltar, Guinea, Mali, Mauritania, Morocco, Nigeria, Spain, Togo, Western Sahara, and the U. S. as "possibly extinct" (i.e., locally extirpated) (Charvet-Almeida *et al.*, 2007). The IUCN provides contradictory information on whether largetooth sawfish currently occur in Angola, The Democratic Republic of Congo, Cote d'Ivoire, Gambia, Liberia, Senegal, and Sierra Leone (Charvet-Almeida *et al.*, 2007).

Declines in Abundance

Quantitative data on largetooth sawfish population trends are lacking in the petition and our files. The best available information from scientific reports and anecdotal information from fisherpeople and others suggests large declines in abundance have occurred on the north coast of Brazil (Charvet-Almeida, 2002) and in other areas where the species still occurs (Charvet-Almeida *et al.*, 2007). Thorson's detailed studies (Thorson, 1976; 1982a; 1982b; 1987) document significant declines of largetooth sawfish in Lake Nicaragua, and others report that these low abundance levels continue (Tanaka, 1994; McDavitt, 2002). The IUCN reports ongoing declines in artisanal and commercial landings (Charvet-Almeida *et al.*, 2007), but they provide no direct citations or data. Based on the local extirpations and declines in abundance the IUCN has placed largetooth sawfish on the IUCN "Red List" as "critically endangered" in the Atlantic (Charvet-Almeida *et al.*, 2007).

Population Structure

There is little information in the petition or our files related to genetic, morphological, or other population structure differences within the species beyond the unique freshwater population of Lake Nicaragua discussed above.

Threats

The petitioner believes the most immediate threat to the species is the reduction in abundance and density caused by overharvest and bycatch. Direct and incidental commercial catch and artisanal and recreational fisheries occur throughout the species' range (Thorson, 1987; Taniuchi, 1992; Tanaka, 1994; Camhi *et al.*, 1998; Charvet-Almeida, 2002). The species is valued for its flesh, fins that are used in the "shark" fin trade, skins that are used for leather, the live aquarium trade, the curio value of the rostral saw, and the rostral teeth, which are used for a variety of purposes including as spurs for roosters used in cockfighting (Charvet-Almeida, 2002; McDavitt and Charvet-Almeida, 2004; Cook *et al.*, 2005). These values have created an international market for sawfish products (McDavitt and Charvet-Almeida, 2004); however largetooth sawfish were added to Appendix I of the Convention on International Trade in Endangered Species in 2007. On his initial visits to Lake Nicaragua, Thorson (pers. comm.; as cited in Cook *et al.*, 2005) noted large catches of largetooth sawfish. Direct fisheries in Lake Nicaragua removed an estimated 60,000 to 100,000 sawfishes between 1970 and 1975 (Thorson, 1976); sawfish are now extremely rare in the lake (Thorson, 1987; Tanaka, 1994; McDavitt, 2002). In Brazil, largetooth sawfish extirpation from the southeastern coast and decline on the north coast is attributed to direct fisheries that continue today (Charvet-Almeida, 2002).

Habitat degradation and loss are also likely contributors to the species' decline. Specific threats to largetooth sawfish habitat include destruction of mangrove forests and coastal development throughout its range (Charvet-Almeida *et al.*, 2007). The petitioner also identified weak or non-existent regulatory or management mechanisms throughout the species range.

Petition Finding

After reviewing the information submitted with, and referenced in, the petition and all other information readily available in our files, the evidence suggests that largetooth sawfish have undergone severe range contractions and local extirpations in their distribution at both the northern and southern extremes of their range; have experienced severe population declines in areas where they still exist; and are subject to ongoing threats of overharvest, habitat loss and degradation, and inadequate management and/or regulation in many parts of their range. Therefore, we determine that the petition presents substantial scientific or commercial

information indicating the petitioned action may be warranted with respect to the species throughout its entire range. In accordance with section 4(b)(3)(B) of the ESA and NMFS' implementing regulations (50 CFR 424.14(b)(2)), we will commence a review of the status of the species and make a determination within 12 months of receiving the petition (i.e., April 24, 2010) as to whether the petitioned action is warranted. If warranted, we will publish a proposed rule and solicit public comments before developing and publishing a final rule.

Information Solicited

To ensure the status review is based on the best available scientific and commercial data, we are soliciting information on whether largetooth sawfish are endangered or threatened. Specifically, we are soliciting information in the following areas: (1) historical and current distribution and abundance of this species throughout its range; (2) historical and current population trends; (3) information on life history in marine environments, (4) curio, meat, "shark" fin or other trade data; (5) information related to taxonomy of the species and closely related forms (e.g., P. microdon); (6) information on any current or planned activities that may adversely impact the species; (7) ongoing efforts to protect and restore the species and its habitat; and (8) information identifying a North American Distinct Population Segment. We request that all information be accompanied by: (1) supporting documentation such as maps, bibliographic references, or reprints of pertinent publications; and (2) the submitter's name, address, and any association, institution, or business that the person represents.

Critical Habitat

The petitioner also requested that we designate critical habitat concurrently with listing the species as threatened or endangered. Under our regulations for designating critical habitat, we are only able to designate critical habitat within areas of U.S. jurisdiction (50 CFR 424.12). Critical habitat is defined in the ESA (16 U.S.C. 1531 *et seq.*) as:

"(i) the specific areas within the geographical area currently occupied by the species, at the time it is listed... 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 upon a determination by the Secretary that such areas are essential for the conservation of the species."

Our implementing regulations (50 CFR 424.12) describe those essential physical and biological features to include: (1) space for individual and population growth, and 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; and (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distribution of a species. We are required to focus on the primary constituent elements (PCEs) which best represent the principal biological or physical features. PCEs may include: spawning sites, feeding sites, water quality and quantity. Our implementing regulations (50 CFR 424.02) define "special management considerations or protection" as "any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species."

Section 4(b)(2) of the ESA requires us to designate critical habitat for listed species based on the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any particular area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

To ensure that our review of critical habitat is complete and based on the best available data, we solicit information and comments on whether the petitioned area in U.S. waters including the Exclusive Economic Zone, or some subset thereof, qualifies as critical habitat. Areas that include the physical and biological features essential to the conservation of the species and that may require special management considerations or protection should be identified. Essential features include, but are not limited to, space for individual growth and for normal behavior, food, water, air, light, minerals, or other nutritional or physiological requirements, cover or shelter, sites for reproduction and development of offspring, and habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of the species (50 CFR 424.12).

Peer Review

On July 1, 1994, NMFS, jointly with the U.S. Fish and Wildlife Service, published a series of policies regarding listings under the ESA, including a policy for peer review of scientific data (59 FR 34270). The intent of the peer review policy is to ensure listings are based on the best scientific and commercial data available. We are soliciting the names of recognized experts in the field who could take part in the peer review process for this status review.

Independent peer reviewers will be selected from the academic and scientific community, tribal and other Native American groups, Federal and state agencies, the private sector, and public interest groups.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: July 24, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. E9–18079 Filed 7–28–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 070821475–81493–01]

RIN 0648–AV15

Protective Regulations for Killer Whales in the Northwest Region Under the Endangered Species Act and Marine Mammal Protection Act

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

ACTION: Proposed rule; request for comments, and availability of Draft Environmental Assessment on regulations to protect killer whales from vessel effects.

SUMMARY: We, the National Marine Fisheries Service (NMFS), propose regulations under the Endangered Species Act and Marine Mammal Protection Act to prohibit vessels from approaching killer whales within 200 yards and from parking in the path of whales for vessels in inland waters of Washington State. The proposed regulations would also prohibit vessels from entering a conservation area during a defined season. Certain vessels would

be exempt from the prohibitions. The purpose of this action is to protect killer whales from interference and noise associated with vessels. In the final rule announcing the endangered listing of Southern Resident killer whales we identified disturbance and sound associated with vessels as a potential contributing factor in the recent decline of this population. The Recovery Plan for Southern Resident killer whales calls for evaluating current guidelines and assessing the need for regulations and/or protected areas. We developed this proposed rule after considering comments submitted in response to an Advance Notice of Proposed Rulemaking (ANPR) and preparing a draft environmental assessment (EA). We are requesting comments on the proposed regulations and the draft EA.

DATES: Comments must be received at the appropriate address (see **ADDRESSES**) no later than October 27, 2009. Public meetings have been scheduled for September 30, 2009, 7–9 p.m. at the Seattle Aquarium, Seattle, WA and October 5, 2009, 7–9 p.m. in The Grange Hall, Friday Harbor, WA. Requests for additional public meetings must be made in writing by August 28, 2009.

ADDRESSES: You may submit comments on the proposed rule, draft EA and any of the supporting documents by any of the following methods:

- *E-mail: orca.plan@noaa.gov.*
- *Federal e-rulemaking Portal: http://www.regulations.gov.*
- *Mail:* Assistant Regional Administrator, Protected Resources Division, Northwest Regional Office, National Marine Fisheries Service, 7600 Sand Point Way, NE., Seattle, WA 98115.

The draft EA and other supporting documents will be available on Regulations.gov and the NMFS Northwest Region Web site at *http://www.nwr.noaa.gov/.*

FOR FURTHER INFORMATION CONTACT: Lynne Barre, Northwest Regional Office, 206–526–4745; or Trevor Spradlin, Office of Protected Resources, 301–713–2322.

SUPPLEMENTARY INFORMATION:

Background

Viewing wild marine mammals is a popular recreational activity for both tourists and local residents. In Washington State, killer whales (*Orcinus orca*) are the principal target species for the commercial whale watch industry (Hoyt 2001). NMFS listed the Southern Resident killer whale distinct population segment (DPS) as endangered under the ESA on November 18, 2005 (70 FR 69903). In the final rule announcing the listing, NMFS identified vessel effects, including direct interference and sound, as a potential contributing factor in the recent decline of this population. NMFS is concerned that some whale watching activities may harm individual killer whales, potentially reducing their fitness and increasing the population's risk of extinction.

Killer whales in the eastern North Pacific have been classified into three forms, or ecotypes, termed residents, transients, and offshore whales. Resident killer whales live in family groups, eat salmon, and include the Southern Resident and Northern Resident communities. Transient killer whales have a different social structure, are found in smaller groups and eat marine mammals. Offshore killer whales are found in large groups and their diet is largely unknown. The Southern Resident killer whale population contains three pods—J, K, and L pods—and frequents inland waters of the Pacific Northwest. During the spring, summer, and fall, the Southern Residents' range includes the inland waterways of Puget Sound, Strait of Juan de Fuca, and Southern Strait of Georgia. Little is known about the winter movements and range of Southern Residents. Their occurrence in coastal waters extends from the coast of central California to the Queen Charlotte Islands in British Columbia. The home ranges of transients, offshore whales, and Northern Residents also include inland waters of Washington and overlap with the Southern Residents.

There is a growing body of evidence documenting effects from vessels on small cetaceans and other marine mammals. The variety of whale responses include stopping feeding, resting, and social interaction (Baker *et al.* 1983; Bauer and Herman 1986; Hall 1982; Krieger and Wing 1984; Lusseau 2003a; Constantine *et al.* 2004); abandoning feeding, resting, and nursing areas (Jurasz and Jurasz 1979; Dean *et al.* 1985; Glockner-Ferrari and Ferrari 1985, 1990; Lusseau 2005; Norris *et al.* 1985; Salden 1988; Forest 2001; Morton and Symonds 2002; Courbis 2004; Bejder 2006); altering travel patterns to avoid vessels (Constantine 2001; Nowacek *et al.* 2001; Lusseau 2003b, 2006); relocating to other areas (Allen and Read 2000); and changes in acoustic behavior (Van Parijs and Corkeron 2001). In some studies marine mammals display no reaction to vessels (Watkins 1986; Nowacek *et al.* 2003). One study found that marine mammals exposed to human-generated noise released increased amounts of stress hormones that have the potential to harm their nervous and immune systems (Romano *et al.* 2004).

Several scientific studies in the Pacific Northwest have documented disturbance of resident killer whales by vessels engaged in whale watching. Short-term behavioral changes in Northern and Southern Residents have been observed and studied by several researchers (Kruse 1991; Kriete 2002; Williams *et al.* 2002a, 2002b, 2006, In Press; Foote *et al.* 2004; Bain *et al.* 2006, Lusseau *et al.* In Press), although it is not always understood whether it is the presence and activity of the vessel, the sounds the vessel makes, or a combination of these factors that disturbs the animals. Individual animals can react in a variety of ways to nearby vessels, including swimming faster, adopting less predictable travel paths, making shorter or longer dives, moving into open water, and altering normal patterns of behavior (Kruse 1991; Williams *et al.* 2002a, In Press; Bain *et al.* 2006; Noren *et al.* 2007, In Press; Lusseau *et al.* In Press). High frequency sound generated from recreational and commercial vessels moving at high speed in the vicinity of whales may mask echolocation (signals sent by the whales that bounce off objects in the water and provide information to the whales) and other signals the species rely on for foraging (Erbe 2002; Holt 2008), communication (Foote *et al.* 2004), and navigation.

Killer whales may also be injured or killed by collisions with passing ships and powerboats, primarily from being struck by the turning propeller blades (Visser 1999, Ford *et al.* 2000, Visser and Fertl 2000, Baird 2001, Carretta *et al.* 2001, 2004). Some animals with severe injuries eventually make full recoveries, such as a female described by Ford *et al.* (2000) that showed healed wounds extending almost to her backbone. A 2005 collision of a Southern Resident with a commercial whale watch vessel in Haro Strait resulted in a minor injury to the whale, which subsequently healed. From the 1960s to 1990s (Baird 2002) only one resident whale mortality from a vessel collision was reported for Washington and British Columbia. However, additional mortalities since then have been reported. In March of 2006 the lone Southern Resident killer whale, L98, residing in Nootka Sound for several years, was killed by a tug boat. While L98 exhibited unusual behavior and often interacted with vessels, his death demonstrates the risk of vessel accidents. Several mortalities of resident killer whales in British Columbia in recent years have been attributed to

vessel collisions (Gaydos and Raverty 2007).

Vessel effects were identified as a factor in the ESA listing of the Southern Residents (70 FR 69903; November 18, 2005) and are addressed in the recovery plan (73 FR 4176; January 24, 2008) which is available on our Web page at *http://www.nwr.noaa.gov/*.

Current MMPA and ESA Prohibitions and NMFS Guidelines and Regulations

The Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.*, contains a general prohibition on take of marine mammals. Section 3(13) of the MMPA defines the term take as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." Except with respect to military readiness activities and certain scientific research activities, the MMPA defines the term harassment as "any act of pursuit, torment, or annoyance which—(i) has the potential to injure a marine mammal or marine mammal stock in the wild, [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment]."

In addition, NMFS regulations implementing the MMPA further define the term take to include: "the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild" (50 CFR 216.3).

The MMPA provides limited exceptions to the prohibition on take for activities such as scientific research, public display, and incidental take in commercial fisheries. Such activities require a permit or authorization, which may be issued only after agency review.

The ESA prohibits the take of endangered species. The ESA defines take to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Both the ESA and MMPA require wildlife viewing to be conducted in a manner that does not cause take.

NMFS has developed specific regulations for certain species in particular locations. Each rule was based on the biology of the marine mammals, and available information on the nature of the threats. NMFS has regulated close vessel approaches to large whales in Hawaii, Alaska, and the North Atlantic. Buffer zones were also created to protect Steller sea lions. There are exceptions to each of these rules.

In 1995, NMFS published a final rule to establish a 100 yard (91.4 m) approach limit for endangered humpback whales in Hawaii (60 FR 3775, January 19, 1995). While available scientific information on the effects of vessel traffic and whale watching did not provide precise guidance on proximity limits for approaching whales, NMFS established the 100 yard approach regulation based on its experience enforcing the prohibition of harassment (i.e., activities that were initiated or occurred within 100 yards of a whale had a high probability of causing harassment). In 2001, NMFS published a final rule (66 FR 29502, May 31, 2001) to establish a 100 yard (91.4 m) approach limit for endangered humpback whales in Alaska that included a speed limit for when a vessel is near a whale. Again limited information on vessel impacts was available for humpback whales, however, the risk of harm to the species from a possible delay in detecting a long-term negative response to increased vessel pressure provided the impetus to implement vessel measures in waters off Alaska. NMFS decided to implement a 100 yard distance to maintain consistency with the published guidelines and with the regulations that existed for viewing humpback whales in Hawaii. Some form of speed restrictions was considered to reduce the likelihood of mortality or injury to a whale in the event of a vessel/whale collision. For practical and enforcement reasons, a slow safe speed standard, rather than a strict nautical mile-per-hour standard, was included in the rule.

In 1997, an interim final rule was published to prohibit vessels from approaching endangered North Atlantic right whales closer than 500 yards (457.2 m) (62 FR 6729, February 13, 1997). The purpose of the 500 yard approach regulation was to reduce the current level of disturbance and the potential for vessel interaction and to reduce the risk of collisions. In addition to collision injuries or mortalities, other vessel impacts were identified, including displacing cow/calf pairs from nearshore waters, whales expending increased energy when feeding is disrupted or migratory paths rerouted, and turbulence associated with vessel traffic which may indirectly affect right whales by breaking up the dense surface zooplankton patches in certain whale feeding areas. To further reduce impacts to North Atlantic right whales from collisions with ships, a final rule was recently published to implement speed restrictions of no more than 10 knots applying to all vessels 65 ft (19.8m) or greater in overall length in certain locations and at certain times of the year along the east coast of the U.S. Atlantic seaboard (73 FR 60173; October 10, 2008).

On November 26, 1990 (55 FR 49204) Steller sea lions were listed as "threatened" under the ESA and the listing included regulations prohibiting vessels from operating within buffer zones 3 nautical miles around the principal Steller sea lion rookeries in the Gulf of Alaska and the Aleutian Islands. Vessels are prohibited from operating within the 3-mile buffer zones, with certain exceptions. Similarly, people are prohibited from approaching on land closer than ½ mile or within sight of a listed Steller sea lion rookery. The buffer zones were created to (1) restrict the opportunities for individuals to shoot at sea lions and facilitate enforcement of this restriction; (2) reduce the likelihood of interactions with sea lions, such as accidents or incidental takings in these areas where concentrations of the animals are expected to be high; (3) minimize disturbances and interference with sea lion behavior, especially at pupping and breeding sites; and, (4) avoid or minimize other related adverse effects.

In addition to these specific regulations, NMFS has provided general guidance for wildlife viewing that does not cause take. This is consistent with the philosophy of responsible wildlife viewing advocated by many Federal and State agencies to unobtrusively observe the natural behavior of wild animals in their habitats without causing disturbance (see *http://www.watchablewildlife.org/* and *http://www.watchablewildlife.org/publications/marine_wildlife_viewing_guidelines.htm*).

Each of the six NMFS Regions has developed recommended viewing guidelines to educate the public on how to responsibly view marine mammals in the wild and avoid causing a take. These guidelines are available on line at: *http://www.nmfs.noaa.gov/prot_res/MMWatch/MMViewing.html*. The "Be Whale Wise" guidelines developed for marine mammals by the NMFS Northwest Regional Office and partners are also available at *http://www.nwr.noaa.gov/Marine-Mammals/upload/BeWhaleWise.pdf*.

Be Whale Wise is a transboundary effort to develop and revise guidelines for viewing marine wildlife. NMFS has partnered with monitoring groups, commercial operators, whale advocacy groups, U.S. and Canadian government

agencies and enforcement divisions over the past several years to promote safe and responsible wildlife viewing practices through the development of outreach materials, training workshops, on-water education and public service announcements. The 2006 version of the Be Whale Wise guidelines recommends that boaters parallel whales no closer than 100 yards (100 meters), approach animals slowly from the side rather than from the front or rear, and avoid putting the vessel within 400 yards (400 meters) in front of or behind the whales. The Be Whale Wise guidelines are used in U.S. and Canadian waters and use meters and yards interchangeably in the guideline materials. Vessels are also recommended to reduce their speed to less than 7 knots (13 km/h) within 400 meters of the whales, and to remain on the outer side of the whales near shore. In 2008 a State bill with similar language to the current approach and "park in the path" guidelines (HB 2514) was approved to protect Southern Resident killer whales in Washington State waters.

Two voluntary no-boat areas off San Juan Island are recognized by San Juan County, although this is separate from the Be Whale Wise guidelines. The first is a 2 mile (~800 m)—wide zone along a 1.8 mile (3 km) stretch of shore centered on the Lime Kiln lighthouse. The second is a ¼ mile (~400 m)—wide zone along much of the west coast of San Juan Island from Eagle Point to Mitchell Point. These areas, totaling approximately 3.8 square miles, were established to facilitate shore-based viewing and to reduce vessel presence in an area used by the whales for feeding, traveling, and resting.

NMFS supports the Soundwatch boater education program, an on-water stewardship and monitoring group, to help develop and promote the Be Whale Wise guidelines and monitor vessel activities in the vicinity of whales. Soundwatch reports incidents when the guidelines are not followed and there is the potential for disturbance of the whales (Koski 2004, 2006). Incidents are frequently observed involving both recreational and commercial whale watching vessels. Soundwatch also serves as a crucial education component, providing information on the viewing guidelines to boaters that are approaching areas with whales.

Despite the regulations, guidelines and outreach efforts, interactions between vessels and killer whales continue to occur in the waters of Puget Sound and the Georgia Basin. Advertisements on the Internet and in local media in the Pacific Northwest promote activities that appear inconsistent with what is recommended in the NMFS guidelines. NMFS has received letters from the Marine Mammal Commission, members of the scientific research community, environmental groups, and members of the general public expressing the view that some types of interactions with wild marine mammals have the potential to harass and/or disturb the animals by causing injury or disruption of normal behavior patterns. Soundwatch reports continue to include high numbers of incidents where guidelines to avoid harassment are not being followed (Koski 2004, 2006). Violations of current ESA and MMPA take prohibitions are routinely reported to NOAA's Office for Law Enforcement; however, the current prohibitions are difficult to enforce. NMFS has also received inquiries from members of the public and commercial tour operators requesting clarification of NMFS' policy on these matters.

In 2002, NMFS published an ANPR requesting comments from the public on what types of regulations and other measures would be appropriate to prevent harassment of marine mammals in the wild caused by human activities directed at the animals (67 FR 4379, January 30, 2002). The 2002 ANPR was national in scope and covered all species of marine mammals under NMFS' jurisdiction (whales, dolphins, porpoises, seals and sea lions), and requested comments on ways to address concerns about the public and commercial operators closely approaching, swimming with, touching or otherwise interacting with marine mammals in the wild. Several potential options were presented for consideration and comment, including: (1) Codifying the current NMFS Regional marine mammal viewing guidelines into regulations; (2) codifying the guidelines into regulations with additional improvements; (3) establishing minimum approach regulations similar to the ones for humpback whales in Hawaii and Alaska and North Atlantic right whales; and (4) restricting activities of concern similar to the MMPA regulation prohibiting the public from feeding or attempting to feed wild marine mammals. The 2002 ANPR specifically mentioned the complaints received from researchers and members of the public concerning close vessel approaches to killer whales in the Northwest. Over 500 comments were received on the 2002 ANPR regarding human interactions with wild marine mammals in United States waters and along the nation's coastlines.

NMFS has determined that existing prohibitions, regulations, and guidelines described above do not provide sufficient protection of killer whales from vessel impacts. We considered information developed through internal scoping, public and agency comments on the 2002 nation-wide ANPR and a 2007 killer whale-specific ANPR (described below), monitoring reports, and scientific information. Monitoring groups continue to report high numbers of vessels around the whales and increasing numbers of vessel incidents that may disturb or harm the whales. Vessel effects may limit the ability of the endangered Southern Resident killer whales to recover and may impact other killer whales in inland waters of Washington. We therefore deem it necessary and advisable to adopt regulations to protect killer whales from vessel impacts, which will support recovery of Southern Resident killer whales.

Development of Proposed Regulations

In March 2007, we published an ANPR (72 FR 13464; March 22, 2007) to gather public input on whether and what type of regulation might be necessary to reduce vessel effects on Southern Residents. The ANPR requested comments on a preliminary list of potential regulations including codifying the Be Whale Wise guidelines, establishing a minimum approach rule, prohibiting particular vessel activities of concern, establishing time-area closures, and creating operator permit or certification programs.

We relied on the public comments on the ANPR, the Recovery Plan, Soundwatch data, and other scientific information to develop a range of alternative individual regulations, including the alternative of not adopting regulations. We analyzed the environmental effects of these alternative regulations and considered options for mitigating effects. After a preliminary analysis of individual regulations, we developed an alternative that combined three of the individual regulations into a single package and analyzed the effects of that package. The results of our analysis are contained in a draft EA under the National Environmental Policy Act (NEPA). The EA is available for review and comment in association with this rulemaking (see **ADDRESSES**).

Comments and Responses to Comments on the ANPR

During the ANPR public comment period, we received a total of 84 comments via letter, e-mail and on the Federal e-rulemaking portal. Comments were submitted by concerned citizens, whale watch operators, research,

conservation and education groups, Federal, State and local government entities, and various industry associations. The majority of comments explicitly stated that regulations were needed to protect killer whales from vessels. Most other comments generally supported protection of the whales. Six comments explicitly stated that no regulations were needed. All comments received during the comment period were posted on the NMFS Northwest Regional Web page *http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Killer-Whales/ESA-Status/Orca-Vessel-Regs.cfm and Regulations.gov* (as supporting documents to this proposed rule). The ANPR requested comments on a preliminary list of potential regulations including codifying the Be Whale Wise guidelines, establishing a minimum approach rule, prohibiting particular vessel activities of concern, establishing time-area closures, and creating operator permit or certification programs. There was support for each of the options in the preliminary list of alternatives published in the ANPR, and many comments supported multiple approaches. Some additional alternatives were also suggested. Here we summarize comments and our responses that directly relate to the measures in this proposed rule. Additional information is provided in the Rationale for Regulations section of this notice.

Mandatory Regulations versus Voluntary Guidelines. Several commenters supported adoption of mandatory regulations, while other commenters stated that voluntary guidelines are adequate to protect the whales. Monitoring of vessel activity around the whales reveals that many vessels violate the current voluntary guidelines, the number of violations appears to be increasing, and the most serious violation—parking in the path of the whales—is committed primarily by commercial whale watch operators. In the draft EA, we examined the available evidence and concluded that mandatory regulations would reduce the number of incidents of vessels disturbing and potentially harming the whales and that this reduction would improve the whales' chances for recovery. Accordingly, we are proposing mandatory regulations governing vessel activity around the whales.

Approach regulation. Some commenters supported an approach limit of 100 yards (current guideline), and others suggested that an approach limit of 200 yards or 200–400 yards would better protect the whales. Commenters noted that an approach regulation could limit the potential for vessels to disturb or collide with whales and could limit the potential for vessel noise to mask the whale's auditory signals, interfering with their ability to communicate and forage. In the draft EA we fully analyzed the effects of both a 100 and 200 yard approach regulation. Researchers have documented behavioral disturbance and considerable potential for masking from vessels at 100 yards and as far away as 400 yards. Researchers have also modeled the potential for vessel noise to mask the whales' auditory signals and concluded that at 100 yards there is likely to be almost 100 percent masking, while at 400 yards the masking has substantially decreased. The 200 yard approach regulation proposed here is intended to limit the risk of vessel strikes, the degree of behavioral disruption, and the amount of noise that masks echolocation and communication. While an approach regulation at a distance greater than 200 yards would further reduce vessel effects, this could diminish both the experience of whale watching and opportunities to participate in whale watching. We recognize that whale watching educates the public about whales and fosters stewardship. We balanced the benefits to killer whales of a greater approach distance regulation and continued whale watching opportunities to arrive at the 200 yard approach regulation we are proposing.

No-go zone. We received comments supporting a mandatory no-go zone similar to the current voluntary no-go zones on the west side of San Juan Island, as well as suggestions to create no-go zones that included larger areas, other shoreline areas, and feeding "hot spots". In the draft EA we fully analyzed the effects of a mandatory no-go zone similar to the current voluntary zone, as well as a larger no-go zone on the west side of San Juan Island. A no-go zone provides protection in an area where researchers have observed high levels of foraging. Keeping vessels out of the zone is intended to eliminate the chance of a vessel strike, create foraging opportunities in the absence of vessels, and provide a buffer that limits the potential for acoustic masking. The proposed regulations include a no-go zone out 880 yards from shore, twice the distance of most of the current no-go zone.

Park in the path. Some commenters supported codifying the guideline to keep clear of the whales' path. The risk of vessel strikes and masking are both most severe when vessels are directly in front of the whales. The draft EA evaluated an alternative that included a mandatory prohibition on parking in the whales' path. The proposed regulations include a prohibition on parking in the path because it provides the best management tool for improving compliance and reducing the risk of vessel strikes and masking from vessels directly in front of the whales.

Other suggested alternatives. We did not propose some of the regulatory options suggested in the ANPR and in public comments for several reasons, including, difficulties in enforcing them, changes to infrastructure needed to implement them, or a lack of sufficient science to support them. For example, a speed limit within a certain distance of the whales (*i.e.*, less than 7 knots within 400 yards of the whales) would be difficult to implement and enforce without vessel tracking technology. A speed limit of 7 knots within 400 yards of the whales was fully analyzed as an alternative in the draft EA. Several other alternatives were suggested during the ANPR comment period and were addressed in the draft EA as alternatives considered but not analyzed in detail. These included:

(1) A permit or certification program which would require a large infrastructure to implement. There would also be equity issues in determining who is permitted or certified and who is not.

(2) A moratorium on all vessel-based whale watching, or protected areas along all shorelines, which would be challenging to enforce and are not supported by available scientific information.

(3) Regulatory options, such as rerouting shipping lanes or imposing noise level standards, which would unnecessarily restrict some types of vessels rarely in close proximity to the whales.

Proposed Rule

Current efforts to reduce vessel impacts have not been sufficient to address vessel interactions that have the potential to harass and/or disturb killer whales by causing injury or disruption of normal behavior patterns. The regulatory measures proposed here are designed to protect killer whales from vessel impacts and will support recovery of Southern Resident killer whales. We are proposing these regulations pursuant to our rulemaking authority under MMPA section 112(a) (16 U.S.C. 1382(a)), and ESA 11(f) (16 U.S.C. 1540(f)). These proposed regulations also are consistent with the purpose of the ESA "to provide a program for the conservation of [* * *] endangered species" and "the policy of Congress that all Federal departments

and agencies shall seek to conserve endangered species [* * *] and shall utilize their authorities in furtherance of the purposes of [the ESA]." 16 U.S.C. 1531(b), (c).

Scope and Applicability

Application to All Killer Whales: Under the MMPA and ESA the proposed regulations would apply to all killer whales. Although killer whales are individually identifiable through photo-identification, individual identification requires scientific expertise and resources (*i.e.*, use of a catalog) and cannot always be done immediately at the time of the sighting. It would be difficult for boaters, especially recreational boaters without expertise and experience with killer whales, to identify the individuals in the ESA-listed Southern Resident DPS or even to identify killer whales to ecotype (resident, transient, offshore). Requiring boaters to know which killer whales they are observing is not feasible. In addition, providing protection of all killer whales in inland waters of Washington is appropriate under the MMPA. Section 11(f) of the ESA provides NMFS with broad rulemaking authority to enforce the provisions of the ESA. In addition, section 112(a) of the MMPA provides NMFS with broad authority to prescribe regulations that are necessary to carry out the purposes of the statute.

Geographic Area: Regulations would apply to vessels in navigable inland waters of Washington under United States jurisdiction. Inland waters include a core summer area for the whales around the San Juan Islands, as well as a fall foraging area in Puget Sound and transit corridor along the Strait of Juan de Fuca. These three areas make up over 2,500 square miles and were designated as critical habitat for Southern Resident killer whales (71 FR 69054; November 29, 2006). This regulation will apply to an area similar to designated critical habitat including all U.S. marine waters in Jefferson, King, Kitsap, Island, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston, Whatcom, and Clallam counties east of a line connecting Cape Flattery, Washington (48°23 10* N./124°43 32* W.), Tatoosh Island, Washington (48°23 30* N./124°44 12* W.), and Bonilla Point, British Columbia (48°35 30* N./124°43 00* W.) and south of the border delineating U.S. and Canadian waters. Marine waters include all waters relative to a contiguous shoreline relative to the mean high water line and cutting across the mouths of all rivers and streams.

Vessels Subject to Proposed Rule: Commercial and recreational whale watch vessels include motorized, non-motorized and self-propelled vessels (*i.e.*, motor boats, sail boats and kayaks), all of which can cause disturbance to whales. While kayaks are small and quiet, they have the potential to disturb whales as obstacles on the surface, and they may startle whales by approaching them without being heard (Mathews 2000). Some kayakers may be less likely to follow rules (Jelinski *et al.* 2002) and more likely to approach wildlife closely because they may be more apt to over-estimate distance because of their low aspect on the water, and to assume they are less likely to disturb wildlife than other vessels (Mathews 2000). In studies comparing effects of motorized and non-motorized vessels on dolphins, the type of vessel did not matter as much as the manner in which the boat moved with respect to the dolphins (Lusseau 2003b). Some dolphins' responses to vessels were specific to kayaks or were greater for kayaks than for motorized vessels (Lusseau 2006, Gregory and Rowden 2001, Duran and Valiente 2008). Several studies that have documented changes in behavior of dolphins and killer whales in the presence of vessels include both motorized and non-motorized vessels in their analysis (Lusseau 2003b, Nichols *et al.* 2001, Trites *et al.* 2007, Noren *et al.* 2007, In Press). Based on this information, it is appropriate to protect killer whales from different types of vessels.

Exceptions: We considered six specific categories of vessels that should be exempted from the vessel regulations: (1) Government vessels, (2) cargo vessels transiting in the shipping lanes, (3) research vessels, (4) fishing vessels actively engaged in fishing, (5) vessels limited in their ability to maneuver safely, and (6) vessels owned by individuals who own shoreline property located immediately adjacent to the no-go zone when such vessels are transiting to or from the property for personal, non-commercial purposes. These exceptions are based on the likelihood of certain categories of vessels having impacts on the whales and the potential adverse effects involved in regulating certain vessels or activities.

Available data on vessel effects on whales from Soundwatch (Koski 2007) and Bain (2007) indicate that commercial and recreational whale watch vessels have the greatest potential to affect killer whales. This is because operators of whale watching vessels are focused on the whales, track the whales' movements, spend extended time with the whales, and are therefore most often in close proximity to the whales. Other vessels such as government vessels, commercial and tribal fishing boats, cargo ships, tankers, tug boats, and ferries do not target whales in their normal course of business. Soundwatch (Koski 2007) and Bain (2007) report that these types of vessels combined comprise only 6 percent or less of vessels within ½ mile of the whales. In addition, these vessels generally move slowly and in usually predictable straight paths, which reduces the risk of strikes to whales. While NMFS recognizes that sound from large vessels has the potential to affect whales even at great distances, the primary concern at this time is the sound from small, fast moving vessels moving in close proximity to the whales.

Vessels engaged in scientific research do closely approach killer whales to obtain photographs, collect a variety of samples, and observe behavior. NMFS considers ongoing research essential to its efforts to recover the whales. Potential effects of these activities are evaluated under section 7 and takes are authorized under section 10 of the ESA for Southern Resident killer whales. Expertise of researchers, operating procedures, and permit terms and conditions reduce the potential impacts to whales, therefore specific research activities authorized by NMFS would be exempt from the vessel regulations.

Regulating some categories of vessels could cause adverse impacts. Government vessels are often critical to safety missions, such as search and rescue operations, enforcement, and activities critical to national security. Washington State ferries would not be considered government vessels operating in the course of their official duties. U.S. and Canadian regulations require power vessels more than 40 meters in length, tugs that are more than eight meters in length, and vessels carrying 50 or more passengers all participate in the monitoring and reporting system set in place by the Co-operative Vessel Traffic Service which is designed to efficiently and safely manage vessel movements in the shared waters of the two countries (Navigation and Navigable Waters, 33 CFR part 161). These ships generally follow the well-defined navigation lanes called the Traffic Separation Scheme under Rule 10, as amended, of the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS), Oct. 20, 1972, 28 U.S.T. 3459, T.I.A.S. 8587, adopted by statute at 33 U.S.C. 1602; 57 FR 29218, July 1, 1992. If they were required to make sudden or unpredictable movements to avoid close approaches to whales, it could increase the risk of

collisions and pose safety hazards. If fishing vessels were required to follow regulations while actively engaged in fishing, it could compromise gear or catch. Exempting treaty Indian fishing vessels is consistent with treaty fishing rights and use of Usual and Accustomed fishing areas. NMFS is also proposing to exempt vessels from any regulations if the exemption is required for safe operation of the vessel to avoid adverse effects to public safety. There are private landowners with property adjacent to the no-go zone. NMFS is proposing to exempt the personal use of privately owned vessels for access to their shoreline by landowners adjacent to the no-go zone.

Based on these considerations, NMFS is proposing exceptions to the regulations. The burden would be on the vessel operator to prove the exception applies, and vessel operators would not be exempt from the take prohibitions under the MMPA or ESA. The following exceptions would apply to all regulations:

(1) The regulations would not apply to Federal, State, and local government vessels operating in the course of official duty.

(2) The regulations would not apply to vessels participating in the Vessel Tracking System and operating within the defined Traffic Separation Scheme shipping lanes.

(3) The regulations would not apply to activities, such as scientific research, authorized through a permit issued by the National Marine Fisheries Service under part 222, subpart C, of this chapter (General Permit Procedures) or through a similar authorization.

(4) The regulations would not apply to treaty Indian fishing vessels lawfully engaged in actively setting, retrieving, or closely tending fishing gear.

(5) The regulations would not apply to vessel operations necessary for safety to avoid an imminent and serious threat to a person or vessel.

(6) The no-go zone regulation would not apply to personal use of private vessels owned by land owners for access to private property they own located adjacent to the no-go zone.

In addition to these exceptions, the prohibition against approaching within 200 yards and parking in the whales' path would not apply to commercial (non-treaty) fishing vessels lawfully engaged in actively setting, retrieving, or closely tending fishing gear. Non-treaty commercial fishing vessels would be prohibited from entering the no-go zone. The regulations would apply to all fishing vessels, including treaty Indian and non-treaty vessels, transiting to or from fishing areas.

Requirements

Approach Restrictions: The proposed regulations would prohibit vessels from approaching any killer whale in the inland waters of Washington closer than 200 yards. This would include approaching by any means, including by interception (*i.e.*, placing a vessel in the oncoming path of a killer whale, so that the whale surfaces within 200 yards of the vessel, or positioning a vessel so that wind or currents carry the vessel to within 200 yards).

No-go zone: The proposed regulations would prohibit vessels from entering a no-go zone along the west side of San Juan Island. The area would extend seaward from the mean high water line to a line approximating ½ mile (800 m) offshore, from Eagle Point to Mitchell Point, and include an area totaling approximately 6.2 square miles (Figure 1). With certain exceptions as described above, no vessels would be permitted inside the no-go zone during the period from May 1 through September 30 of each year.

Prohibition against parking in the whales' path: The proposed regulations would require vessels to keep clear of the whales' path within 400 yards of the whales. Similar to the approach regulation, parking in the path includes interception (positioning a vessel so that whales surface within 200 yards of the vessel, or so that wind or currents carry the vessel into the path of the whales).

Rationale for Regulations

The endangered Southern Resident killer whales are a small population with only 85 whales as of the 2008 summer census. Based on ongoing observations to monitor the population, two whales have disappeared since the census count. The Southern Residents underwent an almost 20 percent decline from 1996 to 2001, and while there were several years of population increases following 2001, as of this year the population is once again in decline.

Our listing decision and the Recovery Plan for Southern Resident killer whales identified three major threats to their continued existence, all of which likely act in concert—prey availability, contaminants, and vessel effects and sound. While we and others in the region are working to restore salmon runs and minimize contamination in Puget Sound, these efforts will likely take many years to provide benefits for killer whales. In contrast, the threats posed by vessels can be reduced quickly by regulating vessel activities. The primary objective of promulgating these regulations is to manage the threats to killer whales from vessels, in support of the recovery of Southern Residents.

Monitoring groups such as Soundwatch have reported that the mean number of vessels following a given group of whales within ½ mile increased from five boats in 1990 to an average of about 20 boats during May through September, for the years 1998 through 2006 (Osborne *et al.* 1999; Baird 2001; Erbe 2002; Marine Mammal Monitoring Project 2002; Koski 2004, 2006). At any one time, the observed numbers of commercial and recreational whale watch boats around killer whales can be much higher. Monitoring groups have collected several years of data on incidents when vessels are not adhering to the guidelines and the whales may be disturbed. In 2006, there were 1,281 incidents of vessels not following the guidelines reported during the time the observers were present (Koski 2007). There was an increasing trend in the number of incidents from 1998 to 2006. Since observers were not present during all days and all hours, it is likely that there were more incidents than those reported. Of the 1,281 incidents in 2006, the majority were committed by private boaters (53 percent), Canadian commercial operators (21 percent), and U.S. commercial operators (9 percent) (Koski 2007). The top incidents also reflect this pattern and are most often committed by private boaters, Canadian commercial whale watch vessels, and U.S. commercial whale watch vessels, respectively. The top four observed incidents were parking in the path, vessels motoring inshore of whales, vessels motoring within 100 yards of whales, and vessels motoring fast within 400 yards of the whales (Koski 2007).

The specific threats from these vessel incidents include (1) risk of strikes, which can result in injury or mortality, (2) behavioral disturbance, which increases energy expenditure and reduces foraging opportunities, and (3) acoustic masking, which interferes with echolocation and foraging, as well as communication. Southern and Northern Resident killer whales have been injured or killed by collisions with vessels. Some whales have sustained injuries from propeller blades and have eventually recovered, one was instantly killed, and several mortalities of stranded animals have been attributed to vessel strikes in recent years (Visser 1999; Ford *et al.* 2000; Visser and Fertl 2000; Baird 2001; Carretta *et al.* 2001, 2004, Gaydos and Raverty 2007).

As described in the background section of this proposed rule and in the EA, it is well documented that killer whales in the Pacific Northwest respond to vessels engaged in whale watching

with short-term behavioral changes. Examples of short-term behavioral responses include increases in direction changes, respiratory intervals, and surface active behaviors, all of which can increase energy expenditure (Bain *et al.* 2006; Noren *et al.* 2007, In Press; Williams *et al.* In Press). Southern Residents also spend less time foraging in the presence of vessels (Bain *et al.* 2006, Lusseau *et al.* In Press). Williams *et al.* (2006) estimated that increased energy expenditure may be less important than the reduced time spent feeding and the resulting likely reduction in prey consumption in the presence of vessels. Vessels in the path of the whales can interfere with important social behaviors such as prey sharing (Ford and Ellis 2006) or with behaviors that generally occur in a forward path as the whales are moving, such as nursing (Kriete 2007).

Vessel sounds may mask or compete with and effectively drown out calls made by killer whales, including echolocation used to locate prey and other signals the whales rely upon for communication and navigation. Masking of echolocation reduces foraging efficiency (Holt 2008), which may be particularly problematic if prey resources are limited. Vessel noise was predicted to significantly reduce the range at which echolocating killer whales could detect salmon in the water column. Holt (2008) reported that the detection range for a killer whale echolocating on a Chinook salmon could be reduced 88 to 100 percent by the presence of a moving vessel within 100 yards of the whale. Masking sound from vessels could affect the ability of whales to coordinate their feeding activities, including searching for prey and prey sharing. Foote *et al.* (2004) attributed increased duration of primary communication calls to increased vessel traffic.

Energetic costs from increased behavioral disturbance and reduced foraging can decrease the fitness of individuals (Lusseau and Bejder 2007). Energy expenditure or disruption of foraging could result in poor nutrition. Poor nutrition could lead to reproductive or immune effects, or, if severe enough, to mortality. Interference with foraging can affect growth and development, which in turn can affect the age at which animals reach reproductive maturity, fecundity, and annual or lifetime reproductive success. Interference with essential behaviors, including prey sharing and communication, could also reduce social cohesion and foraging efficiency for Southern Resident killer whales, and, therefore, the growth, reproduction, and fitness of individuals. Injuries from vessel strikes could also affect the health and fitness of individuals. Any injury to or reduction in fitness of a single member of the Southern Resident killer whale population is serious because of the small population size.

To reduce the risk of vessel strikes, behavioral disturbance, and acoustic masking, and to manage effectively the threat from vessels, regulations must reduce the current number of harmful vessel incidents. Monitoring demonstrates that there are numerous incidents in which the current voluntary guidelines are not observed. Research suggests that vessel operators are more likely to comply with mandatory regulations than with voluntary guidelines (May 2005). In addition, level of compliance is likely to depend on how easy the regulations are to understand, follow and enforce. We therefore expect that clear mandatory regulations will reduce the number of incidents, compared to the current voluntary guidelines.

After analyzing a range of alternative regulations, we concluded that the most appropriate measures to protect the whales are a combination of an approach regulation, a no-go zone, and a prohibition on parking in the path. We recognize that adopting regulations that are different from the current voluntary guidelines and State regulation may present some challenges. The current infrastructure, however, includes enforcement, monitoring, and stewardship groups, who will be available to assist with an education campaign to inform boaters about the new regulations and the scientific information on which they are based. The combination of three measures as part of the regulation package provides multiple tools for enforcement that are measurable, easy for the public to understand, and based on the best available science regarding vessel impacts. The draft EA contains a full analysis of a No-action alternative, six individual alternatives, and the combined approach we are proposing, described below.

200 yard approach regulation. A regulation prohibiting approaches closer than 200 yards would be clear to whale watch operators. These operators would likely know about such a regulation and be able to accurately judge the distance of their vessels from whales, as indicated by their current high levels of compliance with the current 100 yard guideline. Recreational boaters would be less likely to know about such a regulation, though over time it is reasonable to expect that familiarity with the regulation would increase, particularly with education and publicity about any prosecutions. Some recreational boaters may also follow the example of commercial operators to determine the proper viewing distance.

The 200 yard approach regulation is intended to reduce the risk of vessel strikes, the degree of behavioral disruption, and the amount of noise that masks echolocation and communication. Current research results have documented behavioral disturbance and considerable potential for masking from vessels at 100 yards. These effects are reduced at 200 yards and greater distances. Some effects are observed up to 400 yards from the whales. While an approach regulation at a distance greater than 200 yards would further reduce vessel effects, this could diminish both the experience of whale watching and opportunities to participate in whale watching. We recognize that whale watching educates the public about whales and fosters stewardship. We balanced the benefits to killer whales of a greater approach distance regulation and continued whale watching opportunities, and we arrived at the 200 yard approach regulation we are proposing.

No-go zone. A no-go zone is clear and could be readily avoided by both commercial and recreational boaters. The area would be identified using latitude and longitude coordinates and landmarks on maps and charts, making the regulation widely identifiable and compliance and enforcement straightforward. The no-go zone provides special protection in an area where researchers have observed high levels of foraging. Keeping vessels out of the zone is intended to eliminate the chance of a vessel strike, allow for increased foraging opportunities in the absence of vessels, and provide a buffer that greatly reduces the potential for acoustic masking. The potential for masking declines as vessels are kept further away from the whales. Holt (2008) concluded that some fast moving vessels within 200 yards of the whales can decrease the distance at which whales can detect salmon by 75 to 95 percent, while those same vessels at 400 yards reduce the distance at which they can detect salmon by 38 to 90 percent. The expanded no-go zone creates a maximum buffer of over 880 yards from vessels, twice that of the current no-go zone. This large buffer is particularly important for reducing the masking effects on echolocation signals and impacts to foraging from vessel sound.

Parking in the path prohibition. As described above, this is the most common violation of the current

guidelines by commercial whale watch operators. It also carries one of the greatest risks, since it increases the chance of vessel strike. This regulation is consistent with the current guidelines and is therefore already understood by commercial whale watch operators. A prohibition on parking in the path complements the approach regulation, which prohibits approaching within 200 yards of the whales, including by interception. The path regulation provides the best management tool for improving compliance and reducing the risk of vessel strikes and masking from vessels directly in front of the whales. The risk of vessel strikes and masking are both most severe when vessels are directly in front of the whales. By instituting a mandatory regulation in place of a voluntary guideline, we expect increased compliance, particularly by the commercial operators who are most often in the path of the whales.

The proposed regulations for killer whales differ from protective regulations promulgated to protect other marine mammal species in other locations. In each case the development of regulations was based on the biology of the marine mammal species and available information on the nature of the threats. For the Southern Resident killer whales, we have detailed information on killer whale biology, vessel activities around the whales, and vessel effects on the whales' behavior and acoustic foraging activities that informed the selection of the proposed rule.

We did not propose some of the regulatory options suggested in the ANPR and in public comments for several reasons, including, difficulties in enforcing them, changes to infrastructure needed to implement them, or a lack of sufficient science to support them. For example, a speed limit within a certain distance of the whales (*i.e.*, less than 7 knots within 400 yards of the whales) would be difficult to implement and enforce without vessel tracking technology. A permit or certification program would require a large infrastructure to implement. There would also be equity issues in determining who is permitted or certified and who is not. A moratorium on all vessel-based whale watching, or protected areas along all shorelines, would be challenging to enforce and is not supported by available scientific information. Some comments suggested regulatory options such as rerouting shipping lanes or imposing noise level standards, which would unnecessarily restrict some types of vessels rarely in close proximity to the whales.

We considered both benefits and costs in selecting the proposed regulation. The reduction in threats for each element of the regulation package as described above provides a benefit to the whales, as well as to the public who value the whales. Reducing threats to the whales also supports the long-term sustainability of the whale watching industry. The regulations also provide benefits to land-based viewing and may provide benefits to other marine species. In addition to the benefits, we also considered the potential costs of the proposed regulations. To limit some potential costs to vessels or industries rarely in close proximity to the whales, we have proposed several exemptions to the regulations (*i.e.*, ships in shipping lanes, fishing vessels). The exemptions also prevent other potential costs by protecting public safety, allowing for critical government and permitted activities to continue, allowing us to fulfill our treaty trust responsibilities, and avoiding infringement on the use of private land.

The costs of implementing vessel regulations to protect the whales will be borne primarily by the commercial whale watch industry and recreational whale watchers. One cost of the proposed regulations is to increase viewing distance, which may affect the quality of whale watching experiences. An increased viewing distance affects the experience of the whale watch participants and not necessarily the revenue of the industry or companies. While some commercial whale watch operators have suggested that increased viewing distance will affect their revenue, there is information indicating that proximity to the whales is not the most important aspect of whale watching, and that participants value viewing in a manner that respects the whales. We do not anticipate any loss of business or reduction in the number of opportunities for participating in whale watching activities. Another cost is that some commercial and recreational kayakers may need to relocate to alternate launch sites where they are farther from core whale areas. Other impacts to boaters are expected to be minor and include slight deviations of a vessel's path, or relocating to a nearby fishing area in order to comply with proposed regulations.

In developing these regulations, we have determined that current regulations and guidelines are not sufficient to protect endangered Southern Resident killer whales and that additional regulations are necessary to reduce the risk of extinction. While we cannot quantify the reduction in risk of extinction, the perilous status of the Southern Residents compels us to take all reasonable actions to improve their chances of survival and recovery. We proposed the most appropriate regulations to reduce threats posed by vessels, limit costs, and maintain opportunities for the public to participate in whale watching. Of the alternatives considered, we chose a combination of the three with the greatest benefits. All of the options have relatively low socioeconomic and recreation costs. In contrast, the cost of extinction of Southern Residents is incalculable. The proposed regulations maximize net benefits to the whales and the public who value the whales.

Evaluation of the Effectiveness of the Measures

The success of this program is vital to the recovery of the species. Therefore, NMFS will monitor the effectiveness of the final regulations and consider altering the measures or implementing additional measures if appropriate.

References Cited

A complete list of all references cited in this proposed rule can be found on our Web site at *http://www.nwr.noaa.gov/* and is available upon request from the NMFS office in Seattle, Washington (see **ADDRESSES**).

National Environmental Policy Act (NEPA), Regulatory Flexibility Act, and Regulatory Impact Review

NMFS has prepared a draft EA/RIR, pursuant to NEPA (42 U.S.C. 4321 *et seq.*), Executive Order 12866, and an Initial Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), to support this proposed rule. NMFS was the lead agency for the analysis and the U.S. Coast Guard, Washington Department of Fish and Wildlife, and the Department of Fisheries and Oceans, Canada were cooperating agencies. The draft EA/RIR and IRFA contain a full analysis of a No-action alternative, six individual alternatives, and the combined approach we are proposing. There are a number of elements that were common to all of the alternatives analyzed, including the action proposed in this notice. NMFS identified the geographic location, application of regulations and exemptions, as described in the Proposed Rule section of this notice. The elements common to all alternatives are as follows. All regulations would apply to activities in the inland waters of Washington State. The specific protected areas within inland waters are identified. The regulations would apply to all killer whales, not just endangered Southern Residents. The regulations

would not exempt any vessel operators from the harassment or take prohibitions under the MMPA or ESA. The regulations would apply to motorized and non-motorized vessels.

The following exceptions would apply to all regulations:

(1) The regulations would not apply to Federal, State, and local government vessels operating in the course of official duty.

(2) The regulations would not apply to vessels participating in the Vessel Tracking System and operating within the defined Traffic Separation Scheme shipping lanes.

(3) The regulations would not apply to activities, such as scientific research, authorized through a permit issued by the National Marine Fisheries Service or through a similar authorization.

(4) The regulations would not apply to treaty Indian fishing vessels lawfully engaged in actively setting, retrieving, or closely tending fishing gear.

(5) The regulations would not apply to vessel operations necessary for safety to avoid an imminent and serious threat to a person or vessel.

(6) The no-go zone regulation would not apply to personal use of private vessels owned by land owners for access to private property they own located adjacent to the no-go zone.

Additional exceptions considered for individual alternatives are presented under each alternative below.

(1) *Alternative 1:* No Action.The MMPA prohibits take of all marine mammals, including killer whales, and the ESA prohibits the take of listed marine mammals, including endangered Southern Resident killer whales. NMFS promotes responsible viewing through a "Be Whale Wise" education campaign that includes a set of voluntary guidelines designed to help boaters avoid harassment. Under the No-action Alternative, NMFS would not promulgate any new regulations but would continue the education and outreach program with all of the partners involved in Be Whale Wise. The elements common to all alternatives above are specific to regulations and would not apply to the No-action Alternative.

(2) *Alternative 2:* 100 Yard Approach Regulation. Under this alternative, NMFS would promulgate a regulation prohibiting vessels from approaching any killer whale closer than 100 yards. This would include approaching by any means, including by interception (*i.e.,* placing a vessel in the oncoming path of a killer whale, so that the whale surfaces within 100 yards of the vessel, or positioning a vessel so that wind or currents carries the vessel to within 100 yards). In addition to the exceptions listed above, this regulation would not apply to commercial fishing vessels (non-treaty) lawfully engaged in actively setting, retrieving, or closely tending fishing gear.

(3) *Alternative 3:* 200 Yard Approach Regulation. This alternative is the same as Alternative 2, but the rule would prohibit vessel approaches within 200 yards of all killer whales.

(4) *Alternative 4:* Protected Area—Current Voluntary No-go Zone. Under this alternative, NMFS would formalize the current voluntary no-go zone along the west side of San Juan Island. This includes a ½ mile (800 meter)-wide zone centered on the Lime Kiln lighthouse and a ¼ mile (400 meter)-wide zone from Eagle Point to Mitchell Point. No vessels would be permitted inside the protected area from May 1 through September 30. This area would not overlap with shipping lanes or ferry routes and would not be directly adjacent to the Canadian border.

(5) *Alternative 5:* Protected Area—Expanded No-go Zone. Under this alternative, NMFS would formalize a no-go zone along the west side of San Juan Island. The area would extend ½ mile (800 meter) offshore from Eagle Point to Mitchell Point. This is a larger, but simplified area compared to the no-go zone described under Alternative 4. No vessels would be permitted inside the protected area from May 1 through September 30. This area would not overlap with shipping lanes or ferry routes and would not be directly adjacent to the Canadian border.

(6) *Alternative 6:* Speed Limit of 7 Knots Within 400 Yards of Killer Whales. Under this alternative, NMFS would promulgate a regulation prohibiting vessels from operating at speeds over 7 knots when within 400 yards of killer whales. In addition to the exceptions listed above, this regulation would not apply to commercial fishing vessels lawfully engaged in actively setting, retrieving, or closely tending fishing gear.

(7) *Alternative 7:* Keep Clear of the Whales' Path. Under this alternative, NMFS would promulgate a regulation requiring vessels to keep clear of the whales' path. Violations of this regulation would include intercepting or placing a vessel in the oncoming path of a killer whale or positioning a vessel so that wind or currents carry the vessel into the path of the whales. In addition to the exceptions listed above, this regulation would not apply to commercial fishing vessels lawfully engaged in actively setting, retrieving, or closely tending fishing gear.

(8) *Proposed Action.* Under this alternative, NMFS would promulgate a package of regulations incorporating Alternatives 3, 5, and 7 as described in the Proposed Rule section of this notice.

The Draft EA/RIR addresses impacts to the eight resources that could be affected by the proposed action or alternatives: Marine Mammals, Listed and Non-listed Salmonids, Socioeconomics, Recreation, Environmental Justice, Noise, Aesthetics, and Transportation. Impacts to some resources were avoided or reduced by exempting certain classes of vessels or activities under all of the alternatives.

The draft EA/RIR/IRFA, and supporting documents are available for review and comment and can be found on the NMFS Northwest Region Web site at *http://www.nwr.noaa.gov/.*

Clarity of This Proposed Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by any of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible.

Public Comments

You may submit information and comments concerning this Proposed Rule, the draft EA, or any of the supporting documents by any one of several methods (see **ADDRESSES**). Materials related to this notice can be found on the NMFS Northwest Region Web site at *http://www.nwr.noaa.gov/.* We will consider all comments and information received during the comment period in preparing a final rule.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment

to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Public Hearings

Based on the level of interest in killer whales and whale watching, public meetings have been scheduled for September 30, 2009, 7–9 p.m. at the Seattle Aquarium, Seattle, WA and October 5, 2009, 7–9 p.m. in The Grange Hall, Friday Harbor, WA. Requests for additional public hearings must be made in writing (see **ADDRESSES**) by August 28, 2009.

Required Determinations

Paperwork Reduction Act

This proposed rule will not impose any new requirements for collection of information that requires approval by the OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) This proposed rule will not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations.

Executive Order (E.O.) 12866 Regulatory Planning and Review

This Proposed Rule was determined to be significant for purposes of E.O. 12866. It was reviewed by the Office of Management and Budget and other interested Federal agencies.

E.O. 12988 Civil Justice Reform

We have determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of E.O. 12988. We issue protective regulations pursuant to provisions in the ESA and MMPA using an existing approach that improves the clarity of the regulations and minimizes the regulatory burden of managing ESA listings while retaining necessary and advisable protections to provide for the conservation of threatened and endangered species.

E.O. 13175 Consultation and Coordination With Indian Tribal Governments

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and co-management agreements. These differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. E.O. 13175 outlines the responsibilities of the Federal Government in matters affecting tribal interests. During our scoping process we provided the opportunity for all interested tribes to comment on the need for regulations and discuss any concerns they may have. We will continue to coordinate with the tribes on management and conservation actions related to this species.

E.O. 13132 Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt State law, or impose substantial direct compliance costs on State and local governments (unless required by statute). The Washington Department of Fish and Wildlife was a cooperating agency on the NEPA analysis to support development of proposed regulations. A Federal regulation under the MMPA and ESA prohibiting approach within 200 yards of killer whales is more protective than the State regulation HB 2514 prohibiting approach within 100 yards of Southern Resident killer whales and therefore may preempt the State regulation. Inclusion of the Washington Department of Fish and Wildlife as a cooperating agency satisfies the consultation requirements of E.O. 13132.

E.O. 13211 Energy Supply, Distribution, or Use

E.O. 13211 requires agencies to prepare a statement of energy effects when undertaking certain actions. According to E.O. 13211, "significant energy action" means any action by an agency that is expected to lead to the promulgation of a final rule or regulation that is a significant regulatory action under E.O. 12866 and is likely to have a significant adverse effect on the supply, distribution, or use of energy. We have determined that the energy effects of this final rule are unlikely to exceed the energy impact thresholds identified in E.O. 13211 and that this rulemaking is, therefore, not a significant energy action. No statement of energy effects is required.

List of Subjects in 50 CFR Part 224

Endangered marine and anadromous species.

Dated: July 21, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 224 is proposed to be amended as follows:

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

1. The authority citation for 50 CFR part 224 continues to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C 1361 *et seq.*

2. A new § 224.103(e) is added to read as follows:

§ 224.103 Special prohibitions for endangered marine mammals.

* * * * *

(e) *Protective regulations for killer whales in Washington*—(1) *Prohibitions.* The following restrictions apply to all motorized, non-motorized, and self-propelled vessels, regardless of size, transiting the navigable waters of Washington State and subject to the jurisdiction of the United States, which includes all U.S. marine waters in Clallam, Jefferson, King, Kitsap, Island, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston, and Whatcom counties east of a line connecting Cape Flattery, Washington (48°23 10* N./124°43 32* W.), Tatoosh Island, Washington (48°23 30* N./124°44 12* W.); and Bonilla Point, British Columbia (48°35 30* N./124°43 00* W.) and south of the U.S. Canadian border. Marine waters include all waters relative to a contiguous shoreline relative to the mean high water line and cutting across the mouths of all rivers and streams. Except as noted in paragraph (e)(2) of this section it is unlawful to:

(i) Cause a vessel to approach within 200 yards (182.8 m) of any killer whale. This includes approaching a killer whale by any means, including by interception (i.e., by placing a vessel in the path of an oncoming killer whale, so that the whale surfaces within 200 yards (182.8 m) of the vessel, or by positioning a vessel so that the prevailing wind or currents carries the vessel to within 200 yards (182.8 m), or being towed by another vessel).

(ii) Enter the no-go zone located along the west side of San Juan Island extending ½ mile (805 m) offshore from Mitchell Point south to Eagle Point (Figure 1) at any time during the period May 1 through September 30 each year. The boundary of the no-go zone consists of straight lines connecting all of the following points in the order stated:

Beginning at 123°10′120.19″ W, 48°34′20.67″ N;

123°11′6.71″ W, 48°34′20.67″ N;
123°11′13.99″ W, 48°34′8.12″ N;
123°11′15.83″ W, 48°33′56.15″ N;
123°11′13.14″ W, 48°33′38.80″ N;
123°11′2.91″ W, 48°33′22.97″ N;
123°10′55.44″ W, 48°33′7.97″ N;
123°10′40.63″ W, 48°32′51.10″ N;
123°10′21.06″ W, 48°32′37.62″ N;
123°10′21.38″ W, 48°32′28.70″ N;
123°10′30.04″ W, 48°32′12.73″ N;
123°10′29.69″ W, 48°32′2.48″ N;
123°10′26.63″ W, 48°31′45.92″ N;
123°10′18.54″ W, 48°31′29.48″ N;
123°10′5.34″ W, 48°31′16.07″ N;
123°09′48.51″ W, 48°30′55.15″ N;
123°09′45.22″ W, 48°30′46.38″ N;
123°09′31.91″ W, 48°30′32.53″ N;
123°09′19.56″ W, 48°30′20.03″ N;
123°09′13.97″ W, 48°30′16.86″ N;
123°09′0.19″ W, 48°30′3.30″ N;
123°08′44.56″ W, 48°29′55.15″ N;
123°08′40.54″ W, 48°29′46.62″ N;
123°08′20.43″ W, 48°29′31.99″ N;
123°07′54.54″ W, 48°29′26.65″ N;
123°07′40.69″ W, 48°29′16.29″ N;
123°07′24.74″ W, 48°29′8.36″ N;
123°06′50.12″ W, 48°29′3.18″ N;
123°06′34.81″ W, 48°28′59.48″ N;
123°06′25.50″ W, 48°28′54.57″ N;
123°06′11.47″ W, 48°28′39.55″ N;
123°05′56.57″ W, 48°28′31.18″ N;
123°05′39.99″ W, 48°28′27.84″ N;
123°05′6.86″ W, 48°28′31.27″ N;
123°04′38.40″ W, 48°28′25.94″ N;
123°04′32.58″ W, 48°28′15.11″ N;
123°04′18.39″ W, 48°28′1.25″ N;
123°04′1.07″ W, 48°27′54.14″ N;
123°03′37.56″ W, 48°27′47.83″ N;
123°03′18.18″ W, 48°27′32.24″ N;
123°02′58.60″ W, 48°27′25.48″ N;
123°02′53.75″ W, 48°27′21.01″ N;
123°02′34.37″ W, 48°27′7.24″ N;
123°05′13.06″ W, 48°27′3.05″ N;

and connecting back to 123°10′120.19″ W, 48°34′20.67″ N along the shoreline of San Juan Island, following the mean high water line, with the exception of the opening to False Bay, where the shoreward boundary is defined by a straight line connecting 123°04′28.33″ W, 48°28′54.84″ N and 123°04′4.01″ W, 48°28′46.89″ N.

(iii) Position a vessel in the path of any killer whale at any point located within 400 yards of the whale. This includes intercepting a killer whale by positioning a vessel so that the prevailing wind or currents carry the vessel into the path of the whale.

(2) *Exceptions.* The following exceptions apply to this section:

(i) The prohibitions of paragraph (e)(1) of this section do not apply to:

(A) Federal, State, or local government vessels operating in the course of official duty;

(B) Vessels participating in the U.S. Coast Guard and Canadian Coast Guard Co-operative Vessel Traffic Service and constrained to Traffic Separation Scheme shipping lanes;

(C) Vessels engaged in an activity, such as scientific research, authorized through a permit issued by the National Marine Fisheries Service under part 222, subpart C, of this chapter (General Permit Procedures) or through a similar authorization;

(D) Vessels lawfully engaged in treaty Indian fishing that are actively setting, retrieving, or closely tending fishing gear; or

(E) Vessel operations necessary to avoid an imminent and serious threat to a person.

(ii) The prohibition of paragraph (e)(1)(ii) of this section does not apply to privately owned vessels that transit the no-go zone for the sole purpose of gaining access to privately owned shoreline property located immediately adjacent to the no-go zone. For purposes of this section, "transit" means that a vessel crosses the no-go zone by the shortest possible safe route, on a straight line course as consistent with International Regulations for Preventing Collisions at Sea, 1972 (COLREGS), while making way by means of a source of power at all times, other than drifting by means of the prevailing water current or weather conditions.

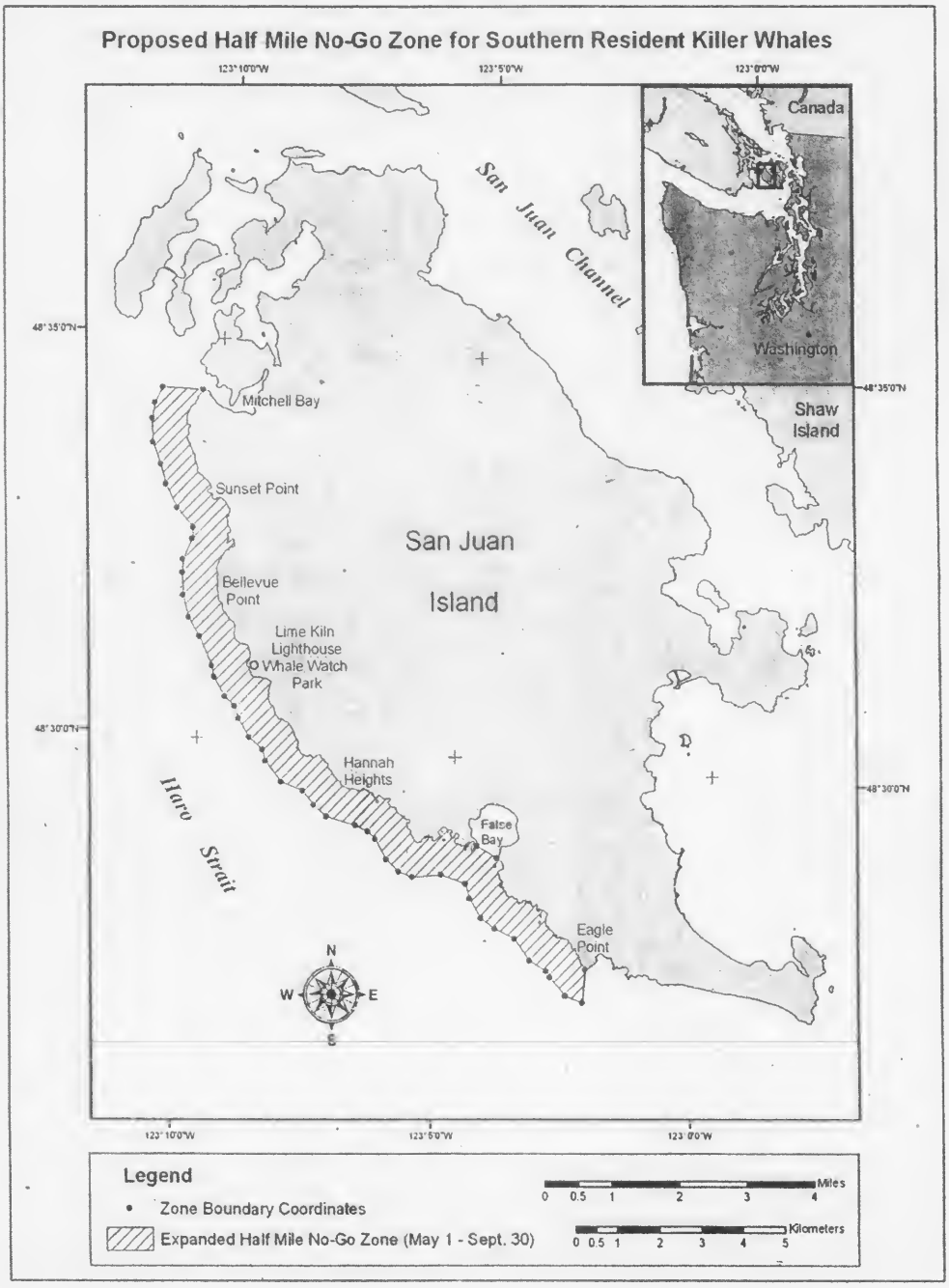
(iii) The prohibitions of paragraphs (e)(1)(i) and (e)(1)(iii) of this section do not apply to non-treaty commercial fishing vessels lawfully engaged in actively setting, retrieving, or closely tending fishing gear.

(3) *Affirmative defense.* In connection with any action alleging a violation of the prohibitions of paragraph (e)(1) of this section, any person claiming the benefit of any exception listed in paragraph (e)(2) of this section shall have a defense where the person can demonstrate that the exception is applicable and was in force, and that the person fully complied with the exception at the time of the alleged violation. This defense is an affirmative defense that must be raised, pleaded, and proven by the proponent.

3. In Part 224, Figure 1 is added to read as follows.

BILLING CODE 3510–22–P

Figure 1 of Part 224 -- Proposed No-go Zone.



[FR Doc. E9–18075 Filed 7–28–09; 8:45 am]

BILLING CODE 3510–22–C

Notices

Federal Register
Vol. 74, No. 144
Wednesday, July 29, 2009

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

July 24, 2009.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Grain Inspection, Packers and Stockyard Administration

Title: Survey of Customers of the Official Grain Inspection and Weighing System.

OMB Control Number: 0580–0018.

Summary of Collection: The United States Grain Standards Act, as amended (7 U.S.C. 71–87) (USGSA), and the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621–1627) (AMA), authorizes the Secretary of the United States Department of Agriculture to establish official inspection, grading, and weighing programs for grains and other agricultural commodities. Under the USGSA and AMA, Grain Inspection, the Packers and Stockyard Administration's (GIPSA) Federal Grain Inspection Service (FGIS) offers inspecting, weighing, grading, quality assurance, and certification services for a user-fee to facilitate the efficient marketing of grain, oilseeds, rice, lentils, dry peas, edible beans, and related agricultural commodities in the global marketplace. The goal of FGIS and the official inspection, grading, and weighing system is to provide timely, high-quality, accurate, consistent, and professional service that facilitates the orderly marketing of grain and related commodities. FGIS will collect information using a survey.

Need and Use of the Information: FGIS is seeking feedback from customers to evaluate the services provided by the official inspection, grading, and weighing programs. FGIS will collect information to determine where and to what extent services are satisfactory, and where and to what extent they can be improved. The information will be shared with other managers and program leaders who will be responsible for making any necessary improvements at the office/agency, program, and project level.

Description of Respondents: Business or other for-profit; State, Local or Tribal Government.

Number of Respondents: 1,100.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 118.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E9–18083 Filed 7–28–09; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Secure Rural Schools Resource Advisory Committees

AGENCY: Office of the Secretary, USDA.

ACTION: Notice of Intent to Establish a Charter.

SUMMARY: The Secretary of Agriculture intends to establish the Eastern Region Resource Advisory Committees (RACs) pursuant to the Emergency, Economic Stabilization Act of 2008, Energy Improvement and Extension Act of 2008, and Tax Extenders and Alternate Minimum Tax Relief Act of 2008 (Pub. L. 110–343) passed into law as an amendment to the Secure Rural School and Community Self-Determination Act of 2000 (Pub. L. No. 106–393) on October 3, 2008. The Eastern Region Resource Advisory Committees are being established to review forest projects (Title II) and to recommend the proposed projects they deem to have merit to the Secretary of Agriculture for approval.

FOR FURTHER INFORMATION CONTACT: Rick Alexander, Payments to States Coordinator, at *ralexander@fs.fed.us,* (202) 205–1780, or at USDA Forest Service, 1400 Independence Avenue, SW., Mailstop 1111, Washington, DC 20250. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (5 U.S.C. App.II), notice is hereby given that the Secretary of the U.S. Department of Agriculture intends to establish the Eastern Region Resource Advisory Committees. The Secretary has determined the work of these committees are in the public interest and relevant to the duties of the Department of Agriculture. The purpose of these committees is to improve

collaborative relationships and to provide advice and recommendations to the Forest Service consistent with the reauthorization of the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. No. 106–393) (Act) as amended by the Emergency, Economic Stabilization Act of 2008, and Tax Extenders and Alternate Minimum Tax Relief Act of 2008 (Pub. L. No. 110–343). The committees are as follow:

1. White Mountain Resource Advisory Committee (Maine)
2. Hiawatha Resource Advisory Committee (Michigan)
3. Gogebic Resource Advisory Committee (Michigan)
4. Huron-Manistee Resource Advisory Committee (Michigan)
5. Ontonagon Resource Advisory Committee (Michigan)
6. Chippewa Resource Advisory Committee (Minnesota)
7. Superior Resource Advisory Committee (Minnesota)
8. Eleven Point Resource Advisory Committee (Missouri)
9. Allegheny Resource Advisory Committee (Pennsylvania)
10. West Virginia Resource Advisory Committee (West Virginia)
11. Chequamegon-Nicolet Resource Advisory Committee (Wisconsin)
12. Nicolet Resource Advisory Committees (Wisconsin)

These Advisory Committees shall consist of 15 members appointed by the Secretary of Agriculture or the Secretary's designee and shall consist of members who represent the interests of the following three categories (16 U.S.C. 500 § 205 (d)):

(A) Five persons that—
- i. Represent organized labor or non-timber forest product harvester group,
- ii. Represent developed outdoor recreation, off-highway vehicle users, or commercial recreation activities,
- iii. Represent energy and mineral development, or commercial or recreational fishing interests,
- iv. Represent the commercial timber industry, or
- v. Hold Federal grazing permits or other land use permits or represent non-industrial private forest land owners, within the area for which the committee is organized.

(B) Five persons that represent—
- i. Nationally recognized environmental organizations,
- ii. Regionally or locally recognized environmental organizations,
- iii. Dispersed recreational activities,
- iv. Archaeological and historical interests, or
- v. Nationally or regionally wild horse and burro interest groups, wildlife or hunting organizations, or watershed associations.

(C) Five persons that—
- i. Hold State elected office or their designee,
- ii. Hold county or local elected office,
- iii. Represent American Indian tribes within or adjacent to the area for which the committee is organized,
- iv. Are school officials or teachers, or
- v. Represent the affected public-at-large.

Equal opportunities practices, in line with USDA policies, will be followed in all appointments to the advisory committees. To ensure that the recommendations of the Committee have taken into account the needs of the diverse groups served by the Department, membership includes, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and person with disabilities.

Dated: June 26, 2009.

Pearlie Reed,

Assistant Secretary of Administration.

[FR Doc. E9–17977 Filed 7–28–09; 8:45 am]

BILLING CODE 3410–11–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of meeting.

DATE AND TIME: Friday, August 7, 2009; 9:30 a.m. EDT.

PLACE: 624 9th St., NW., Room 540, Washington, DC 20425.

Meeting Agenda

This meeting is open to the public.

I. Approval of Agenda.
II. Approval of Minutes of July 10, 2009 Meeting.
III. Announcements.
IV. Management and Operations.
- Scheduling of Monthly Teleconferences

V. Program Planning.
- Approval of 2009 Statutory Report
- Approval of Concept Paper for 2010 Statutory Report Topic
- Consideration of a Follow-up Letter to the Department of Justice Regarding Dismissal of Voter Intimidation Charges from an Incident in Philadelphia During the 2008 Election
- Consideration of a Letter to the President Regarding Racial and Gender Preferences in Proposed Health Care Legislation
- Update on Status of Document Request to Government Agencies Regarding their Civil Rights Enforcement Activities
- Update on Possible Commission Public Service Announcements

VI. Adjourn.

CONTACT PERSON FOR FURTHER INFORMATION: Lenore Ostrowsky, Acting Chief, Public Affairs Unit, (202) 376–8591. TDD: (202) 376–8116.

Persons with a disability requiring special services, such as an interpreter for the hearing impaired, should contact Pamela Dunston at least seven days prior to the meeting at 202–376–8105. TDD: (202) 376–8116.

Dated: July 27, 2009.

David Blackwood,

General Counsel.

[FR Doc. E9–18222 Filed 7–27–09; 4:15 pm]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Order No. 1634]

Expansion of Foreign–Trade Zone 49, Newark, New Jersey, Area

Pursuant to its authority under the Foreign–Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign–Trade Zones Board (the Board) adopts the following Order:

Whereas, the Port Authority of New York and New Jersey, grantee of Foreign–Trade Zone 49, submitted an application to the Board for authority to expand its zone to include a site at the Heller Industrial Park (Site 11) in Edison, New Jersey, within the Newark/New York Customs and Border Protection port of entry (FTZ Docket 5–2009, filed 2/6/09);

Whereas, notice inviting public comment was given in the **Federal Register** (74 FR 7392–7393, 2/17/09) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendation of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to expand FTZ 49 is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, and to the Board's standard 2,000–acre activation limit for

the overall general–purpose zone project, and further subject to a sunset provision that would terminate authority on July 31, 2014, for Site 11 if no activity has occurred under FTZ procedures before that date.

Signed at Washington, DC, this 16th day of July 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign–Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E9–18078 Filed 7–28–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XP90

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery off the Southern Atlantic States and Coral and Coral Reefs Fishery in the South Atlantic; Exempted Fishing Permit

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

ACTION: Notice of receipt of an application for an exempted fishing permit; request for comments.

SUMMARY: NMFS announces the receipt of an application for an exempted fishing permit (EFP) from Mr. M. Scott Baker, Jr., on behalf of North Carolina Sea Grant in Wilmington, North Carolina. If granted, the EFP would authorize Mr. Baker to collect, with certain conditions, seven species of reef fish in Federal waters, off the coast of North Carolina, South Carolina, Georgia, and Florida. The specimens will be used to evaluate electronic monitoring as a tool to characterize fishing activities of the commercial snapper-grouper vertical hook-and-line (bandit) fleet, and to help determine the age-size structure of discarded fish caught as bycatch in this fishery.

DATES: Comments must be received no later than 5 p.m., Eastern standard time, on August 28, 2009.

ADDRESSES: Comments on the application may be sent via fax to 727–824–5308 or mailed to: Nikhil Mehta, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701. Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *0648–XP90@noaa.gov*. Include in the subject line of the e-mail document the following text: Comment on M. Scott Baker, Jr. EFP Application. The application and related documents are available for review upon written request to the address above or the by request via the contact numbers listed under **FOR FURTHER INFORMATION CONTACT** below.

FOR FURTHER INFORMATION CONTACT: Nikhil Mehta, 727–824–5305; fax 727–824–5308.

SUPPLEMENTARY INFORMATION: The EFP is requested under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C 1801 *et seq.*), and regulations at 50 CFR 600.745(b) concerning exempted fishing.

This action involves activities covered by regulations implementing the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region. The applicant requires authorization to collect a maximum of 300 sub-legal fish of each of the following species: red snapper, vermilion snapper, gag, red grouper, greater amberjack, black sea bass, and red porgy.

Specimens would be collected in Federal waters off the coast of North Carolina, South Carolina, Georgia, and Florida. The project proposes to use vertical hook-and-line (bandit) gear to make the collections. Samples would be collected year-round for a period of 2 years, commencing on the date of issuance of the EFP.

The overall intent of the project is to work cooperatively with fishermen to evaluate electronic video monitoring as a tool to characterize fishing activities of the commercial snapper-grouper vertical hook-and-line (bandit) fleet. Biological data would also be collected from the samples to characterize the age-size structure of the frequently encountered species discarded in this fishery.

NMFS finds this application warrants further consideration. Based on a preliminary review, NMFS intends to issue the requested EFP, pending receipt of public comments, as per 50 CFR 600.745(b)(3)(i). Possible conditions the agency may impose on this permit, if it is indeed granted, include but are not limited to, a prohibition on conducting research within marine protected areas, marine sanctuaries, special management zones, or artificial reefs without additional authorization. Additionally, NMFS may prohibit the possession of Nassau or goliath grouper, and require any sea turtles taken incidentally during the course of fishing or scientific research activities to be handled with due care to prevent injury to live specimens, observed for activity, and returned to the water. Periodic updates on the project findings will be required every 6 months, to be submitted to NMFS and reviewed by the South Atlantic Fishery Management Council. A final decision on issuance of the EFP will depend on NMFS's review of public comments received on the application, consultations with the affected states, the Mid- and South Atlantic Fishery Management Councils, and the U.S. Coast Guard, as well as a determination that it is consistent with all applicable laws.

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

Dated: July 23, 2009.

James P. Burgess,

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

[FR Doc. E9–17923 Filed 7–28–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Docket 30–2009]

Foreign–Trade Zone 072 - Indianapolis, Indiana, Application for Subzone, Brightpoint North America L.P. (Cell Phone Kitting and Distribution), Plainfield, Indiana

An application has been submitted to the Foreign–Trade Zones Board (the Board) by the Indianapolis Airport Authority, grantee of FTZ 72, requesting special–purpose subzone status for the cell phone kitting and distribution facilities of Brightpoint North America L.P. (Brightpoint), located in Plainfield, Indiana. The application was submitted pursuant to the provisions of the Foreign–Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on July 21, 2009.

The Brightpoint facilities (1,470 employees, 60,000,000 unit capacity) consist of 2 sites on 52.92 acres: *Site 1* (34.34 acres) is located at 501 Airtech Parkway, Plainfield; and *Site 2* (18.58 acres) is located at 1251 South Perry Road; Plainfield. The facilities are used for cell phone kitting, testing, programming, packaging, warehousing and distribution. Components and materials sourced from abroad (representing 70–90% of the value of the finished product) include: decals; plastic holsters; carrying cases; straps; power supplies; batteries; line telephone sets; videophones; base stations; microphones; speakers; headsets;

telephone answering machines; video recorders; transceivers; monitors and projectors; key pads; thermionic, cold cathode or photocathode tubes; and cables (duty rate ranges from 0 to 17.6%).

FTZ procedures could exempt Brightpoint from customs duty payments on the foreign components used in export production. The company anticipates that some 5 percent of the plant's shipments will be exported. On its domestic sales, Brightpoint would be able to choose the duty rates during customs entry procedures that apply to cell phone sets (duty–free) for the foreign inputs noted above. FTZ designation would further allow Brightpoint to realize logistical benefits through the use of weekly customs entry procedures. Customs duties also could possibly be deferred or reduced on foreign status production equipment. The request indicates that the savings from FTZ procedures would help improve the plant's international competitiveness.

In accordance with the Board's regulations, Elizabeth Whiteman of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is September 28, 2009. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to October 13, 2009.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign–Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, DC 20230–0002, and in the "Reading Room" section of the Board's website, which is accessible via www.trade.gov/ftz.

For further information, contact Elizabeth Whiteman at *Elizabeth__Whiteman@ita.doc.gov* or (202) 482–0473.

Dated: July 21, 2009.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E9–18094 Filed 7–28–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce ("the Department") has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings with June anniversary dates. In accordance with the Department's regulations, we are initiating those administrative reviews. The Department also received a request to defer the initiation of an administrative review for one antidumping duty order.

EFFECTIVE DATE: July 29, 2009.

FOR FURTHER INFORMATION CONTACT: Sheila E. Forbes, Office of AD/CVD Operations, Customs Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482–4697.

SUPPLEMENTARY INFORMATION:

Background

The Department has received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of various antidumping and countervailing duty orders and findings with June anniversary dates. Please note that in the initiation notice that published on June 24, 2009 (74 FR 30052) the Department listed incorrect case numbers for the antidumping duty orders on Ball Bearings and Parts Thereof from France, Germany, Italy, Japan and the United Kingdom. The correct case numbers for these cases are as follows: France (A–427–801), Germany (A–428–801), Italy (A–475–801), Japan (A–588–804), and the United Kingdom (A–412–801).

Notice of No Sales

Under 19 CFR 351.213(d)(3), the Department may rescind a review where there are no exports, sales, or entries of subject merchandise during the respective period of review ("POR") listed below. If a producer or exporter named in this initiation notice had no exports, sales, or entries during the POR, it should notify the Department within 30 days of publication of this notice in the **Federal Register**. The Department will consider rescinding the review only if the producer or exporter, as appropriate, submits a properly filed and timely statement certifying that it had no exports, sales, or entries of subject merchandise during the POR. All submissions must be made in accordance with 19 CFR 351.303 and are subject to verification in accordance with section 782(i) of the Tariff Act of 1930, as amended ("the Act"). Six copies of the submission should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230. Further, in accordance with 19 CFR 351.303(f)(1)(i), a copy of each request must be served on every party on the Department's service list.

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews, the Department intends to select respondents based on U.S. Customs and Border Protection ("CBP") data for U.S. imports during the POR.

We intend to release the CBP data under Administrative Protective Order ("APO") to all parties having an APO within five days of publication of this initiation notice and to make our decision regarding respondent selection within 20 days of publication of this **Federal Register** notice. The Department invites comments regarding the CBP data and respondent selection within 10 calendar days of publication of this **Federal Register** notice.

Separate Rates

In proceedings involving non–market economy ("NME") countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991), as amplified by *Final Determination of Sales at Less Than*

Fair Value: Silicon Carbide from the People's Republic of China, 59 FR 22585 (May 2,1994). In accordance with the separate–rates criteria, the Department assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate–rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate–rate application or certification, as described below. For these administrative reviews, in order to demonstrate separate–rate eligibility, the Department requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on the Department's website at http://www.trade.gov/ia on the date of publication of this **Federal Register**. In responding to the certification, please follow the "Instructions for Filing the Certification" in the Separate Rate Certification. Separate Rate Certifications are due to the Department no later than 30 calendar days of publication of this **Federal Register** notice. The deadline and requirement for submitting a Certification applies equally to NME–owned firms, wholly foreign–owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

Entities that currently do not have a separate rate from a completed segment of the proceeding [1] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. In addition, companies that received a separate rate in a completed segment of the proceeding that have subsequently made changes, including, but not limited to, changes to corporate structure, acquisitions of new companies or facilities, or changes to their official company name,[2] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. The Separate Rate Application will be available on the Department's website at http://ia.ita.doc.gov/nme/nme–sep-rate.html on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Status Application, refer to the instructions contained in the application. Separate Rate Status Applications are due to the Department no later than 60 calendar days of publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Status Application applies equally to NME–owned firms, wholly foreign–owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

For exporters and producers who submit a separate–rate status application or certification and subsequently are selected as mandatory respondents, these exporters and producers will no longer be eligible for separate–rate status **UNLESS** they respond to all parts of the questionnaire as mandatory respondents.

Initiation of Reviews

In accordance with section 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than June 30, 2010. Also in accordance with 19 CFR 351.213(c), we deferring for one year the initation of the May 1, 2008 through April 30, 2009 administrative review of the antidumping duty order on Ball Bearings and Parts Thereof from Germany with respect to one exporter.

Antidumping Duty Proceedings	Period to be Reviewed
JAPAN: Ball Bearings and Parts Thereof.	
A–588–804	5/1/08 - 4/30/09
International Aero Engines AG (IAE)[3].	
JAPAN: Certain Large Diameter Carbon and Alloy Seamless, Standard, Line, and Pressure Pipe.	
A–588–850	6/1/08 - 5/31/09
JFE Steel Corporation.	
Nippon Steel Corporation.	
NKK Tubes.	
Sumitomo Metal Industries, Ltd..	
JAPAN: Hot–Rolled Carbon Steel Flat Products.	
A–588–846	6/1/08 - 5/31/09
Nippon Steel Corporation.	
SPAIN: Chlorinated Isocyanurates.	
A–469–814	6/1/08 - 5/31/09
Aragonesas Industrias y Energia S.A..	
SOUTH KOREA: Polyethylene Terephthalate Film, Sheet, and Strip.	
A–580–807	6/1/08 - 5/31/09
Kolon Industries, Inc..	
TAIWAN: Certain Stainless Steel Butt–Weld Pipe Fittings.	
A–583–816	6/1/08 - 5/31/09
Ta Chen Stainless Pipe Co., Ltd..	
THE PEOPLE'S REPUBLIC OF CHINA: Certain Polyester Staple Fiber[4].	
A–570–905	6/1/08 - 5/31/09
Far Eastern Industries, Ltd. (Shanghai) and Far Eastern Polychem Industries.	
Ningbo Dafa Chemical Fiber Co., Ltd..	
Cixi Sansheng Chemical Fiber Co., Ltd..	
Cixi Santai Chemical Fiber Co., Ltd..	
Cixi Waysun Chemical Fiber Co., Ltd..	
Hangzhou Best Chemical Fiber Co., Ltd..	
Hangzhou Hanbang Chemical Fibre Co., Ltd..	

[1] Such entities include entities that have not participated in the proceeding, entities that were preliminarily granted a separate rate in any currently incomplete segment of the proceedings (*e.g.*, an ongoing administrative review, new shipper review, etc.) and entities that lost their separate rate in the most recently complete segment of the proceeding in which they participated.

[2] Only changes to the official company name, rather than trade names, need to be addressed via a Separate Rate Application. Information regarding new trade names may be submitted via a Separate Rate Application.

Antidumping Duty Proceedings	Period to be Reviewed
Hangzhou Huachuang Co., Ltd..	
Hangzhou Sanxin Paper Co., Ltd..	
Hangzhou Taifu Textile Fiber Co., Ltd..	
Jiaxing Fuda Chemical Fibre Factory.	
Nantong Luolai Chemical Fiber Co., Ltd..	
Nan Yang Textiles Co., Ltd..	
Suzhou PolyFiber Co., Ltd..	
Xiamen Xianglu Chemical Fiber Co..	
Zhaoqing Tifo New Fiber Co., Ltd..	
Zhejiang Anshun Pettechs Fibre Co., Ltd..	
Zhejiang Waysun Chemical Fiber Co., Ltd..	
Dragon Max Trading Development.	
Xiake Color Spinning Co., Ltd..	
Jiangyin Hailun Chemical Fiber Co., Ltd..	
Hyosung Singapore PTE Ltd..	
Jiangyin Changlong Chemical Fiber Co., Ltd..	
Ma Ha Company, Ltd..	
Jiangyin Huahong Chemical Fiber Co., Ltd..	
Jiangyin Mighty Chemical Fiber Co., Ltd..	
Huvis Sichuan.	
THE PEOPLE'S REPUBLIC OF CHINA: Chlorinated Isocyanurates[5].	
A–570–898	6/1/08 - 5/31/09
Hebei Jiheng Chemical Company, Ltd..	
Zhucheng Taisheng Chemical Co., Ltd..	
THE PEOPLE'S REPUBLIC OF CHINA: Folding Metal Tables and Chairs[6].	
A–570–868	6/1/08 - 5/31/09
New–Tec Integration Co., Ltd..	
New–Tec Integration (Xiamen) Co., Ltd..	
Feili Furniture Development Ltd. Quanzhou City[7]	6/1/07 - 5/31/08
Feili Furniture Development Co., Ltd.	6/1/08 - 5/31/09
Feili Group (Fujian) Co., Ltd..	
Feili (Fujian) Co., Ltd..	
THE PEOPLE'S REPUBLIC OF CHINA: Silicon Metal[8].	
A–570–806	6/1/08 - 5/31/09
Shanghai Jinneng International Trade Co., Ltd..	
Datong Jinneng Industrial Silicon Co., Inc..	
Jiangxi Gangyuan Silicon Industry Company, Ltd..	
THE PEOPLE'S REPUBLIC OF CHINA: Tapered Roller Bearings and Parts Thereof, Finished and Unfinished[9].	
A–570–601	6/1/08 - 5/31/09
Hubei New Torch Science & Technology Co., Ltd..	
Peer Bearing Company - Changshan.	
Countervailing Duty Proceeding.	
None..	
Suspension Agreements.	
None..	
Deferral of Initiation of Administrative Review.	
GERMANY: Ball Bearings and Parts Thereof.	
A–428–801	5/1/08 - 4/30/09
Gebrueder Reinfurt GmbH & Co., KG ("GRW")[10].	

[3] Company inadvertently omitted from intiation notice published on June 24, 2009 (74 FR 30052).

[4] If one of the above-named companies does not qualify for a separate rate, all other exporters of Certain Polyester Staple Fiber from the People's Republic of China (≥PRC≥) who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[5] If one of the above-named companies do not qualify for a separate rate, all other exporters of Chlorinated Isocyanurates from the PRC who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[6] If one of the above-named companies do not qualify for a separate rate, all other exporters of Folding Metal Tables and Chairs from the PRC who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[7] The Department deferred the 06/01/2007-05/31/2008 administrative review for the Feili group of companies for one year on 07/30/2008 (73 FR 44220). The Department is now initiating this review one year later along with the 06/01/2008-05/31/2009 administrative review.

[8] If one of the above-named companies does not qualify for a separate rate, all other exporters of Silicon Metal from the PRC who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[9] If one of the above-named companies do not qualify for a separate rate, all other exporters of Tapered Roller Bearings and Part Thereof, Finished and Unfinished from the PRC who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[10] In the initiation notice that published on 06/24/2009 (74 FR 30052), we inadvertently overlooked GRW's request for deferral of initiation for the 2008-2009 administrative review. We hereby correct this oversight and are deferring the initiation of this review, pursuant to 19 CFR 351.213(c).

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping duty order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset

review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine, consistent with *FAG Italia v.United States*, 291 F.3d 806 (Fed. Cir. 2002), as appropriate, whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures*, 73 FR 3634 (January 22, 2008). Those procedures apply to administrative reviews included in this notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.*, the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).

These initiations and this notice are in accordance with section 751(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1675(a)), and 19 CFR 351.221(c)(1)(i).

Dated: July 23, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–18093 Filed 7–28–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

National Estuarine Research Reserve System

AGENCY: Estuarine Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

ACTION: Notice of public comment period for the Revised Management Plan for the North Carolina National Estuarine Research Reserve.

SUMMARY: Notice is hereby given that the Estuarine Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce is announcing a thirty day public comment period on the North Carolina National Estuarine Research Reserve Management Plan Revision.

Four sites in coastal North Carolina comprise the North Carolina National Estuarine Research Reserve; Currituck Banks, Rachel Carson, Masonboro Island and Zeke's Island. Currituck Banks, Rachel Carson and Zeke's Island were designated in 1985, and Masonboro Island was designated in 1991, as the North Carolina National Estuarine Research Reserve pursuant to Section 315 of the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1461. The reserve has been operating in partnership with the North Carolina Department of Environment and Natural Resources under a management plan approved in 1998. Pursuant to 15 CFR Section 921.33(c), a state must revise their management plan every five years. The submission of this plan fulfills this requirement and sets a course for successful implementation of the goals and objectives of the reserve. An increase in the vertical placement of the program on the state organizational chart, a new administrative facility, and updated programmatic objectives are notable revisions to the 1998 approved management plan.

The revised management plan outlines the administrative structure; the education, stewardship, and research goals of the reserve; and the plans for future land acquisition and facility development to support reserve operations. This management plan describes how the strengths of the reserve will focus on several areas relevant to coastal North Carolina, including coastal population increase, altered land use, storm water runoff and eutrophication, invasive species, tropical and coastal storm impacts and sea level rise.

Since 1998, the reserve has added a coastal training program that delivers science-based information to key decision makers in North Carolina; has completed a site profile that characterizes the reserve; and has expanded the monitoring, stewardship and education programs. A new administrative building (2007) has been built to support the growth of reserve programs.

FOR FURTHER INFORMATION CONTACT: Amy Clark at (301) 563–1137 or Laurie McGilvray at (301) 563–1158 of NOAA's National Ocean Service, Estuarine Reserves Division, 1305 East-West Highway, N/ORM5, 10th floor, Silver Spring, MD 20910. For copies of the North Carolina Management Plan revision, visit *http://www.nccoastalreserve.net/*.

Dated: July 23, 2009.

Donna Wieting,

Deputy Director, Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration.

[FR Doc. E9–18087 Filed 7–28–09; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

National Estuarine Research Reserve System

AGENCY: Estuarine Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

ACTION: Notice of Public Comment Period for the Revised Management Plan for the Hudson River National Estuarine Research Reserve.

SUMMARY: Notice is hereby given that the Estuarine Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce is announcing a thirty day public comment period on the Hudson River National Estuarine Research Reserve Management Plan Revision.

Four sites along the Hudson River comprise the Hudson River National Estuarine Research Reserve; Piermont Marsh, Iona Island, Tivoli Bays, and Stockport Flats. The Hudson River National Estuarine Research Reserve was designated in 1982 pursuant to Section 315 of the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1461. The reserve has been operating in partnership with the New York State Department of Environmental Conservation under a management plan approved in 1993. Pursuant to 15 CFR 921.33(c), a state must revise their management plan every five years. The submission of this plan fulfills this requirement and sets a course for successful implementation of the goals and objectives of the reserve. New facilities and updated programmatic objectives are notable revisions to the 1993 approved management plan.

The revised management plan outlines the administrative structure; the education, stewardship, and research goals of the reserve; and the plans for future land acquisition and facility development to support reserve operations. This management plan describes how the strengths of the reserve will focus on several areas relevant to the Hudson River, including sea level rise and other effects of climate change, development pressure, and invasive species.

Since 1993, the reserve has added an estuary training program that delivers science-based information to key decision makers in New York; has completed a site profile that characterizes the reserve; and has expanded the monitoring, stewardship and education programs. A new headquarters building, the Norrie Point Environmental Center, (2007) has been built to support the growth of reserve programs.

FOR FURTHER INFORMATION CONTACT: Amy Clark at (301) 563–1137 or Laurie McGilvray at (301) 563–1158 of NOAA's National Ocean Service, Estuarine Reserves Division, 1305 East-West Highway, N/ORM5, 10th floor, Silver Spring, MD 20910. For copies of the Hudson River Management Plan revision, visit: *http://hrnerr.org.*

Dated: July 23, 2009.

Donna Wieting,

Deputy Director, Office of Ocean and Coastal Resource Management National Oceanic and Atmospheric Administration.

[FR Doc. E9–18072 Filed 7–28–09; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–886

Polyethylene Retail Carrier Bags from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests from interested parties, the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on polyethylene retail carrier bags (PRCBs) from the People's Republic of China (PRC). The review covers Rally Plastics Co., Ltd. The period of review (POR) is August 1, 2007, through July 31, 2008.

We have preliminarily determined that sales have been made at prices below normal value by the company subject to this review. If these preliminary results are adopted in our final results of administrative review, we will instruct U.S. Customs and Border Protection to assess antidumping duties on all appropriate entries.

We invite interested parties to comment on these preliminary results. Parties who submit comments in this review are requested to submit with each argument (1) a statement of the issue and (2) a brief summary of the argument.

EFFECTIVE DATE: July 29, 2009.

FOR FURTHER INFORMATION CONTACT: Catherine Cartsos or Minoo Hatten, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–1757 or (202) 482–1690, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 9, 2004, the Department published the antidumping duty order on PRCBs from the PRC. See *Antidumping Duty Order: Polyethylene Retail Carrier Bags From the People's Republic of China*, 69 FR 48201 (August 9, 2004). In accordance with 19 CFR 351.213(b), the Department received requests for a review of Rally Plastics Co., Ltd. (Rally). In accordance with 19 CFR 351.213(g) and 19 CFR 351.221(b) we published a notice of initiation of administrative review. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 73 FR 56795 (September 30, 2008).

Since initiation of the review, we have extended the due date for completion of these preliminary results from May 3, 2009, to July 22, 2009. See *Polyethylene Retail Carrier Bags From Malaysia, Thailand, and the People's Republic of China: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Reviews*, 74 FR 17633 (April 16, 2009), and *Polyethylene Retail Carrier Bags From the People's Republic of China: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review*, 74 FR 32884 (July 9, 2009).

We are conducting this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The merchandise subject to the antidumping duty order is PRCBs, which may be referred to as t–shirt sacks, merchandise bags, grocery bags, or checkout bags. The subject merchandise is defined as non–sealable sacks and bags with handles (including drawstrings), without zippers or integral extruded closures, with or without gussets, with or without printing, of polyethylene film having a thickness no greater than 0.035 inch (0.889 mm) and no less than 0.00035 inch (0.00889 mm), and with no length or width shorter than 6 inches (15.24 cm) or longer than 40 inches (101.6 cm). The depth of the bag may be shorter than 6 inches but not longer than 40 inches (101.6 cm).

PRCBs are typically provided without any consumer packaging and free of charge by retail establishments, *e.g.*, grocery, drug, convenience, department, specialty retail, discount stores, and restaurants, to their customers to package and carry their purchased products. The scope of the order excludes (1) polyethylene bags that are not printed with logos or store names and that are closeable with drawstrings made of polyethylene film and (2) polyethylene bags that are packed in consumer packaging with printing that refers to specific end–uses other than packaging and carrying merchandise from retail establishments, *e.g.*, garbage bags, lawn bags, trash–can liners.

As a result of changes to the Harmonized Tariff Schedule of the United States (HTSUS), imports of the subject merchandise are currently classifiable under statistical category 3923.21.0085 of the HTSUS. Furthermore, although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Verification

As provided in section 782(i) of the Act, we have verified information provided by Rally using standard verification procedures including on–site inspection of the manufacturer's facilities and the examination of relevant sales and financial records. Our verification results are outlined in the public version of the verification report on file in the Central Records Unit, Room 1117 of the main Department building.

NME Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as a non–market-economy (NME) country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. See *Brake Rotors From the*

People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review, 71 FR 66304 (November 14, 2006). None of the parties to this proceeding has contested such treatment. Accordingly, we have calculated normal value in accordance with section 773(c) of the Act, which applies to NME countries.

Separate Rates

In proceedings involving NME countries, the Department has a rebuttable presumption that all companies within the country are subject to government control and thus should be assigned a single antidumping duty rate. It is the Department's policy to assign all exporters of merchandise subject to review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. Exporters can demonstrate this independence through the absence of both *de jure* and *de facto* government control over export activities. The Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) (*Sparklers*), as developed further in the *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (*Silicon Carbide*). If the Department determines that a company is wholly foreign–owned or located in a market economy, however, then a separate–rate analysis is not necessary to determine whether it is independent from government control.

Rally submitted information that demonstrates it is a wholly foreign–owned company located in Hong Kong. See Rally's November 26, 2008, Section A Response, *e.g.*, articles of association, business license, and export license. Therefore, we have not conducted a separate–rate analysis of Rally.

Surrogate Country

When the Department analyzes imports from an NME country, section 773(c)(1) of the Act directs it to base normal value, in most circumstances, on the NME producer's factors of production (FOP), valued in a surrogate market–economy country or countries the Department considers to be appropriate. In accordance with section 773(c)(4) of the Act, in valuing the FOPs, the Department shall use, to the extent possible, the prices or costs of FOPs in one or more market–economy countries that are at a level of economic development comparable to that of the NME country and significant producers of comparable merchandise.

On December 22, 2008, the Department's Office of Policy issued a memorandum identifying India as being at a level of economic development comparable to the PRC for the POR. See Memorandum entitled "Request for a List of Surrogate Countries for an Administrative Review of the Antidumping Duty Order on Polyethylene Retail Carrier Bags from the People's Republic of China" dated December 22, 2008. In the Department's March 16, 2009, letter to interested parties requesting surrogate–country and surrogate–value comments, the Department indicated that India is among the countries comparable to the PRC in terms of overall economic development. In addition, based on publicly available information placed on the record (*i.e.*, export data), India is a significant producer of the subject merchandise. See Memorandum entitled "Polyethylene Retail Carrier Bags from the People's Republic of China: Selection of a Surrogate Country," dated July 22, 2009.

Furthermore, India has been the primary surrogate country in determinations for past segments of this proceeding and the Polyethylene Retail Carrier Bag Committee [1] submitted surrogate values based on Indian data that are contemporaneous with the POR, giving further credence to the use of India as a surrogate country. See, *e.g.*, *Polyethylene Retail Carrier Bags From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 52282 (September 9, 2008). The sources of the surrogate values are discussed under the "Normal Value" section below and in the Memorandum entitled "Polyethylene Retail Carrier Bags from the People's Republic of China: Surrogate–Values Memorandum," dated July 22, 2009 (Surrogate–Value Memorandum).

U.S. Price

A. Export Price

In accordance with section 772(a) of the Act, we based U.S. price on the export price (EP) for sales to the United States because the first sale to an unaffiliated party was made before the date of importation and the use of constructed EP was not otherwise warranted. We calculated EP for Rally based on the prices to unaffiliated purchasers in the United States.

In accordance with section 772(c) of the Act, we first added adjustments to the gross unit price and then deducted from the price to unaffiliated purchasers, where appropriate, foreign inland freight, brokerage and handling, international freight, and marine insurance. See Memorandum from Catherine Cartsos to the File, "Administrative Review of Polyethylene Retail Carrier Bags from the People's Republic of China: Preliminary Results Memorandum for Rally Plastics Co., Ltd.," dated July 22, 2009 (Analysis Memorandum). Consistent with *Certain Orange Juice from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 46584 (August 11, 2008) (*OJ Brazil Final*), and accompanying Issues and Decision Memorandum at Comment 7, we have incorporated freight–related revenues as offsets to movement expenses because they relate to the movement and transportation of subject merchandise. We also incorporated packing–related revenue as an offset to packing expenses because these items relate to the packing of subject merchandise (see *OJ Brazil Final*).

For certain transactions, Rally requested an adjustment for remuneration for samples. Because Rally has not adequately supported its claim, we have denied this claim for an adjustment to U.S. price. See Analysis Memorandum.

B. Surrogate Values for Expenses Incurred in the PRC for U.S. Sales

Rally reported that, for certain U.S. sales, foreign inland freight was provided by an NME vendor or it paid for freight using an NME currency. In such instances, we based the deduction of these charges on surrogate values. We valued foreign inland freight with the surrogate value for truck freight. For foreign brokerage and handling, marine insurance, and international freight, Rally reported using market–economy vendors and stated that it paid these expenses in a market–economy currency. Where movement services were provided by a market–economy vendor and the respondent paid in a market–economy currency, we deducted the actual cost per kilogram of the freight. See Surrogate–Value Memorandum.

Normal Value

A. Methodology

Section 773(c)(1)(B) of the Act provides that the Department shall determine the normal value using an

[1] Consisting of Hilex Poly Company, LLC, and the Superbag Corporation (collectively, the petitioners).

FOP methodology if the merchandise is exported from an NME country and the information does not permit the calculation of normal value using home–market prices, third–country prices, or constructed value under section 773(a) of the Act. The Department bases normal value on the FOPs because the presence of government controls on various aspects of NME countries renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies. See *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind in Part*, 70 FR 39744 (July 11, 2005) (unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of 2003–2004 Administrative Review and Partial Rescission of Review*, 71 FR 2517 (January 17, 2006)).

In accordance with 19 CFR 351.408(c)(1), when a producer sources an input from a market–economy country and pays for it in a market–economy currency, the Department will normally value the factor using the actual price paid for the input. See 19 CFR 351.408(c)(1); see also *Lasko Metal Products v. United States*, 43 F.3d 1442, 1445–1446 (CAFC 1994) (affirming the Department's use of market–based prices to value certain FOPs). Where a portion of the input is purchased from a market–economy supplier and the remainder from an NME supplier, the Department will normally use the price paid for the inputs sourced from market–economy suppliers to value all of the input, provided the volume of the market–economy inputs as a share of total purchases from all sources is "meaningful." See *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27366 (May 19, 1997), and *Shakeproof v. United States*, 268 F.3d 1376, 1382 (CAFC 2001). See also 19 CFR 351.408(c)(1).

The Department has instituted a rebuttable presumption that market–economy input prices are the best available information for valuing an input when the total volume of the input purchased from all market–economy sources during the POR exceeds 33 percent of the total volume of the input purchased from all sources during the same period. In such cases, unless case–specific facts provide adequate grounds to rebut the Department's presumption, the Department will use the weighted–average market–economy purchase price to value the input.

Alternatively, when the volume of an NME firm's purchases of an input from market–economy suppliers during the period is equal to or below 33 percent of its total volume of purchases of the input during the period but where these purchases are otherwise valid and there is no reason to disregard the prices, the Department will weight–average the weighted–average market–economy purchase price with an appropriate surrogate value according to their respective shares of the total volume of purchases unless case–specific facts provide adequate grounds to rebut the presumption. When a firm has made market–economy input purchases that may have been dumped or subsidized, are not *bona fide*, or are otherwise not acceptable for use in a dumping calculation, the Department will exclude them from the numerator of the ratio to ensure a fair determination of whether valid market–economy purchases meet the 33–percent threshold. See *Antidumping Methodologies: Market Economy Inputs, Expected Non–Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716, 61717–19 (October 19, 2006). Also, where the quantity of the input purchased from market–economy suppliers is insignificant, the Department will not rely on the price paid by an NME producer to a market–economy supplier because it cannot have confidence that a company could fulfill all its needs at that price. *Id.*

We have found in other proceedings that Indonesia, South Korea, and Thailand maintain broadly available, non–industry-specific export subsidies. Therefore, it is reasonable to infer that all exports to all markets from these countries may be subsidized and it is our practice to disregard input prices from such countries. See *China Nat'l Mach. Import & Export Corp. v. United States*, 293 F. Supp. 2d 1334, 1336 (CIT 2003), aff'd 104 Fed. Appx. 183 (Fed. Cir. 2004), and *Certain Cut–to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 70 FR 12651 (March 15, 2005), and accompanying Issues and Decision Memorandum at Comment 4. The legislative history reflects the Department's practice that, in making its determination as to whether input values may be subsidized, the Department does not conduct a formal investigation; rather, the Department bases its decision on information that is available to it at the time it makes its determination. See H.R. Rep. 100–576, at 590 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1623–24.

The FOPs for PRCBs include the following elements: (1) quantities of raw materials employed; (2) hours of labor required; (3) amounts of energy and other utilities consumed; (4) representative capital and selling costs; (5) packing materials. We used the FOPs reported by the respondent for materials, labor, energy, by–products, and packing.

B. FOP Valuation

In accordance with section 773(c) of the Act, we calculated normal value based on the FOPs reported by the respondent for the POR. To calculate normal value, we multiplied the reported per–unit factor–consumption rates by publicly available surrogate values. In selecting the surrogate values, we considered the quality, specificity, and contemporaneity of the data.

During the POR, Rally purchased some of the inputs exclusively from market–economy suppliers in a market–economy currency. We valued these inputs at the weighted–average market–economy purchase price the respondent reported. Consistent with our practice as described above, we have disregarded all market–economy input prices from all countries that we suspect subsidize the input price. For further analysis, see Surrogate–Value Memorandum.

During the POR, Rally purchased some of the inputs from market–economy suppliers in an market–economy currency and from NME suppliers in NME currency. Accordingly, we have weight–averaged the market–economy input price with the appropriate surrogate value. Consistent with our practice as described above, we have disregarded all market–economy input prices from all countries that we suspect subsidize the input price. For further analysis, see Surrogate–Value Memorandum.

During the POR, Rally purchased certain inputs exclusively from NME suppliers in an NME currency. We have valued these inputs using surrogate values from a market–economy country that is at a level of economic development comparable to that of the PRC and a significant producer of comparable merchandise. For further analysis, see Surrogate–Value Memorandum.

It is the Department's practice to calculate price–index adjustors to inflate or deflate, as appropriate, surrogate values that are not contemporaneous with the POR using the wholesale price index for the subject country. See, *e.g., Certain Preserved*

Mushrooms from the People's Republic of China: Preliminary Results of the Antidumping Duty New Shipper Review, 71 FR 38617, 38619 (July 7, 2006) (unchanged in *Certain Preserved Mushrooms from the People's Republic of China: Final Results of the Antidumping Duty New Shipper Review*, 71 FR 66910 (November 17, 2006)). Therefore, where we could not obtain publicly available information contemporaneous with the POR, we adjusted surrogate values using the Wholesale Price Index (WPI) for India as published in the *International Financial Statistics* of the International Monetary Fund.

Except as indicated below, we valued raw–material inputs using the weighted–average unit import values derived from the Monthly Statistics of the Foreign Trade of India, as published by the Directorate General of Commercial Intelligence and Statistics of the Ministry of Commerce and Industry, Government of India in the World Trade Atlas (WTA), available at http://www.gtis.com/wta.htm. Consistent with our practice as described above, for those surrogate values based upon Indian import statistics, we disregarded input prices from all countries that we suspect subsidize the input price.

We have also disregarded Indian import data concerning raw materials from countries that we have previously determined to be NME countries as well as imports originating from "unspecified" countries because we could not be certain that they were not from either an NME country or a country with generally available export subsidies. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Chlorinated Isocyanurates From the People's Republic of China*, 69 FR 75294, 75300 (December 16, 2004), (unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates From the People's Republic of China*, 70 FR 24502 (May 10, 2005)). For a comprehensive list of the sources and data we used to determine the surrogate vales for the FOPs, by–products, and the surrogate financial ratios for factory overhead, selling, general and administrative expenses (SG&A), and profit, see Surrogate–Value Memorandum.

Where appropriate, we adjusted the Indian import prices by including freight costs to make them delivered prices. Specifically, we added to the Indian import prices a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the production factory or the distance from the nearest seaport to the production factory where appropriate. This adjustment is in accordance with the decision by the Court of Appeals for the Federal Circuit in *Sigma Corp. v. United States*, 117 F.3d 1401, 1407–1408 (CAFC 1997). Where we did not use Indian import data as the basis of the surrogate value, we calculated inland freight based on the reported distance from the supplier to the factory. We valued truck–freight expenses using a per–unit average rate calculated from data on the following Web site: http://www.infobanc.com/logistics/logtruck.htm. See Surrogate–Value Memorandum. The logistics section of this Web site contains inland–freight truck rates between many large Indian cities. Because this value is not contemporaneous with the POR, we deflated the rate using the WPI. See Surrogate–Value Memorandum.

We valued electricity using price data for small, medium, and large industries as published by the Central Electricity Authority of the Government of India in its publication titled Electricity Tariff & Duty and Average Rates of Electricity Supply in India, dated July 2006. These electricity rates represent actual country–wide, publicly available information on tax–exclusive electricity rates charged to industries in India. Because the rates are not contemporaneous with the POR, we deflated the values using the WPI. See Surrogate–Value Memorandum.

For direct labor, indirect labor, and packing labor, consistent with 19 CFR 351.408(c)(3), we used the PRC regression–based wage rate as reported on the Import Administration web site. See *Corrected 2007 Calculation of Expected Non–Market Economy Wages*, 73 FR 27795, 27796 (May 14, 2008) (available at http://ia.ita.doc.gov/wages). The source of these wage–rate data on the Import Administration website is the Yearbook of Labour Statistics 2003, ILO (Geneva: 2003), Chapter 5B: Wages in Manufacturing. The years of the reported wage rates range from 2003 through 2004. Because this regression–based wage rate does not separate the labor rates into different skill levels or types of labor, we have applied the same wage rate to all skill levels and types of labor reported by the respondent. See Surrogate–Value Memorandum.

To value factory overhead, SG&A, and profit values, we used information from M/S Synthetic Packers Private Ltd. for the fiscal year ending March 31, 2008. From this information, we were able to determine factory overhead as a percentage of the total raw materials, labor and energy (ML&E) costs, SG&A as a percentage of ML&E plus overhead (*i.e.*, cost of manufacture), and profit as a percentage of the cost of manufacture plus SG&A. See Surrogate–Value Memorandum.

For packing materials, we used the per–kilogram values obtained from the WTA and made adjustments to account for freight costs incurred between the PRC suppliers and the respondent's production facilities. See Surrogate–Value Memorandum.

Preliminary Results of the Review

As a result of our review, we preliminarily determine that a weighted–average dumping margin of 17.95 percent exists for Rally for the period August 1, 2007, through July 31, 2008.

Comments

We will disclose the calculations used in our analysis to parties in this review within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Interested parties may submit publicly available information to value FOPs no later than 20 days after the date of publication of these preliminary results of review. See 19 CFR 351.301(c)(3)(ii). Any interested party may request a hearing within 30 days of the date of publication of this notice. See 19 CFR 351.310. Interested parties who wish to request a hearing or to participate in a hearing if a hearing is requested must submit a written request to the Assistant Secretary for Import Administration within 30 days of the date of publication of this notice. Requests should contain the following: (1) the party's name, address, and telephone number; (2) the number of participants; (3) a list of issues to be discussed. See 19 CFR 351.310(c).

Issues raised in the hearing will be limited to those raised in the case briefs. See 19 CFR 351.310(c). Case briefs from interested parties may be submitted not later than 30 days after the date of publication of this notice of preliminary results of review. See 19 CFR 351.309(c)(1)(ii). Rebuttal briefs from interested parties, limited to the issues raised in the case briefs, may be submitted not later than five days after the time limit for filing the case briefs or comments. See 19 CFR 351.309(d)(1). If requested, any hearing will be held two days after the scheduled date for submission of rebuttal briefs. See 19 CFR 351.310(d). Parties who submit case briefs or rebuttal briefs in this proceeding are requested to submit with each argument a statement of the issue, a summary of the arguments not exceeding five pages, and a table of

statutes, regulations, and cases cited. See 19 CFR 351.309(c)(2).

The Department will issue the final results of this administrative review, including the results of its analysis of issues raised in any such written briefs or at the hearing, if held, not later than 120 days after the date of publication of this notice. See section 751(a)(3)(A) of the Act.

Assessment Rates

The Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated importer–specific (or customer–specific) assessment rates for merchandise subject to this review.

For these preliminary results, we divided the total dumping margins (calculated as the difference between normal value and EP) for each of Rally's importers or customers by the total number of units the exporter sold to that importer or customer. We will direct CBP to assess the resulting per–unit dollar amount against each unit of merchandise in each of that importer's/customer's entries during the review period.

We intend to issue assessment instructions to CBP 15 days after the date of publication of the final results of review.

Cash–Deposit Requirements

The following cash deposit requirements will be effective upon publication of the notice of final results of the administrative review for all shipments of PRCBs from the PRC entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Act: (1) for subject merchandise exported by Rally, the cash–deposit rate will be that established in the final results of review; (2) for previously reviewed or investigated companies not listed above that have separate rates, the cash–deposit rate will continue to be the company–specific rate published for the most recent period; (3) for all other PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash–deposit rate will be the PRC–wide rate of 77.57 percent; (4) for all non–PRC exporters of subject merchandise, the cash–deposit rate will be the rate applicable to the PRC exporter that supplied that exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and this notice are in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: July 22, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–18086 Filed 7–28–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before September 28, 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 Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: July 23, 2009.

Angela C. Arrington,

Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: New.

Title: William D. Ford Federal Direct Loan Program (DL) Regulations—Servicemembers Civil Relief Act (SCRA).

Frequency: On Occasion.

Affected Public: Individuals or household; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 4,500.

Burden Hours: 743.

Abstract: The William D Ford Federal Direct Loan Program proposed regulations revise current regulations in areas of program administration. The proposed regulations assure the Secretary that the integrity of the program is protected from fraud and misuse of program funds. The proposed regulations would provide that upon a loan holder's receipt of a written request from a borrower and a copy of the borrower's military orders, the maximum interest rate that may be charged on Stafford loans made prior to entering active military duty is six percent while on active duty.

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 4056. 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. E9–18117 Filed 7–28–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before September 28, 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 Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: July 23, 2009.

Angela C. Arrington,

Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: New.

Title: Federal Family Educational Loan Program—Servicemembers Civil Relief Act (SCRA).

Frequency: On Occasion.

Affected Public: Individuals or household.

Reporting and Recordkeeping Hour Burden:

Responses: 13,550.

Burden Hours: 2,236.

Abstract: The Federal Family Educational Loan Program proposed regulations revise current regulations in areas of program administration and assure the Secretary that program integrity is protected from fraud and misuse of program funds. The proposed regulations would provide that upon a loan holder's receipt of a written request from a borrower and a copy of the borrower's military orders, the maximum interest rate that may be charged on Stafford loans made prior to entering active military duty is six percent while on active duty.

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 4055. 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. E9–18115 Filed 7–28–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–445–000]

Riviera Drilling & Exploration Company, Complainant, v. SG Interests I, Ltd and Gunnison Energy Corporation, Respondents; Notice of Complaint

July 21, 2009.

Take notice that on July 16, 2009, Riviera Drilling & Exploration Company (Complainant) filed a formal complaint against SG Interests I, Ltd and Gunnison Energy Corporation (Respondents) under section 7 of the Natural Gas Act (NGA) and Rule 206 of the Commission's Rule of Practice and Procedure alleging that Respondents' proposed Bull Mountain Pipeline Project is subject to the Commission's NGA jurisdiction and requires that Respondents seek Commission approval under Parts 157 and 284 of the Commission's regulations prior to beginning construction.

The Complainant certifies that copies of the complaint were served on the contacts for SG Interests I, Ltd and Gunnison Energy Corporation.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the

Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 10, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–17984 Filed 7–28–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL09–65–000]

Californians for Renewable Energy, Inc. (CARE), Complainant v. California Public Utilities Commission, Southern California Edison, and the California Independent System Operator Corporation, Respondent; Notice of Complaint

July 22, 2009.

Take notice that on July 16, 2009, Californians for Renewable Energy, Inc. (CARE) submitted a complaint against the California Public Utilities Commission (CPUC), Southern California Edison Company (SCE), and the California Independent System Operator Corporation (CASIO) regarding the SCE Application for a Certificate of Public Convenience and Necessity Concerning the Tehachapi Renewable Transmission Project and SCE's Tehachapi amendment to its open access transmission tariff under Docket No. ER08–375–000.

CARE states that copies of this filing were served upon Respondents and other interested parties.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 11, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–17987 Filed 7–28–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. TS09–9–000;EL99–4–001]

City of Santa Clara, CA; Notice of Filing

July 21, 2009.

Take notice that on July 13, 2009, The City of Santa Clara, California, doing business as Silicon Valley Power (SVP) filed a request for continued waiver of the Commission's standards of conduct requirements, pursuant to the Commission's May 21, 2009 Order, *Material Changes in Facts Underlying Waiver of Order No. 889 and Part 358 of the Commission's Regulations*, 127 FERC 61,141 (2009) and consistent with the waiver granted previously to SVP by the Commission on January 19, 1999 in Docket No. EL99–4–000, *M–S–R Public Power Agency, et al.*, 86 FERC 61,031 (1999).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 19, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–17983 Filed 7–28–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL09–64–000]

City of Vernon, CA; Notice of Filing

July 22, 2009.

Take notice that on July 15, 2009, The City of Vernon (Vernon), California filed a Petition for Declaratory Order, pursuant to Rule 207 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, 18 CFR 385.207 (2008). The City of Vernon, California request the Commission to determine that when Vernon's Transmission Revenue Requirement (TRR) is incorporated into and reviewed

as a component of the California Independent System Operator Corporation Transmission Access Charge (TAC), it will not affect the TAC's status as a just and reasonable rate and to the extent necessary, Vernon's Transmission Owner Tariff (TO) provisions remain consistent with the TO Tariff provisions of other Participating Transmission Owners. Vernon also request that the filing fee for this petition be waived and any waivers necessary to accept Vernon's TRR and TO Tariff are granted.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 14, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–17986 Filed 7–28–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL08–48–002]

Braintree Electric Light Department, Hingham Municipal Lighting Plant, Hull Municipal Lighting Plant, Mansfield Municipal Electric Department, Middleborough Gas & Electric Department, Taunton Municipal Light Plant v. ISO New England Inc.; Notice of Filing

July 22, 2009.

Take notice that on July 17, 2009, the ISO New England, Inc. filed its Report of Compliance, pursuant to the Commission July 18, 2008 Order, *Braintree Light Dept., et al.* v. *ISO New England Inc.*, 124 FERC 61,061 (2008) and section 1907 of the Commission's rule of Practice and Procedure, 18 CFR 385.1907 (2008).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 7, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–17988 Filed 7–28–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–1462–000]

Lake Benton Power Partners II, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

July 22, 2009.

This is a supplemental notice in the above-referenced proceeding of Lake Benton Power Partners II, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC, 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is August 11, 2009.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–17985 Filed 7–28–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Post–2010 Resource Pool, Pick-Sloan Missouri Basin Program—Eastern Division

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of proposed allocation.

SUMMARY: Western Area Power Administration (Western), Upper Great Plains Region, a Federal power marketing agency of the Department of Energy (DOE), hereby announces the Post–2010 Resource Pool Proposed Allocation of Power. The Energy Planning and Management Program (Program) provides for project-specific resource pools and allocating power from these pools to new preference customers and other appropriate purposes as determined by Western. Western, in accordance with the Program, is proposing an allocation of Federal power from the Pick-Sloan Missouri Basin Program—Eastern Division (P–SMBP—ED) beginning January 1, 2011. Western intends to use power previously returned to Western for this proposed allocation. Western will prepare and publish the Final Allocation of Power in the **Federal Register** after all public comments on the proposed allocation have been considered.

DATES: Entities interested in commenting on the proposed allocation of power must submit written comments to Western's Upper Great Plains Regional Office. Western must receive written and/or electronic comments by 4 p.m., MDT, on September 28, 2009. Western reserves the right to not consider any comments that are received after the prescribed date and time.

Western will hold a public information forum and a public comment forum (immediately following the information forum) on the proposed allocation of power. The public information and public comment forums will be held on September 17, 2009, at 9 a.m., CDT, in Sioux Falls, South Dakota.

ADDRESSES: Submit written comments regarding this proposed allocation of Western power to Robert J. Harris, Regional Manager, Upper Great Plains Region, Western Area Power Administration, 2900 4th Avenue North, Billings, MT 59101–1266. Comments on the proposed allocation may also be faxed to (406) 247–7408 or e-mailed to *UGPPost2010@wapa.gov.*

The public information and comment forums will be held at the Holiday Inn, 100 West 8th Street, Sioux Falls, South Dakota.

FOR FURTHER INFORMATION CONTACT: John A. Pankratz, Public Utilities Specialist, Upper Great Plains Region, Western Area Power Administration, 2900 4th Avenue North, Billings, MT 59101–1266, telephone (406) 247–7392, e-mail *pankratz@wapa.gov.*

SUPPLEMENTARY INFORMATION: In accordance with the Program, (60 FR 54151, October 20, 1995), Western published the proposed procedures and call for applications in the **Federal Register** on October 15, 2008 (73 FR 61109). Western held a public information and comment forum on November 20, 2008, to accept oral and written comments on the proposed procedures and call for applications. Applications for power were accepted at Western's Upper Great Plains Regional Office until close of business on January 13, 2009. On May 5, 2009, Western published the final procedures in the **Federal Register** (74 FR 20697). The proposed allocation of power published here is the result of applications received during the call for applications. Applications were subjected to the Final Post–2010 Resource Pool Allocation Procedures.

Past resource pools under the Program were established from withdrawals of power from existing customers. Subject to the size of the final allocation, Western does not intend to make a withdrawal of power from existing customers for the proposed Post–2010 Resource Pool allocation. Instead of withdrawal, Western, in accordance with 10 CFR 905.32(e)(2) of the Program, intends to use power previously placed under contract and subsequently returned to Western through termination of that contract (Returned Power) for this proposed allocation. The amount of Returned Power is sufficient for the proposed allocation; therefore, withdrawal from existing customers may not be required. Any Returned Power not used to establish the Post–2010 Resource Pool for the final allocation will continue to be used to reduce the need to acquire firming resources and other uses recognized under the Program.

Availability of Information

Documents developed or retained by Western in developing this Post–2010 Resource Pool will be available for inspection and copying at the Upper Great Plains Regional Office in Billings, Montana. Written comments received on the proposed allocation will be available for viewing at *http://www.wapa.gov/ugp/Post2010/default.htm* after the close of the comment period.

Proposed Allocation of Power

Western received four applications from entities interested in an allocation of power from the Post–2010 Resource Pool. Review of the applications indicated that three of the four applicants did not qualify under the Final Post–2010 Resource Pool Allocation Procedures. The proposed allocation of power for the new eligible customer was calculated using the Final Post–2010 Resource Pool Allocation Procedures. The proposed summer allocation is 24.84413 percent of peak summer load; the proposed winter allocation is 35.98853 percent of peak winter load as defined in the Post–1985 Marketing Plan criteria, under the Final Post–2010 Resource Pool Allocation Procedures. The proposed allocation of power for the new eligible customer and the load upon which this proposed allocation is based is as follows:

New customer	2007 Summer Season peak load (kilowatts)	2007 Winter Season peak load (kilowatts)	Proposed Post–2010 power allocation	
			Summer (kilowatts)	Winter (kilowatts)
City of New Ulm, MN	1,626	1,301	404	468

If the P–SMBP–ED marketable resource is adjusted in the future, the proposed allocation of power may be adjusted accordingly.

Entities interested in commenting on the proposed allocation of power must submit written comments to Western's Upper Great Plains Regional Office as described in the Addresses Section above or provide comments at the Public Comment Forum described in the Dates Section above. Western will respond to comments received on the proposed allocation of power and will publish its notice of final allocation following the end of the public comment period.

Post–2010 Resource Pool Procedures Requirements

Environmental Compliance

In compliance with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321–4347 (2007)); the Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508); and DOE NEPA Implementing Procedures and Guidelines (10 CFR part 1021), Western has determined that this action is categorically excluded from further NEPA review.

Dated: July 22, 2009.

Timothy J. Meeks,

Administrator.

[FR Doc. E9–18073 Filed 7–28–09; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2009–0295; FRL–8936–7]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Inclusion of Delaware and New Jersey in the Clean Air Interstate Rule (Renewal); EPA ICR No. 2184.03, OMB Control No. 2060–0584

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before August 28, 2009.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2009–0295, to (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to *a-and-r-docket@epamail.epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Air and Radiation Docket and Information Center, Mailcode 28221T, 1200 Pennsylvania Ave., NW, Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Karen VanSickle, Clean Air Markets Division, Office of Air and Radiation, (6204J), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–343–9220; fax number: 202–343–2361; e-mail address: *vansickle.karen@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 11, 2009 (74 FR 21802), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2009–0295, which is available for online viewing at *http://www.regulations.gov*, or in-person viewing at the Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Air and Radiation Docket is 202–566–1742.

Use EPA's electronic docket and comment system at *http://www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or on paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov*.

Title: Inclusion of Delaware and New Jersey in the Clean Air Interstate Rule (Renewal).

ICR numbers: EPA ICR No. 2184.03, OMB Control No. 2060–0584.

ICR Status: This ICR is scheduled to expire on July 31, 2009. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The United States (U.S.) Environmental Protection Agency (EPA) promulgated a rule to add the States of Delaware and New Jersey to the States that are subject to the Clean Air Interstate Rule (CAIR) because of their

$PM_{2.5}$ impact on other States and to require that Delaware and New Jersey report all of the emissions-related data required by CAIR. (Delaware and New Jersey are already affected by ozone-related requirements in CAIR.) These emissions data reporting requirements include reporting requirements and combine these reporting requirements with existing requirements from the Consolidated Emissions Reporting Rule (CERR), the Emission Reporting Requirements for Ozone State Implementation Plan (SIP) Revisions Relating to Statewide Budgets for NO_X Emissions to Reduce Regional Transport of Ozone (NO_X SIP Call), the Acid Rain Program under Title IV of the CAA Amendments of 1990, and the Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule, CAIR). Each of these four existing requirements has an approved ICR in place. The current ICRs are: for the CERR, EPA ICR 0916.12 (OMB 2060–0088), for the NO_X SIP Call, EPA ICR 1857.04 (OMB 2060–0445), for the Acid Rain Program, EPA ICR 1633.14 (OMB 2060–0258), and for CAIR, EPA ICR 2152.03 (OMB 2060–0570).

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 4 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Electric utilities, Industrial sources, and State Governments.

Estimated Number of Respondents: 62.

Frequency of Response: on occasion, quarterly, and annually.

Estimated Total Annual Hour Burden: 2,334.

Estimated Total Annual Cost: $235,925, which includes $20,300.00 in annualized capital or O&M costs.

Changes in the Estimates: There is a decrease of 208 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This decrease is due to adjustments to the estimates reflecting the current requirements of the program.

Dated: July 23, 2009.

John Moses,

Director, Collection Strategies Division.

[FR Doc. E9–18002 Filed 7–28–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2005–0490; FRL–8936–8]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Consolidated Emissions Reporting Rule (Renewal); EPA ICR No. 0916.13, OMB Control No. 2060–0088

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before August 28, 2009.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2005–0490, to: (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to *a-and-r-docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Air and Radiation, 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Dennis Beauregard, Office of Air Quality Planning and Standards, Air Quality Assessment Division, Mail Code C339–02, Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–5512; fax number: (919) 541–0684; e-mail address: *beauregard.dennis@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On April 21, 2009 (74 FR 18226), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments during the comment period. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2005–0490, which is available for online viewing at *http://www.regulations.gov*, or in person viewing at the Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Air and Radiation Docket is 202–566–1742.

Use EPA's electronic docket and comment system at *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov*.

Title: Consolidated Emissions Reporting Rule (Renewal).

ICR numbers: EPA ICR No. 0916.13, OMB Control No. 2060–0088.

ICR Status: This ICR is scheduled to expire on October 31, 2009. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when

approved, are listed in 40 CFR part 9 and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: EPA has promulgated a Consolidated Emissions Reporting Rule (CERR) (40 CFR part 51, subpart A) to coordinate new emissions inventory reporting requirements with existing requirements of the Clean Air Act (CAA) and the 1990 Amendments. Under the CERR, 55 state and territorial air quality agencies, including the District of Columbia (DC), as well as an estimated 49 local air quality agencies, must annually submit emissions data for point sources emitting specified levels of volatile organic compounds, oxides of nitrogen, carbon monoxide, sulfur dioxide, particulate matter less than or equal to 10 micrometers in diameter, particulate matter less than or equal to 2.5 micrometers in diameter ($PM_{2.5}$), and ammonia (NH_3).

Every 3 years, states are required to submit a point source inventory, as well as a statewide stationary nonpoint, nonroad mobile, onroad mobile, and biogenic source inventory for all criteria pollutants (including lead and lead compounds) and their precursors. The emissions data submitted for the annual and 3-year cycle inventories for stationary point, nonpoint, nonroad mobile, and onroad mobile sources are used by EPA's Office of Air Quality Planning and Standards to assist in developing ambient air quality emission standards, performing regional modeling, and preparing national trends assessments and special analyses and reports. Any data submitted to EPA under the CERR is in the public domain and cannot be treated as confidential.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 31 hours per response. The total number of respondents is assumed to be 1,863. This total number of respondents includes 104 State agencies that are subject to the CERR data reporting requirements and 1,759 sources that are not subject, but are assumed to incur the burden for reporting estimates of $PM_{2.5}$ and NH_3 to State agencies. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: 55 State and territorial air pollution control agencies, 49 local air agencies, and 1,759 industry sources.

Estimated Number of Respondents: 1,863.

Frequency of Response: Annual.

Estimated Total Annual Hour Burden: 57,698.

Estimated Total Annual Cost: $230,880, includes $230,880 annualized capital or operational and maintenance costs.

Changes in the Estimates: There is a decrease of 474 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This decrease is due to use of updated point source reporting data from the 2005 National Emissions Inventory indicating fewer Type A sources will be reported annually to EPA.

Dated: July 21, 2009.

Jenny Noonan Edmonds,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. E9–18037 Filed 7–28–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2007–0352; FRL–8936–9]

Final Risk and Exposure Assessment Report for Sulfur Dioxide (SO_2)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of final report.

SUMMARY: On or about July 31, 2009, the Office of Air Quality Planning and Standards (OAQPS) of EPA is making available a final report, *Risk and Exposure Assessment to Support the Review of the SO_2 Primary National Ambient Air Quality Standard: Final Report.* This document presents the approaches taken to assess exposures to ambient SO_2 and to characterize associated health risks, and presents the results of those assessments. This document also contains a staff policy assessment regarding the adequacy of the current SO_2 NAAQS and potential alternative primary SO_2 standards.

FOR FURTHER INFORMATION CONTACT: Dr. Michael J. Stewart, Office of Air Quality Planning and Standards (Mail Code C504–06), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; e-mail: *stewart.michael@epa.gov;* telephone: 919–541–7524; fax: 919–541–0237.

SUPPLEMENTARY INFORMATION:

General Information

A. 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 No. EPA–HQ–OAR–2007–0352. Publicly available docket materials are available either electronically through *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 EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Office of Air and Radiation Docket is (202) 566–1742.

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/.*

Under section 108(a) of the Clean Air Act (CAA), the Administrator identifies and lists certain pollutants which "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." The EPA then issues air quality criteria for listed pollutants, which are commonly referred to as "criteria pollutants." The air quality criteria are to "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air, in varying quantities." Under section 109 of the CAA, EPA establishes national ambient air quality standards (NAAQS) for each listed pollutant, with the NAAQS based on the air quality criteria. Section 109(d) of the CAA requires periodic review and, if appropriate, revision of existing air quality criteria. The revised air quality criteria reflect advances in scientific knowledge on the effects of the pollutant on public health or welfare. The EPA is also required to

periodically review and, if appropriate, revise the NAAQS based on the revised criteria.

Air quality criteria have been established for sulfur oxides (SO_X) and NAAQS have been established for sulfur dioxide (SO_2), an indicator for gaseous SO_X. Presently, EPA is in the process of reviewing the NAAQS for SO_2. As part of its review of the NAAQS, EPA prepared an assessment of exposures and health risks associated with ambient SO_2. A plan describing the proposed approaches to assessing exposures and risks was described in *Sulfur Dioxide Health Assessment Plan: Scope and Methods for Exposure and Risk Assessment.* This document was released for public review and comment in November 2007 and was the subject of a consultation with the Clean Air Scientific Advisory Committee (CASAC) on December 5–6, 2007. Comments received from that consultation were considered in developing a draft document, *Risk and Exposure Assessment to Support the Review of the SO_2 Primary National Ambient Air Quality Standard: First Draft,* which was released for public review and comment in July 2008 and was the subject of a CASAC review on July 30–31, 2008. Comments received from that review were considered in developing a second draft document, *Risk and Exposure Assessment to Support the Review of the SO_2 Primary National Ambient Air Quality Standard: Second Draft,* which was released for public review and comment in March 2009 and was the subject of a CASAC review on April 16–17, 2009. In preparing the final risk and exposure assessment report, EPA considered comments received from CASAC and the public at and subsequent to that meeting.

The *Risk and Exposure Assessment to Support the Review of the SO_2 Primary National Ambient Air Quality Standard: Final Report* being released at this time conveys the approaches taken to assess exposures to ambient SO_2 and to characterize associated health risks, and presents the results of those assessments. This document also contains a staff policy assessment that considers the health evidence presented in an EPA document, *Integrated Science Assessment for Oxides of Sulfur* (available at: *http://www.epa.gov/ttn/naaqs/standards/so2/s_so2_cr_isa.html*), and the exposure and risk characterization results, as they relate to the adequacy of the current SO_2 NAAQS and consideration of potential alternative primary SO_2 standards. The *Risk and Exposure Assessment to Support the Review of the SO_2 Primary National Ambient Air Quality Standard: Final Report* will be available online at: *http://www.epa.gov/ttn/naaqs/standards/so2/s_so2_cr_rea.html.*

Dated: July 22, 2009.

Jenny Noonan Edmonds,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. E9–18005 Filed 7–28–09; 8:45 am]

BILLING CODE 6560–50–P

EXPORT–IMPORT BANK OF THE U.S.

[Public Notice 123]

Agency Information Collection Activities: Final Collection; Comment Request

AGENCY: Export-Import Bank of the U.S.

ACTION: Submission for OMB Review and Comments Request.

Form Title: Application for Medium-Term Insurance or Guarantee (EIB 03–02).

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

Our customers will be able to submit this form on paper or electronically. The information collected will be used to make a determination of eligibility under the Export Import Bank's medium-term insurance and guarantee programs.

DATES: Comments should be received on or before September 28, 2009 to be assured of consideration.

ADDRESSES: Direct all comments to Michele Kuester, Export Import Bank of the United States, 811 Vermont Ave., NW., Washington, DC 20571.

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 03–02. Medium Term Insurance or Guarantee Application.

OMB Number: 3048–0014.

Type of Review: Regular.

Need and Use: The information collected will be used to make a determination of eligibility under the Export Import Bank's medium-term insurance and guarantee program.

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 400.

Estimated Time per Respondent: 1.5 hours.

Government Annual Burden Hours: 300.

Frequency of Reporting or Use: As needed to request support for a medium-term export sale.

Sharon A. Whitt,

Agency Clearance Officer.

[FR Doc. E9–18020 Filed 7–28–09; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested

July 24, 2009.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before August 28, 2009. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via Internet at *Nicholas_A._Fraser@omb.eop.gov* or via fax at (202) 395–5167 and to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC or via

Internet at *Cathy.Williams@fcc.gov* or *PRA@fcc.gov*.

To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called "Currently Under Review," (3) click on the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB control number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR."

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0075.

Title: Application for Transfer of Control of a Corporate Licensee or Permittee or Assignment of License or Permit for an FM or TV Translator Station or a Low Power Television Station, FCC Form 345.

Form Number: FCC Form 345.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; not-for-profit institutions; State, local or tribal government.

Number of Respondents and Responses: 1,700 respondents; 2,700 responses.

Estimated Time per Response: 0.084–1.25 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Total Annual Burden: 2,667 hours.

Total Annual Costs: $2,678,025.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 154(i) and 310 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this information collection.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: On June 29, 2009, the Commission adopted a Report and Order, Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations, MB Docket No. 07–172, FCC 09–59. In the Report and Order, the Commission adopted changes to the FM translator rules that would allow AM stations to use authorized FM translator stations to rebroadcast the AM signal locally, retransmitting their AM programming as a "fill-in" service. The adopted cross-service translating rules limit FM translators to providing "fill-in" service only, specifically within the AM primary station's authorized service area. In addition, the Commission limited the cross-service rule changes to "currently authorized FM translators," that is, those translators with licenses or permit in effect as of May 1, 2009.

Consistent with actions taken by the Commission in the Report and Order, the following changes are made to Form 345: Section III of Form 345 includes a new certification concerning compliance with the AM station "fill-in" service requirements. Specifically, in the AM service, applicants certify that the coverage contour of the FM translator station is contained within the lesser of: (a) The 2 mV/m daytime contour of the AM primary station being rebroadcast, or (b) a 25-mile radius centered at the AM station's transmitter site. The instructions for Section III have been revised to assist applicants with completing the new question.

Filing of the FCC Form 345 is required when applying for authority for the assignment of license or permit, or for consent to transfer of control of a corporate licensee or permittee for an FM or TV translator station, or low power TV station.

OMB Control Number: 3060–0110.

Title: Application for Renewal of Broadcast Station License, FCC Form 303–S.

Form Number: FCC Form 303–S.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; not-for-profit institutions.

Number of Respondents and Responses: 3,884 respondents; 3,884 responses.

Estimated Time per Response: 1–11.83 hours.

Frequency of Response: Every eight year reporting requirement; Third party disclosure requirement.

Total Annual Burden: 7,727 hours.

Total Annual Costs: $2,148,549.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in 154(i), 303, 307 and 308 of the Communications Act of 1934, as amended, and Section 204 of the Telecommunications Act of 1996.

Nature and Extent of Confidentiality: There is no need for confidentiality with this information collection.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: On June 29, 2009, the Commission adopted a Report and Order, Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations, MB Docket No. 07–172, FCC 09–59. In the Report and Order, the Commission adopted changes to the FM translator rules that would allow AM stations to use authorized FM translator stations to rebroadcast the AM signal locally, retransmitting their AM programming as a "fill-in" service. The adopted cross-service translating rules limit FM translators to providing "fill-in" service only, specifically within the AM primary station's authorized service area. In addition, the Commission limited the cross-service rule changes to "currently authorized FM translators," that is, those translators with licenses or permit in effect as of May 1, 2009.

Consistent with actions taken by the Commission in the Report and Order, the following changes are made to Form 303–S: Section V of Form 303–S, to be completed by FM and TV Translator and Low Power TV licensees only, includes a new certification concerning compliance with the AM station "fill-in" service requirements. Specifically, in the AM service, applicants certify that the coverage contour of the FM translator station is contained within the lesser of: (a) The 2 mV/m daytime contour of the AM primary station being rebroadcast, or (b) a 25-mile radius centered at the AM station's transmitter site. The instructions for Section V have been revised to assist applicants with completing the new question.

FCC Form 303–S is used in applying for renewal of license for a commercial or noncommercial AM, FM or TV broadcast station and FM translator, TV translator or Low Power TV, and Low Power FM broadcast stations. It can also be used in seeking the joint renewal of licenses for an FM or TV translator station and its co-owned primary FM, AM, TV, or LPTV station.

OMB Control Number: 3060–0250.

Title: Sections 73.1207, 74.784 and 74.1284, Rebroadcasts.

Form Number: Not applicable.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions; State, local or tribal government.

Number of Respondents and Responses: 6,462 respondents; 11,012 responses.

Estimated Time per Response: 0.50 hours.

Frequency of Response: Recordkeeping requirement; on occasion reporting requirement; semi-

annual reporting requirement; third party disclosure requirement.

Total Annual Burden: 5,506 hours.

Total Annual Costs: None.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 154(i) and 325(a) of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this information collection.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: On June 29, 2009, the Commission adopted a Report and Order, Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations, MB Docket No. 07–172, FCC 09–59. In the Report and Order, the Commission adopted several rule changes that would allow AM stations to use FM translator stations to rebroadcast the AM signal. Therefore, 47 CFR 74.1284 is one of the rules that was changed as a result of the Commission adopting FCC 09–59. 47 CFR 74.1284 requires that the licensee of an FM translator station obtain prior consent to rebroadcast programs of any broadcast station or other FM translator. The licensee of the FM translator station must notify the Commission of the call letters of each station rebroadcast and must certify that written consent has been received from the licensee of that station.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–18006 Filed 7–28–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

July 21, 2009.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501—3520. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before September 28, 2009. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to *Judith-B.Herman@fcc.gov*, Federal Communications Commission, or an e-mail to *PRA@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0149.

Title: Part 63, Application and Supplemental Information Requirements.

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 90 respondents; 90 responses.

Estimated Time per Response: 5 hours.

Frequency of Response: On occasion requirement, and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. Sections 151, 154(i), 154(j), 160, 161, 201–205, 214, 218, 403 and 571.

Total Annual Burden: 450 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The Commission will submit this information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission is requesting approval of a revision of this information collection. The Commission is reporting an increase of 45 respondents/responses and therefore, the total annual burden has increased by 225 total annual hours. In a Report and Order, FCC 09–40, *IP–Enabled Services* ("VoIP Discontinuance Order"), released on May 13, 2009, the Commission modified Part 63 to extend to providers of interconnected Voice over Internet Protocol (VoIP) service the discontinuance obligations that apply to domestic non-dominant telecommunications carriers under Section 214 of the Communications Act of 1934, as amended. Accordingly, the Commission found that before an interconnected VoIP provider may discontinue, reduce, or impair service, it must comply with the streamlined discontinuance requirements for non-dominant providers under Part 63 of the Commission's rules, including the requirements to provide written notice to all affected customers, notify relevant state authorities, and file an application with the Commission for authorization of the planned action. In general, providers of facilities-based interconnected VoIP services and "over-the-top" interconnected VoIP services are subject to the rules in the VoIP Discontinuance Order. However, the Commission found that it made more sense to treat providers of interconnected VoIP services that are mobile in the same way as Commercial Mobile Radio Service (CMRS) providers, which are not subject to the Commission's Section 214 discontinuance obligations.

OMB Control Number: 3060–None.

Title: Implementation of the NET 911 Improvement Act of 2008; Location Information From Owners and Controllers of 911 and E911 Capabilities.

Form No.: N/A.

Type of Review: New collection.

Respondents: Business or other for-profit.

Number of Respondents: 60 respondents; 60 responses.

Estimated Time per Response: .0833 hours (5 minutes).

Frequency of Response: On occasion requirement, and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in the New and Emering Technologies 911 Improvement Act of 2008 (NET 911 Act), Public Law 110–283, Stat. 2620 (2008) (to be codified at 47 U.S.C. Section 615a–1), and section

222 of the Communications Act of 1934, as amended.

Total Annual Burden: 5 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The Commission will submit this information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission is requesting OMB approval of a new information collection. The Commission is reporting a program change increase of 60 respondents/responses and therefore, the total annual burden is estimated to be 5 total annual hours.

The FCC requires an owner or controller of a 911 or enhanced 911 capability to make that capability available to a requesting interconnected Voice Over Internet Protocol (VoIP) provider in certain circumstances. This requirement involves the collection and disclosure to emergency services personnel of customers' location information. In a previous action, the Commission required interconnected VoIP providers to collect certain location information from their customers and disclose it to the entities that own or control an Automatic Location Information (ALI) database. That OMB-approved requirement is under OMB Control Number 3060–1085. All the relevant costs of the entities that own or control an ALI database were previously described in 3060–1085. The Commission has calculated the paperwork burdens of this present item in such a way as to prevent double counting for OMB's inventory.

For more information regarding this new information collection, see 74 FR 31860 (July 6, 2009), available at *http://frwebtgate5.access.gpo.gov/cgi-bin/PDFgate.cgi? WAISdocID=594374209894+10+2+0&WAISaction=retrieve.*

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–18007 Filed 7–28–09; 8:45 am]

BILLING CODE 6712–01–P

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 the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov*.

Agreement No.: 011426–044.

Title: West Coast of South America Discussion Agreement.

Parties: APL Co. Pte Ltd.; Compania Chilena de Navigacion Interoceanica, S.A.; Compania Sud Americana de Vapores, S.A.; Frontier Liner Services, Inc.; Hamburg-Süd; King Ocean Services Limited, Inc.; Maruba S.C.A.; Seaboard Marine Ltd.: South Pacific Shipping Company, Ltd.; and Trinity Shipping Line.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP: 1850 M Street, NW., Suite 900, Washington, DC 20036.

Synopsis: The amendment would add A.P. Moller-Maersk A/S as a party to the agreement.

Agreement No.: 201162–003.

Title: NYSA–ILA Assessment Agreement.

Parties: New York Shipping Association, Inc. and the International Longshoremen's Association, AFL–CIO for the Port of New York and New Jersey.

Filing Parties: Donato Caruso, Esq.; The Lambos Firm; 29 Broadway, 9th Floor, New York, NY 10006; and Andre Mazzola, Esq., Marrinan & Mazzola Mardon, P.C. 26 Broadway, 17th Floor , New York, NY 10004.

Synopsis: The amendment phases out preferential treatment to certain assessment categories as of August 1, 2009.

Agreement No.: 201204.

Title: Port of Houston Authority and Houston Marine Terminal Operators/ Freight Handlers Agreement.

Parties: Port of Houston Authority; Ceres Gulf, Inc.; Chaparral Stevedoring Company of Texas, Inc.; CT Stevedoring, Inc. dba Cooper/T. Smith Stevedoring Co.; Ports America Texas, Inc.; GP Terminals LLC; Shippers Stevedoring Company; and SSA Gulf, Inc.

Filing Party: Erik A. Eriksson, Esq.; Port of Houston Authority and seven affiliated freight handlers to discuss and voluntarily agree on matters of common interest at the Port of Houston.

Dated: July 24, 2009.

By Order of the Federal Maritime Commision.

Tanga FitzGibbon,

Assistant Secretary.

[FR Doc. E9–18205 Filed 7–28–09; 8:45 am]

BILLING CODE P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Reissuances

Notice is hereby given that the following Ocean Transportation Intermediary licenses have been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

License No.	Name/address	Date reissued
019355N	ABAD Air, Inc., 10411 NW. 28th Street, Miami, FL 33172	June 21, 2009.
013552N	Boston Shipping Enterprise, Inc., 506 Decatur Street, Brooklyn, NY 11233	April 16, 2009.
004670F	The Pelixan Group, Inc., 3405–B NW. 72nd Avenue, Miami, FL 33122	May 9, 2009.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. E9–18097 Filed 7–28–09; 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 Applicants

Miami Envios Express Inc., 7468 SW 117 Ave., Miami, FL 33183. Officers: Mauricio Perez, President (Qualifying Individual), Freddy Acevedo, Secretary.

Len-Mar Shipping LLC, 710 Schenck Ave., Brooklyn, NY 11207. Officer: Lennox P. Bobb, President (Qualifying Individual).

Montero Express Cargo, Inc., 7705 NW 29 Street, Unit 101, Doral, FL 33122. Officers: Jose L. Montero, Vice President (Qualifying Individual), Enrique A. Montero, President.

Comercial Andina Import & Export Corporation, 782 NW 42 Avenue, #431, Miami, FL 33126. Officers: Patricia Nazar, President (Qualifying Individual), Patricia Kokaly, Vice President.

Imodal Limited Liability Company dba Imodal, 224 Datura Street, Ste. 214, West Palm Beach, FL 33401. Officer: Joseph A. Dymkowski, Member/Manager (Qualifying Individual).

Trade & Traffic Corp, 8358 NW 66th Street, Miami, FL 33166. Officer: Gardenia Y. Cantos, President (Qualifying Individual).

Nippon Express U.S.A. (Illinois), Inc., dba Arrow International GNS, Arrow Pacific, Arrow Atlantic, 950 N. Edgewood Avenue, Wood Dale, IL 60191–1257. Officer: Hirotaka Hara, Vice President (Qualifying Individual).

RCB Logistics Corp., 67 West Merrick Road, Valley Stream, NY 11580. Officers: Salvatore Distefano, President (Qualifying Individual), Enzo Matranga, Director.

Miami Shipping Services, Inc., dba Richard Shipping Services, 3560 N.W. 34 Street, Miami, FL 33142. Officer: Kevin Arango, Vice President (Qualifying Individual).

Awilda Shipping, Inc., 41–02 108th Street, Corona, NY 11368. Officers: Ynocencia Del Villar, President (Qualifying Individual), Jorge Perez, Vice President.

Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants

Air&Ocean Cargo Logistics, Inc., 12612 Greentree Ave., Garden Grove, CA 92840. Officers: Mimi Du Lai, President, (Qualifying Individual), Tuan A. Luong, Secretary.

Moon Logistics Inc. dba M Global Logistics, 879 W. 190th Street, Ste. 940, Gardena, CA 90248. Officers: Terri E. Yi, Secretary, (Qualifying Individual), Dae Ho Moon, President.

AGUNSA Logistics & Distribution (Los Angeles), Inc., 19600 So. Alameda Street, Rancho Dominguez, CA 90221. Officers: Stanley J. Jozwiak, President (Qualifying Individual), Bert A. Johnson, Managing Director.

Hua Feng (USA) Logistics Inc., 11222 S. La Cienega Blvd., Ste. 100, Inglewood, CA 90304. Officer: Dong Wang, President (Qualifying Individual).

InterChez Global Services, Inc., 3924 Clock Pointe Trail, Ste. 101, Stow, OH 44224. Officer: David K. Matts, V.P. Marketing (Qualifying Individual).

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants

LB&B Associates Inc., 9891 Broken Land Parkway, #400, Columbia, MD 21046. Officers: James Ryan, V. P. of Logistics (Qualifying Individual), Lily A. Brandon, Chairman.

John Judabong dba Juda Trade, 2723 Fairlane Place, Chino Hills, CA 91709. Officer: John Judabong, President, (Qualifying Individual).

J & S Universal Services, Inc., dba Patrick & Rosenfeld Shipping Corp., 12972 SW 133 Court, Miami, FL 33186. Officer: Juan C. Gonzalez, President (Qualifying Individual).

HTS, Inc. dba Harte-Hanks Logistics, 1525 NW 3rd Street, Ste. 21, Deerfield Beach, FL 33442. Officer: Thomas C. Pidgeon, Vice President (Qualifying Individual).

Proservi, Inc., 2995 NW 95th Street, Miami, FL 33147. Officers: Miguel A. Enriquez, Vice President (Qualifying Individual), Ada B. Paz, President.

Universal Logistics, Inc., 2700 Greens Rd., Ste. K400, Houston, TX 77032. Officers: Tamara Cato, Vice President (Qualifying Individual), David B. Rogers, President.

Texas Time Express, 801–B Port America Place, Grapevine, TX 76051. Officers: Brian Rumph, Vice President (Qualifying Individual), Doug Tabor, President.

Dated: July 24, 2009.

Tanga S. FitzGibbon,

Assistant Secretary.

[FR Doc. E9–18095 Filed 7–28–09; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515, effective on the corresponding date shown below:

License Number: 020086F.
Name: Allfreight Worldwide Cargo, Inc.
Address: 4810 Beauregard Street, Ste. 100, Alexandria, VA 22312.
Date Revoked: July 11, 2009.
Reason: Failed to maintain a valid bond.

License Number: 016923F.
Name: Carolina Shipping Company, Inc.
Address: 1064 Gardner Road, Ste. 312, Charleston, SC 29415–0988.
Date Revoked: July 16, 2009.
Reason: Surrendered license voluntarily.

License Number: 004101F.
Name: Distribution Support Management, Inc.
Address: 75 Northcrest Drive, Newnan, GA 30265.
Date Revoked: July 17, 2009.
Reason: Failed to maintain a valid bond.

License Number: 020383NF.
Name: Eastern Direct System International Corp.
Address: 149–09 183rd Street, Jamaica, NY 11413.
Date Revoked: July 17, 2009.
Reason: Failed to maintain valid bonds.

License Number: 020815F.
Name: F.E.P.A. Enterprises, Inc. dba FEPA Logistics (USA).
Address: 17010 Buffalo Peak Court, Humble, TX 77346.
Date Revoked: July 3, 2009.
Reason: Failed to maintain a valid bond.

License Number: 018024F.
Name: Fabius Logistics, Inc.
Address: 181 Hudson Street, Ste. 2F, New York, NY 10013.
Date Revoked: July 9, 2009.
Reason: Surrendered license voluntarily.

License Number: 007984N.
Name: General Ocean Freight Container Lines, Inc.
Address: 300 West Carob Street, Compton, CA 90220.

Date Revoked: July 4, 2009.
Reason: Failed to maintain a valid bond.

License Number: 004186F.
Name: Hanmi Shipping, Inc.
Address: 2694 Coyle Ave., Elk Grove Village, IL 60007.
Date Revoked: July 10, 2009.
Reason: Failed to maintain a valid bond.

License Number: 020605NF.
Name: Ocean Express Marine USA Inc.
Address: 24–30 Milleed Way, Avenel, NJ 07001.
Date Revoked: June 21, 2009.
Reason: Failed to maintain valid bonds.

License Number: 016262N.
Name: Pro-Well Sea U.S.A. Inc.
Address: 14251 E. Don Julian Rd., City of Industry, CA 91746.
Date Revoked: July 4, 2009.
Reason: Failed to maintain a valid bond.

License Number: 016527N.
Name: Safeway Transport Co. Inc.
Address: 600 Meadowlands Pkwy., Ste. 147, Secaucus, NJ 07094.
Date Revoked: July 4, 2009.
Reason: Failed to maintain a valid bond.

License Number: 021667N.
Name: South Florida Logistic Partners, Inc.
Address: 330 SW 27th Ave., Ste. 605, Miami, FL 33135.
Date Revoked: July 1, 2009.
Reason: Failed to maintain a valid bond.

License Number: 019299N.
Name: Trans Atlantic Shipping, Inc. dba TAS, Inc.
Address: 1005 W. Arbor Vitae Street, Inglewood, CA 90301.
Date Revoked: July 11, 2009.
Reason: Failed to maintain a valid bond.

License Number: 019597N.
Name: United Cargo International, Inc.
Address: 30998 Huntwood Ave., #106, Hayward, CA 94544.
Date Revoked: July 8, 2009.
Reason: Failed to maintain a valid bond.

License Number: 019276N.
Name: Westcove Investments, Inc. dba Cargo Link International.
Address: 16725 E. Gale Ave., City of Industry, CA 91745.
Date Revoked: July 11, 2009.
Reason: Failed to maintain a valid bond.

Sandra L. Kusumoto,
Director, Bureau of Certification and Licensing.

[FR Doc. E9–18098 Filed 7–28–09; 8:45 am]
BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0269; 30-day notice]

Agency Information Collection Request. 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov*, or call the Reports Clearance Office on (202) 690–5683. Send written comments and recommendations for the proposed information collections within 30 days of this notice directly to the OS OMB Desk Officer; faxed to OMB at 202–395–5806.

Proposed Project: Complaint Forms for Discrimination; Health Information Privacy Complaints OMB No. 0990–0269 —Extension—Office of Civil Rights.

Abstract: The Office for Civil Rights is seeking approval for a 3 year clearance on a previous collection. Individuals may file written complaints with the Office for Civil Rights when they believe they have been discriminated against by programs or entities that receive Federal financial assistance from the Health and Human Service or if they believe that their right to the privacy of protected health information has been violated. Annual Number of Respondents frequency of submission is record keeping and reporting on occasion.

ESTIMATED ANNUALIZED BURDEN TABLE

Forms	Type of respondent	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Civil Rights Complaint Form	Individuals or households, Not-for-profit institutions.	3037	1	45/60	2278
Health Information Privacy Complaint Form.	Individuals or households, Not-for-profit institutions.	8944	1	45/60	6708
Total					8986

Seleda Perryman,
Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.
[FR Doc. E9–18014 Filed 7–28–09; 8:45 am]
BILLING CODE 4153–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0294; 30-day notice]

Agency Information Collection Request. 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov*, or call the Reports Clearance Office on (202) 690–5683. Send written comments and recommendations for the proposed information collections within 30 days of this notice directly to the OS OMB Desk Officer; faxed to OMB at 202–395–5806.

Proposed Project: Standards for Privacy of Individually Identifiable Health Information and Supporting Regulations at 45 CFR Parts 160 and 164 (Extension)—OMB No. 0990–0294 Office of Civil Rights

Abstract: The Privacy Rule implements the privacy requirements of the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996. The final regulation requires covered entities (as defined in the regulation) to maintain strong protections for the privacy of individually identifiable health information; to use or disclose this information only as required or permitted by the Rule or with the express written authorization of the individual; to provide a notice of the entity's privacy practices; and to document compliance with the Rule. Respondents are health care providers with health plans, and health care clearinghouses. The affected public includes individuals, public and private businesses, state and local governments.

ESTIMATED ANNUALIZED BURDEN TABLE

Section	Type of respondent	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
160.204	Process for Requesting Exception Determinations (states or persons).	40	1	16	640
164.504	Uses and Disclosures—Organizational Requirements	764,799	1	5/60	63,733
164.508	Uses and Disclosures for Which Individual authorization is required.	764,799	1	1	764,799
164.512	Uses and Disclosures for which Consent, Individual Authorization, or Opportunity to Agree or Object is Not Required (for other specified purposes by an IRB or privacy board).	113,524	1	5/60	9,460
164.520	Notice of Privacy Practices for Protected Health Information (health plans).	10,570	1	3/60	529
164.520	Notice of Privacy Practices for Protected Health Information (health care providers—dissemination).	613,000,000	1	3/60	30,650,000
164.520	Notice of Privacy Practices for Protected Health Information (health care providers—acknowledgement).	613,000,000	1	3/60	30,650,000
164.522	Rights to Request Privacy Protection for Protected Health Information.	150,000	1	3/60	7,500
164.524	Access of Individuals to Protected Health Information (disclosures).	150,000	1	3/60	7,500
164.526	Amendment of Protected Health Information (requests)	150,000	1	3/60	7,500
164.526	Amendment of Protected Health Information (denials)	50,000	1	3/60	2,500
164.528	Accounting for Disclosures of Protected Health Information	1,080,000	1	5/60	90,000
Total					62,254,161

Seleda Perryman,
Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.
[FR Doc. E9–18016 Filed 7–28–09; 8:45 am]
BILLING CODE 4153–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: State Plan for Foster Care and Adoption Assistance—Title IV–E.

OMB No.: 0980–0141.

Description: A title IV–E plan is required by section 471 part IV–E of the Social Security Act (the Act) for each public child welfare agency requesting Federal funding for foster care, adoption assistance and guardianship assistance under the Act. The title IV–E plan provides assurances the programs will be administered in conformity with the specific requirements stipulated in title IV–E. The plan must include all applicable State statutory, regulatory, or policy references and citations for each requirement as well as supporting documentation. A title IV–E agency may use the pre-print format prepared by the Children's Bureau of the Administration for Children and Families or a different format, on the condition that the format used includes all of the title IV–E State plan requirements of the law.

Public Law 110–351, the Fostering Connections to Success and Increasing Adoptions Act of 2008, created a new title IV–E plan option to provide a Guardianship Assistance Program for relatives of children in foster care (section 471(a)(28) of the Act). The Guardianship Assistance program was made effective for States upon enactment of Public Law 110–351 (October 7, 2008).

Effective October 1, 2009, Public Law 110–351 will allow Tribes, Tribal organizations and Tribal consortia to directly operate title IV–E programs for foster care maintenance payments, adoption assistance and kinship guardianship assistance.

The law also made a number of other changes to title IV–E plan requirements and eligibility criteria. The law's provisions expanding the scope of the title IV–E program necessitates a revision of the preprint.

Respondents: State and Territorial Agencies (State Agencies) administering or supervising the administration of the title IV–E programs and Federally-recognized Tribes, Tribal organizations and Tribal consortia administering title IV–E programs.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Title IV–E Plan	33	1	16	528

Estimated Total Annual Burden Hours: 528.

Additional Information

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

OMB Comment

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–7245, Attn: Desk Officer for the Administration for Children and Families.

Dated: July 23, 2009.

Janean Chambers,
Reports Clearance Officer.
[FR Doc. E9–17934 Filed 7–28–09; 8:45 am]
BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; Parental Knowledge, Attitudes, and Behaviors Related to Pediatric Cardiovascular Health

SUMMARY: In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Heart, Lung, and Blood Institute (NHLBI), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Describe the proposed information collection activity as follows. Include: *Title:* Parental Knowledge, Attitudes, and Behaviors Related to Pediatric Cardiovascular Health; *Type of Information Collection Request:* New; *Need and Use of Information Collection:* Coinciding with the release of the Integrated Pediatric Cardiovascular Risk Reduction Guidelines, the National Heart, Lung, and Blood Institute (NHLBI) will conduct a national public awareness campaign to help parents understand that risk for cardiovascular disease (CVD) begins in childhood, and to engage them in encouraging healthy habits in their children to promote heart health and reduce their children's CVD risk now and as they grow. Currently, little is known about parental knowledge, attitudes, and behaviors related to heart health in children. Serving as a baseline for evaluation of NHLBI's outreach activities related to the campaign, this study seeks to learn the following: (a) Parents' awareness of cardiovascular disease risk factors in children and knowledge of what to do for risk reduction, (b) parents' level of efficacy toward taking action to promote cardiovascular health and reduce risk factors, and (c) parents' behaviors related to cardiovascular health. The findings will provide valuable information that will enable NHLBI to identify the gaps in knowledge and awareness and target specific information in communications with parents. NHLBI will also be able to determine parents' efficacy related to the actions needed to promote their

children's heart health, allocating resources for the campaign to provide support to overcome perceived barriers; *Frequency of Response:* One-time survey; *Affected Public:* Individuals or households; and *Type of Respondents:* Parents and caregivers of children ages 0–7. The annual reporting burden is as follows: *Estimated Number of Respondents:* 1,175; *Estimated Number of Responses per Respondent:* 1; *Average Burden Hours per Response:* .167; and *Estimated Total Annual Burden Hours Requested:* 196.23. *There are no Capital Costs, Operating Costs and/or Maintenance Costs to report.*

Request for Comments: Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function 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, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Amy Pianalto, National Heart, Lung, and Blood Institute, NIH, 31 Center Drive, Building 31A, Room 4A10, Bethesda, MD 20892; or call non-toll-free number 301–594–2093 or e-mail request, including your address, to *pianaltoa@nhlbi.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60-days of the date of this publication.

Dated: July 21, 2009.

Amy Pianalto,

Office of Communications and Legislative Activities, NHLBI, National Institutes of Health.

[FR Doc. E9–18071 Filed 7–28–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0097]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Request for Samples and Protocols

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.

DATES: Fax written comments on the collection of information by August 28, 2009.

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 0910–0206. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3794.

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.

Request for Samples and Protocols—(OMB Control Number 0910–0206)—Extension

Under section 351 of the Public Health Service Act (42 U.S.C. 262), FDA has the responsibility to issue regulations that prescribe standards designed to ensure the safety, purity, and potency of biological products and to ensure that the biologics licenses for such products are only issued when a product meets the prescribed standards. Under § 610.2 (21 CFR 610.2), the Center for Biologics Evaluation and Research (CBER) or the Center for Drug Evaluation and Research may at any time require manufacturers of licensed biological products to submit to FDA samples of any lot along with the protocols showing the results of applicable tests prior to distributing the lot of the product. In addition to § 610.2, there are other regulations that require the submission of samples and protocols for specific licensed biological products: §§ 660.6 (21 CFR 660.6) (Antibody to Hepatitis B Surface Antigen); 660.36 (21 CFR 660.36) (Reagent Red Blood Cells); and 660.46 (21 CFR 660.46) (Hepatitis B Surface Antigen). Section 660.6(a) provides requirements for the frequency of submission of samples from each lot of Antibody to Hepatitis B Surface Antigen product, and § 660.6(b) provides the requirements for the submission of a protocol containing specific information along with each required sample. For § 660.6 products subject to official release by FDA, one sample from each filling of each lot is required to be submitted along with a protocol consisting of a summary of the history of manufacture of the product, including all results of each test for which test results are requested by CBER. After official release is no longer required, one sample along with a protocol is required to be submitted at 90-day intervals. In addition, samples, which must be accompanied by a protocol, may at any time be required to be submitted to CBER if continued evaluation is deemed necessary.

Section 660.36(a) requires, after each routine establishment inspection by FDA, the submission of samples from a lot of final Reagent Red Blood Cell product along with a protocol containing specific information. Section 660.36(a)(2) requires that a protocol contain information including, but not limited to, manufacturing records, certain test records, and identity test results. Section 660.36(b) requires a copy of the antigenic constitution matrix specifying the antigens present or absent to be submitted to the CBER Director at the time of initial distribution of each lot. Section 660.46(a) contains requirements as to the frequency of submission of samples from each lot of Hepatitis B Surface Antigen product, and § 660.46(b) contains the requirements as to the submission of a protocol containing specific information along with each required sample. For § 660.46 products subject to official release by FDA, one sample from each filling of each lot is required to be submitted along with a protocol consisting of a summary of the history of manufacture of the product, including all results of each test for which test results are requested by CBER. After notification of official release is received, one sample along

with a protocol is required to be submitted at 90-day intervals. In addition, samples, which must be accompanied by a protocol, may at any time be required to be submitted to CBER if continued evaluation is deemed necessary.

Samples and protocols are required by FDA to help ensure the safety, purity, or potency of a product because of the potential lot-to-lot variability of a product produced from living organisms. In cases of certain biological products (e.g., Albumin, Plasma Protein Fraction, and therapeutic biological products) that are known to have lot-to-lot consistency, official lot release is not normally required. However, submissions of samples and protocols of these products may still be required for surveillance, licensing, and export purposes, or in the event that FDA obtains information that the manufacturing process may not result in consistent quality of the product.

The following burden estimate is for the protocols required to be submitted with each sample. The collection of samples is not a collection of information under 5 CFR 1320.3(h)(2).

Respondents to the collection of information under § 610.2 are manufacturers of licensed biological products. Respondents to the collection of information under §§ 660.6(b), 660.36(a)(2) and (b), and 660.46(b) are manufacturers of the specific products referenced previously in this document. The estimated number of respondents for each regulation is based on the annual number of manufacturers that submitted samples and protocols for biological products including submissions for lot release, surveillance, licensing, or export. Based on information obtained from FDA's database system, approximately 69 manufacturers submitted samples and protocols in fiscal year (FY) 2008, under the regulations cited previously in this document. FDA estimates that approximately 65 manufacturers submitted protocols under § 610.2 and 21 CFR 610.3 manufacturers submitted protocols under the regulations (§§ 660.6 and 660.46) for the other specific products. FDA received no submissions under § 660.36; however, FDA is using the estimate of one protocol submission in the event one is submitted in the future.

The estimated total annual responses are based on FDA's final actions completed in FY 2008, which totaled 6,314, for the various submission requirements of samples and protocols for the licensed biological products. The rate of final actions is not expected to change significantly in the next few years. The hours per response are based on information provided by industry. The burden estimates provided by industry ranged from 1 to 5.5 hours. Under § 610.2, the hours per response are based on the average of these estimates and rounded to 3 hours. Under the remaining regulations, the hours per response are based on the higher end of the estimate (rounded to 5 or 6 hours) since more information is generally required to be submitted in the other protocols than under § 610.2.

In the **Federal Register** of March 6, 2009 (74 FR 9820), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

FDA estimates the burden of this collection of information 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
610.2	65	95.5	6,208	3	18,624
660.6(b)	2	44	88	5	440
660.36(a)(2) and (b)	1	1	1	6	6
660.46(b)	1	17	17	5	85
Total	69		6,314		19,155

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: July 22, 2009.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E9–17978 Filed 7–28–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–E–0072]

Determination of Regulatory Review Period for Purposes of Patent Extension; RAPAFLO

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for RAPAFLO and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human drug product.

ADDRESSES: Submit written comments and petitions 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.*

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6222, Silver Spring, MD 20993–0002, 301–796–3602.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Public Law 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human drug product RAPAFLO (silodosin). RAPAFLO is indicated for treatment of the signs and symptoms of benign prostatic hyperplasia. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for RAPAFLO (U.S. Patent No. 5,387,603) from Kissei Pharmaceutical Co., Ltd., and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated February 26, 2009, FDA advised the Patent and Trademark Office that this human drug product had undergone a regulatory review period and that the approval of RAPAFLO represented the first permitted commercial marketing or use of the product. Thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for RAPAFLO is 3,681 days. Of this time, 3,380 days occurred during the testing phase of the regulatory review period, while 301 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355(i)) became effective*: September 12, 1998. The applicant claims September 17, 1998, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was September 12, 1998, which was 30 days after FDA receipt of the IND.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the act*: December 13, 2007. FDA has verified the applicant's claim that the new drug application (NDA) for RAPAFLO (NDA 22–206) was initially submitted on December 13, 2007.

3. *The date the application was approved*: October 8, 2008. FDA has verified the applicant's claim that NDA 22–206 was approved on October 8, 2008.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,826 days of patent term extension.

Anyone with knowledge that any of the dates as published are incorrect may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments and ask for a redetermination by September 28, 2009. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by January 25, 2010. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Division of Dockets Management. Three copies of any mailed information are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: June 23, 2009.

Jane A. Axelrad,

Associate Director for Policy, Center for Drug Evaluation and Research.

[FR Doc. E9–18032 Filed 7–28–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–E–0021]

Determination of Regulatory Review Period for Purposes of Patent Extension; DUREZOL

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for DUREZOL and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human drug product.

ADDRESSES: Submit written comments and petitions 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.*

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6222, Silver Spring, MD 20993–0002, 301–796–3602.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Public Law 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory

review period may count toward the actual amount of extension that the Director of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human drug product DUREZOL (difluprednate ophthalmic emulsion). DUREZOL is indicated for the treatment of inflammation and pain associated with ocular surgery. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for DUREZOL (U.S. Patent No. 6,114,319) from Senju Pharmaceutical Co. Ltd., and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated February 18, 2009, FDA advised the Patent and Trademark Office that this human drug product had undergone a regulatory review period and that the approval of DUREZOL represented the first permitted commercial marketing or use of the product. Thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for DUREZOL is 560 days. Of this time, 369 days occurred during the testing phase of the regulatory review period, while 181 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355(i)) became effective:* December 13, 2006. FDA has verified the applicant's claim that the investigational new drug application became effective on December 13, 2006.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the act:* December 26, 2007. FDA has verified the applicant's claim that the new drug application (NDA) for DUREZOL (NDA 22–212) was initially submitted on December 26, 2007.

3. *The date the application was approved:* June 23, 2008. FDA has verified the applicant's claim that NDA 22–212 was approved on June 23, 2008.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 369 days of patent term extension.

Anyone with knowledge that any of the dates as published are incorrect may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments and ask for a redetermination by September 28, 2009. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by January 25, 2010. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Division of Dockets Management. Three copies of any mailed information are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: June 23, 2009.

Jane A. Axelrad,

Associate Director for Policy, Center for Drug Evaluation and Research.

[FR Doc. E9–18034 Filed 7–28–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, July 27, 2009, 9 a.m. to July 28, 2009, 6 p.m., National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 which was published in the **Federal Register** on July 1, 2009, 74 FR 31453–31454.

The meeting will be held August 3, 2009 to August 4, 2009. The meeting time and location remain the same. The meeting is closed to the public.

Dated: July 23, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–18023 Filed 7–28–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Go Applications.

Date: August 5, 2009.

Time: 2 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: Raul A Saavedra, Ph.D., Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS, NSC; 6001 Executive Blvd., Ste. 3208, Bethesda, MD 20892–9529, 301–496–9223, *saavedrr@ninds.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Go Applications.

Date: August 6, 2009.

Time: 10 a.m. to 12 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: Ernest W Lyons, Ph.D. Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 952, Bethesda, MD 20892–9529, 301–496–4056, *lyonse@ninds.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences; 93.701, ARRA Related Biomedical Research and Research Support Awards., National Institutes of Health, HHS)

Dated: July 23, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–18025 Filed 7–28–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, July 28, 2009, 9 a.m. to July 28, 2009, 8 p.m., National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD, 20892 which was published in the **Federal Register** on July 17, 2009, 74 FR 34762–34764.

The meeting will be held August 3, 2009 to August 4, 2009. The meeting time and location remain the same. The meeting is closed to the public.

Dated: July 23, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–18022 Filed 7–28–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Statement of Organization, Functions and Delegations of Authority

This notice amends Part R of the Statement of Organization, Functions and Delegations of Authority of the Department of Health and Human Services (HHS), Health Resources and Services Administration (HRSA) (60 FR 56605, as amended November 6, 1995; as last amended at 73 FR 30406–30408 dated May 27, 2008).

This notice reflects organizational changes in the Health Resources and Services Administration. Specifically, this notice renames the Office of Financial Management (RB) to the Office of Operations (RB); moves the Office of Management (RAM) under the Office of Operations (RB) and moves the Office of Information Technology (RAG) under the Office of Operations (RB).

Chapter RA—Office of the Administrator

Section RA–10, Organization

Delete in its entirety and replace with the following:

The Office of the Administrator (RA) is headed by the Administrator, Health Resources and Services Administration, who reports directly to the Secretary. The OA includes the following components:

(1) Immediate Office of the Administrator (RA);
(2) Office of Equal Opportunity and Civil Rights (RA2);
(3) Office of Planning and Evaluation (RA5);
(4) Office of Communications (RA6);
(5) Office of Minority Health and Health Disparities (RA9);
(6) Office of Legislation (RAE);
(7) Office of International Health Affairs (RAH).

Chapter RB—Office of Operations

Section RB–10, Organization

Delete in its entirety and replace with the following:

The Office of Operations (RB) is headed by the Chief Operating Officer who reports directly to the Administrator, Health Resources and Services Administration. The Office of Operations includes the following components:

(1) Office of the Chief Operating Officer (RB);
(2) Office of Budget (RB1);
(3) Office of Financial Policy and Controls (RB2);
(4) Office of Acquisitions Management and Policy (RB3);
(5) Office of Management (RB4); and
(6) Office of Information Technology (RB5).

Section RB–20, Functions

(1) Rename the Office of Financial Management (RB) to the Office of Operations (RB); (2) delete the functional statement for the Office of Management (RAM) and transfer the function to the Office of Operations (RB); and (3) delete the functional statement for the Office of Information Technology (RAG) and transfer the function to the Office of Operations (RB).

Office of the Chief Operating Officer (RB)

(1) Provides leadership for operational activities, interaction and execution of Agency initiatives across the Health Resources and Services Administration; (2) plans, organizes and manages annual and multi-year budgets and resources and assures that the conduct of Agency administrative and financial management activities effectively support program operations; (3) provides an array of Agency-wide services including information technology, procurement management, facilities, workforce management, and budget execution and formulation; (4) maintains overall responsibility for policies, procedures, monitoring of internal controls and systems related to payment and disbursement activities; (5) provides management expertise, staff advice, and support to the Administrator in program and policy formulation and execution; (6) provides leadership in the development, review and implementation of policies and procedures to promote improved information technology management capabilities and best practices throughout HRSA; (7) coordinates IT workforce issues and works closely with the Department on IT recruitment and training issues; and (8) administers functions of the Chief Financial Office.

Office of Budget (RB1)

(1) Reviews funds control measures to assure that no program, project or activity of HRSA obligates or disburses funds in excess of appropriations or obligates funds in violation of authorized purposes; (2) provides advice and assistance to senior HRSA management to verify the accuracy, validity, and technical treatment of budgetary data in forms, schedules, and reports, or the legality and propriety of using funds for specific purposes; (3) maintains primary liaison to expedite the flow of financial management work and materials within the Agency and/or between Agency components and HHS, Office of Management and Budget (OMB), and congressional staff; (4) provides overall financial-based analyses and fiduciary review for senior HRSA management in order to assure appropriate workforce planning, funds control guidance, and analytical technical assistance in all phases of the budgetary process; and (5) develops the long-range program and financial plan for the Agency in collaboration with the Office of Planning and Evaluation, and other administrative Agency components.

Division of Budget Formulation and Presentation (RB11)

(1) Manages and coordinates development of the Administration's budget for HRSA from independent submissions prepared by Bureau/Office contacts; (2) formulates the total HRSA financial plan for the Administrator, evaluates and assures total Agency budget requests conform to current Administration policy and economic assumptions; (3) coordinates performance measures pursuant to the Government Performance and Results Act with budget proposals; (4) represents, supports and defends the HRSA budget in meetings/hearings before the Office of the Secretary, OMB, and the Congress; (5) provides policy direction and guidance for the preparation and consolidation of the budget and its transmittal to OMB through information technology; (6) analyzes proposed legislation and subsequent congressional action for budgetary implications; (7) prepares periodic summary analysis and impact statements on budget allowances and applicable congressional actions; (8) develops all financial and personnel staffing aspects of HRSA's implementation plans for establishing new or phasing out existing programs; (9) develops analyses of proposed budget estimates and supporting narrative through the use of available financial data reporting systems for Agency senior management; (10) maintains liaison with the Office of the Secretary and the OMB, the General Accountability Office, other Government organizations, and the Congress on HRSA's financial management matters; (11) consults with the Office of Program Evaluation to provide guidance and advice in implementing performance systems, including the Performance Assessment and Rating Tool assessments, Key Performance Indicators, and HRSA's Government Performance Results Act program; (12) collaborates with other parts of HRSA in the development and implementation of long-range program and financing plans; (13) completes chain-of-command requirements in timing and reporting of cleared information to parties outside the Executive Branch (i.e., the Congress, media, public); and (14) appropriately safeguards all embargoed information and all draft materials to maintain integrity of data, and secure work information.

Division of Budget Execution and Management (RB12)

(1) Provides budget policy interpretation, management guidance and direction for senior HRSA management; (2) conducts the HRSA budget control process in conformance with statutory requirements and OMB guidelines; (3) approves program spending plans and obtains apportionment of funds from the OMB; (4) establishes and maintains a system of budgetary fund and position control; (5) provides senior HRSA management status and activity reports on total funds control and position control activities throughout the fiscal year; (6) administers and reviews requests for apportionments and allotments; (7) reviews, controls, and reports obligations and expenditures through central monitoring and advice to Bureau/Office management officials; (8) verifies funds available to Central HRSA Offices, and the propriety of using appropriated and non-appropriated funds for the requested purposes for which the funds have been proposed for expenditure through commitment accounting; (9) develops and interprets budgetary policies and practices for operating units of the Agency including analysis and approval for all equipment, supplies, travel, transportation and services procured by HRSA, and ensures the validity, legality and proper accounting treatment of expenditures processed through the UFMS; (10) controls the Agency's processes of allotment, allocation, obligation, and expenditure of funds in approved annual operating plans for all HRSA accounts; (11) monitors Bureau obligations in current allocations, disbursements and outlays; notifies Bureaus of potential deficiencies in allotments and allowances for specific periods for corrective action by Bureau staff; (12) maintains primary liaison between HRSA and the Program Support Center's Financial Operations Center for accounting functions; (13) maintains tracking of inputs into HRSA account for the central HHS accounting system (UFMS), which includes the examination, verification, and maintenance of accounts and accounting data within the accounting system; (14) provides standardized accounting codes across the Agency, performs technical audit functions, develops and/or installs revised accounting procedures, and serves as primary administrator of systems accounting functions within HRSA; (15) provides appropriate tracking of all "fee-for-service" charges to HRSA from other HHS components and outside entities; and (16) manages the centralized HRSA Pay Management for allocation of staff and position management.

Division of Program Budget Services (RB13)

(1) Provides direct budget execution services to assigned program components working with appropriate program management officials; (2) coordinates budget services through formalized and integrated communications with program management officials or their designees to ensure effective and efficient delivery of services to its customers; (3) supports the formulation of annual budgets, develops spending plans and manages budget activities ensuring funds are expended in accordance with congressional intent; (4) provides reports on program activities to Budget Execution and Management Staff for control of commitment accounting within allotments and allowances and for position control activities; (5) analyzes and maintains reports on disbursements and changing obligations within closed year accounts for assigned program components; and (6) assures all open documents are closed without outstanding balances.

Office of Financial Policy and Controls (RB2)

(1) Chief Financial Officer (CFO) serves as liaison with all HRSA Bureau/Office components and outside customers to provide financial information, resolve problems, and provide information on payment, and disbursement issues; (2) maintains overall responsibility for policies, procedures, monitoring of internal controls and systems related to payment and disbursement activities; (3) coordinates the development and improvement of HRSA's financial systems with the UFMS; (4) samples obligation documents and payment requests from a variety of private sector and Government sources to determine the validity and legality of the requests; (5) compiles and submits a variety of cash management and travel reports required by the Department of the Treasury and various other outside agencies; (6) provides leadership to define the control environment with Senior HRSA management to perform risk assessments identifying the most significant areas necessary for internal control placements; (7) analyzes internal reports to provide management information on special interest topics; (8) develops needs assessment for financial management training based on Government-wide and HHS standards;

and (9) assures Treasury requirements and OMB suggestions for best practices are implemented in training plan for Agency-wide use.

Division of Internal Controls (RB21)

(1) Coordinates risk assessments identifying the most significant areas necessary for internal control placements; (2) analyzes and reconciles disbursements made for HRSA by other Federal activities, and insures that disbursements are consistent with Federal Appropriations Law requirements, GAO policies, interagency elimination entry requirements, and other governing financial regulations; (3) analyzes year-end unliquidated obligations for compliance with Federal Appropriations Laws and the Economy Act, and recommends funding changes to senior HRSA management; (4) reviews and reconciles all U.S. Treasury Department reports and transmissions; (5) performs ongoing quality control reviews of various payment and disbursement processes and systems in the Office of Operations; and (6) develops needs assessment for financial management training based on Government-wide and HHS standards. Assures Treasury requirements and OMB suggestions for best practices are implemented in training plan for Agency-wide use.

Division of Financial Policy and Analysis (RB22)

(1) Defines the control environment (e.g., programs, operations, or financial reporting) with Senior HRSA management; (2) maintains overall responsibility for policies, procedures, monitoring of internal controls and systems related to payment and disbursement activities; (3) conducts analyses to inform Office of Operations and Senior HRSA management of relevant financial information, potential problems/solutions, and information on payment, travel, and disbursement issues; and (4) reviews policy documents, Inter/Intra-Agency agreements and Agency materials for financial consistency with internal controls and disbursement requirements; (5) conducts analyses of management and operational problems in terms of financial management information; (6) analyzes the design, implementation, enhancement and documentation of automated financial systems within the Office of Operations to assist management in operating more efficiently; (7) provides consultative services to systems implementers within HRSA on a broad range of issues including policy, data integrity, systems integration and interfacing issues as they relate to financial management systems; (8) provides technical support and assistance to operating components and users in the integration of financial systems and the access and interpretation of financial system data; (9) analyzes and offers recommendations concerning the costs and benefits of alternative methods of financing Agency programs and administrative operations; (10) prepares long-range resource projections for the acquisition and use of funds to support specific Agency projects and programs; (11) facilitates the review of HRSA audit activities in compliance with the Chief Financial Officer's Act of 1990; and (12) provides support to the Annual Financial Statements by monitoring statement of net cost, preparing management representation correspondence, cycle memoranda and serves as audit liaison to the combined HHS Combined Financial Statement.

Office of Acquisitions Management and Policy (RB3)

(1) Provides leadership in the planning, development, and implementation of policies and procedures for contracts; (2) exercises the sole responsibility within HRSA for the award and management of contracts; (3) provides advice and consultation of interpretation and application of the Department of Health and Human Services' policies and procedures governing contracts management; (4) develops operating procedures and policies for the Agency's contracts programs; (5) establishes standards and guides for and evaluates contracts operations throughout the Agency; (6) coordinates the Agency's positions and actions with respect to the audit of contracts; (7) maintains liaison directly with or through Agency Bureaus or Offices with contractors, other organizations, and various components of the Department; (8) provides leadership, guidance, and advice on the promotion of the activities in HRSA relating to procurement and material management governed by the Small Business Act of 1958, Executive Order 11625, and other statutes and national policy directives for augmenting the role of private industry, and small and minority businesses as sources of supply to the Government and Government contractors; and (9) plans, directs, and coordinates the Agency's sourcing program.

Division of Contracts Operations (RB31)

(1) Responsible for soliciting, negotiating, awarding, and administering negotiated contracts in support of HRSA programs and activities; (2) provides professional, in-depth advice and consultation to HRSA staff regarding the various phases of the acquisition cycle relating to contracts awarded by the Agency; (3) conducts pre-award reviews of proposed contracts that exceed the requirements called for in the Federal and departmental acquisition regulations; (4) plans and coordinates acquisition reviews of contracting activities within HRSA headquarters and the field components; and (5) responds to congressional inquiries and requests for acquisition information from other Federal agencies and non-Federal sources.

Division of General Acquisitions (RB32)

(1) Plans, negotiates and awards simplified acquisitions for headquarters and field components; (2) administers HRSA's acquisition data retrieval system; (3) oversees system and inputs data to the automated contracts reporting system; and reviews the PRISM reports and obtains specific information from various outside sources; (4) takes necessary actions regarding close out of both negotiated contracts and simplified acquisitions in support of HRSA programs; (5) provides a full range of in-depth advice and consultation regarding acquisition matters relating to the simplified acquisition to headquarters and field contracting activities; (6) conducts and monitors the performance of the HRSA purchase card IMPAC program for headquarters and field offices; (7) responds to congressional inquiries and requests for information from other departments and non-Federal sources on simplified acquisitions; (8) reviews and provides necessary recommendations on the disposition of awards which result in mistakes of bids, protests, and unauthorized obligations; (9) responsible for administration of the training and certification program for acquisition officials; (10) responsible for close-out of completed contracts and purchase orders; and (11) manages the Inter/Intra-Agency agreements.

Office of Management (RB4)

Provides Agency-wide leadership, program direction, and coordination of all phases of administrative management. Specifically, the Office of Management: (1) Provides management expertise, staff advice, and support to the Administrator in program and policy formulation and execution; (2) provides administrative management services including human resources, procurement, property, space planning, safety, physical security, and general administrative services; (3) conducts Agency-wide workforce analysis studies

and surveys; (4) plans, directs, and coordinates the Agency's activities in the areas of human resources management, including labor relations, personnel security, performance and alternative dispute resolution; (5) coordinates the development of policy and regulations; (6) oversees the development of annual operating objectives and coordinates HRSA work planning and appraisals; (7) directs and coordinates the Agency's organizations, functions and delegations of authority programs; (8) manages the Continuity of Operations (COOP) program for the Offices supported by the Office of Management; (9) administers the Agency's Executive Secretariat and committee management functions; (10) provides staff support to the Agency Chief Travel Official; and (11) provides staff support to the Deputy Ethics Counselor.

Division of Policy Review and Coordination (RB41)

(1) Advises the Administrator and other key Agency officials on cross-cutting policy issues and assists in the identification and resolution of cross-cutting policy issues and problems; (2) establishes and maintains tracking systems that provide Agency-wide coordination and clearance of policies, regulations and guidelines; (3) plans, organizes and directs the Agency's Executive Secretariat with primary responsibility for preparation and management of written correspondence; (4) arranges briefings for Department officials on critical policy issues and oversees the development of necessary briefing documents; (5) administers administrative early alert system for the Agency to assure senior Agency officials are informed about administrative actions and opportunities; (6) coordinates the preparation of proposed rules and regulations relating to Agency programs and coordinates Agency review and comment on other Department regulations and policy directives that may affect the Agency's programs; (7) manages and maintains a records management program for the Agency; (8) oversees and coordinates the Agency's committee management activities; (9) coordinates the review and publication of **Federal Register** Notices; (10) provides advice and guidance for the establishment or modification of administrative delegations of authority; (11) provides advice and guidance for the establishment or modification of program delegations of authority; and (12) contributes to the analysis, development and implementation of Agency-wide administrative policies through coordination with relevant Agency program components and other related sources.

Division of Workforce Management (RB42)

(1) Conducts Agency-wide workforce analysis studies and surveys; (2) develops comprehensive workforce strategies that meet the requirements of the President's Management Agenda, programmatic needs of HRSA, and the governance and management needs of HRSA leadership; (3) evaluates employee development practices to develop and enhance strategies to ensure HRSA retains a cadre of public health professionals and reduces risks associated with turnover in mission critical positions; (4) provides advice and guidance for the establishment or modification of organization structures, functions, and delegations of authority; (5) manages ethics and personnel security programs; (6) administers the Agency's performance management programs, including the SES Performance Review Board; (7) manages quality of work life, flexi place, and incentive and honor awards programs; (8) coordinates with the service provider the provision of human resources management, working with the service provider to communicate human resources requirements and monitoring the provider's performance; (9) directs and serves as a focal point for the Agency's intern and mentoring programs; (10) manages the Alternative Dispute Resolution Program; and (11) provides support and guidance on human resources issues for the Offices supported by the Office of Management.

Division of Management Services (RB43)

(1) Provides administrative management services including procurement, property, space planning, safety, physical security, and general administrative services; (2) ensures implementation of statutes, Executive Orders, and regulations related to official travel, transportation, and relocation; (3) provides oversight for the HRSA travel management program involving use of travel management services/systems, passenger transportation, and travel charge cards; (4) provides planning, management and oversight of all interior design projects, move services and furniture requirements; (5) develops space and furniture standards and related policies; (6) provides analysis of office space requirements required in supporting decisions relating to the acquisition of commercial leases and manages the furniture inventory; (7) provides advice, counsel, direction, and support to employees to fulfill the Agency's primary safety responsibility of providing a workplace free from recognizable safety and health concerns; (8) manages, controls, and/or coordinates all matters relating to mail management within HRSA, including developing and implementing procedures for the receipt, delivery, collection, and dispatch of mail; (9) maintains overall responsibility for the HRSA Forms Management Program which includes establishing internal controls to assure conformity with departmental policies and standards, including adequate systems for reviewing, clearing, costing, storing and controlling forms; and (10) manages the Continuity of Operations (COOP) program for the Offices supported by the Office of Management.

Office of Information Technology (RB5)

The Chief Information Officer (CIO) is responsible for the organization, management, and administrative functions necessary to carry out the responsibilities of the office including: (1) Organizational development, investment control, budget formulation and execution, policy development, strategic and tactical planning, and performance monitoring; (2) provides leadership in the development, review and implementation of policies and procedures to promote improved information technology management capabilities and best practices throughout HRSA; and (3) coordinates IT workforce issues and works closely with the Department on IT recruitment and training issues.

The Chief Technology Officer (CTO) is responsible for HRSA's emerging and advanced technology integration program consistent with HRSA's missions and program objectives including: (1) Managing technology planning and coordinating the Agency's Enterprise Architecture (EA) efforts with the capital planning process, ensuring the suitability and consistency of technology investments with HRSA's EA and strategic objectives; (2) incorporating security standards as a component of the EA process; (3) providing leadership for strategic planning that leverages information systems security, program strategies, and advanced technology integration to achieve program objectives through innovative technology use; and (4) providing leadership and establishing policy to address legislative or regulatory requirements, such as Section 508 of the Rehabilitation Act, and providing oversight for Agency IT configuration management and control.

The Chief Information Security Officer (CISO) is responsible for: (1)

Leadership and collaboration with Agency staff to oversee the implementation of security and privacy policy in the management of their IT systems, and plans all activities associated with the Federal Information Security Management Act (FISMA) or other agency security and privacy initiatives; (2) implementing, coordinating, and administering security and privacy programs to protect the information resources of HRSA in compliance with legislation, Executive Orders, directives of the OMB, or other mandated requirements; e.g., Presidential Decision Directive 63, OMB Circular A–130, the National Security Agency, the Privacy Act, and other Federal agencies; (3) executing the Agency's Risk Management Program, and evaluates and assists with the implementation of safeguards to protect major information systems, and IT infrastructure; (4) coordinating with the Division of IT Operations and Customer Service to develop and implement HRSA level policies, procedures, guidelines, and standards for the incorporation of intrusion detection systems, vulnerability scanning, forensic and other security tools used to monitor automated systems and subsystems to safeguard HRSA's electronic information and data assets; and (5) managing the development, implementation, and evaluation of the HRSA information technology security and privacy training program to meet the requirements as mandated by OMB Circular A–130, the Computer Security Act, and Privacy Act.

Division of Business Information Management (RB51)

(1) Provides consultation, assistance, and services to HRSA to promote and manage information dissemination and collaboration practices using appropriate electronic media; (2) evaluates and integrates emerging technology to facilitate the translation of data and information from data repositories into electronic formats for internal and external dissemination; (3) collaborates with the Office of Communications on the design, deployment, and maintenance of HRSA's Internet and Intranet Web sites including development and implementation of related policies and procedures; (4) develops and maintains an overall data and information management strategy for HRSA that is integrated with HHS and Government-wide strategies; (5) identifies information needs across HRSA and develops approaches for meeting those needs using appropriate technologies including development and maintenance of an enterprise reporting platform; (6) provides for data quality and ensures that data required for enterprise information requirements are captured in appropriate enterprise applications and that necessary data repositories are built and maintained; (7) enhances and expands use and utility of HRSA's data by providing basic analytic and user support, develops and maintains a range of information products for internal and external users and demonstrates potential uses of information in supporting management decisions; and (8) provides leadership and establishes policy to address legislative or regulatory requirements in its areas of responsibility.

Division of Capital Planning and Project Management (RB52)

(1) Coordinates the development and review of policies and procedures for IT Capital Planning and Investment Control, Earned Value Management, IT portfolio management, IT project management, and the enterprise performance lifecycle methodology; (2) administers the Department's multi-year strategic information resources planning process, including developing and administering the Department's Strategic IT Plan, supports the Budget Office in its evaluation of IT initiatives, and preparation of Agency, departmental, and OMB Budget Exhibits and documents; (3) works to obtain required information and analyzes it as appropriate; (4) coordinates control and evaluation review of ongoing IT projects, including support to the HRSA ITIRB in conducting such review; (5) promotes and follows a consistent methodology for project management and improves Agency-wide project management; and (6) operates a Project Management Office to improve management, communications and functional user involvement, assists with project prioritization, and monitors progress and budget.

Division of Enterprise Solutions Development and Management (RB53)

(1) Provides leadership, consultation, and IT project management services in the definition of Agency business applications architectures, the engineering of business processes, the building and deployment of applications, and the development, maintenance and management of enterprise systems and data collections efforts; (2) responsible for technology evaluation, application and data architecture definition, controlling software configuration management, data modeling, database design, development and management and stewardship services for business process owners; (3) manages the systems development lifecycle by facilitating business process engineering efforts, systems requirements definition, and provides oversight for application change management control; and (4) provides enterprise application user training, Tier-3 assistance, and is responsible for end-to-end application building, deployment, maintenance and data security assurance.

Division of IT Operations and Customer Services (RB54)

(1) Provides leadership, consultation, training, and management services for HRSA's enterprise computing environment; (2) directs and manages the support and acquisition of HRSA network and desktop hardware, servers, wireless communication devices, and software licenses; (3) responsible for the HRSA Data Center and the operation and maintenance of a complex, high-availability network infrastructure on which mission-critical applications are made available 24 hours per day, 7 days per week; (4) provides oversight for outsourced electronic mail, Internet and connectivity, web and video conferencing, and co-managed firewall and security monitoring services; (5) controls infrastructure configuration management, installations and upgrades, security perimeter protection, and system resource access; (6) coordinates IT activities for Continuity of Operations Planning (COOP) Agency-wide, including provisioning and maintaining IT infrastructure and hardware at designated COOP locations to support emergency and COOP requirements; (7) accounts for property life cycle management and tracking of Agency-wide IT capital equipment; and (8) provides oversight for outsourced Tier-1 and Tier-2 Help Desk Call Center technical assistance, maintains workstation hardware and software configuration management controls, and provides oversight of outsourced network and desktop services to staff in HRSA Regional Offices.

Section RB–30, Delegations of Authority

All delegations of authority and re-delegations of authority made to HRSA officials that were in effect immediately prior to this reorganization, and that are consistent with this reorganization, shall continue in effect pending further re-delegation.

This reorganization is effective upon the date of signature.

July 23, 2009.

Mary K. Wakefield,

Administrator.

[FR Doc. E9–18036 Filed 7–28–09; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Intent To Request Approval From OMB of One New Public Collection of Information: Pipeline Operator Security Information

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-day Notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on a new Information Collection Request (ICR). As required by the Paperwork Reduction Act, TSA will submit the application to the Office of Management and Budget (OMB) for review and approval. The ICR describes the nature of the information collection and its expected burden. Specifically, the collection involves the submission of contact information of the company's primary and alternate security manager and the telephone number of the security operations or control center, as well as data concerning pipeline security incidents.

DATES: Send your comments by September 28, 2009.

ADDRESSES: Comments may be mailed or delivered to Ginger LeMay, Office of Information Technology, TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011.

FOR FURTHER INFORMATION CONTACT: Ginger LeMay at the above address or by telephone (571) 227–3616 or e-mail *ginger.lemay@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless collection has been granted a valid OMB control number. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

The ICR documentation is available at *http://www.reginfo.gov.*

Information Collection Requirement

Purpose of Data Collection

Under the Aviation and Transportation Security Act (ATSA) (Pub. L. 107–71, 115 Stat. 597 (November 19, 2001)) 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." [1] Pipeline transportation is a mode of transportation over which TSA has jurisdiction. The Pipeline Security Division within the Office of Transportation Sector Network Management (TSNM) has the lead within TSA for pipeline matters.

In executing its responsibility for pipeline security, TSNM has employed the Pipeline Security Information Circular (Circular), which was issued on September 5, 2002 by the Department of Transportation's (DOT) Office of Pipeline Safety. The Circular defines critical pipeline facilities, identifies appropriate countermeasures for protecting them, and explains how the Federal government will verify that operators have taken appropriate action to implement satisfactory security procedures and plans. This document has been the primary Federal guideline for pipeline security. In 2008, TSA recognized that the Circular required updating, and initiated a process to amend and supersede the Circular with forthcoming Pipeline Security Guidelines. The document will include recommendations for the voluntary submission of pipeline operator security manager contact information to TSA's Pipeline Security Division and the reporting of security incident data to the Transportation Security Operation Center (TSOC).

Description of Data Collection

The draft Pipeline Security Guidelines indicate that each operator should provide TSA with the 24/7 contact information of the company's primary and alternate security manager, and the telephone number of the security operations or control center. Submission of this voluntary information may be done by telephone, email, or any other method convenient to the pipeline operator.

The document also requests that pipeline operators notify the TSOC via telephone or email if any of the following occur:

- Explosions or fires of a suspicious nature affecting pipeline systems, facilities, or assets
- Actual or suspected attacks on pipeline systems, facilities, or assets
- Bomb threats or weapons of mass destruction (WMD) threats to pipeline systems, facilities, or assets
- Theft of pipeline company vehicles, uniforms, or employee credentials
- Suspicious persons or vehicles around pipeline systems, facilities, assets, or right-of-way
- Suspicious photography or possible surveillance of pipeline systems, facilities, or assets
- Suspicious phone calls from people asking about the vulnerabilities or security practices of a pipeline system, facility, or asset operation
- Suspicious individuals applying for security-sensitive positions in the pipeline company
- Theft or loss of Sensitive Security Information (SSI) (detailed pipeline maps, security plans, etc.)
- Actual or suspected cyber attacks that could impact pipeline Supervisory Control and Data Acquisition (SCADA) or enterprise associated IT systems.

When contacting the TSOC, the draft Guidelines request that pipeline operators provide as much of the following information as possible:

- Name and contact information (e-mail address, telephone number)
- The time and location of the incident, as specifically as possible
- A description of the incident or activity involved
- Who has been notified and what actions have been taken

[1] *See* 49 U.S.C. 114(d). The TSA Assistant Secretary's current authorities under ATSA have been delegated by the Secretary of Homeland Security. Section 403(2) of the Homeland Security Act (HSA) of 2002 (Pub. L. 107–296, 116 Stat. 2315 (November 25, 2002)) transferred all functions of TSA, including those of the Secretary of Transportation and the Under Secretary of Transportation 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 respect to TSA, including that in section 403(2) of the HSA.

• The names and/or descriptions of persons involved or suspicious parties and license plates as appropriate.

There are approximately 3,000 pipeline companies in the United States. TSA estimates that pipeline operators will require a maximum of 15 minutes to collect, review, and submit primary/alternate security manager and security operations or control center contact information by telephone or email. Assuming voluntary submission of the requested information by all operators, the potential burden to the public is estimated to be a maximum of 750 hours. (3,000 companies × 15 minutes = 750 hours) Turnover of security personnel would necessitate changes to previously-submitted contact information on an as-occurring basis. Assuming an annual employee turnover rate of 10 percent, the potential burden to the public is estimated to be a maximum of 75 hours. (3,000 companies × 10 percent turnover = 300 updates; 300 updates × 15 minutes = 75 hours)

Reporting of pipeline security incidents will occur on an irregular basis. TSA estimates that approximately 140 incidents will be reported annually, requiring a maximum of 30 minutes to collect, review, and submit event information. The potential burden to the public is estimated to be 70 hours. (140 incidents × 30 minutes = 70 hours)

Use of Results

TSA's Pipeline Security Division will use the operator contact information to provide security-related information to company security managers and/or the security operations or control center. Additionally, TSA may use operator contact information to solicit additional information following a pipeline security incident. TSA will use the security incident information provided by operators for vulnerability identification and analysis and trend analysis. TSA may also include the information, in redacted form, in the TSA Office of Intelligence Transportation Suspicious Incident Report (TSIR), an unclassified weekly comprehensive review of suspicious incident reporting related to transportation which is provided to industry and government stakeholders. To the extent that incident information provided by pipeline operators is SSI, it will be protected in accordance with procedures meeting the transmission, handling, and storage requirements of SSI set forth in 49 CFR parts 15 and 1520.

Issued in Arlington, Virginia, on July 23, 2009.

Ginger LeMay,

Paperwork Reduction Act Officer, Business Improvements and Communications, Office of Information Technology.

[FR Doc. E9–17980 Filed 7–28–09; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

United States Immigration and Customs Enforcement

Agency Information Collection Activities: Extension of a currently approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review; Form I–515A, Notice to Student or Exchange Visitor; OMB Control No. 1653–0037.

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (USICE), is submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The Information Collection was previously published in the **Federal Register** on May 22, 2009 Vol. 74 No. 98 24027, allowing for a 60 day public comment period. USICE received one comment on this Information Collection from the public during this 60 day period.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted for thirty days until August 28, 2009.

Written comments and suggestions from the public and affected agencies regarding items contained in this notice and especially with regard to the estimated public burden and associated response time should be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for U.S. Immigration and Customs Enforcement, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved Information Collection.

(2) *Title of the Form/Collection:* Notice to Student and Exchange Visitor.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–515A. U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. When an academic student (F–1), vocational student (M–1), exchange visitor (J–1), or dependent (F–2, M–2 or J–2) is admitted to the United States as a nonimmigrant alien under section 101(a)(15) of the Immigration and Nationality Act (Act), he or she is required to have certain documentation. If the student or exchange visitor or dependent is missing documentation, he or she is provided with the Form I–515A, Notice to Student or Exchange Visitor. The Form I–515A provides a list of the documentation the student or exchange visitor or dependent will need to provide to the Department of Homeland Security (DHS), Student and Exchange Visitor Program (SEVP) office within 30 days of admission.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 8,000 responses at 10 minutes (0.1667 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 1,333.6 annual burden hours.

Requests for a copy of the proposed information collection instrument, with instructions; or inquiries for additional information regarding this Information Collection should be requested via

email to: *forms.ice@dhs.gov* with "ICE Form I–515A" in the subject line.

Dated: July 22, 2009..

Lucrezia Rotolo,

Chief, Policy Unit, Office of Investigations, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

[FR Doc. E9–17982 Filed 7–28–09; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–59]

Notice of Submission of Proposed Information Collection to OMB; Standardized Form for Collecting Information Regarding Race and Ethnic Data

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice of proposed information collection.

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: September 28, 2009.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval number (2535–0113) and should be sent to: Lillian L. Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; Telephone (202) 402–8048, (this is not a toll-free number) or e-mail Ms Deitzer at *Lillian.L.Deitzer@hud.gov;* for a copy of the proposed form and other available information.

FOR FURTHER INFORMATION CONTACT: Eric Gauff, AJT, Office of Departmental Grants Management and Oversight, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 3156, Washington, DC 20410; e-mail: *Eric.Gauff @hud.gov;* telephone (202) 402–3376; Fax (202) 708–0531 (this is not a toll-free number) for other available information. If you are a hearing-or-speech-impaired person, you may reach the above telephone numbers through TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

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: Standardized Form for Collecting Information Regarding Race and Ethnic Data.

OMB Control Number if applicable: 2535–0113.

Description of the need for the information and proposed use: HUD's standardized form for the Collection of Race and Ethnic Data complies with OMB's revised standards for Federal Agencies issued, October 30, 1997. These standards apply to HUD Program Office and Partners that collect, maintain, and report Federal Data on race and ethnicity for program administrative reporting.

Agency form numbers, if applicable: HUD–27061.

Members of Affected Public: Individuals or Households, Business or other-for-profit, Not-for-profit institutions, State, Local or Tribal Government.

Estimation of the total number of hours needed to prepare the information collection including number of responses, frequency of responses, and hours of responses: This proposal will result in no significant increase in the current information collection burden. An estimation of the total number of hours needed to provide the information for each grant application is 1 hour; however, the burden will be assessed against each individual grant program submission under the Paperwork Reduction Act; number of respondents is an estimated 11,000; 60% of responses will be quarterly and 40% annually.

Status of the proposed information collection: Extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: July 23, 2009.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–18090 Filed 7–28–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–60]

Notice of Submission of Proposed Information Collection to OMB; Contract and Subcontract Activity Reporting on Minority Business Enterprise (MBE)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice of proposed information collection.

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: September 28, 2009.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval number (2535–0117) and should be sent to: Lillian L. Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; Telephone (202) 402–8048, (this is not a toll-free number) or e-mail Ms Deitzer at *Lillian.L.Deitzer@hud.gov;* for a copy of the proposed form and other available information.

FOR FURTHER INFORMATION CONTACT: Lillian L. Deitzer, Reports Management Officer, QDAM, Office of the Chief Information Officer, Department of Housing and Urban Development 451 Seventh Street, SW., Room 4178, Washington, DC 20410; e-mail: *Lillian.L.Deitzer@hud.gov;* telephone (202) 402–8048; Fax 202–708–3135. (This is not a toll-free number) for other available information. If you are a hearing-or-speech-impaired person, you may reach the above telephone numbers through TTY by calling the toll-free

Federal Information Relay Service at 1–800–877–8339.

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: Contract and Subcontract Activity Reporting on Minority Business Enterprise (MBE).

OMB Control Number if applicable: 2535–0117.

Description of the need for the information and proposed use: The information is collected from developers, borrowers, sponsors, or project managers. Summaries from this report enable HUD to monitor and evaluate progress toward designated Minority Business Enterprise (MBE) Goals of Executive Order 12432. The information is used for the Department's annual report.

Agency form numbers, if applicable: HUD–2516.

Members of Affected Public: Not-for-profit institutions.

Estimation of the total numbers of hours needed to prepare the information collection including number of responses, frequency of responses, and hours of responses: An estimation of the total numbers of hours needed to prepare the Information collection is 5,365, number of respondents is 5,365, frequency of response is 'quarterly,'' and the hours per Response is 1 hour.

Status of the proposed information collection: Extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: July 23, 2009.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–18089 Filed 7–28–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5300–N–10]

Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2009 Fair Housing Initiatives Program (FHIP)

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice.

SUMMARY: HUD announces the availability on its website of the application information, submission deadlines, funding criteria, and other requirements for the FY2009 Fair Housing Initiatives Program (FHIP). The NOFA makes approximately $26.3 million available under the Department of Housing and Urban Development Appropriations Act 2009 (Public Law 111–8, approved March 11, 2009) to investigate allegations of housing discrimination and to educate the public and the housing industry about their rights and responsibilities under the Fair Housing Act. The notice providing information regarding the application process, funding criteria and eligibility requirements is available on the Grants.gov Web site at *https://apply07.grants.gov/apply/forms/_apps_idx.html*. A link to Grants.gov is also available on the HUD Web site at *http://www.hud.gov/offices/adm/grants/fundsavail.cfm*. The Catalogue of Federal Domestic Assistance (CFDA) number for the Fair Housing Initiatives Program is 14.408. Applications must be submitted electronically through Grants.gov.

FOR FURTHER INFORMATION CONTACT: Questions regarding specific program requirements should be directed to the agency contact identified in the program NOFA. Questions regarding the 2009 General Section should be directed to the Office of Departmental Grants Management and Oversight at 202–708–0667 (this is not a toll-free number) or the NOFA Information Center at 1–800–HUD–8929 (toll-free). Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 1–800–877–8339. The NOFA Information Center is open between the hours of 10 a.m. and 6:30 p.m. eastern time, Monday through Friday, except Federal holidays.

Dated: July 1, 2009.

John Trasviña,

Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. E9–18035 Filed 7–24–09; 4:15 pm]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5300–N–25]

Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2009 Resident Opportunity and Self-Sufficiency (ROSS)—Service Coordinators Program

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: HUD announces the availability on its website of the applicant information, submission deadlines, funding criteria and other requirements for HUD's Resident Opportunity and Self-Sufficiency (ROSS)—Service Coordinators Program NOFA for FY 2009. Approximately $28 million is made available through this NOFA, by the Department of Housing and Urban Development Appropriations Act, 2009 (Pub. L. 111–8, approved March 11, 2009), plus any carryover or recaptured funds from prior ROSS appropriations that may become available. The notice providing information regarding the application process, funding criteria and eligibility requirements is available on the Grants.gov Web site at *http://apply07.grants.gov/apply/forms_app_idx.html*. A link to Grants.gov is also available on the HUD Web site at *http://www.hud.gov/offices/adm/grants/fundsavail.cfm*. The Catalogue of Federal Domestic Assistance (CFDA) number for the ROSS—Service Coordinators Program is 14.870. Applications must be submitted electronically through Grants.gov.

FOR FURTHER INFORMATION CONTACT: Questions regarding specific program requirements should be directed to the agency contact identified in the program NOFA. Questions regarding the 2009 General Section should be directed to the Office of Departmental Grants Management and Oversight at 202–708–0667 (this is not a toll-free number) or the NOFA Information Center at 1–800–HUD–8929 (toll-free). Persons with

hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 1–800–877–8339.

Dated: June 30, 2009.

Sandra B. Henriquez,

Assistant Secretary for Public and Indian Housing.

[FR Doc. E9–18038 Filed 7–24–09; 4:15 pm]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5330–D–02]

Redelegation of Authority for Homelessness Prevention and Rapid Re-Housing Program

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of redelegation of authority.

SUMMARY: In this notice, the Assistant Secretary for Community Planning and Development redelegates to the Community Planning and Development Field Directors the authority necessary to implement the Homelessness Prevention and Rapid Re-Housing Program (HPRP), which was established under the Homelessness Prevention Fund heading of Division A, Title XII of the American Recovery and Reinvestment Act of 2009.

DATES: *Effective Date: July 21, 2009.*

FOR FURTHER INFORMATION CONTACT: Ann Oliva, Director, Office of Special Needs Assistance Programs, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, 202–708–4300. (This is not a toll-free number.) Hearing or speech-impaired individuals, may access this number via TTY by calling the Federal Information Relay Service at 1–800–877–8399.

SUPPLEMENTARY INFORMATION:

This notice states the scope of authority delegated to the Community Planning and Development Field Directors with respect to HPRP. The Secretary of Housing and Urban Development delegated to the Assistant Secretary for Community Planning and Development all power and authority of the Secretary with respect to HPRP, except the power to sue and be sued. In that delegation published on June 5, 2009 (74 FR 28055), the Secretary authorized the Assistant Secretary to redelegate to employees of HUD any of the powers and authority delegated to the Assistant Secretary, with the exception of the authority to issue or waive rules and regulations. In this notice, the Assistant Secretary for Community Planning and Development redelegates the power and authority of the Assistant Secretary as specified below, in accordance with applicable law, rule and departmental policy.

- Section A. Authority Redelegated: The Community Planning and Development Field Directors are redelegated all power and authority of the Assistant Secretary for Community Planning and Development with respect to HPRP.
- Section B. Authority Excepted: The power and authority redelegated under Section A do not include the power and authority to issue or waive rules and regulations or the power to sue and be sued.
- Section C. No Further Redelegation: The power and authority redelegated under Section A may not be further redelegated.

Authority: Section 7(d) of the Department of HUD Act, 42 U.S.C. 3535(d).

Dated: July 21, 2009.

Mercedes Márquez,

Assistant Secretary for Community Planning and Development.

[FR Doc. E9–18088 Filed 7–28–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Availability of Draft Director's Order (DO) Concerning National Park Service (NPS) Policies and Procedures Governing Its Dam Safety Program

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of availability.

SUMMARY: The NPS is proposing to adopt a DO setting forth the policies and procedures under which NPS will develop and implement the Dam Safety Program. The NPS maintains an inventory of NPS owned and non-NPS owned dams that range greatly in size, complexity and potential for failure. This DO summarizes the NPS's policies and procedures for meeting Federal requirements as codified at 33 U.S.C. 467 and as required per Departmental Manual 245 and 753 and NPS Management Policies 2006. The DO will help ensure that all necessary actions are taken to identify NPS owned and non-NPS owned dams which impact parks, and inspect, operate, maintain, and reduce risk for NPS owned dams.

DATES: Written comments will be accepted until August 28, 2009.

ADDRESSES: Draft DO #40 is available on the Internet at *http://www.nps.gov/policy/DO-40draft.htm.* Requests for copies of, and written comments on, the DO should be sent to Commander Nate Tatum, Dam Safety Program, Park Facilities Management Division, 1201 Eye (I) St., Washington, DC 20005, or to his Internet address: *nate_tatum@partner.nps.gov.*

FOR FURTHER INFORMATION CONTACT: Commander Nate Tatum, 202/513–7228.

SUPPLEMENTARY INFORMATION: When the NPS adopts documents containing new policy or procedural requirements that may affect parties outside the NPS, the documents are first made available for public review and comment before being adopted. The draft DO covers topics such as the authorities and guidance for the Dam Safety program; NPS's Dam Safety policy; and elements of the Dam Safety Program (*e.g.*, action, management review, and hazard potential classification, dam safety inventory, inspection, emergency action plans, operation and maintenance of dams, corrective action, facility security plans, roles and responsibilities, etc).

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: July 23, 2009.

Timothy M. Harvey,

Chief, Park Facility Management Division.

[FR Doc. E9–18091 Filed 7–28–09; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–920–1320–EL, WYW178270]

Coal Exploration License, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of invitation for coal exploration license.

SUMMARY: Pursuant to section 2(b) of the Mineral Leasing Act of 1920, as amended by section 4 of the Federal Coal Leasing Amendments Act of 1976, 90 Stat. 1083, 30 U.S.C. 201(b), and to the regulations adopted as 43 CFR 3410, all interested parties are hereby invited to participate with Bridger Coal

Company on a pro rata cost sharing basis in its program for the exploration of coal deposits owned by the United States of America in the following-described lands in Sweetwater County, Wyoming:

T. 20 N., R. 100 W., 6th P.M., Wyoming
Sec. 12: W½.

Containing 320.00 acres, more or less.

The purpose of the exploration program is to obtain structural and quality information of the coal. The proposed exploration program is fully described and will be conducted pursuant to an exploration plan to be approved by the Bureau of Land Management.

DATES: Any party electing to participate in this exploration program must send written notice to the Bridger Coal Company and the Bureau of Land Management, as provided in the **ADDRESSES** section below, which must be received within 30 days after publication of this Notice of Invitation in the **Federal Register**.

ADDRESSES: Copies of the exploration plan (serialized under number WYW178270) are available for review during normal business hours in the following offices: Bureau of Land Management, Wyoming State Office, 5353 Yellowstone Road, P.O. Box 1828, Cheyenne, Wyoming 82003; and Bureau of Land Management, Rock Springs Field Office, 280 Highway 191 North, Rock Springs, Wyoming 82901.

The written notice should be sent to the following addresses: Bridger Coal Company, c/o Interwest Mining Company, Attn: Scott M. Child, 1407 West North Temple, Suite 310, Salt Lake City, Utah 84116, and the Bureau of Land Management, Wyoming State Office, Branch of Solid Minerals, Attn: Mavis Love, P.O. Box 1828, Cheyenne, Wyoming 82003.

SUPPLEMENTARY INFORMATION: All of the coal in the above-described land consists of unleased Federal coal within the Green River/Hams Fork Region. The purpose of the exploration program is to obtain coal quantity, quality and seam structure information for the D5, D4, D3, D2 and D1 coal seams. This notice of invitation will be published in the Rock Springs Daily Rocket-Miner once each week for two consecutive weeks beginning the week of June 1, 2009, and once in the **Federal Register**.

The foregoing is published in the **Federal Register** pursuant to 43 CFR 3410.2–1(c)(1).

Larry Claypool,

Deputy State Director, Minerals and Lands.

[FR Doc. E9–18084 Filed 7–28–09; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVLVRWF1640000.L51010000.ER0000; N–82076; 09–08807; TAS: 14x5017]

Notice of Intent To Prepare a Supplemental Environmental Impact Statement for the Proposed One Nevada Transmission Line, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1976 (NEPA), as amended, and the Federal Land Policy and Management Act of 1976 FLPMA, as amended, the Bureau of Land Management (BLM) Ely and Southern Nevada District Offices intend to prepare a Supplemental Environmental Impact Statement (SEIS) for a proposed 500 kilovolt (kv) transmission line and associated facility from Ely, Nevada, to the Harry Allen substation just north of Las Vegas, Nevada and by this notice are announcing the beginning of the scoping process to solicit public comments and identify issues.

DATES: This notice initiates the public scoping process for the SEIS. Comments on issues may be submitted in writing until August 28, 2009. The date(s) and location(s) of any scoping meetings will be announced at least 15 days in advance through local news media, newspapers and the BLM Web site at: *http://www.blm.gov/nv/st/en/fo/ely_field_office.html.* In order to be included in the draft SEIS, all comments must be received prior to the close of the scoping period or 15 days after the last public meeting, whichever is later. We will provide additional opportunities for public participation upon publication of the draft SEIS.

ADDRESSES: You may submit comments related to the Proposed One Nevada Transmission Line by any of the following methods:

- *Web Site: http://www.blm.gov/nv/st/en/fo/ely_field_office.html;*
- *E-mail: eyfoweb@nv.blm.gov;*
- *Fax:* 775–289–1910;
- *Mail:* BLM, Ely District Office, 702 North Industrial Way, Ely, NV 89301; or
- *Mail:* Southern Nevada District Office, 4701 North Torrey Pines Drive, Las Vegas, NV 89130.

Documents pertinent to this proposal may be examined at the Ely and Southern Nevada District Offices.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to our mailing list, send requests to: ATTN: One Nevada Transmission Line; contact Michael Dwyer, telephone (702) 821–7102; address, Ely District Office, 702 North Industrial Way, Ely, NV 89301; e-mail *michael_dwyer@blm.gov.*

SUPPLEMENTARY INFORMATION: On June 5, 2006 the applicant, Sierra Pacific Power Company (SPPC), requested authorization for the Ely Energy Center (EEC), a proposed power-generating facility that included rail lines, transmission lines with fiber optic cable, new and expanded substations, water well-fields and pipeline delivery systems, and associated facilities to be located on mostly public lands in White Pine, Lincoln, Nye, Elko, and Clark counties, Nevada. On January 26, 2007, the BLM published a Notice of Intent to prepare an EIS for the EEC and its associated facilities. Five public scoping meetings were held between February 5 and 9, 2007 in Las Vegas, Alamo, Ely, Elko, and Reno, Nevada. In January 2009, the BLM published a Notice of Availability of a draft EIS initiating a 90-day public comment period on the draft EIS. In February 2009, during the public comment period, NV Energy (formerly SPPC) made public its intention to postpone indefinitely the power generation facilities associated with the EEC from its proposal. On March 30, 2009, the BLM received an amended application and Plan of Development from NV Energy for one approximately 236-mile 500 kV transmission line, one new substation, an expansion of one substation, one fiber optic line, and related appurtenances that were part of the EEC proposal. The project was given a new name by the proponent: The One Nevada 500 kV Transmission Line Project (ON Line Project).

The BLM will develop a SEIS for the project because of substantial changes to the proposed action that are relevant to environmental concerns. See 40 CFR 1502.9(c). Removal of the coal-fired power generation facilities from the application makes an assessment of their impacts in the draft EIS no longer applicable.

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 process for developing the EIS. This scoping process will direct the preparation of a SEIS for a proposed 500 kv transmission line and associated facilities from Ely, Nevada, to the Harry Allen substation just north of Las Vegas, Nevada. The SEIS will supplement the Draft Environmental Impact Statement (EIS) for the Ely Energy Center. A power

generation plant is not associated with the SEIS.

Because the ON line proposed action is part of the EEC proposed action, the ON Line SEIS will incorporate all applicable sections of the draft EIS. The ON Line draft SEIS will be made available for public comment, and applicable comments collected during the public comment period on the EEC draft EIS will be carried forward into the SEIS process. The BLM will use and coordinate the NEPA commenting process to satisfy the public involvement requirements of Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470f) as provided for in 36 CFR 800.2(d)(3). Native American Tribal consultations will be conducted in accordance with policy, and Tribal concerns will be given due consideration, including impacts on Indian trust assets. Federal, State, and local agencies, as well as individuals or organizations that may be interested or affected by the BLM's decision on this project are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate as a cooperating agency. Before including your address, phone number, email 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.

Authority: 43 CFR part 2800.

Michael J. Herder,

District Manager,

Ely District.

[FR Doc. E9–18081 Filed 7–28–09; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNV952000–09–L14200000–BJ0000; 09–08807; TAS: 14X1109]

Filing of Plats of Survey; Nevada

AGENCY: Bureau of Land Management.

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform the public and interested State and local government officials of the filing of Plats of Survey in Nevada.

DATES: *Effective Dates:* Filing is effective at 10 a.m. on the dates indicated below.

FOR FURTHER INFORMATION CONTACT: David D. Morlan, Chief, Branch of Geographic Sciences, Bureau of Land Management (BLM), Nevada State Office, 1340 Financial Blvd., P.O. Box 12000, Reno, NV 89520, 775–861–6541.

SUPPLEMENTARY INFORMATION:

1. The Plats of Survey of the following described lands were officially filed at the Nevada State Office, Reno, Nevada, on April 16, 2009:

The supplemental plat, showing amended lottings in section 1, Township 24 South, Range 60 East, Mount Diablo Meridian, Nevada, was accepted April 14, 2009.

This supplemental plat was prepared to meet certain administrative needs of the Bureau of Land Management.

The plat representing the dependent resurvey of a portion of the subdivisional lines, the further subdivision of section 8 and a metes-and-bounds survey of a portion of the centerline of Las Vegas Boulevard in section 8, Township 23 South, Range 61 East, Mount Diablo Meridian, Nevada, under Group No. 859, was accepted April 14, 2009.

This survey was executed to meet certain administrative needs of the Bureau of Land Management.

The plat representing the dependent resurvey of a portion of the subdivisional lines and a metes-and-bounds survey of a portion of the centerline of U.S. Highway No. 93, Township 11 South, Range 63 East, Mount Diablo Meridian, Nevada, under Group No. 863, was accepted April 14, 2009.

This survey was executed to meet certain administrative needs of the Bureau of Land Management and Coyote Springs Investment, L.L.C.

2. The Plats of Survey of the following described lands were officially filed at the Nevada State Office, Reno, Nevada, on May 7, 2009:

The plat, in two sheets, representing the dependent resurvey of a portion of the south boundary and a portion of the subdivisional lines, and the subdivision of sections 31 and 32, Township 21 South, Range 59 East, Mount Diablo Meridian, Nevada, under Group No. 752, was accepted May 6, 2009.

The plat, in three sheets, representing the dependent resurvey of a portion of the subdivisional lines and a portion of the subdivision-of-section lines of section 17, the subdivision of sections 4, 5, 7 and 8, and the further subdivision of section 17, Township 22 South, Range 59 East, Mount Diablo Meridian, Nevada, under Group No. 752, was accepted May 6, 2009.

These surveys were executed to meet certain administrative needs of the Bureau of Land Management.

3. The Plat of Survey of the following described lands was officially filed at the Nevada State Office, Reno, Nevada, on May 21, 2009:

The plat representing the dependent resurvey of a portion of the subdivisional lines and a metes-and-bounds survey in section 19, Township 1 South, Range 68 East, Mount Diablo Meridian, Nevada, under Group No. 866, was accepted May 19, 2009.

This survey was executed to meet certain administrative needs of the Bureau of Land Management and the State of Nevada.

4. The above-listed surveys are now the basic record for describing the lands for all authorized purposes. These surveys have been placed in the open files in the BLM Nevada State Office and are available to the public as a matter of information. Copies of the surveys and related field notes may be furnished to the public upon payment of the appropriate fees.

Dated: July 13, 2009.

David D. Morlan,

Chief Cadastral Surveyor, Nevada.

[FR Doc. E9–18021 Filed 7–28–09; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on July 24, 2009, a proposed Consent Decree was lodged with the United States District Court for the District of Massachusetts in *United States* v. *American Premier Underwriters, Inc.*, Civil Action No. 05–CV–12189–RWZ.

In this action, the United States, on November 1, 2005, filed a complaint, under Sections 107(a) and 113(g)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9607(a) and 9613(g)(2), against American Premier Underwriters, Inc. ("APU"), seeking reimbursement of response costs incurred for response actions taken in connection with the release or threatened release of hazardous substances at the Morses Pond Culvert Superfund Site in Wellesley, Massachusetts (the "Site") and a declaration that APU is liable for future response costs incurred in connection with the Site. The proposed Consent Decree provides that APU will pay the

United States $2,975,000, plus interest on that amount from May 27, 2009 to the date of payment. The proposed Consent Decree has a standard covenant not to sue under Section 107(a) of CERCLA, 42 U.S.C. 9607(a), for Past Response Costs, which are defined as the costs that the United States Environmental Protection Agency ("EPA"), or the United States Department of Justice on behalf of EPA, pays at or in connection with the Site through the date of entry of the Consent Decree, as well as all accrued interest on such costs. The Decree has a standard reservation of rights provision. The Decree also provides that APU is entitled to contribution protection with respect to Past Response Costs pursuant to Section 113(f)(2) of CERCLA, 42 U.S.C. 9613(f)(2), or as may otherwise be provided by law.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *American Premier Underwriters, Inc.*, D.J. Ref. 90–11–3–07035. Comments may also be submitted by e-mail to *pubcomment-ees.enrd@usdoj.gov*. A copy of the comments should also be sent to Donald Frankel, Trial Attorney, Environmental Enforcement Section, Department of Justice, Suite 616, One Gateway Center, Newton, MA 02458.

The Consent Decree may be examined at the Office of the United States Attorney, District of Massachusetts, U.S. Courthouse, Suite 9200, One Courthouse Way, Boston, MA 02210 (contact Barbara Healy Smith). During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy of the Consent Decree from the Consent Decree Library, please enclose a check in the amount of $4.00 (25 cents per page reproduction cost) payable to the U.S. Treasury (if the request is by fax or e-mail, forward a check to the Consent Decree Library at the address stated above).

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E9–18004 Filed 7–28–09; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

[OMB Number 1110–0015]

Agency Information Collection Activities: Proposed Collection, Comments Requested

ACTION: 30-day Notice of Information Collection Under Review: Extension of a currently approved collection; Hate Crime Incident Report and Quarterly Hate Crime Report.

The Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with established review procedures of the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 74, Number 80, pages 19239–19240, on April 28, 2009.

The purpose of this notice is to allow for an additional 30 days for public comment until August 28, 2009. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to Gregory E. Scarbro, Unit Chief, Federal Bureau of Investigation, Criminal Justice Information Services Division (CJIS), Module E–3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306; facsimile (304) 625–3566.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques of other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of information collection:* Revision of a currently approved collection.

(2) *The title of the form/collection:* Hate Crime Incident Report and Quarterly Hate Crime Report,

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* Forms 1–699 and 1–700; Criminal Justice Information Services Division, Federal Bureau of Investigation, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: City, county, state, federal and tribal law enforcement agencies.

This collection is needed to collect information on hate crime incidents committed throughout the United States. Data are tabulated and published in the annual Crime in the United States and Hate Crime Statistics.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There are approximately 13,242 law enforcement agency respondents with an estimated response time of 9 minutes.

(6) *An estimate of the total public burden (in hours) associated with this collection:* There are approximately 7,945 hours, annual burden, associated with this information collection.

If additional information is required contact: Ms. Lynn Bryant, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: July 23, 2009.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E9–17981 Filed 7–28–09; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

Parole Commission

Record of Vote of Meeting Closure; Public Law 94–409; 5 U.S.C. Sec. 552b

I, Isaac Fulwood, of the United States Parole Commission, was present at a meeting of said Commission, which started at approximately 11:30 a.m., on Thursday, July 16, 2009, at the U.S. Parole Commission, 5550 Friendship Boulevard, 4th Floor, Chevy Chase, Maryland 20815. The purpose of the meeting was to decide one petition for reconsideration pursuant to 28 CFR 2.27. Four Commissioners were present, constituting a quorum when the vote to close the meeting was submitted.

Public announcement further describing the subject matter of the meeting and certifications of General Counsel that this meeting may be closed by vote of the Commissioners present were submitted to the Commissioners prior to the conduct of any other business. Upon motion duly made, seconded, and carried, the following Commissioners voted that the meeting be closed: Isaac Fulwood, Cranston J. Mitchell, Edward F. Reilly, Jr. and Patricia K. Cushwa.

In witness whereof, I make this official record of the vote taken to close this meeting and authorize this record to be made available to the public.

Dated: July 17, 2009.

Isaac Fulwood,

Chairman, U.S. Parole Commission.

[FR Doc. E9–17887 Filed 7–28–09; 8:45 am]

BILLING CODE 4410–01–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

July 23, 2009.

The Department of Labor (DOL) hereby announces the submission of the following public information collection requests (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of each ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number)/e-mail: *DOL_PRA_PUBLIC@dol.gov.*

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor—Mine Safety and Health Administration (MSHA), Office of Management and Budget, 725 17th Street, NW., Room 10235, Washington, DC 20503, Telephone: 202–395–4816/Fax: 202–395–5806 (these are not toll-free numbers), E-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the applicable OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: Mine Safety and Health Administration.

Type of Review: Extension without change of currently approved collection.

Title of Collection: Miner Operator Dust Cards.

OMB Control Number: 1219–0011.

Form Number: N/A.

Estimated Number of Respondents: 830.

Estimated Total Annual Burden Hours: 33,199.

Estimated Total Annual Cost Burden (does not include hourly wage costs): $3,839,714.

Affected Public: Business or other for profits (mines)

Description: Coal Mine operators are required to collect and submit respirable dust samples to MSHA for analysis. Pertinent information associated with identifying and analyzing these samples is submitted on the dust data cards that accompany the samples. For additional information, see related notice published at 74 FR 19988 on April 30, 2009.

Agency: Mine Safety and Health Administration.

Type of Review: Extension without change of currently approved collection.

Title of Collection: Ground Control Plan.

OMB Control Number: 1219–0026.

Form Number: N/A.

Estimated Number of Respondents: 925.

Estimated Total Annual Burden Hours: 2,841.

Estimated Total Annual Cost Burden (does not include hourly wage costs): $520.

Affected Public: Business or other for profits (mines)

Description: Ground control plans are reviewed by MSHA to ensure that surface coal mine operators' methods of controlling highwalls and spoil banks are consistent with prudent engineering design and will ensure safe working conditions for miners. For additional information, see related notice published at Vol. 74 FR 19987 on April 30, 2009.

Agency: Mine Safety and Health Administration.

Type of Review: Extension without change of currently approved collection.

Title of Collection: Underground Retorts.

OMB Control Number: 1219–0096.

Form Number: N/A.

Estimated Number of Respondents: 1.

Estimated Total Annual Burden Hours: 160.

Estimated Total Annual Cost Burden (does not include hourly wage costs): $0.

Affected Public: Business or other for profits (mines)

Description: Falls of roofs, faces, ribs, and highwalls in surface mines, historically, have been among the leading cause of injuries and deaths in mines. Therefore, in order to protect the safety of miners, mine operators are required to obtain certification from the manufacturers that roof and rock bolts and accessories are manufactured and tested in accordance with the applicable American Society for Testing and Materials specifications and make that certification available to an authorized representative of the Secretary. For additional information, see related notice published at 74 FR 19986 on April 30, 2009.

Darrin A, King,

Departmental Clearance Officer.

[FR Doc. E9–17998 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

July 23, 2009.

The Department of Labor (DOL) hereby announces the submission of the following public information collection requests (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of each ICR, with applicable supporting documentation; including, among other things, a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number)/e-mail: *DOL_PRA_PUBLIC@dol.gov*.

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor—Occupational Safety and Health Administration (OSHA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–7316/Fax: 202–395–5806 (these are not toll-free numbers), E-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: Occupational Safety and Health Administration.

Type of Review: Extension without change of a previously approved collection.

Title of Collection: Lead in General Industry (29 CFR 1910.1025)

OMB Control Number: 1218–0092.

Affected Public: Business or other for-profits.

Estimated Number of Respondents: 61,405.

Estimated Total Annual Burden Hours: 1,225,255.

Estimated Total Annual Costs Burden (excludes hourly wage costs): $143,566,299.

Description: The purpose of the Lead in General Industry standard and its information collection requirements is to provide protection for employees from the adverse effects associated with occupational exposure to the carcinogen lead. Employers must monitor exposure to lead, provide medical surveillance, train employers about the hazards of lead, and establish and maintain accurate records of employee exposure to lead. These records will be used by employers, employees, physicians, and the Government to ensure that employees are not being harmed by exposure to lead. For additional information, see the related 60-day preclearance notice published in the **Federal Register** at 74 FR 23209 on May 18, 2009. PRA documentation prepared in association with the preclearance notice is available on *http://www.regulations.gov* under docket number OSHA–2009–0009.

Agency: Occupational Safety and Health Administration.

Type of Review: Extension without change of a previously approved collection.

Title of Collection: Lead in Construction Standard (29 CFR 1926.62)

OMB Control Number: 1218–0189.

Affected Public: Business or other for-profits.

Estimated Number of Respondents: 136,484.

Estimated Total Annual Burden Hours: 1,363,803.

Estimated Total Annual Costs Burden (excludes hourly wage costs): $63,254,826.

Description: The Lead in Construction Standard standard requires employers to train employees about the hazards of lead, monitor employee exposure, provide medical surveillance, and maintain accurate records of employee exposure to lead. These records will be used by employers, employees, physicians and the Government to ensure that employees are not harmed by exposure to lead in the workplace. For additional information, see the related 60-day preclearance notice published in the **Federal Register** at 74 FR 23210 on May 18, 2009. PRA documentation prepared in association with the preclearance notice is available on *http://www.regulations.gov* under docket number OSHA–2009–0008.

Darrin A. King,

Departmental Clearance Officer.

[FR Doc. E9–18069 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

July 23, 2009.

The Department of Labor (DOL) hereby announces the submission of the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of this ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number)/e-mail: *DOL_PRA_PUBLIC@dol.gov*.

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor—ETA, Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–7316/Fax: 202–395–5806 (these are not toll-free numbers), E-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Employment and Training Administration.

Type of Review: Revision of a currently approved collection.

Title of Collection: Standard Job Corps Request for Proposal and Related Contractor Information Gathering.

OMB Control Number: 1205–0219.

Agency Form Number: ETA–3–28; ETA–6–61; ETA–6–131, A, B, and C; ETA–640; ETA–2110; and ETA–2181.

Affected Public: Private Sector.

Total Estimated Number of Respondents: 122.

Total Estimated Annual Burden Hours: 62,525.

Total Estimated Annual Costs Burden (does not include hour costs): $0.

Description: The collections of information included under OMB Control number 1205–0219 are necessary for the operation and management of Job Corps Centers. For additional information, see related notice published at Volume 74 FR 5680 on January 30, 2009.

Darrin A. King,

Departmental Clearance Officer.

[FR Doc. E9–18011 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment Standards Administration

Proposed Extension of the Approval of Information Collection Requirements

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment Standards Administration is soliciting comments concerning its proposal to extend the Office of Management and Budget (OMB) approval of the Information *Collection:* Pharmacy Billing Requirements. A copy of the proposed information collection request can be obtained by contacting the office listed below in the **ADDRESSES** section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before September 28, 2009.

ADDRESSES: Mr. Steven D. Lawrence, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0292, fax (202) 693–1451, E-mail *Lawrence.Steven@dol.gov*. Please use only one method of transmission for comments (mail, fax, or E-mail).

SUPPLEMENTARY INFORMATION:

I. Background

The Office of Workers' Compensation Programs (OWCP) is the agency responsible for administration of the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*, and the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA), 42 U.S.C. 7384 *et seq.* All three of these statutes require that OWCP pay for covered medical treatment provided to beneficiaries; this medical treatment can include medicinal drugs dispensed by pharmacies. In order to determine whether amounts billed for drugs are appropriate, OWCP must receive 19 data elements, including the name of the patient/beneficiary, the National Drug Code (NDC) number of the drugs prescribed, the quantity provided, the prescription number and the date the prescription was filled. The regulations implementing these statutes require the collection of information needed to enable OWCP to determine if bills for drugs submitted directly by pharmacies, or as reimbursement requests submitted by claimants, should be paid. There is no standardized paper form for submission of the billing information collected in this Information Collection Request (ICR). Over the past several years, the majority of pharmacy bills submitted to OWCP have been submitted electronically using one of the industry-wide standard formats for the electronic transmission of billing data through nationwide data clearinghouses devised by the National Council for Prescription Drug Programs (NCPDP). However, since some pharmacy bills are still submitted using a paper-based bill format, OWCP will continue to accept any of the many paper-based bill formats still used by some providers so long as they contain the data elements needed for processing the bill. None of the paper-based or electronic billing formats have been designed by or provided by OWCP; they are billing formats commonly accepted by other Federal programs and in the private health insurance industry for drugs. Nonetheless, the three programs (FECA, BLBA and EEOICPA) provide instructions for the submission of necessary pharmacy bill data elements in provider manuals distributed or made available to all pharmacies enrolled in the programs. This information collection is currently approved for use through March 31, 2010.

II. Review Focus

The Department of Labor is particularly interested in comments that:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility, and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

III. Current Actions

The Department of Labor seeks approval for the extension of this information collection in order to carry out its responsibility to provide payment for pharmaceuticals covered under the Acts.

Type of Review: Extension.

Agency: Employment Standards Administration.

Title: Pharmacy Billing Requirements.

OMB Number: 1215–0194.

Affected Public: Business or other for-profit.

Total Respondents: 28,150.

Total Annual Responses: 1,463,800.

Estimated Total Burden Hours: 121,494.

Estimated Time Per Response: 5 minutes.

Frequency: On Occasion.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: July 23, 2009.

Steven D. Lawrence,

Acting Chief, Branch of Management Review and Internal Control, Division of Financial Management, Office of Management, Administration and Planning, Employment Standards Administration.

[FR Doc. E9–17993 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–CH–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,762]

Chrysler, LLC, Sterling Heights Assembly Plant, Including On-Site Leased Workers from Caravan Knight Facilities Management LLC; Sterling Heights, MI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on April 27, 2009, applicable to workers of Chrysler, LLC, Sterling heights Assembly Plant, Sterling Heights, Michigan. The notice was published in the **Federal Register** on May 18, 2009 (74 FR 23214).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers assemble the Chrysler Sebring, Chrysler Sebring Convertible and the Dodge Avenger.

New information shows that workers leased from Caravan Knight Facilities Management LLC were employed on-site at the Sterling Heights, Michigan location of Chrysler, LLC, Sterling Heights Assembly Plant. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Caravan Knight Facilities Management LLC working on-site at the Sterling Heights, Michigan location of Chrysler, LLC, Sterling Heights Assembly Plant.

The amended notice applicable to TA–W–65,762 is hereby issued as follows:

All workers of Chrysler, LLC, Sterling Heights Assembly Plant, including on-site leased workers from Caravan Knight Facilities Management LLC, Sterling Heights, Michigan, who became totally or partially separated from employment on or after March 8, 2008, through April 27, 2011, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 29th day of June 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18040 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,137]

J.T. Posey Company/Arcadia Manufacturing Group, Arcadia, CA; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated on May 18, 2009 in response to a worker petition filed on behalf of workers of J.T. Posey Company/Arcadia Manufacturing Group, Arcadia, California.

The petitioning group of workers is covered by an active certification, (TA–W–61,804) which expires on September 18, 2009. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 30th day of June, 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18044 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,466]

Borg Warner Diversified Transmission Products, Inc., Muncie, IN; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated on June 30, 2009 in response to a company official petition filed on behalf of workers of Borg Warner Diversified Transmission Products, Inc., Muncie, Indiana.

The group of workers employed by the subject firm is covered by an earlier petition (TA–W–71,378) filed on June 22, 2009 that is the subject of an ongoing investigation for which a determination has not yet been issued. Consequently, further investigation in this case would serve no purpose, and the investigation under this petition has been terminated.

Signed at Washington, DC, this 7th day of July 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18060 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,302]

TNS Custom Research, Indiana, PA; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated on June 17, 2009 in response to a worker petition filed by workers of TNS Custom Research, Indiana, Pennsylvania.

The petitioning group of workers is covered by an earlier petition (TA–W–71,297) filed on June 17, 2009 that is the subject of an ongoing investigation for which a determination has not yet been issued. Consequently, further investigation in this case would serve no purpose, and the investigation under this petition has been terminated.

Signed at Washington, DC, this 1st day of July 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18058 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,113; TA–W–71,113A]

Mitsubishi Heavy Industries Climate Control, Inc., Franklin, IN, and Greenwood, IN; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on June 9, 2009, in response to a petition filed by a company official on behalf of workers at Mitsubishi Heavy Industries, Climate Control, Inc., Franklin, Indiana (TA–W–71,113), and Greenwood, Indiana (TA–W–71,113A).

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 29th day of June 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18055 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,888]

Camcar LLC—Rochester Operations, DBA Acument Global Technologies—Rochester Operations, Rochester, IN; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated on June 3, 2009 in response to a worker petition filed by a company official on behalf of workers of Camcar LLC—Rochester Operations, dba Acument Global Technologies, Rochester Operations, Rochester, Indiana.

The petitioning group of workers is covered by an existing certification (TA–W–70,260L) filed on May 20, 2009. The determination date of the existing certification is July 1, 2009. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 1st day of July 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18052 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,751]

Freeport McMoran Copper and Gold, Tyrone, NM; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated on May 29, 2009, in response to a worker petition filed on behalf of workers of Freeport McMoran Copper and Gold, Tyrone, New Mexico.

The petitioning group of workers is covered by an earlier petition (TA–W–70,264) filed on May 21, 2009, that is the subject of an ongoing investigation for which a determination has not yet been issued. Consequently, further investigation in this case would serve no purpose, and the investigation under this petition has been terminated.

Signed at Washington, DC, this 6th day of July 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18050 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,642]

Williams Controls, Inc., Portland, OR; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on May 28, 2009, on behalf of workers of Williams Controls, Inc., Portland, Oregon.

The petition filed with the Department has been deemed invalid. A petition when filed by workers must be signed by three workers. This requirement was not met.

Consequently, the investigation has been terminated.

Signed at Washington, DC, this 13th day of July 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18049 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,606]

Tyrone Mining LLC, a Division of Freeport Mcmoran, Tyrone, NM; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated on May 26, 2009 in response to a worker petition filed on behalf of workers of Tyrone Mining LLC, a division of Freeport McMoran, Tyrone, New Mexico.

The petitioning group of workers is covered by an earlier petition (TA–W–70,264) filed on May 21, 2009 that is the subject of an ongoing investigation for which a determination has not yet been issued. Consequently, further investigation in this case would serve no purpose, and the investigation under this petition has been terminated.

Signed at Washington, DC, this 6th day of July 2009

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18048 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,548]

Plum Creek Marketing, Inc., Columbia Falls, MT; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated on May 26, 2009 in response to a worker petition filed by a company official on behalf of workers of Plum Creek Marketing, Inc., Columbia Falls, Montana.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation under this petition has been terminated.

Signed at Washington, DC, this 29th day of June, 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18047 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,390]

Springs Global US, Inc., Sardis, MS; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on May 21, 2009 by a company official on behalf of workers of Springs Global US, Inc., Sardis, Mississippi.

The petitioner has requested that the petition is withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 14th day of July 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18046 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,198]

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Augusta, ME; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on May 19, 2009 by a State of Maine Workforce Office representative on behalf of workers of United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, August, Maine.

The petitioner has requested that the petition is withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 14th day of July 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18045 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,107]

International Brotherhood of Electrical Workers Local Union 567, Lewiston, ME; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated on May 19, 2009, in response to a worker petition filed by the State of Maine Workforce Office on behalf of workers of the International Brotherhood of Electrical Workers, Local Union 567, Lewiston, Maine.

The petitioner requested that this petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation under this petition has been terminated.

Signed at Washington, DC, this 29th day of June 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18043 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,917]

BonaKemi USA, Incorporated, Monroe, NC; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on May 14, 2009 in response to a petition filed by a company official on behalf of workers of BonaKemi USA, Incorporated, Monroe, North Carolina.

The petitioner has requested that the petition be withdrawn. Therefore, the investigation under this petition has been terminated.

Signed at Washington, DC, this 6th day of July 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18042 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,896]

North River Boats, Roseburg, OR; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on May 6, 2009, in response to a petition filed on behalf of workers of North River Boats, Roseburg, Oregon.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 29th day of June 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18041 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,620]

Circuit City, Coon Rapids, MN; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated on July 9, 2009 in response to a worker petition filed by the Minnesota State Workforce Office on behalf of workers of Circuit City, Coon Rapids, Minnesota.

The petitioner requested that this petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation under this petition has been terminated.

Signed at Washington, DC, this 14th day of July 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18062 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,477]

SER Enterprise/DHL Logistics, Ogden, UT; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on June 30, 2009 on behalf of workers of SER Enterprise/DHL Logistics, Ogden, Utah.

Petitions filed by a group of adversely affected workers must be signed by at least three workers. Since the petition did not include signatures by at least three workers, the petition regarding the investigation has been deemed invalid. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 9th day of July 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18061 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,429]

Teradyne, Inc., Richardson, TX; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated on June 26, 2009 in response to a worker petition filed by workers of Teradyne, Inc., Richardson, Texas.

The petitioning group of workers is covered by an earlier petition (TA–W–71,397) filed on June 26, 2009 that is the subject of an ongoing investigation for which a determination has not yet been issued. Consequently, further investigation in this case would serve no purpose, and the investigation under this petition has been terminated.

Signed at Washington, DC, this 6th day of July 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18059 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,262]

Penn-Union Corporation, Edinboro, PA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on June 17, 2009, by the Glass, Molders, Pottery International Union (GMP) Local 61, on behalf of workers of Penn-Union Corporation, Edinboro, Pennsylvania.

The petition is a duplicate of petition number TA–W–70,689, filed on May 28, 2009, that is subject of an ongoing investigation. Therefore, further investigation in this case would serve no purpose and the investigation has been terminated.

Signed at Washington, DC, this 29th of June 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18057 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,209]

A.J. Oster, LLC, Allentown, PA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on June 15, 2009, by a company official on behalf of workers of A.J. Oster, LLC, Allentown, Pennsylvania.

The petitioner has requested that the petition be withdrawn. Accordingly, the investigation has been terminated.

Signed at Washington, DC, this 30th day of June 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18056 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,099]

Seymour Tubing, Inc., Dunlap, TN; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed by a company official on June 9, 2009 on behalf of workers of Seymour Tubing, Inc., Dunlap, Tennessee.

The petition is a duplicate of petition (TA–W–71,051) filed on June 8, 2009, that is subject of an ongoing investigation. Therefore, further investigation in this case would serve no purpose and the investigation has been terminated.

Signed at Washington, DC, this 15th of July 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18054 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,007]

Federal Marine Terminals, Inc., Eastport, ME; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on June 5, 2009, by a company official on behalf of workers of Federal Marine Terminals, Inc., Eastport, Maine.

The petitioner has requested that the petition be withdrawn. Accordingly, the investigation has been terminated.

Signed at Washington, DC this 15th day of July 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18053 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,864]

Western/Scott Fetzer Company, Avon Lake, OH; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated in response to a petition filed on June 2, 2009, on behalf of workers of Western/Scott Fetzer Company, Avon Lake, Ohio.

The petition regarding the investigation has been deemed invalid. The petitioner was a former company official, but not at the time of the filing of this petition.

Consequently, the investigation has been terminated.

Signed at Washington, DC, this 10th day of July 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18051 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,621]

Sealy Mattress Company, Clarion, PA; Notice of Termination of Investigation

Pursuant to Section 223 of the Trade Act of 1974, as amended, an investigation was initiated on July 9, 2009 in response to a worker petition filed on behalf of workers of Sealy Mattress Company, Clarion, Pennsylvania.

The petitioning group of workers is covered by an earlier petition (TA–W–71,415) filed on June 26, 2009 that is the subject of an ongoing investigation for which a determination has not yet been issued. Consequently, further investigation in this case would serve no purpose, and the investigation under this petition has been terminated.

Signed at Washington, DC, this 14th day of July 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–18039 Filed 7–28–09; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL SCIENCE FOUNDATION

Notice of Availability of Final Environmental Impact Statement (FEIS)

AGENCY: National Science Foundation.

ACTION: Notice of Availability of Final Environmental Impact Statement (FEIS).

SUMMARY: The National Science Foundation (NSF) is considering whether to approve a proposal submitted by the National Solar Observatory to fund the construction of the Advanced Technology Solar Telescope (ATST) Project at the Haleakalā High Altitude Observatory site on the Island of Maui, Hawai'i. The NSF has prepared a Final Environmental Impact Statement (FEIS) for the proposed ATST Project that serves as a joint Federal and State of Hawai'i document prepared in compliance with the Federal National Environmental Policy Act, 42 U.S.C. 4321, *et seq.* (NEPA), and the State of Hawai'i Chapter 343, Hawai'i Revised Statutes. This FEIS was also prepared to evaluate the potential environmental impacts associated with the issuance of a National Park Service Special Use Permit, pursuant to 36 CFR 5.6, to operate commercial vehicles on the Haleakalā National Park road during the construction and operation of the proposed ATST Project, if approved.

Please note that responses to all comments received (including all written comments and those provided through testimony at the public hearings) on both the Draft Environmental Impact Statement (September 2006), and on the Supplemental Draft Environmental Impact Statement (May of 2009), are included in Volume IV of the FEIS. The written comments and transcripts of public hearings are also included in Volume IV. The FEIS reflects the changes made to the SDEIS based on the comments received, availability of new data, and correction of errors and omissions. The FEIS is now available on the Internet at: *http://atst.nso.edu/nsf-env* in Adobe® portable document format (PDF). The FEIS has also been distributed to interested Federal, State, and local agencies, organizations, and individuals, as well as selected repositories.

DATES: The NSF will issue a record of decision (ROD) for the proposed ATST Project following consideration of the entire administrative record for the proposed ATST Project, including the FEIS and NSF's compliance with Section 106 of the National Historic Preservation Act. The ROD will be issued no earlier than August 31, 2009, or 30 days from the date of publication in the **Federal Register** of the U.S. Environmental Protection Agency's Notice of Availability of the FEIS, whichever is later. Limited hard copies of the ROD will be available, on a first request basis, by contacting the NSF contact, Craig Foltz, Ph.D., ATST Program Director, 4201 Wilson Boulevard, Room 1045, Arlington, VA 22230, Telephone: 703–292–4909, e-mail: *cfoltz@nsf.gov*. The ROD will also be available on the Internet at the web address provided above.

FOR FURTHER INFORMATION CONTACT: Craig Foltz, Ph.D., ATST Program Manager, National Science Foundation, Division of Astronomical Sciences, 4201 Wilson Boulevard, Room 1045, Arlington, VA 22230, Telephone: 703–292–4909, Fax: 703–292–9034, E-mail: *cfoltz@nsf.gov*.

Dated: July 24, 2009.

Craig Foltz,

ATST Program Manager, National Science Foundation.

[FR Doc. E9–18027 Filed 7–28–09; 8:45 am]

BILLING CODE 7555–01–P

OFFICE OF PERSONNEL MANAGEMENT

[OMB Control No. 3206–0212; Forms RI 38–117, RI 38–118, and RI 37–22]

Proposed Information Collection; Request for Review of a Revised Information Collection

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Public Law 104–13, May 22, 1995), this notice announces that the Office of Personnel Management (OPM) intends to submit to the Office of Management and Budget (OMB) a request for review of a revised information collection. This information collection, "Rollover Election" (OMB Control No. 3206–0212, Form RI 38–117), is used to collect information from each payee affected by a change in the tax code (Pub. L. 107–16) so that OPM can make payment in accordance with the wishes of the payee. "Rollover Information" (OMB Control No. 3206–0212, Form RI 38–118), explains the election. "Special Tax Notice Regarding Rollovers" (OMB Control No. 3206–0212, Form RI 37–22), provides more detailed information.

Comments are particularly invited on: whether this collection of information is necessary for the proper performance of

functions of the Office of Personnel Management, and whether it will have practical utility; whether our estimate of the public burden of this collection is accurate, and based on valid assumptions and methodology; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of the appropriate technological collection techniques or other forms of information technology.

The estimated number of respondents is 1,500. We estimate it takes approximately 30 minutes to complete the form. The annual burden is 750 hours.

For copies of this proposal, contact Cyrus S. Benson on (202) 606–0623, Fax (202) 606–0910 or via E-mail to *Cyrus.Benson@opm.gov*. Please include a mailing address with your request.

DATES: Comments on this proposal should be received within 60 calendar days from the date of this publication.

ADDRESS: Send or deliver comments to—James K. Freiert, Deputy Assistant Director, Retirement Services Program, Center for Retirement and Insurance Services, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3305, Washington, DC 20415–3500.

For information regarding administrative coordination contact: Cyrus S. Benson, Team Leader, Publications Team, RIS Support Services/Support Group, U.S. Office of Personnel Management, 1900 E Street, NW.—Room 4H28, Washington, DC 20415, (202) 606–0623.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. E9–18080 Filed 7–28–09; 8:45 am]

BILLING CODE 6325–38–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2009–53; Order No. 254]

Global Expedited Package Services Contract

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add a Global Expedited Package Services 1 contract to the Competitive Product List. This notice addresses procedural steps associated with these filings.

DATES: Comments are due August 3, 2009.

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. Introduction
II. Notice of Filing
III. Ordering Paragraphs

I. Introduction

On July 22, 2009, the Postal Service filed a notice announcing that it has entered into an additional Global Expedited Package Services 1 (GEPS 1) contract.[1] GEPS 1 provides volume-based incentives for mailers that send large volumes of Express Mail International (EMI) and/or Priority Mail International (PMI). The Postal Service believes the instant contract is functionally equivalent to previously submitted GEPS 1 contracts, and is supported by the Governors' Decision filed in Docket No. CP2008–4.[2] Notice at 1.

It further notes that in Order No. 86, which established GEPS 1 as a product, the Commission held that additional contracts may be included as part of the GEPS 1 product if they meet the requirements of 39 U.S.C. 3633, and if they are functionally equivalent to the initial GEPS 1 contract filed in Docket No. CP2008–5.[3] Notice at 1.

The instant contract. The Postal Service filed the instant contract pursuant to 39 CFR 3015.5. In addition, the Postal Service contends that the contract is in accordance with Order No. 86. The Postal Service states that the instant contract replaces the contract for the customer in Docket No. CP2008–12, which will end on August 31, 2009. *Id.* at 2. It submitted the contract and supporting material under seal, and attached a redacted copy of the contract and certified statement required by 39 CFR 3015.5(c)(2) to the Notice as Attachments 1 and 2, respectively. *Id.* at 1–2. The term of the instant contract is 1 year from the date the Postal Service notifies the customer that all necessary regulatory approvals have been received.

The Notice advances reasons why the instant GEPS 1 contract fits within the Mail Classification Schedule language for GEPS 1. The Postal Service asserts that the instant contract is functionally equivalent to the GEPS 1 contracts filed previously. It states that in Governors' Decision No. 08–7, a pricing formula and classification system were established to ensure that each contract meets the statutory and regulatory requirements of 39 U.S.C. 3633. The Postal Service contends that the instant contract demonstrates its functional equivalence with the previous GEPS 1 contracts because of several factors: The customers are small or medium-sized businesses that mail directly to foreign destinations using EMI and/or PMI, the contract term of one year applies to all GEPS 1 contracts, the contracts have similar cost and market characteristics, and each requires payment through permit imprint. *Id.* at 4. It asserts that even though prices may be different based on volume or postage commitments made by the customers, or updated costing information, these differences do not affect the contracts' functional equivalency because the GEPS 1 contracts share similar cost attributes and methodology. *Id.* at 4–5.

The Postal Service also identifies several other contractual differences including provisions that clarify the availability of other Postal Service products and services, exclude certain flat rate products from the mail qualifying for discounts, simplify mailing notice requirements, modify mail tender locations, clarify the mailer's volume and revenue commitment in the event of early termination, and change certain provisions in the prior contract in minor respects. *Id.* at 5–6.

The Postal Service states that these differences related to a particular mailer are "incidental differences" and do not change the conclusion that these agreements are functionally equivalent in all important respects. *Id.* at 6.

The Postal Service requests that this contract be included within the GEPS 1 product. *Id.* at 7.

The Postal Service maintains that certain portions of the contract and certified statement required by 39 CFR 3015.5(c)(2), names of GEPS 1 customers, related financial information, portions of the certified statement which contain costs and pricing as well as the accompanying analyses that provide prices, terms, conditions, and financial projections should remain under seal. *Id.* at 3.

[1] Notice of United States Postal Service Filing of Functionally Equivalent Global Expedited Package Services 1 Negotiated Service Agreement, July 16, 2009 (Notice).

[2] *See* Docket No. CP2008–4, Notice of United States Postal Service of Governors' Decision Establishing Prices and Classifications for Global Expedited Package Services Contents, May 20, 2008.

[3] *See* Docket No. CP2008–5, Order Concerning Global Expedited Package Services Contracts, June 27, 2008, at 7 (Order No. 86).

II. Notice of Filing

The Commission establishes Docket No. CP2009–53 for consideration of matters related to the contract identified in the Postal Service's Notice.

Interested persons may submit comments on whether the Postal Service's contract is consistent with the policies of 39 U.S.C. 3632, 3622 or 3642. Comments are due no later than August 3, 2009. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Paul L. Harrington to serve as Public Representative in this proceeding.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2009–53 for consideration of the issues raised in this docket.

2. Comments by interested persons in these proceedings are due no later than August 3, 2009.

3. Pursuant to 39 U.S.C. 505, Paul L. Harrington is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Judith M. Grady,

Acting Secretary.

[FR Doc. E9–18029 Filed 7–28–09; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION [REMOVED PRIVATE FIELD]

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:

Rule 17a–6; OMB Control No. 3235–0489; SEC File No. 270–433.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), 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.

Rule 17a–6 (17 CFR 240.17a–6) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) permits national securities exchanges, national securities associations, registered clearing agencies, and the Municipal Securities Rulemaking Board (collectively, "SROs") to destroy or convert to microfilm or other recording media records maintained under Rule 17a–1, if they have filed a record destruction plan with the Commission and the Commission has declared such plan effective.

There are currently 27 SROs: 17 National securities exchanges, 1 national securities association, and 9 registered clearing agencies. Of the 27 SROs, 2 SRO respondents have filed a record destruction plan with the Commission. The staff calculates that the preparation and filing of a new record destruction plan should take 160 hours. Further, any existing SRO record destruction plans may require revision, over time, in response to, for example, changes in document retention technology, which the Commission estimates will take much less than the 160 hours estimated for a new plan. Thus, the total annual compliance burden is estimated to be 60 hours per year. The approximate cost per hour is $305, resulting in a total cost of compliance for these respondents of $18,300 per year (60 hours @ $305 per hour).

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 control number.

Comments should be directed to: (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 *Shagufta_Ahmed@omb.eop.gov* and (ii) Charles Boucher, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or by sending an e-mail to *PRA_Mailbox@sec.gov*. Comments must be submitted within 30 days of this notice.

Dated: July 23, 2009.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–17943 Filed 7–28–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Federal Register Citation of Previous Announcement [74 FR 36281, July 22, 2009]

STATUS: Closed Meeting.

PLACE: 100 F Street, NE., Washington, DC.

DATE AND TIME OF PREVIOUSLY ANNOUNCED MEETING: Friday, July 24, 2009 at 8 a.m.

CHANGE IN THE MEETING: Time Change.

The Closed Meeting scheduled for Friday, July 24, 2009 at 8 a.m. has been changed to Friday, July 24, 2009 at 9 a.m.

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: July 23, 2009.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–17989 Filed 7–28–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60373; File No. S7–17–09]

Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request on Behalf of Eurex Clearing AG Related to Central Clearing of Credit Default Swaps, and Request for Comments

July 23, 2009.

I. Introduction

In response to the recent turmoil in the financial markets, the Securities and Exchange Commission ("Commission") has taken multiple actions to protect investors and ensure the integrity of the nation's securities markets, including actions [1] designed to address concerns related to the market in credit default swaps ("CDS").[2] The over-the-counter

[1] *See generally* Securities Exchange Act Release No. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009) (temporary exemption in connection with CDS clearing by Chicago Mercantile Exchange Inc.), Securities Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009) (temporary exemption in connection with CDS clearing by ICE US Trust LLC), Securities Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009) (temporary exemption in connection with CDS clearing by LIFFE A&M and LCH.Clearnet Ltd.) and other Commission actions discussed therein.

[2] A CDS is a bilateral contract between two parties, known as counterparties. The value of this

("OTC") market for CDS has been a source of concern to us and other financial regulators, and we have recognized that facilitating the establishment of central counterparties ("CCPs") for CDS can play an important role in reducing the counterparty risks inherent in the CDS market, and thereby can help mitigate potential systemic impacts.[3] Thus, taking action to help foster the prompt development of CCPs, including granting conditional exemptions from certain provisions of the federal securities laws, is in the public interest.

The Commission's authority over this OTC market for CDS is limited. Specifically, Section 3A of the Securities Exchange Act of 1934 ("Exchange Act") limits the Commission's authority over swap agreements, as defined in Section 206A of the Gramm-Leach-Bliley Act.[4] For those CDS that are swap agreements, the exclusion from the definition of security in Section 3A of the Exchange Act, and related provisions, will continue to apply. The Commission's action today does not affect these CDS, and this Order does not apply to them. For those CDS that are not swap agreements ("non-excluded CDS"), the Commission's action today provides conditional exemptions from certain requirements of the Exchange Act.

The Commission believes that using well-regulated CCPs to clear transactions in CDS would provide a number of benefits, by helping to promote efficiency and reduce risk in the CDS market and among its participants, requiring maintenance of records of CDS transactions that would aid the Commission's efforts to prevent and detect fraud and other abusive market practices, addressing concerns about counterparty risk—through the novation process—by substituting the creditworthiness and liquidity of the CCP for the creditworthiness and liquidity of the counterparties to a CDS,[5] contributing generally to the goal of market stability, and reducing CDS risks through multilateral netting of trades.[6]

In this context, Eurex Clearing AG ("Eurex") has requested that the Commission grant exemptions from certain requirements under the Exchange Act with respect to its proposed activities in clearing and settling certain CDS, as well as the proposed activities of certain other persons, as described below.[7]

Based on the facts presented and the representations made in the request on behalf of Eurex,[8] and for the reasons discussed in this Order, the Commission temporarily is exempting, subject to certain conditions, Eurex from the requirement to register as a clearing agency under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS transactions. The Commission also temporarily is exempting eligible contract participants and others from certain Exchange Act requirements with respect to non-excluded CDS cleared by Eurex.[9] The Commission's exemptions are temporary and will expire on April 23, 2010.[10]

II. Discussion

A. Description of Eurex's Proposal

The exemptive request on behalf of Eurex describes how its proposed arrangement for central clearing of CDS would operate, and makes representations about the safeguards associated with those arrangements, as described below:

1. Eurex Organization

Eurex is a stock corporation formed and incorporated under the laws of Germany. It is a wholly-owned subsidiary of Eurex Frankfurt AG ("Eurex Frankfurt"), a German stock corporation that is itself wholly-owned by Eurex Zürich AG ("Eurex Zürich"), a Swiss stock corporation. Eurex Zürich has two 50 percent parents: Deutsche Börse AG ("DBAG"), a German stock corporation listed on the Frankfurt Stock Exchange, and the SIX Swiss Exchange ("SIX").

Eurex is regulated as a CCP under the German Banking Act ("Banking Act"), which explicitly treats the provision of central counterparty services as a banking activity. Operation of a banking institution requires prior written authorization from the German Federal Financial Supervisory Authority ("BaFin"). On an annual basis, BaFin requires Eurex to undergo an audit that covers financial requirements and risk management.

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financial contract is based on underlying obligations of a single entity or on a particular security or other debt obligation, or an index of several such entities, securities, or obligations. The obligation of a seller under a CDS to make payments under a CDS contract is triggered by a default or other credit event as to such entity or entities or such security or securities. Investors may use CDS for a variety of reasons, including to offset or insure against risk in their fixed-income portfolios, to take positions in bonds or in segments of the debt market as represented by an index, or to capitalize on the volatility in credit spreads during times of economic uncertainty. In recent years, CDS market volumes have rapidly increased. *See* Semiannual OTC derivatives statistics at end-December 2008, Bank for International Settlement ("BIS"), available at *http://www.bis.org/statistics/otcder/dt1920a.pdf.*

This growth has coincided with a significant rise in the types and number of entities participating in the CDS market. CDS were initially created to meet the demand of banking institutions looking to hedge and diversify the credit risk attendant with their lending activities. However, financial institutions such as insurance companies, pension funds, securities firms, and hedge funds have entered the CDS market.

[3] *See generally* actions referenced in note 1, *supra.*

[4] 15 U.S.C. 78c-1. Section 3A excludes both a non-security-based and a security-based swap agreement from the definition of "security" under Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10). Section 206A of the Gramm-Leach-Bliley Act defines a "swap agreement" as "any agreement, contract, or transaction between eligible contract participants (as defined in section 1a(12) of the Commodity Exchange Act * * *) * * * the material terms of which (other than price and quantity) are subject to individual negotiation." 15 U.S.C. 78c note.

[5] "Novation" is a "process through which the original obligation between a buyer and seller is discharged through the substitution of the CCP as seller to buyer and buyer to seller, creating two new contracts." Committee on Payment and Settlement Systems, Technical Committee of the International Organization of Securities Commissioners, *Recommendations for Central Counterparties* (November 2004) at 66. Through novation, the CCP assumes counterparty risk.

[6] *See generally* actions referenced in note 1, *supra.*

[7] *See* Letter from Paul Architzel, Alston & Bird LLP, to Elizabeth M. Murphy, Secretary, Commission, July 23, 2009.

[8] *See id.* The exemptions we are granting today are based on representations made in the request on behalf of Eurex. We recognize, however, that there could be legal uncertainty in the event that one or more of the underlying representations were to become inaccurate. Accordingly, if any of these exemptions were to become unavailable by reason of an underlying representation no longer being materially accurate, the legal status of existing open positions in non-excluded CDS associated with persons subject to those unavailable exemptions would remain unchanged, but no new positions could be established pursuant to the exemptions until all of the underlying representations were again accurate.

[9] This Order, however, does not provide exemptive relief in connection with Eurex's clearing of certain customer CDS transactions; specifically, customer CDS transactions cleared through U.S. clearing members (other than registered broker-dealers), and CDS transactions by U.S. customers cleared through non-U.S. clearing members. The Commission is considering the issues raised by that type of customer clearing activity—particularly with respect to the segregation of customer funds and securities that customers post with members as collateral, and the protection and transfer of those customer assets in the event of a member's insolvency. The Commission is working toward the goal of being able to provide exemptive relief to facilitate the central clearing, by Eurex, of these customer CDS transactions.

[10] To facilitate the operation of one or more CCPs for the CDS market, the Commission has also approved interim final temporary rules providing exemptions under the Securities Act of 1933 and the Exchange Act for non-excluded CDS. *See* Securities Act Release No. 8999 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009).

Further, the Commission has provided temporary exemptions in connection with Sections 5 and 6 of the Exchange Act for transactions in non-excluded CDS. *See* Securities Exchange Act Release No. 59165 (Dec. 24, 2008), 74 FR 133 (Jan. 2, 2009).

Eurex received permission to act as a CCP from BaFin on December 12, 2006. Eurex is supervised by BaFin cooperatively with the Deutsche Bundesbank, the German Federal Bank. BaFin is Eurex's principal regulator and is responsible for all sovereign measures, including licensing, monitoring, and closing individual institutions. BaFin also can issue general instructions, including principles and regulations that establish rules for carrying out banking business, providing financial services, and limiting risk. The Deutsche Bundesbank is responsible for current, ongoing oversight and supervision with respect to the safety and soundness of the institution's operations. In the U.K., Eurex is a Recognised Overseas Clearing House ("ROCH"), subject to regulation by the U.K. Financial Services Authority.

2. Eurex Central Counterparty Services for CDS

Eurex's CDS clearance and settlement services will accept for clearing bilateral CDS transactions within the product scope of its rules and that are recorded in the Depository Trust & Clearing Corporation's ("DTCC") Deriv/SERV Trade Information Warehouse ("TIW").[11] Eurex will act as a central counterparty for entities that are CDS clearing members of Eurex in connection with clearing of CDS transactions by assuming, through novation, the obligations of all eligible CDS transactions accepted by it for clearing and collecting margin and other credit support from CDS clearing members to collateralize their obligations to Eurex. Eurex's trade submission process is designed to ensure that it maintains a matched book of offsetting CDS contracts.

Operationally, for a transaction to clear through Eurex, it must first be recorded in Deriv/SERV's Trade Information Warehouse ("TIW"). Eurex will leverage the Deriv/SERV infrastructure in operating its CDS clearing services by establishing an interface to DTCC's Deriv/SERV TIW to capture matched and confirmed trades.[12]

Under Eurex rules, each bilateral CDS contract between CDS clearing members that is submitted to and accepted by Eurex for clearing will be novated. At the time of novation, each bilateral CDS contract submitted to Eurex will be terminated and replaced by two CDS contracts between Eurex and each of the original counterparties. As central counterparty to each novated CDS contract, Eurex will be able to net offsetting positions on a multilateral basis, which will significantly reduce the outstanding notional amount of each CDS clearing member's CDS portfolio.

3. Eurex Risk Management

Eurex represents that it will maintain strict, objectively determined, risk-based margin and clearing fund requirements, which will be subject to ongoing regulation and oversight by the BaFin. These requirements will also be consistent with clearing industry practice and international standards established for central counterparties as articulated in the Committee on Payment and Settlement Systems/ International Organization of Securities Commissions ("CPSS–IOSCO") *Recommendations for Central Counterparties* ("RCCP").[13] Eurex has a multilevel system to mitigate counterparty risk. The amount of margin and guaranty fund required of each Eurex clearing member will be continuously monitored and periodically adjusted as required to reflect the size and profile of, and risk associated with, the Eurex clearing member's cleared CDS transactions (and related market factors). An initial level of protection is provided by a system of collateral margining. The margining system is supplemented by (i) mandatory contributions to the Eurex CDS clearing fund ("CDS Clearing Fund") and (ii) reserves maintained by Eurex.

Eurex will calculate the amount of up-front margin required for cleared CDS transactions based upon the overall risk exposure of the CDS clearing member. The CDS clearing member's risk exposure will be based on five components: (i) Mark-to-market margin, based on the difference between the net present values based on the CDS spread in the agreement and the most recently observed market spread; (ii) next day margin, which accounts for the decay in value in liquidating outstanding positions of a defaulting member; (iii) liquidity margin, which takes into account the time necessary to unwind a position that is in default; (iv) accrued premium margin,[14] which represents the daily value of the spread the protection buyer pays to the protection seller; and (v) credit event margin.[15] Acceptable margin includes cash in currencies deemed acceptable by Eurex, currently the U.S. dollar, the Euro, the Swiss franc, and British pound, and securities in accordance with existing eligibility criteria.[16] The total margin requirement for CDS covers the market risk of the positions held by a CDS clearing member so that, should a CDS clearing member default, Eurex would have sufficient margin to cover losses to at least the 99 percent confidence interval without recourse to other financial resources.

Eurex will also maintain a clearing fund to cover losses arising from a Eurex CDS clearing member's default on cleared CDS transactions that exceed the amount of margin held by Eurex from the defaulting Eurex CDS clearing member. Each Eurex CDS clearing member will be required to contribute five percent of their margin requirement to the clearing fund, subject to a minimum of €50 million. Since the size of the clearing fund will grow in relation to the volume of each CDS clearing member's open positions, it is designed to maintain adequate, liquid resources to enable Eurex to handle a default in which the defaulting CDS clearing member's margin requirement is insufficient to cover the loss.

Eurex will also establish rules that mutualize the risk of a Eurex CDS clearing member default across all Eurex CDS clearing members. In the event of a Eurex CDS clearing member's default,

[11] Eurex will offer CDS clearance and settlement services on the iTraxx Europe (Main), iTraxx HiVol, and iTraxx Europe Crossover CDS Indices. It will also offer CDS clearance and settlement services on single-name reference entities that are the constituents of those indices. Once it has offered clearance and settlement services for CDS transactions on the iTraxx indices and their constituents, Eurex will accept bilateral transactions on the CDX Index. Eventually, depending on market demand, Eurex may offer clearance and settlement services on single-name reference entities on the CDX constituents.

[12] Major market participants frequently use the Deriv/SERV comparison and confirmation service of DTCC when documenting their CDS transactions. This service creates electronic records of transaction terms and counterparties. As part of this service, market participants separately submit the terms of a CDS transaction to Deriv/SERV in electronic form. Paired submissions are compared to verify that their terms match in all required respects. If a match is confirmed, the parties receive an electronic confirmation of the submitted transaction. All submitted transactions are recorded in the Deriv/SERV TIW, which serves as the primary registry for submitted transactions.

[13] The RCCP was drafted by a joint task force ("Task Force") composed of representative members of IOSCO and CPSS and published in November 2004. The Task Force consisted of securities regulators and central bankers from 19 countries and the European Union. The U.S. representatives on the Task Force included staff from the Commission, the Federal Reserve Board of Governors, and the Commodity Futures Trading Commission.

[14] Accrued premium margin is applicable to CDS protection buyers only.

[15] Credit event margin is applicable to CDS protection sellers only.

[16] *See http://www.eurexclearing.com/risk/parameters_en.html* for admission criteria and current acceptable collateral.

Eurex will look to the following resources, in order: (i) The defaulting CDS clearing member's margin; (ii) the defaulting CDS clearing member's contribution to the clearing fund; (iii) Eurex's reserve fund; (iv) non-defaulting CDS clearing members' contribution to the clearing fund; and (v) a one-time assessment to non-defaulting CDS clearing members.

Eurex will conduct routine stress testing periodically throughout the trading day to ensure that it can meet its obligations as a CCP in normal and extreme market conditions to a 99.9 percent confidence level. Each CDS clearing member's risk exposure will be stress-tested against a comprehensive set of scenarios for all product groups that it clears. Stress-testing scenarios include the worst historical observations experienced in each of the product groups as well as Eurex's expectation on worst potential future price movements. Potential losses based on stress scenarios are compared to each CDS clearing member's additional margin. Losses beyond additional margin are then compared to the clearing fund. As soon as the consumption of the clearing fund by any CDS clearing member—irrespective of the CDS clearing member's credit quality—breaches a defined threshold, Eurex will take risk-mitigating actions. These risk-mitigating actions may be CDS clearing member-specific, such as imposing extra margin requirements, or general, such as calling for additional clearing fund contributions by all CDS clearing members.

4. Member Default

Following a default by a CDS clearing member, Eurex would follow a procedure to help ensure an orderly liquidation and unwinding of the open positions of the defaulting member. First, the defaulting CDS clearing member is required to close its existing cleared CDS contracts and notify its customers so that they can transfer their transactions to another Eurex CDS clearing member. If the Eurex CDS clearing member does not close or transfer cleared CDS contracts within a reasonable period of time, Eurex can close the positions on behalf of the defaulting CDS clearing member. If Eurex is unable to close the cleared CDS contracts within a reasonable period, it may use a voluntary auction process to liquidate the defaulting CDS clearing member's position as a whole or in meaningful amounts. Finally, Eurex may assign any remaining positions to non-defaulting CDS clearing members on a pro rata basis.

B. Temporary Conditional Exemption From Clearing Agency Registration Requirement

Section 17A of the Exchange Act sets forth the framework for the regulation and operation of the U.S. clearance and settlement system, including CCPs. Specifically, Section 17A directs the Commission to use its authority to promote enumerated Congressional objectives and to facilitate the development of a national clearance and settlement system for securities transactions. Absent an exemption, a CCP that novates trades of non-excluded CDS that are securities and generates money and settlement obligations for participants is required to register with the Commission as a clearing agency.

Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.[17]

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until April 23, 2010 to Eurex from Section 17A of the Exchange Act, solely to perform the functions of a clearing agency for Cleared CDS,[18] subject to the conditions discussed below.

Our action today balances the aim of facilitating the prompt establishment of Eurex as a CCP for non-excluded CDS transactions—which should help reduce systemic risks—with ensuring that important elements of Commission oversight are applied to the non-excluded CDS market. In doing so, we are mindful that applying the full scope of the Exchange Act to transactions involving non-excluded CDS could deter the prompt establishment of Eurex as a CCP to settle those transactions.

While we are acting so that the prompt establishment of Eurex as a CCP for non-excluded CDS will not be delayed by the need to apply the full scope of Exchange Act Section 17A's requirements that govern clearing agencies, the relief we are providing is temporary and conditional. The limited duration of the exemptions will permit the Commission to continue to gain more direct experience with the non-excluded CDS market after Eurex becomes operational, giving the Commission the ability to oversee the development of the centrally cleared non-excluded CDS market as it evolves. During the exemptive period, the Commission will closely monitor the impact of the CCPs on the CDS market. In particular, the Commission will seek to assure itself that the CCPs do not act in an anticompetitive manner or indirectly facilitate anticompetitive behavior with respect to fees charged to members, the dissemination of market data and the access to clearing services by independent CDS exchanges or CDS trading platforms. The Commission will take that experience into account in future actions.

Moreover, this temporary exemption in part is based on Eurex's representation that it meets the standards set forth in the CPSS–IOSCO RCCP report. The RCCP establishes a framework that requires a CCP to have: (i) the ability to facilitate the prompt and accurate clearance and settlement of CDS transactions and to safeguard its users' assets; and (ii) sound risk management, including the ability to appropriately determine and collect clearing fund and monitor its users' trading. This framework is generally consistent with the requirements of Section 17A of the Exchange Act.

[17] 15 U.S.C. 78mm.

[18] For purposes of this exemption, and the other exemptions addressed in this Order, "Cleared CDS" means a credit default swap that is submitted (or offered, purchased, or sold on terms providing for submission) to Eurex, that is offered only to, purchased only by, and sold only to eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), and in which: (1) The reference entity, the issuer of the reference security, or the reference security is one of the following: (i) an entity reporting under the Exchange Act, providing Securities Act Rule 144A(d)(4) information, or about which financial information is otherwise publicly available; (ii) a foreign private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States; (iii) a foreign sovereign debt security; (iv) an asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; or (v) an asset-backed security issued or guaranteed by the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), or the Government National Mortgage Association ("Ginnie Mae"); or (2) the reference index is an index in which 80% or more of the index's weighting is comprised of the entities or securities described in subparagraph (1). As discussed above, the Commission's action today does not affect CDS that are swap agreements under Section 206A of the Gramm-Leach-Bliley Act. *See* note 4, *supra*. The Commission's action today also does not affect activities in CDS that are outside the jurisdiction of the United States.

In addition, this Order is designed to assure that—as represented in the request on behalf of Eurex—information will be available to market participants about the terms of the CDS cleared by Eurex, the creditworthiness of Eurex or any guarantor, and the clearing and settlement process for the CDS. Moreover, to be within the definition of Cleared CDS for purposes of this exemption (as well as the other exemptions granted through this Order), a CDS may only involve a reference entity, a reference security, an issuer of a reference security, or a reference index that satisfies certain conditions relating to the availability of information about such persons or securities. For non-excluded CDS that are index-based, the definition provides that at least 80 percent of the weighting of the index must be comprised of reference entities, issuers of a reference security, or reference securities that satisfy the information conditions. The definition does not prescribe the type of financial information that must be available or the location of the particular information, recognizing that eligible contract participants have access to information about reference entities and reference securities through multiple sources. The Commission believes, however, that it is important in the CDS market, as in the market for securities generally, that parties to transactions should have access to financial information that would allow them to appropriately evaluate the risks relating to a particular investment and make more informed investment decisions.[19] Such information availability also will assist Eurex and the buyers and sellers in valuing their Cleared CDS and their counterparty exposures. As a result of the Commission's actions today, the Commission believes that information should be available for market participants to be able to make informed investment decisions, and value and evaluate their Cleared CDS and their counterparty exposures.

This temporary exemption is subject to a number of conditions that are designed to enable Commission staff to monitor Eurex's clearance and settlement of CDS transactions, cooperate with BaFin, and help reduce risk in the CDS market. These conditions require that Eurex: (i) Make available on its Web site annual audited financial statements; (ii) preserve records of all activities related to the business of Eurex as a CCP for Cleared CDS for at least five years (in an easily accessible place for the first two years); (iii) supply information relating to its Cleared CDS clearance and settlement services as may be reasonably requested by the Commission and provide access to the Commission to conduct on-site inspections of facilities, records and personnel related to its Cleared CDS clearance and settlement services;[20] (iv) notify the Commission about material disciplinary actions taken against any of its members with respect to Cleared CDS clearance and settlement services, and about the involuntary termination of the membership of an entity using those services; (v) notify the Commission not less than one day prior to implementation or effectiveness of changes to its rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services, or, in exigent circumstances, as promptly as reasonably practicable under the circumstances; (vi) provide the Commission with reports prepared by independent audit personnel that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements[21] and its annual audited financial statements prepared by independent audit personnel; and (vii) report all significant systems outages to the Commission.

In addition, this relief is conditioned on Eurex, directly or indirectly, making available to the public on terms that are fair and reasonable and not unreasonably discriminatory: (i) all end-of-day settlement prices and any other prices with respect to Cleared CDS that Eurex may establish to calculate mark-to-market margin requirements for Eurex clearing members; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by Eurex. The Commission believes this is an appropriate condition for Eurex's exemption from registration as a clearing agency. In Section 11A of the Exchange Act, Congress found that "[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure . . . the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities."[22] The President's Working Group on Financial Markets has stated that increased transparency is a policy objective for the over-the-counter derivatives market,[23] which includes the market for CDS. The condition is designed to further this policy objective of both Congress and the President's Working Group by requiring Eurex to make useful pricing data available to the public on terms that are fair and reasonable and not unreasonably discriminatory. Congress adopted these standards for the distribution of data in Section 11A. The Commission long has applied the standards in the specific context of securities market data,[24] and it anticipates that Eurex will distribute its data on terms that generally are consistent with the application of these standards to securities market data. For example, data distributors generally are required to treat subscribers equally and not grant special access, fees, or other privileges to favored customers of the distributor. Similarly, distributors must make their data feeds reasonably available to data vendors for those subscribers who wish to receive their data indirectly through a vendor rather than directly from the distributor. In addition, a distributor's attempt to tie data products that must be made available to the public with other products or services of the distributor would be inconsistent with the statutory requirements.[25] The Commission

[19] The Commission notes the recommendations of the President's Working Group on Financial Markets regarding the informational needs and due diligence responsibilities of investors. *See* Policy Statement on Financial Market Developments, The President's Working Group on Financial Markets, Mar. 13, 2008, available at: *http://www.ustreas.gov/press/releases/reports/pwgpolicystatemktturmoil_03122008.pdf.*

[20] The Commission's inspections shall be subject to cooperation with BaFin and upon terms and conditions agreed to between the Commission and BaFin in the bilateral MOU related to cooperation and information-sharing. "Memorandum of Understanding Concerning Consultation, Cooperation, and the Exchange of Information Related to Market Oversight and the Supervision of Financial Services Firms," Apr. 26, 2007.

[21] *See* Automated Systems of Self-Regulatory Organizations, Securities Exchange Act Release No. 27445 (Nov. 16, 1989), 54 FR 48703 (Nov. 24, 1989), and Automated Systems of Self-Regulatory Organizations, Securities Exchange Act Release No. 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991).

[22] 15 U.S.C. 78k–1(a)(1)(C)(iii). *See also* 15 U.S.C. 78k–1(a)(1)(D).

[23] *See* President's Working Group on Financial Markets, Policy Objectives for the OTC Derivatives Market (Nov. 14, 2008), available at *http://www.ustreas.gov/press/releases/reports/policyobjectives.pdf* ("Public reporting of prices, trading volumes and aggregate open interest should be required to increase market transparency for participants and the public."). *See also* Department of the Treasury, *Financial Regulatory Reform: A New Foundation*, available at *http://www.financialstability.gov/docs/regs/FinalReport_web.pdf*, at p.48 ("[m]arket efficiency and price transparency should be improved in derivatives markets . . . by requiring development of a system for timely reporting of trades and prompt dissemination of prices and other trade information.").

[24] *See* Securities Exchange Act Release No. 42209 (Dec. 9, 1999), 64 FR 70613, 70621–70623 (Dec. 17, 1999) ("Market Information Concept Release") (discussion of legal standards applicable to market data distribution since Section 11A was adopted in 1975).

[25] *See* Securities Exchange Act Release No. 59039 (Dec. 2, 2008), 73 FR 74770, 74793 (Dec. 9, 2008)

carefully evaluates any type of discrimination with respect to subscribers and vendors to assess whether there is a reasonable basis for the discrimination given, among other things, the Exchange Act objective of promoting price transparency.[26] Moreover, preventing unreasonable discrimination is a practical means to promote fair and reasonable terms for data distribution because distributors are more likely to act appropriately when the terms applicable to the broader public also must apply to any favored classes of customers.[27]

As a CCP, Eurex will collect and process information about CDS transactions, prices, and positions from all of its clearing members. With this information, a CCP will, among other things, calculate and disseminate current values for open positions for the purpose of setting appropriate margin levels. The availability of such information can improve fairness, efficiency, and competitiveness of the market—all of which enhance investor protection and facilitate capital formation. Moreover, with pricing and valuation information relating to Cleared CDS, market participants would be able to derive information about underlying securities and indexes. This may improve the efficiency and effectiveness of the securities markets by allowing investors to better understand credit conditions generally.

C. Temporary General Exemption for Eurex and Certain Eligible Contract Participants

Applying the full panoply of Exchange Act requirements to participants in transactions in non-excluded CDS likely would deter some participants from using CCPs to clear CDS transactions. At the same time, it is important that the antifraud provisions of the Exchange Act apply to transactions in non-excluded CDS; indeed, OTC transactions subject to individual negotiation that qualify as security-based swap agreements already are subject to these antifraud provisions.[28]

We thus believe that it is appropriate in the public interest and consistent with the protection of investors temporarily to apply substantially the same framework to transactions by market participants in non-excluded CDS that applies to transactions in security-based swap agreements. Applying substantially the same set of requirements to participants in transactions in non-excluded CDS as apply to participants in OTC CDS transactions will avoid deterring market participants from promptly using CCPs, which would detract from the potential benefits of central clearing.

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until April 23, 2010 from certain requirements under the Exchange Act. This temporary exemption in part applies to Eurex, and to any Eurex U.S. Clearing Member[29] or Eurex non-U.S. Clearing Member[30] that is not a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof). This temporary exemption also applies to certain eligible contract participants[31] other than: eligible contract participants that receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling or holding Cleared CDS positions for other persons;[32] eligible contract participants that are self-regulatory organizations; or eligible contract participants that are registered brokers or dealers.[33]

Under this temporary exemption, and solely with respect to Cleared CDS,

("NYSE ArcaBook Order") ("[S]ection 6 and Exchange Act Rule 603(a) require NYSE Arca to distribute the ArcaBook data on terms that are not tied to other products in a way that is unfairly discriminatory or anticompetitive.").

[26] *See* Market Information Concept Release, 64 FR at 70630 ("The most important objectives for the Commission to consider in evaluating fees are to assure (1) the wide availability of market information, (2) the neutrality of fees among markets, vendors, broker-dealers, and users, (3) the quality of market information—its integrity, reliability, and accuracy, and (4) fair competition and equal regulation among markets and broker-dealers.").

[27] *See* NYSE ArcaBook Order, 73 FR at 74794 ("[T]he proposed fees for ArcaBook data will apply equally to all professional subscribers and all non-professional subscribers . . . The fees therefore do not unreasonably discriminate among types of subscribers, such as by favoring participants in the NYSE Arca market or penalizing participants in other markets.").

[28] While Section 3A of the Exchange Act excludes "swap agreements" from the definition of "security," certain antifraud and insider trading provisions under the Exchange Act explicitly apply to security-based swap agreements. *See* (a) paragraphs (2) through (5) of Section 9(a), 15 U.S.C. 78i(a), prohibiting the manipulation of security prices; (b) Section 10(b), 15 U.S.C. 78j(b), and underlying rules prohibiting fraud, manipulation or insider trading (but not prophylactic reporting or recordkeeping requirements); (c) Section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices; (d) Sections 16(a) and (b), 15 U.S.C. 78p(a) and (b), which address disclosure by directors, officers and principal stockholders, and short-swing trading by those persons, and rules with respect to reporting requirements under Section 16(a); (e) Section 20(d), 15 U.S.C. 78t(d), providing for antifraud liability in connection with certain derivative transactions; and (f) Section 21A(a)(1), 15 U.S.C. 78u–1(a)(1), related to the Commission's authority to impose civil penalties for insider trading violations.

"Security-based swap agreement" is defined in Section 206B of the Gramm-Leach-Bliley Act as a swap agreement in which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein.

[29] For Purposes of this Order, a "Eurex U.S. Clearing Member" means any U.S. clearing member of Eurex that submits Cleared CDS to Eurex for clearance and settlement exclusively (i) for its own account or (ii) for the account of an affiliate that controls, is controlled by, or is under common control with the U.S. clearing member of Eurex.

[30] For Purposes of this Order, a "Eurex non-U.S. Clearing Member" means any Eurex clearing member, other than a clearing member that is a U.S. person, that submits Cleared CDS to Eurex for clearance and settlement exclusively (i) for its own account, (ii) for the account of an affiliate (including a U.S. affiliate) that controls, is controlled by, or is under common control with the non-U.S. clearing member of Eurex, or (iii) for the account of any other person except a U.S. person.

Consistent with these definitions of "Eurex U.S. Clearing Member" and "Eurex non-U.S. Clearing Member," this exemption is available to Eurex members that clear CDS transactions for themselves and their affiliates, or, in the case of non-U.S. members of Eurex, that clear CDS transactions on behalf of non-U.S. customers. The exemption otherwise does not extend to persons who engage in customer clearing activities on Eurex (*e.g.*, customer clearing by a U.S. member of Eurex for any persons, or customer clearing by a non-U.S. member of Eurex for U.S. persons). *See* note 9, *supra*.

The exemptive relief for Eurex non-U.S. Clearing Members is intended to provide legal certainty for these non-U.S. persons in those circumstances when their activities in Cleared CDS are within the jurisdiction of the United States. The exemptive relief is not necessary for these non-U.S. persons when their activities in Cleared CDS are not otherwise subject to the federal securities laws.

[31] This exemption in general applies to eligible contract participants, as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order, other than persons that are eligible contract participants under paragraph (C) of that section.

[32] Solely for purposes of this requirement, an eligible contract participant would not be viewed as receiving or holding funds or securities for purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons, if the other persons involved in the transaction would not be considered "customers" of the eligible contract participant under the analysis used for determining whether certain persons would be considered "customers" of a broker-dealer under Exchange Act Rule 15c3–3(a)(1). For these purposes, and for the purpose of the definition of "Cleared CDS," the terms "purchasing" and "selling" mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing the rights or obligations under, a Cleared CDS, as the context may require. This is consistent with the meaning of the terms "purchase" or "sale" under the Exchange Act in the context of security-based swap agreements. *See* Exchange Act Section 3A(b)(4).

[33] A separate temporary exemption addresses the Cleared CDS activities of registered broker-dealers. *See* Part II.D, *infra*. Solely for purposes of this Order, a registered broker-dealer, or a broker or dealer registered under Section 15(b) of the Exchange Act, does not refer to someone that would otherwise be required to register as a broker or dealer solely as a result of activities in Cleared CDS in compliance with this Order.

these persons generally are exempt from the provisions of the Exchange Act and the rules and regulations thereunder that do not apply to security-based swap agreements. Those persons thus would still be subject to those Exchange Act requirements that explicitly are applicable in connection with security-based swap agreements.[34] In addition, all provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such provisions would remain applicable.[35] In this way, the temporary exemption would apply the same Exchange Act requirements in connection with non-excluded CDS as apply in connection with OTC credit default swaps.

This temporary exemption, however, does not extend to Sections 5 and 6 of the Exchange Act. The Commission separately issued a conditional exemption from these provisions to all broker-dealers and exchanges.[36] This temporary exemption also does not extend to Section 17A of the Exchange Act; instead, Eurex is exempt from registration as a clearing agency under the conditions discussed above. In addition, this temporary exemption does not apply to Exchange Act Sections 12, 13, 14, 15(d) and 16;[37] eligible contract participants and other persons instead should refer to the interim final temporary rules issued by the Commission. Finally, this temporary exemption does not extend to the Commission's administrative proceeding authority under Sections 15(b)(4) and (b)(6),[38] or to certain provisions related to government securities.[39]

D. Temporary General Exemption for Certain Registered Broker-Dealers

The temporary exemptions addressed above—with regard to Eurex and certain eligible contract participants—are not available to persons that are registered as broker-dealers with the Commission (other than those that are notice registered pursuant to Section 15(b)(11)).[40] The Exchange Act and its underlying rules and regulations require broker-dealers to comply with a number of obligations that are important to protecting investors and promoting market integrity. We are mindful of the need to avoid creating disincentives to the prompt use of CCPs, and we recognize that the factors discussed above suggest that the full panoply of Exchange Act requirements should not immediately be applied to registered broker-dealers that engage in transactions involving Cleared CDS. At the same time, we also are sensitive to the critical importance of certain broker-dealer requirements to promoting market integrity and protecting customers (including those broker-dealer customers that are not involved with CDS transactions).

This calls for balancing the facilitation of the development and prompt implementation of CCPs with the preservation of certain key investor protections. Pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until April 23, 2010 from certain Exchange Act requirements. Consistent with the temporary exemptions discussed above, and solely with respect to Cleared CDS, we are exempting registered broker-dealers in general from the provisions of the Exchange Act and its underlying rules and regulations that do not apply to security-based swap agreements. As above, we are not excluding registered broker-dealers from Exchange Act provisions that explicitly apply in connection with security-based swap agreements or from related enforcement authority provisions.[41] As above, and for similar reasons, we are not exempting registered broker-dealers from: Sections 5, 6, 12(a) and (g), 13, 14, 15(b)(4), 15(b)(6), 15(d), 16 and 17A of the Exchange Act.[42]

Further we are not exempting registered broker-dealers from the following additional provisions under the Exchange Act: (i) Section 7(c),[43] which addresses the unlawful extension of credit by broker-dealers; (ii) Section 15(c)(3),[44] which addresses the use of unlawful or manipulative devices by broker-dealers; (iii) Section 17(a),[45] regarding broker-dealer obligations to make, keep and furnish information; (iv) Section 17(b),[46] regarding broker-dealer records subject to examination; (v) Regulation T,[47] a Federal Reserve Board regulation regarding extension of credit by broker-dealers; (vi) Exchange Act Rule 15c3–1, regarding broker-dealer net capital; (vii) Exchange Act Rule 15c3–3, regarding broker-dealer reserves and custody of securities; (viii) Exchange Act Rules 17a–3 through 17a–5, regarding records to be made and preserved by broker-dealers and reports to be made by broker-dealers; and (ix) Exchange Act Rule 17a–13, regarding quarterly security counts to be made by certain exchange members and broker-dealers.[48] Registered broker-dealers

[34] *See* note 28, *supra*.

[35] Thus, for example, the Commission retains the ability to investigate potential violations and bring enforcement actions in the federal courts and administrative proceedings, and to seek the full panoply of remedies available in such cases.

[36] *See* note 10, *supra*. A national securities exchange that effects transactions in Cleared CDS would continue to be required to comply with all requirements under the Exchange Act applicable to such transactions. A national securities exchange could form subsidiaries or affiliates that operate exchanges exempt under that order. Any subsidiary or affiliate of a registered exchange could not integrate, or otherwise link, the exempt CDS exchange with the registered exchange including the premises or property of such exchange for effecting or reporting a transaction without being considered a "facility of the exchange." *See* Section 3(a)(2), 15 U.S.C. 78c(a)(2).

[37] 15 U.S.C. 78*l*, 78m, 78n, 78o(d), 78p.

[38] Exchange Act Sections 15(b)(4) and 15(b)(6), 15 U.S.C. 78o(b)(4) and (b)(6), grant the Commission authority to take action against broker-dealers and associated persons in certain situations. Accordingly, while this exemption generally extends to persons that act as inter-dealer brokers in the market for Cleared CDS and do not hold funds or securities for others, such inter-dealer brokers may be subject to actions under Sections 15(b)(4) and (b)(6) of the Exchange Act. In addition, such inter-dealer brokers may be subject to actions under Exchange Act Section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices. As noted above, Section 15(c)(1) explicitly applies to security-based swap agreements. Sections 15(b)(4), 15(b)(6) and 15(c)(1), of course, would not apply to persons subject to this exemption who do not act as broker-dealers or associated persons of broker-dealers.

[39] This exemption specifically does not extend to the Exchange Act provisions applicable to government securities, as set forth in Section 15C, 15 U.S.C. 78o–5, and its underlying rules and regulations; nor does the exemption extend to related definitions found at paragraphs (42) through (45) of Section 3(a), 15 U.S.C. 78c(a). The Commission does not have authority under Section 36 to issue exemptions in connection with those provisions. *See* Exchange Act Section 36(b), 15 U.S.C. 78mm(b).

[40] Exchange Act Section 15(b)(11) provides for notice registration of certain persons that effect transactions in security futures products. 15 U.S.C. 78o(b)(11).

[41] *See* notes 28 and 35, *supra*. As noted above, broker-dealers also would be subject to Section 15(c)(1) of the Exchange Act, which prohibits brokers and dealers from using manipulative or deceptive devices, because that provision explicitly applies in connection with security-based swap agreements. In addition, to the extent the Exchange Act and any rule or regulation thereunder imposes any other requirement on a broker-dealer with respect to security-based swap agreements (*e.g.*, requirements under Rule 17h–1T to maintain and preserve written policies, procedures, or systems concerning the broker or dealer's trading positions and risks, such as policies relating to restrictions or limitations on trading financial instruments or products), these requirements would continue to apply to broker-dealers' activities with respect to Cleared CDS.

[42] We also are not exempting those members from provisions related to government securities, as discussed above.

[43] 15 U.S.C. 78g(c).

[44] 15 U.S.C. 78o(c)(3).

[45] 15 U.S.C. 78q(a).

[46] 15 U.S.C. 78q(b).

[47] 12 CFR 220.1 *et seq.*

[48] Solely for purposes of this exemption, in addition to the general requirements under the

should comply with these provisions in connection with their activities involving non-excluded CDS because these provisions are especially important to helping protect customer funds and securities, ensure proper credit practices and safeguard against fraud and abuse.[49]

E. Solicitation of Comments

The Commission is continuing to monitor closely the development of the CDS market and intends to determine to what extent, if any, additional regulatory action may be necessary. For example, as circumstances warrant, certain conditions could be added, altered, or eliminated. Moreover, because these exemptions are temporary, the Commission will in the future consider whether they should be extended or allowed to expire. The Commission believes it would be prudent to solicit public comment on its action today, and on what action it should take with respect to the CDS market in the future. The Commission is soliciting public comment on all aspects of these temporary exemptions, including:

1. Whether the length of this temporary exemption (until April 23, 2010) is appropriate. If not, what should the appropriate duration be?

2. Whether the conditions to these temporary exemptions are appropriate. Why or why not? Should other conditions apply? Are any of the present conditions to the temporary exemptions provided in this Order unnecessary? If so, please specify and explain why such conditions are not needed.

3. Whether Eurex ultimately should be required to register as a clearing agency under the Exchange Act. Why or why not?

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–17–09 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–17–09. 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. We will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/exorders.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 am and 3 pm. 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.

III. Conclusion

It is hereby ordered, pursuant to Section 36(a) of the Exchange Act, that, until April 23, 2010:

(a) Exemption from Section 17A of the Exchange Act.

Eurex Clearing AG ("Eurex") shall be exempt from Section 17A of the Exchange Act solely to perform the functions of a clearing agency for Cleared CDS (as defined in paragraph (d)(1) of this Order), subject to the following conditions:

(1) Eurex shall make available on its Web site its annual audited financial statements.

(2) Eurex shall keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts and other such records as shall be made or received by it relating to its Cleared CDS clearance and settlement services. These records shall be kept for at least five years and for the first two years shall be held in an easily accessible place.

(3) Eurex shall supply information and periodic reports relating to its Cleared CDS clearance and settlement services as may be reasonably requested by the Commission, and shall provide access to the Commission to conduct on-site inspections of all facilities (including automated systems and systems environment), records, and personnel related to Eurex's Cleared CDS clearance and settlement services.

(4) Eurex shall notify the Commission, on a monthly basis, of any material disciplinary actions taken against any of its members using its Cleared CDS clearance and settlement services, including the denial of services, fines, or penalties. Eurex shall notify the Commission promptly when it terminates on an involuntary basis the membership of an entity that is using Eurex's Cleared CDS clearance and settlement services. Both notifications shall describe the facts and circumstances that led to Eurex's disciplinary action.

(5) Eurex shall notify the Commission of all changes to its rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services, including its fee schedule and changes to risk management practices, not less than one day prior to effectiveness or implementation of such changes or, in exigent circumstances, as promptly as reasonably practicable under the circumstances. All such rule changes will be posted on Eurex's Web site. Such notifications will not be deemed rule filings that require Commission approval.

(6) Eurex shall provide the Commission with reports prepared by independent audit personnel concerning its Cleared CDS clearance and settlement services that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements. Eurex shall provide the Commission with annual audited financial statements for Eurex prepared by independent audit personnel.

(7) Eurex shall report all significant systems outages to the Commission. If it appears that the outage may extend for 30 minutes or longer, Eurex shall report the systems outage immediately. If it appears that the outage will be resolved in fewer than 30 minutes, Eurex shall report the systems outage within a reasonable time after the outage has been resolved.

(8) Eurex, directly or indirectly, shall make available to the public on terms that are fair and reasonable and not unreasonably discriminatory: (i) all end-of-day settlement prices and any other prices with respect to Cleared CDS that Eurex may establish to calculate mark-to-market margin requirements for Eurex clearing members; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by Eurex.

(b) Exemption for Eurex, certain Eurex clearing members, and certain eligible contract participants.

(1) Persons eligible. The exemption in paragraph (b)(2) is available to:

(i) Eurex;

(ii) Any Eurex U.S. Clearing Member (as defined in paragraph (d)(2) of this Order) that is not a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof);

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referenced Exchange Act sections, registered broker-dealers shall only be subject to the enumerated rules under the referenced Exchange Act sections.

[49] Indeed, Congress directed the Commission to promulgate broker-dealer financial responsibility rules, including rules regarding custody, the use of customer securities and the use of customers' deposits or credit balances, and regarding establishment of minimum financial requirements.

(iii) Any Eurex non-U.S. Clearing Member (as defined in paragraph (d)(3) of this Order) that is not a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof); and

(iv) Any eligible contract participant (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), other than: (A) An eligible contract participant that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons; (B) an eligible contract participant that is a self-regulatory organization, as that term is defined in Section 3(a)(26) of the Exchange Act; or (C) a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof).

(2) Scope of exemption.

(i) In general. Such persons generally shall, solely with respect to Cleared CDS, be exempt from the provisions of the Exchange Act and the rules and regulations thereunder that do not apply in connection with security-based swap agreements. Accordingly, under this exemption, those persons would remain subject to those Exchange Act requirements that explicitly are applicable in connection with security-based swap agreements (*i.e.*, paragraphs (2) through (5) of Section 9(a), Section 10(b), Section 15(c)(1), paragraphs (a) and (b) of Section 16, Section 20(d) and Section 21A(a)(1) and the rules thereunder that explicitly are applicable to security-based swap agreements). All provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such provisions also remain applicable.

(ii) Exclusions from exemption. The exemption in paragraph (b)(2)(i), however, does not extend to the following provisions under the Exchange Act:

(A) Paragraphs (42), (43), (44), and (45) of Section 3(a);

(B) Section 5;

(C) Section 6;

(D) Section 12 and the rules and regulations thereunder;

(E) Section 13 and the rules and regulations thereunder;

(F) Section 14 and the rules and regulations thereunder;

(G) Paragraphs (4) and (6) of Section 15(b);

(H) Section 15(d) and the rules and regulations thereunder;

(I) Section 15C and the rules and regulations thereunder;

(J) Section 16 and the rules and regulations thereunder; and

(K) Section 17A (other than as provided in paragraph (a)).

(c) Exemption for certain registered broker-dealers.

A broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof) shall be exempt from the provisions of the Exchange Act and the rules and regulations thereunder specified in paragraph (b)(2), solely with respect to Cleared CDS, except:

(1) Section 7(c);

(2) Section 15(c)(3);

(3) Section 17(a);

(4) Section 17(b);

(5) Regulation T, 12 CFR 200.1 *et seq.*;

(6) Rule 15c3–1;

(7) Rule 15c3–3;

(8) Rule 17a–3;

(9) Rule 17a–4;

(10) Rule 17a–5; and

(11) Rule 17a–13.

(d) Definitions.

For purposes of this Order:

(1) "Cleared CDS" shall mean a credit default swap that is submitted (or offered, purchased or sold on terms providing for submission) to Eurex, that is offered only to, purchased only by, and sold only to eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), and in which:

(i) The reference entity, the issuer of the reference security, or the reference security is one of the following:

(A) An entity reporting under the Exchange Act, providing Securities Act Rule 144A(d)(4) information, or about which financial information is otherwise publicly available;

(B) A foreign private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States;

(C) A foreign sovereign debt security;

(D) An asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; or

(E) An asset-backed security issued or guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae; or

(ii) The reference index is an index in which 80 percent or more of the index's weighting is comprised of the entities or securities described in subparagraph (i).

(2) "Eurex U.S. Clearing Member" shall mean any U.S. clearing member of Eurex that submits Cleared CDS to Eurex for clearance and settlement exclusively (i) for its own account or (ii) for the account of an affiliate that controls, is controlled by, or is under common control with the U.S. clearing member of Eurex.

(3) "Eurex non-U.S. Clearing Member" shall mean any clearing member of Eurex, other than a clearing member that is a U.S. person, that submits Cleared CDS to Eurex for clearance and settlement exclusively (i) for its own account, (ii) for the account of an affiliate (including a U.S. affiliate) that controls, is controlled by, or is under common control with the non-U.S. clearing member of Eurex, or (iii) for the account of any other person except a U.S. person.

By the Commission.

Elizabeth M. Murphy,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60372; File No. S7–16–09]

Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request on Behalf of Ice Clear Europe Limited Related to Central Clearing of Credit Default Swaps, and Request for Comments

July 23, 2009.

I. Introduction

In response to the recent turmoil in the financial markets, the Securities and Exchange Commission ("Commission") has taken multiple actions to protect investors and ensure the integrity of the nation's securities markets, including actions[1] designed to address concerns related to the market in credit default swaps ("CDS").[2] The over-the-counter

[1] *See generally* Securities Exchange Act Release No. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009) (temporary exemption in connection with CDS clearing by Chicago Mercantile Exchange Inc.), Securities Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009) (temporary exemption in connection with CDS clearing by ICE US Trust LLC), Securities Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009) (temporary exemption in connection with CDS clearing by LIFFE A&M and LCH.Clearnet Ltd.) and other Commission actions discussed therein.

[2] A CDS is a bilateral contract between two parties, known as counterparties. The value of this financial contract is based on underlying obligations of a single entity or on a particular security or other debt obligation, or an index of several such entities, securities, or obligations. The obligation of a seller under a CDS to make payments under a CDS contract is triggered by a default or other credit event as to such entity or entities or such security or securities. Investors may use CDS for a variety of reasons, including to offset or insure against risk in their fixed-income portfolios, to take positions in bonds or in segments of the debt

("OTC") market for CDS has been a source of concern to us and other financial regulators, and we have recognized that facilitating the establishment of central counterparties ("CCPs") for CDS can play an important role in reducing the counterparty risks inherent in the CDS market, and thereby can help mitigate potential systemic impacts.[3] Thus, taking action to help foster the prompt development of CCPs, including granting conditional exemptions from certain provisions of the Federal securities laws, is in the public interest.

The Commission's authority over this OTC market for CDS is limited. Specifically, Section 3A of the Securities Exchange Act of 1934 ("Exchange Act") limits the Commission's authority over swap agreements, as defined in Section 206A of the Gramm-Leach-Bliley Act.[4] For those CDS that are swap agreements, the exclusion from the definition of security in Section 3A of the Exchange Act, and related provisions, will continue to apply. The Commission's action today does not affect these CDS, and this Order does not apply to them. For those CDS that are not swap agreements ("non-excluded CDS"), the Commission's action today provides conditional exemptions from certain requirements of the Exchange Act.

The Commission believes that using well-regulated CCPs to clear transactions in CDS would provide a number of benefits, by helping to promote efficiency and reduce risk in the CDS market and among its participants, requiring maintenance of records of CDS transactions that would aid the Commission's efforts to prevent and detect fraud and other abusive market practices, addressing concerns about counterparty risk—through the novation process—by substituting the creditworthiness and liquidity of the CCP for the creditworthiness and liquidity of the counterparties to a CDS,[5] contributing generally to the goal of market stability, and reducing CDS risks through multilateral netting of trades.[6]

In this context, ICE Clear Europe Limited ("ICE Clear Europe") has requested that the Commission grant exemptions from certain requirements under the Exchange Act with respect to its proposed activities in clearing and settling certain CDS, as well as the proposed activities of certain other persons, as described below.[7]

Based on the facts presented and the representations made in the request on behalf of ICE Clear Europe,[8] and for the reasons discussed in this Order, the Commission temporarily is exempting, subject to certain conditions, ICE Clear Europe from the requirement to register as a clearing agency under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS transactions. The Commission also temporarily is exempting eligible contract participants and others from certain Exchange Act requirements with respect to non-excluded CDS cleared by ICE Clear Europe. In addition, the Commission temporarily is exempting ICE Clear Europe and certain members of ICE Clear Europe from the registration requirements of Sections 5 and 6 of the Exchange Act solely in connection with the calculation of mark-to-market prices for non-excluded CDS cleared by ICE Clear Europe. The Commission's exemptions are temporary and will expire on April 23, 2010.[9]

II. Discussion

A. Description of ICE Clear Europe's Proposal

The exemptive request on behalf of ICE Clear Europe describes how its proposed arrangement for central clearing of CDS would operate and makes representations about the safeguards associated with those arrangements, as described below:

1. ICE Clear Europe Organization

ICE Clear Europe is indirectly a wholly-owned subsidiary of the IntercontinenalExchange, Inc. ("ICE").[10] ICE Clear Europe was incorporated in England and Wales on April 19, 2007 as a private limited company under the Companies Act 1985 (as amended, now largely superseded by the Companies Act 2006). ICE Clear Europe is subject to direct supervision by the United Kingdom's Financial Services Authority ("FSA") as a Recognised Clearing House ("RCH").

2. ICE Clear Europe Central Counterparty Services for CDS

ICE Clear Europe will act as a central counterparty for ICE Clear Europe Clearing Members[11] by assuming, through novation, the obligations of all eligible CDS transactions accepted by it for clearing and collecting margin and other credit support from ICE Clear Europe Clearing Members to collateralize their obligations to ICE Clear Europe. ICE Clear Europe's trade submission process is designed to ensure that it maintains a matched book of offsetting CDS contracts.

ICE Clear Europe will leverage the Deriv/SERV infrastructure in operating its CDS clearing service. Initially, all trades submitted by ICE Clear Europe Clearing Members for clearing through

market as represented by an index, or to capitalize on the volatility in credit spreads during times of economic uncertainty. In recent years, CDS market volumes have rapidly increased. *See* Semiannual OTC derivatives statistics at end-December 2008, Bank for International Settlement ("BIS"), available at *http://www.bis.org/statistics/otcder/dt1920a.pdf*.

This growth has coincided with a significant rise in the types and number of entities participating in the CDS market. CDS were initially created to meet the demand of banking institutions looking to hedge and diversify the credit risk attendant with their lending activities. However, financial institutions such as insurance companies, pension funds, securities firms, and hedge funds have entered the CDS market.

[3] *See generally* actions referenced in note 1, *supra*.

[4] 15 U.S.C. 78c-1. Section 3A excludes both a non-security-based and a security-based swap agreement from the definition of "security" under Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10). Section 206A of the Gramm-Leach-Bliley Act defines a "swap agreement" as "any agreement, contract, or transaction between eligible contract participants (as defined in section 1a(12) of the Commodity Exchange Act * * *) * * * the material terms of which (other than price and quantity) are subject to individual negotiation." 15 U.S.C. 78c note.

[5] "Novation" is a "process through which the original obligation between a buyer and seller is discharged through the substitution of the CCP as seller to buyer and buyer to seller, creating two new contracts." Committee on Payment and Settlement Systems, Technical Committee of the International Organization of Securities Commissioners, *Recommendations for Central Counterparties* (Nov. 2004) at 66. Through novation, the CCP assumes counterparty risk.

[6] *See generally* actions referenced in note 1, *supra*.

[7] *See* Letter from Abigail Arms, Shearman & Sterling LLP, to Elizabeth M. Murphy, Secretary, Commission, July 23, 2009.

[8] *See id.* The exemptions we are granting today are based on representations made in the request on behalf of ICE Clear Europe. We recognize, however, that there could be legal uncertainty in the event that one or more of the underlying representations were to become inaccurate. Accordingly, if any of these exemptions were to become unavailable by reason of an underlying representation no longer being materially accurate, the legal status of existing open positions in non-excluded CDS associated with persons subject to those unavailable exemptions would remain unchanged, but no new positions could be established pursuant to the exemptions until all of the underlying representations were again accurate.

[9] To facilitate the operation of one or more CCPs for the CDS market, the Commission has also approved interim final temporary rules providing exemptions under the Securities Act of 1933 and the Exchange Act for non-excluded CDS. *See* Securities Act Release No. 8999 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009).

Further, the Commission has provided temporary exemptions in connection with Sections 5 and 6 of the Exchange Act for transactions in non-excluded CDS. *See* Securities Exchange Act Release No. 59165 (Dec. 24, 2008), 74 FR 133 (Jan. 2, 2009).

[10] ICE Clear Europe is owned by IntercontinentalExchange Holdings, which itself is over 99% owned by ICE Netherlands C.V. ICE Netherlands C.V. is owned by ICE Markets, Inc. and by IntercontinentalExchange International Inc., both of which are wholly owned by ICE.

[11] *See* note 33, *infra*.

ICE Clear Europe will be recorded in the Deriv/SERV Trade Information Warehouse ("TIW").[12] ICE Clear Europe will, initially on a weekly basis, obtain from DTCC matched trades that have been recorded in the Deriv/SERV TIW as having been submitted for clearing through ICE Clear Europe. Eventually, ICE Clear Europe intends to obtain matched trades from DTCC on a real-time basis.

Members may use the facilities of an inter-dealer broker to execute CDS transactions, for example, to access liquidity more rapidly or to maintain pre-execution anonymity and submit such transactions for clearance and settlement to ICE Clear Europe. The inter-dealer brokers do not assume market positions in connection with their intermediation of CDS transactions.

Once a matched CDS contract has been forwarded to, or obtained by, ICE Clear Europe, and has been accepted for clearing by it, ICE Clear Europe will clear the CDS contract by becoming the central counterparty to each party to the trade. Deriv/SERV's current infrastructure will help to ensure that ICE Clear Europe maintains a matched book of offsetting CDS contracts. Maintaining a matched offsetting book is essential to managing the credit risk associated with CDS submitted to ICE Clear Europe for clearing.

Under ICE Clear Europe's draft CDS rules and CDS procedures ("ICE Clear Europe Rules"), each bilateral CDS contract between two ICE Clear Europe Clearing Members that is submitted to and accepted by ICE Clear Europe for clearing will be "novated." As part of this process, each bilateral CDS contract submitted to ICE Clear Europe will be replaced by two superseding CDS contracts between each of the original parties to the submitted transaction and ICE Clear Europe on standard terms mandated by ICE Clear Europe. Under these new contracts, ICE Clear Europe will act as the protection buyer to the original protection seller and protection seller to the original protection buyer. As central counterparty to each novated CDS contract, ICE Clear Europe will be able to net offsetting positions on a multilateral basis, even though ICE Clear Europe will have different counterparties with respect to the novated CDS contracts that are being netted.

As part of the novation process, the terms and conditions governing the CDS bilaterally negotiated by the submitting counterparties will be superseded by the relevant provisions of the ICE Clear Europe Rules, the ISDA 2002 Master Agreement, and the Schedule to the ISDA 2002 Master Agreement that is entered into by ICE Clear Europe and each ICE Clear Europe Clearing Member. Multilateral netting will significantly reduce the outstanding notional amount of each ICE Clear Europe Clearing Member's portfolio. When ICE Clear Europe acts as the central counterparty to all cleared CDS of an ICE Clear Europe Clearing Member, that member's positions will be netted down to a single exposure to ICE Clear Europe.

3. ICE Clear Europe Risk Management

ICE Clear Europe will mitigate counterparty risk through a six-tiered waterfall consisting of: (i) Membership criteria; (ii) initial margin; (iii) mark-to-market margin; (iv) intraday risk monitoring; (v) guaranty fund; and (vi) a one-time power of assessment. ICE Clear Europe's risk management infrastructure and related risk metrics are structured specifically for the CDS products that ICE Clear Europe clears. Each ICE Clear Europe Clearing Member's credit support obligations will be governed by a uniform credit support framework and applicable ICE Clear Europe Rules.

ICE Clear Europe will maintain strict, objectively determined, risk-based margin and guaranty fund requirements,[13] which will be consistent with clearing industry practice and international standards established for central counterparties as articulated in the Committee on Payment and Settlement Systems/ International Organization of Securities Commissions ("CPSS–IOSCO") Recommendations for Central Counterparties ("RCCP").[14] These requirements will also be subject to ongoing regulation and oversight by the FSA. The amount of margin and guaranty fund required of each ICE Clear Europe Clearing Member will be continuously monitored and periodically adjusted as required to reflect the size and profile of, and risk associated with, the ICE Clear Europe Clearing Member's cleared CDS transactions (and related market factors).

Each ICE Clear Europe Clearing Member's margin requirement will consist of two components: (i) Initial margin, reflecting a risk-based calculation of potential loss on outstanding CDS positions in the event of a significant adverse market movement; and (ii) mark-to-market margin, based upon an end-of-day mark-to-market of outstanding positions. At any time when a requirement for initial margin falls due and insufficient permitted cover is held, the ICE Clear Europe Clearing Member must initially transfer cash. Thereafter, an ICE Clear Europe Clearing Member may substitute such cash margin with other permitted cover by delivery of the replacement permitted cover to ICE Clear Europe.[15] Mark-to-market margin payments, however, may be made by ICE Clear Europe or an ICE Clear Europe Clearing Member only in cash. ICE Clear Europe Clearing Members will be required to cover any end-of-day margin deficit with Euros (or such other currency as may be permitted under the proposed CDS finance procedures) by the following morning, and ICE Clear Europe will have the discretion to require and collect additional margin, both at the end of the day and intraday, as it deems necessary.[16]

ICE Clear Europe will also maintain a guaranty fund in respect of ICE Clear Europe Clearing Members (the "CDS Guaranty Fund") to cover losses arising

[12] Major market participants frequently use the Deriv/SERV comparison and confirmation service of The Depository Trust & Clearing Corporation ("DTCC") when documenting their CDS transactions. This service creates electronic records of transaction terms and counterparties. As part of this service, market participants separately submit the terms of a CDS transaction to Deriv/SERV in electronic form. Paired submissions are compared to verify that their terms match in all required respects. If a match is confirmed, the parties receive an electronic confirmation of the submitted transaction. All submitted transactions are recorded in the Deriv/SERV Trade Information Warehouse, which serves as the primary registry for submitted transactions.

[13] ICE Clear Europe takes collateral, including margin and guaranty fund contributions and non-cash collateral, by way of a "title transfer financial collateral arrangement" for purposes of the Directive 2002/47/EC on Financial Collateral Arrangements ("Financial Collateral Regulations"). This is different from applicable U.S. law, which mandates that a clearinghouse receive pledged collateral. This collateral structure results in ICE Clear Europe having an unencumbered property right in all collateral provided to it, subject only to an obligation to return excess collateral or such collateral as remains unexpended following a closeout on a default. The Financial Collateral Regulations also provide for the effectiveness of financial collateral arrangements and close-out netting provisions under English law notwithstanding an insolvency of the counterparty.

[14] The RCCP was drafted by a joint task force ("Task Force") composed of representative members of IOSCO and CPSS and published in November 2004. The Task Force consisted of securities regulators and central bankers from 19 countries and the European Union. The U.S. representatives on the Task Force included staff from the Commission, the Federal Reserve Board of Governors, and the Commodity Futures Trading Commission.

[15] The full list of permitted cover is set out in ICE Clear Europe circulars. The most recent circular in this respect is available at: *https://www.theice.com/publicdocs/clear_europe/circulars/C09015_att.pdf.*

[16] An ICE Clear Europe Clearing Member would be permitted to withdraw mark-to-market margin amounts credited to its account to the extent not required to satisfy its initial margin requirement.

from an ICE Clear Clearing Member's default on cleared CDS transactions that exceed the amount of margin held by ICE Clear Europe from the defaulting ICE Clear Europe Clearing Member. Each ICE Clear Europe Clearing Member will be required to contribute a minimum of 15 million Euros to the CDS Guaranty Fund initially when it becomes a Clearing Member and additional amounts based on its actual and anticipated CDS position exposures plus such other amount as ICE Clear Europe at its discretion determines is necessary based on projected clearing activity. The adequacy of the total amount of the CDS Guaranty Fund will be monitored daily, and if ICE Clear Europe determines the total amount in the CDS Guaranty Fund is to change, ICE Clear Europe Clearing Members will be given notice and will be required to deposit their new contribution prior to the opening of business on the next business day. As a result, the CDS Guaranty Fund will grow in proportion to the position risk associated with the aggregate volume of CDS cleared by ICE Clear Europe.

ICE Clear Europe will also establish rules that "mutualize" the risk of an ICE Clear Europe Clearing Member default across all such clearing members.[17] In the event of an ICE Clear Europe Clearing Member's default, ICE Clear Europe may look to the margin posted by such ICE Clear Europe Clearing Members, such an ICE Clear Europe Clearing Member's CDS Guaranty Fund contributions and, if applicable, any recovery from a parent guarantor. In addition, at its discretion, ICE Clear Europe will be authorized to use, to the extent needed, other ICE Clear Europe Clearing Members' CDS Guaranty Fund contributions to satisfy any obligations of the defaulting ICE Clear Europe Clearing Member.

In the event that the total CDS Guaranty Fund is exhausted, remaining ICE Clear Europe Clearing Members will be obligated to contribute additional amounts to the CDS Guaranty Fund based on a one-time limited power of assessment. The amount of the assessment will be up to, but will not exceed,[18] each ICE Clear Europe Clearing Member's CDS Guaranty Fund obligation immediately prior to the default.

4. Member Default

Following a default by an ICE Clear Europe Clearing Member, ICE Clear Europe has a number of tools available to it under the ICE Clear Europe Rules to ensure an orderly liquidation and unwinding of the open positions of such defaulting ICE Clear Europe Clearing Member. In the first instance, upon determining that a default has occurred, ICE Clear Europe will have the ability to immediately enter into replacement CDS transactions with other ICE Clear Europe Clearing Members that are designed to mitigate, to the greatest extent possible, the market risk of the defaulting clearing member's open positions. ICE Clear Europe can also seek to sell or transfer positions to other ICE Clear Europe clearing members. For open positions in which there is no liquid trading market, ICE Clear Europe may enter into covering CDS transactions for which there is a liquid market and that are most closely correlated with such illiquid open positions.

After entering into covering transactions in the open market, if any, ICE Clear Europe will seek to close out any remaining open positions of the defaulting ICE Clear Europe Clearing Member by using one or more auctions or other commercially reasonable unwind processes. ICE Clear Europe may close out its position through auctions, open market processes, or by allocating replacement transactions to non-defaulting ICE Clear Europe Clearing Members at the floor price established by ICE Clear Europe.

B. Temporary Conditional Exemptions From Clearing Agency and Exchange Registration Requirements

1. Exemption From Section 17A of the Exchange Act

Section 17A of the Exchange Act sets forth the framework for the regulation and operation of the U.S. clearance and settlement system, including CCPs. Specifically, Section 17A directs the Commission to use its authority to promote enumerated Congressional objectives and to facilitate the development of a national clearance and settlement system for securities transactions. Absent an exemption, a CCP that novates trades of non-excluded CDS that are securities and generates money and settlement obligations for participants is required to register with the Commission as a clearing agency.

Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.[19]

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until April 23, 2010 to ICE Clear Europe from Section 17A of the Exchange Act, solely to perform the functions of a clearing agency for Cleared CDS,[20] subject to the conditions discussed below.

Our action today balances the aim of facilitating the prompt establishment of ICE Clear Europe as a CCP for non-

[17] In the event of a default of an ICE Clear Europe Clearing Member, only the CDS Guaranty Fund will be available to cover losses from the default. In the event of a default of an energy-only clearing member, only the Energy Guaranty Fund will be available to cover losses from the default. In the event of a default of an ICE Clear Europe Clearing Member that is active in both CDS and energy contracts, the Clearing Member's margin and guaranty fund are available to cover any loss, but the CDS Guaranty Fund deposits of the non-defaulting ICE Clear Europe Clearing Members can only be applied against losses in CDS contracts, and the Energy Guaranty Fund deposits of the non-defaulting Energy Clearing Members can only be applied against losses in energy contracts.

[18] An ICE Clear Europe Clearing Member can limit the amount of its assessment to an amount equal to such clearing member's guaranty fund contribution immediately prior to the relevant default only by contributing such amount and terminating its membership from ICE Clear Europe, with the withdrawal effective three months after notice.

[19] 15 U.S.C. 78mm.

[20] For purposes of this exemption, and the other exemptions addressed in this Order, "Cleared CDS" means a credit default swap that is submitted (or offered, purchased, or sold on terms providing for submission) to ICE Clear Europe, that is offered only to, purchased only by, and sold only to eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), and in which: (i) The reference entity, the issuer of the reference security, or the reference security is one of the following: (A) An entity reporting under the Exchange Act, providing Securities Act Rule 144A(d)(4) information, or about which financial information is otherwise publicly available; (B) a foreign private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States; (C) a foreign sovereign debt security; (D) an asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; or (E) an asset-backed security issued or guaranteed by the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), or the Government National Mortgage Association ("Ginnie Mae"); or (ii) the reference index is an index in which 80 percent or more of the index's weighting is comprised of the entities or securities described in subparagraph (i). As discussed above, the Commission's action today does not affect CDS that are swap agreements under Section 206A of the Gramm-Leach-Bliley Act. *See* note 4, *supra*. The Commission's action today also does not affect activities in CDS that are outside the jurisdiction of the United States.

excluded CDS transactions—which should help reduce systemic risks—with ensuring that important elements of Commission oversight are applied to the non-excluded CDS market. In doing so, we are mindful that applying the full scope of the Exchange Act to transactions involving non-excluded CDS could deter the prompt establishment of ICE Clear Europe as a CCP to settle those transactions.

While we are acting so that the prompt establishment of ICE Clear Europe as a CCP for non-excluded CDS will not be delayed by the need to apply the full scope of Exchange Act Section 17A's requirements that govern clearing agencies, the relief we are providing is temporary and conditional. The limited duration of the exemptions will permit the Commission to continue to gain more direct experience with the non-excluded CDS market after ICE Clear Europe becomes operational, giving the Commission the ability to oversee the development of the centrally cleared non-excluded CDS market as it evolves. During the exemptive period, the Commission will closely monitor the impact of the CCPs on the CDS market. In particular, the Commission will seek to assure itself that the CCPs do not act in an anticompetitive manner or indirectly facilitate anticompetitive behavior with respect to fees charged to members, the dissemination of market data and the access to clearing services by independent CDS exchanges or CDS trading platforms. The Commission will take that experience into account in future actions.

Moreover, this temporary exemption in part is based on ICE Clear Europe's representation that it meets the standards set forth in the CPSS–IOSCO RCCP report. The RCCP establishes a framework that requires a CCP to have: (i) The ability to facilitate the prompt and accurate clearance and settlement of CDS transactions and to safeguard its users' assets; and (ii) sound risk management, including the ability to appropriately determine and collect clearing fund and monitor its users' trading. This framework is generally consistent with the requirements of Section 17A of the Exchange Act.

In addition, this Order is designed to assure that—as represented in the request on behalf of ICE Clear Europe—information will be available to market participants about the terms of the CDS cleared by ICE Clear Europe, the creditworthiness of ICE Clear Europe or any guarantor, and the clearing and settlement process for the CDS. Moreover, to be within the definition of Cleared CDS for purposes of this exemption (as well as the other exemptions granted through this Order), a CDS may only involve a reference entity, a reference security, an issuer of a reference security, or a reference index that satisfies certain conditions relating to the availability of information about such persons or securities. For non-excluded CDS that are index-based, the definition provides that at least 80 percent of the weighting of the index must be comprised of reference entities, issuers of a reference security, or reference securities that satisfy the information conditions. The definition does not prescribe the type of financial information that must be available or the location of the particular information, recognizing that eligible contract participants have access to information about reference entities and reference securities through multiple sources. The Commission believes, however, that it is important in the CDS market, as in the market for securities generally, that parties to transactions should have access to financial information that would allow them to appropriately evaluate the risks relating to a particular investment and make more informed investment decisions.[21] Such information availability also will assist ICE Clear Europe and the buyers and sellers in valuing their Cleared CDS and their counterparty exposures. As a result of the Commission's actions today, the Commission believes that information should be available for market participants to be able to make informed investment decisions, and value and evaluate their Cleared CDS and their counterparty exposures.

This temporary exemption is subject to a number of conditions that are designed to enable Commission staff to monitor ICE Clear Europe's clearance and settlement of CDS transactions and help reduce risk in the CDS market. These conditions require that ICE Clear Europe: (i) Make available on its Web site its annual audited financial statements; (ii) preserve records of all activities related to the conduct of its Cleared CDS clearance and settlement services for at least five years (in an easily accessible place for the first two years); (iii) supply information relating to its Cleared CDS clearance and settlement services as may be reasonably requested by the Commission and provide access to the Commission to conduct on-site inspections of facilities, records, and personnel related to its Cleared CDS clearance and settlement services, subject to cooperation with the FSA and upon terms and conditions agreed between the FSA and the Commission; (iv) notify the Commission about material disciplinary actions taken against any of its members using its Cleared CDS clearance and settlement services, and about the involuntary termination of the membership of an entity that is using ICE Clear Europe's Cleared CDS clearance and settlement services; (v) notify the Commission not less than one day prior to implementation or effectiveness of changes to rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services, or, in exigent circumstances, as promptly as reasonably practicable under the circumstances; (vi) provide the Commission with reports prepared by independent audit personnel that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements[22] and its annual audited financial statements prepared by independent audit personnel; and (vii) provide notice to the Commission regarding the suspension of services or inability to operate facilities in connection with Cleared CDS clearance and settlement services at the same time it provides notice to the FSA.

In addition, this relief is conditioned on ICE Clear Europe, directly or indirectly, making available to the public on terms that are fair and reasonable and not unreasonably discriminatory: (i) All end-of-day settlement prices and any other prices with respect to Cleared CDS that ICE Clear Europe may establish to calculate mark-to-market margin requirements for ICE Clear Europe Clearing Members; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by ICE Clear Europe. The Commission believes this is an appropriate condition for ICE Clear Europe's exemption from registration as a clearing agency. In Section 11A of the Exchange Act, Congress found that "[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure * * * the availability to brokers, dealers, and investors of

[21] The Commission notes the recommendations of the President's Working Group on Financial Markets regarding the informational needs and due diligence responsibilities of investors. *See* Policy Statement on Financial Market Developments, The President's Working Group on Financial Markets, Mar. 13, 2008, available at: *http://www.ustreas.gov/press/releases/reports/pwgpolicystatemktturmoil_03122008.pdf.*

[22] *See* Automated Systems of Self-Regulatory Organizations, Securities Exchange Act Release No. 27445 (Nov. 16, 1989), 54 FR 48703 (Nov. 24, 1989), and Automated Systems of Self-Regulatory Organizations, Securities Exchange Act Release No. 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991).

information with respect to quotations for and transactions in securities."[23] The President's Working Group on Financial Markets has stated that increased transparency is a policy objective for the over-the-counter derivatives market,[24] which includes the market for CDS. The condition is designed to further this policy objective of both Congress and the President's Working Group by requiring ICE Clear Europe to make useful pricing data available to the public on terms that are fair and reasonable and not unreasonably discriminatory. Congress adopted these standards for the distribution of data in Section 11A. The Commission long has applied the standards in the specific context of securities market data,[25] and it anticipates that ICE Clear Europe will distribute its data on terms that generally are consistent with the application of these standards to securities market data. For example, data distributors generally are required to treat subscribers equally and not grant special access, fees, or other privileges to favored customers of the distributor. Similarly, distributors must make their data feeds reasonably available to data vendors for those subscribers who wish to receive their data indirectly through a vendor rather than directly from the distributor. In addition, a distributor's attempt to tie data products that must be made available to the public with other products or services of the distributor would be inconsistent with the statutory requirements.[26] The Commission carefully evaluates any type of discrimination with respect to subscribers and vendors to assess whether there is a reasonable basis for the discrimination given, among other things, the Exchange Act objective of promoting price transparency.[27] Moreover, preventing unreasonable discrimination is a practical means to promote fair and reasonable terms for data distribution because distributors are more likely to act appropriately when the terms applicable to the broader public also must apply to any favored classes of customers.[28]

As a CCP, ICE Clear Europe will collect and process information about CDS transactions, prices, and positions from all of its participants. With this information, a CCP will, among other things, calculate and disseminate current values for open positions for the purpose of setting appropriate margin levels. The availability of such information can improve fairness, efficiency, and competitiveness of the market—all of which enhance investor protection and facilitate capital formation. Moreover, with pricing and valuation information relating to Cleared CDS, market participants would be able to derive information about underlying securities and indexes. This may improve the efficiency and effectiveness of the securities markets by allowing investors to better understand credit conditions generally.

2. Exemption From Sections 5 and 6 of the Exchange Act

ICE Clear Europe represents that, in connection with its clearing and risk management process, it will calculate an end-of-day settlement price for each Cleared CDS in which an ICE Clear Europe Clearing Member has a cleared position, based on prices submitted by ICE Clear Europe Clearing Members. As part of this mark-to-market process, ICE Clear Europe will periodically require ICE Clear Europe Clearing Members to execute certain CDS trades at the applicable end-of-day settlement price. Requiring ICE Clear Europe Clearing Members to trade CDS periodically in this manner is designed to help ensure that such submitted prices reflect each ICE Clear Europe Clearing Member's best assessment of the value of each of its open positions in Cleared CDS on a daily basis, thereby reducing risk by allowing ICE Clear Europe to impose appropriate margin requirements.

Section 5 of the Exchange Act states that "[i]t shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of using any facility of an exchange * * * to effect any transaction in a security, or to report any such transactions, unless such exchange (1) is registered as a national securities exchange under section 6 of [the Exchange Act], or (2) is exempted from such registration * * * by reason of the limited volume of transactions effected on such exchange * * *."[29] Section 6 of the Exchange Act sets forth a procedure whereby an exchange[30] may register as a national securities exchange.[31] To facilitate the establishment of ICE Clear Europe's end-of-day settlement price process, including the periodically required trading described above, the Commission is exercising its authority under Section 36 of the Exchange Act to temporarily exempt ICE Clear Europe and ICE Clear Europe Clearing Members from Sections 5 and 6 of the Exchange Act and the rules and regulations thereunder in connection with ICE Clear Europe's calculation of mark-to-market prices for open positions in Cleared CDS. This temporary exemption is subject to the following conditions:

First, ICE Clear Europe must report the following information with respect to the calculation of mark-to-market prices for Cleared CDS to the Commission within 30 days of the end of each quarter, and preserve such reports during the life of the enterprise and of any successor enterprise:

- The total dollar volume of transactions executed during the quarter, broken down by reference entity, security, or index; and
- The total unit volume and/or notional amount executed during the

[23] 15 U.S.C. 78k–1(a)(1)(C)(iii). *See also* 15 U.S.C. 78k–1(a)(1)(D).

[24] *See* President's Working Group on Financial Markets, Policy Objectives for the OTC Derivatives Market (Nov. 14, 2008), available at *http://www.ustreas.gov/press/releases/reports/policyobjectives.pdf* ("Public reporting of prices, trading volumes and aggregate open interest should be required to increase market transparency for participants and the public."). *See also* Department of the Treasury, *Financial Regulatory Reform: A New Foundation*, available at *http://www.financialstability.gov/docs/regs/FinalReport_web.pdf*, at p.48 ("[m]arket efficiency and price transparency should be improved in derivatives markets * * * by requiring development of a system for timely reporting of trades and prompt dissemination of prices and other trade information.").

[25] *See* Securities Exchange Act Release No. 42209 (Dec. 9, 1999), 64 FR 70613, 70621–70623 (Dec. 17, 1999) ("Market Information Concept Release") (discussion of legal standards applicable to market data distribution since Section 11A was adopted in 1975).

[26] *See* Securities Exchange Act Release No. 59039 (Dec. 2, 2008), 73 FR 74770, 74793 (Dec. 9, 2008) ("NYSE ArcaBook Order") ("[S]ection 6 and Exchange Act Rule 603(a) require NYSE Arca to distribute the ArcaBook data on terms that are not tied to other products in a way that is unfairly discriminatory or anticompetitive.").

[27] *See* Market Information Concept Release, 64 FR at 70630 ("The most important objectives for the Commission to consider in evaluating fees are to assure (1) the wide availability of market information, (2) the neutrality of fees among markets, vendors, broker-dealers, and users, (3) the quality of market information—its integrity, reliability, and accuracy, and (4) fair competition and equal regulation among markets and broker-dealers.").

[28] *See* NYSE ArcaBook Order, 73 FR at 74794 ("[T]he proposed fees for ArcaBook data will apply equally to all professional subscribers and all non-professional subscribers * * * The fees therefore do not unreasonably discriminate among types of subscribers, such as by favoring participants in the NYSE Arca market or penalizing participants in other markets.").

[29] 15 U.S.C. 78e.

[30] Section 3(a)(1) of the Exchange Act, 15 U.S.C. 78c(a)(1), defines "exchange." Rule 3b–16 under the Exchange Act, 17 CFR 240.3b–16, defines certain terms used in the statutory definition of exchange. *See* Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844 (Dec. 22, 1998) (adopting Rule 3b–16 in addition to Regulation ATS).

[31] 15 U.S.C. 78f. Section 6 of the Exchange Act also sets forth various requirements to which a national securities exchange is subject.

quarter, broken down by reference entity, security, or index.

Reporting of this information will assist the Commission in carrying out its responsibility to supervise and regulate the securities markets.

Second, ICE Clear Europe must establish adequate safeguards and procedures to protect members' confidential trading information. Such safeguards and procedures shall include: (i) Limiting access to the confidential trading information of members to those employees of ICE Clear Europe who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and (ii) implementing standards controlling employees of ICE Clear Europe trading for their own accounts. ICE Clear Europe must adopt and implement adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed. This condition is designed to prevent any misuse of ICE Clear Europe Clearing Members' trading information that may be available to ICE Clear Europe in connection with the daily marking-to-market process of open positions in Cleared CDS. This should strengthen confidence in ICE Clear Europe as a CCP for CDS, promoting participation.

Third, ICE Clear Europe must comply with the conditions to the temporary exemption from registration as a clearing agency granted in this Order. As set forth above, this Order is designed to facilitate the prompt establishment of ICE Clear Europe as a CCP for non-excluded CDS. ICE Clear Europe has represented that, to enhance the reliability of end-of-day settlement prices submitted as part of the daily mark-to-market process, it must require periodic trading of Cleared CDS positions by ICE Clear Europe Clearing Members whose submitted end-of-day prices lock or cross. The Commission's temporary exemption from Sections 5 and 6 of the Exchange Act is based on ICE Clear Europe's representation that the end-of-day settlement pricing process, including the periodically required trading, is integral to its risk management. Accordingly, as a condition to ICE Clear Europe's temporary exemption from Sections 5 and 6 of the Exchange Act, ICE Clear Europe must comply with the conditions to the temporary exemption from Section 17A of the Exchange Act in this Order.

The Commission is also temporarily exempting each ICE Clear Europe Clearing Member from the prohibition in Section 5 of the Exchange Act to the extent that such ICE Clear Europe Clearing Member uses any facility of ICE Clear Europe to effect any transaction in Cleared CDS, or to report any such transaction, in connection with ICE Clear Europe's calculation of mark-to-market prices for open positions in Cleared CDS. Absent an exemption, Section 5 would prohibit any ICE Clear Europe Clearing Member that is a broker or dealer from effecting transactions in Cleared CDS on ICE Clear Europe, which will rely on this Order for an exemption from exchange registration. The Commission believes that temporarily exempting ICE Clear Europe Clearing Members from the restriction in Section 5 is necessary and appropriate in the public interest and is consistent with the protection of investors because it will facilitate their use of ICE Clear Europe's CCP for Cleared CDS, which for the reasons noted in this Order the Commission believes to be beneficial. Without also temporarily exempting ICE Clear Europe Clearing Members from this Section 5 requirement, the Commission's temporary exemption of ICE Clear Europe from Sections 5 and 6 of the Exchange Act would be ineffective, because ICE Clear Europe Clearing Members that are brokers or dealers would not be permitted to effect transactions on ICE Clear Europe in connection with the end-of-day settlement price process.

C. Temporary General Exemption for ICE Clear Europe, ICE Clear Europe Clearing Members, and Certain Eligible Contract Participants

Applying the full panoply of Exchange Act requirements to participants in transactions in non-excluded CDS likely would deter some participants from using CCPs to clear CDS transactions. At the same time, it is important that the antifraud provisions of the Exchange Act apply to transactions in non-excluded CDS; indeed, OTC transactions subject to individual negotiation that qualify as security-based swap agreements already are subject to these antifraud provisions.[32]

We thus believe that it is appropriate in the public interest and consistent with the protection of investors temporarily to apply substantially the same framework to transactions by market participants in non-excluded CDS that applies to transactions in security-based swap agreements. Applying substantially the same set of requirements to participants in transactions in non-excluded CDS as apply to participants in OTC CDS transactions will avoid deterring market participants from promptly using CCPs, which would detract from the potential benefits of central clearing.

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until April 23, 2010 from certain requirements under the Exchange Act. This temporary exemption applies to ICE Clear Europe, any ICE Clear Europe Clearing Member[33] which is not a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof), and any eligible contract participants[34] other than: Eligible contract participants that receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling or holding Cleared CDS positions for other persons;[35] eligible contract

[32] While Section 3A of the Exchange Act excludes "swap agreements" from the definition of "security," certain antifraud and insider trading provisions under the Exchange Act explicitly apply to security-based swap agreements. *See* (a) paragraphs (2) through (5) of Section 9(a), 15 U.S.C. 78i(a), prohibiting the manipulation of security prices; (b) Section 10(b), 15 U.S.C. 78j(b), and underlying rules prohibiting fraud, manipulation or insider trading (but not prophylactic reporting or recordkeeping requirements); (c) Section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices; (d) Sections 16(a) and (b), 15 U.S.C. 78p(a) and (b), which address disclosure by directors, officers and principal stockholders, and short-swing trading by those persons, and rules with respect to reporting requirements under Section 16(a); (e) Section 20(d), 15 U.S.C. 78t(d), providing for antifraud liability in connection with certain derivative transactions; and (f) Section 21A(a)(1), 15 U.S.C. 78u–1(a)(1), related to the Commission's authority to impose civil penalties for insider trading violations.

"Security-based swap agreement" is defined in Section 206B of the Gramm-Leach-Bliley Act as a swap agreement in which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein.

[33] For purposes of this Order, an "ICE Clear Europe Clearing Member" means any clearing member of ICE Clear Europe that submits Cleared CDS to ICE Clear Europe for clearance and settlement exclusively (i) for its own account or (ii) for the account of an affiliate that controls, is controlled by, or is under common control with the clearing member of ICE Clear Europe. In general, this exemption does not apply to any ICE Clear Europe Clearing Member that is registered with the Commission as a broker-dealer. A separate temporary exemption addresses the Cleared CDS activities of registered broker-dealers. *See* Part II.D., *infra*.

[34] This exemption in general applies to eligible contract participants, as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order, other than persons that are eligible contract participants under paragraph (C) of that section.

[35] Solely for purposes of this requirement, an eligible contract participant would not be viewed as

participants that are self-regulatory organizations; or eligible contract participants that are registered brokers or dealers.[36]

Under this temporary exemption, and solely with respect to Cleared CDS, these persons generally are exempt from the provisions of the Exchange Act and the rules and regulations thereunder that do not apply to security-based swap agreements. Those persons thus would still be subject to those Exchange Act requirements that explicitly are applicable in connection with security-based swap agreements.[37] In addition, all provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such provisions would remain applicable.[38] In this way, the temporary exemption would apply the same Exchange Act requirements in connection with non-excluded CDS as apply in connection with OTC credit default swaps.

This temporary exemption, however, does not extend to Sections 5 and 6 of the Exchange Act.[39] The Commission separately issued a conditional exemption from these provisions to all broker-dealers and exchanges.[40] This temporary exemption also does not extend to Section 17A of the Exchange Act; instead, ICE Clear Europe is exempt from registration as a clearing agency under the conditions discussed above. In addition, this temporary exemption does not apply to Exchange Act Sections 12, 13, 14, 15(d), and 16;[41] eligible contract participants and other persons instead should refer to the interim final temporary rules issued by the Commission. Finally, this temporary exemption does not extend to the Commission's administrative proceeding authority under Sections 15(b)(4) and (b)(6),[42] or to certain provisions related to government securities.[43]

D. Temporary General Exemption for Certain Registered Broker-Dealers

The temporary exemptions addressed above—with regard to ICE Clear Europe, certain ICE Clear Europe Clearing Members, and certain eligible contract participants—are not available to persons that are registered as broker-dealers with the Commission (other than those that are notice registered pursuant to Section 15(b)(11)).[44] The Exchange Act and its underlying rules and regulations require broker-dealers to comply with a number of obligations that are important to protecting investors and promoting market integrity. We are mindful of the need to avoid creating disincentives to the prompt use of CCPs, and we recognize that the factors discussed above suggest that the full panoply of Exchange Act requirements should not immediately be applied to registered broker-dealers that engage in transactions involving Cleared CDS. At the same time, we also are sensitive to the critical importance of certain broker-dealer requirements to promoting market integrity and protecting customers (including those broker-dealer customers that are not involved with CDS transactions).

This calls for balancing the facilitation of the development and prompt implementation of CCPs with the preservation of certain key investor protections. Pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until April 23, 2010 from certain Exchange Act requirements. Consistent with the temporary exemptions discussed above, and solely with respect to Cleared CDS, we are temporarily exempting registered broker-dealers in general from the provisions of the Exchange Act and its underlying rules and regulations that do not apply to security-based swap agreements. As above, we are not excluding registered broker-dealers from Exchange Act provisions that explicitly apply in connection with security-based swap agreements or from related enforcement authority provisions.[45] As above, and for similar reasons, we are not exempting registered broker-dealers from: Sections 5, 6, 12(a) and (g), 13, 14, 15(b)(4), 15(b)(6), 15(d), 16 and 17A of the Exchange Act.[46]

Further we are not exempting registered broker-dealers from the following additional provisions under

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receiving or holding funds or securities for purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons, if the other persons involved in the transaction would not be considered "customers" of the eligible contract participant under the analysis used for determining whether certain persons would be considered "customers" of a broker-dealer under Exchange Act Rule 15c3–3(a)(1). For these purposes, and for the purpose of the definition of "Cleared CDS," the terms "purchasing" and "selling" mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing the rights or obligations under, a Cleared CDS, as the context may require. This is consistent with the meaning of the terms "purchase" or "sale" under the Exchange Act in the context of security-based swap agreements. *See* Exchange Act Section 3A(b)(4).

[36] A separate temporary exemption addresses the Cleared CDS activities of registered broker-dealers. *See* Part II.D., *infra*. Solely for purposes of this Order, a registered broker-dealer, or a broker or dealer registered under Section 15(b) of the Exchange Act, does not refer to someone that would otherwise be required to register as a broker or dealer solely as a result of activities in Cleared CDS in compliance with this Order.

[37] *See* note 32, *supra*.

[38] Thus, for example, the Commission retains the ability to investigate potential violations and bring enforcement actions in the Federal courts and administrative proceedings, and to seek the full panoply of remedies available in such cases.

[39] This Order includes a separate temporary exemption regarding the mark-to-market process of ICE Clear Europe, discussed above.

[40] *See* note 9, *supra*. A national securities exchange that effects transactions in Cleared CDS would continue to be required to comply with all requirements under the Exchange Act applicable to such transactions. A national securities exchange could form subsidiaries or affiliates that operate exchanges exempt under that order. Any subsidiary or affiliate of a registered exchange could not integrate, or otherwise link, the exempt CDS exchange with the registered exchange including the premises or property of such exchange for effecting or reporting a transaction without being considered a "facility of the exchange." *See* Section 3(a)(2), 15 U.S.C. 78c(a)(2).

[41] 15 U.S.C. 78*l*, 78m, 78n, 78o(d), 78p.

[42] Exchange Act Sections 15(b)(4) and 15(b)(6), 15 U.S.C. 78o(b)(4) and (b)(6), grant the Commission authority to take action against broker-dealers and associated persons in certain situations. Accordingly, while this exemption generally extends to persons that act as inter-dealer brokers in the market for Cleared CDS and do not hold funds or securities for others, such inter-dealer brokers may be subject to actions under Sections 15(b)(4) and (b)(6) of the Exchange Act.

In addition, such inter-dealer brokers may be subject to actions under Exchange Act Section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices. As noted above, Section 15(c)(1) explicitly applies to security-based swap agreements. Sections 15(b)(4), 15(b)(6) and 15(c)(1), of course, would not apply to persons subject to this exemption who do not act as broker-dealers or associated persons of broker-dealers.

[43] This exemption specifically does not extend to the Exchange Act provisions applicable to government securities, as set forth in Section 15C, 15 U.S.C. 78o–5, and its underlying rules and regulations; nor does the exemption extend to related definitions found at paragraphs (42) through (45) of Section 3(a), 15 U.S.C. 78c(a). The Commission does not have authority under Section 36 to issue exemptions in connection with those provisions. *See* Exchange Act Section 36(b), 15 U.S.C. 78mm(b).

[44] Exchange Act Section 15(b)(11) provides for notice registration of certain persons that effect transactions in security futures products. 15 U.S.C. 78o(b)(11).

[45] *See* notes 32 and 38, *supra*. As noted above, broker-dealers also would be subject to Section 15(c)(1) of the Exchange Act, which prohibits brokers and dealers from using manipulative or deceptive devices, because that provision explicitly applies in connection with security-based swap agreements. In addition, to the extent the Exchange Act and any rule or regulation thereunder imposes any other requirement on a broker-dealer with respect to security-based swap agreements (*e.g.*, requirements under Rule 17h–1T to maintain and preserve written policies, procedures, or systems concerning the broker or dealer's trading positions and risks, such as policies relating to restrictions or limitations on trading financial instruments or products), these requirements would continue to apply to broker-dealers' activities with respect to Cleared CDS.

[46] We also are not exempting those members from provisions related to government securities, as discussed above.

the Exchange Act: (i) Section 7(c),[47] which addresses the unlawful extension of credit by broker-dealers; (ii) Section 15(c)(3),[48] which addresses the use of unlawful or manipulative devices by broker-dealers; (iii) Section 17(a),[49] regarding broker-dealer obligations to make, keep and furnish information; (iv) Section 17(b),[50] regarding broker-dealer records subject to examination; (v) Regulation T,[51] a Federal Reserve Board regulation regarding extension of credit by broker-dealers; (vi) Exchange Act Rule 15c3–1, regarding broker-dealer net capital; (vii) Exchange Act Rule 15c3–3, regarding broker-dealer reserves and custody of securities; (viii) Exchange Act Rules 17a–3 through 17a–5, regarding records to be made and preserved by broker-dealers and reports to be made by broker-dealers; and (ix) Exchange Act Rule 17a–13, regarding quarterly security counts to be made by certain exchange members and broker-dealers.[52] Registered broker-dealers should comply with these provisions in connection with their activities involving non-excluded CDS because these provisions are especially important to helping protect customer funds and securities, ensure proper credit practices and safeguard against fraud and abuse.[53]

E. Solicitation of Comments

The Commission is continuing to monitor closely the development of the CDS market and intends to determine to what extent, if any, additional regulatory action may be necessary. For example, as circumstances warrant, certain conditions could be added, altered, or eliminated. Moreover, because these exemptions are temporary, the Commission will in the future consider whether they should be extended or allowed to expire. The Commission believes it would be prudent to solicit public comment on its action today, and on what action it should take with respect to the CDS market in the future. The Commission is soliciting public comment on all aspects of these temporary exemptions, including:

1. Whether the length of this temporary exemption (until April 23, 2010) is appropriate. If not, what should the appropriate duration be?

2. Whether the conditions to these temporary exemptions are appropriate. Why or why not? Should other conditions apply? Are any of the present conditions to the temporary exemptions provided in this Order unnecessary? If so, please specify and explain why such conditions are not needed.

3. Whether ICE Clear Europe ultimately should be required to register as a clearing agency under the Exchange Act. Why or why not?

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–16–09 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–16–09. 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. We will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/exorders.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 10:00 am and 3:00 pm. 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.

III. Conclusion

It is hereby ordered, pursuant to Section 36(a) of the Exchange Act, that, until April 23, 2010:

(a) Exemption From Section 17A of the Exchange Act

ICE Clear Europe Limited ("ICE Clear Europe") shall be exempt from Section 17A of the Exchange Act solely to perform the functions of a clearing agency for Cleared CDS (as defined in paragraph (e)(1) of this Order), subject to the following conditions:

(1) ICE Clear Europe shall make available on its Web site its annual audited financial statements.

(2) ICE Clear Europe shall keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it relating to its Cleared CDS clearance and settlement services. These records shall be kept for at least five years and for the first two years shall be held in an easily accessible place.

(3) ICE Clear Europe shall supply information and periodic reports relating to its Cleared CDS clearance and settlement services as may be reasonably requested by the Commission and, subject to cooperation with the FSA and upon such terms and conditions as may be agreed between the FSA and the Commission, shall provide access to the Commission to conduct on-site inspections of all facilities (including automated systems and systems environment), records, and personnel related to ICE Clear Europe's Cleared CDS clearance and settlement services.

(4) ICE Clear Europe shall notify the Commission, on a monthly basis, of any material disciplinary actions taken against any of its members using its Cleared CDS clearance and settlement services, including the denial of services, fines, or penalties. ICE Clear Europe shall notify the Commission promptly when ICE Clear Europe terminates on an involuntary basis the membership of an entity that is using ICE Clear Europe's Cleared CDS clearance and settlement services. Both notifications shall describe the facts and circumstances that led to the ICE Clear Europe's disciplinary action.

(5) ICE Clear Europe shall notify the Commission of all changes to its rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services, including its fee schedule and changes to risk management practices, not less than one day prior to effectiveness or implementation of such changes or, in exigent circumstances, as promptly as reasonably practicable under the circumstances. If ICE Clear Europe gives notice to, or seeks approval from, the FSA regarding any other changes to its rules regarding its Cleared CDS clearance and settlement services, ICE Clear Europe will also provide notice to the Commission. All such rule changes will be posted on ICE Clear Europe's Web site. Such notifications will not be

[47] 15 U.S.C. 78g(c).

[48] 15 U.S.C. 78o(c)(3).

[49] 15 U.S.C. 78q(a).

[50] 15 U.S.C. 78q(b).

[51] 12 CFR 220.1 *et seq.*

[52] Solely for purposes of this exemption, in addition to the general requirements under the referenced Exchange Act sections, registered broker-dealers shall only be subject to the enumerated rules under the referenced Exchange Act sections.

[53] Indeed, Congress directed the Commission to promulgate broker-dealer financial responsibility rules, including rules regarding custody, the use of customer securities and the use of customers' deposits or credit balances, and regarding establishment of minimum financial requirements.

deemed rule filings that require Commission approval.

(6) ICE Clear Europe shall provide the Commission with reports prepared by independent audit personnel concerning its Cleared CDS clearance and settlement services that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements. ICE Clear Europe shall provide the Commission with annual audited financial statements for ICE Clear Europe prepared by independent audit personnel.

(7) ICE Clear Europe shall notify the Commission at the same time it notifies the FSA in accordance with FSA REC 3.15 and FSA REC 3.16 regarding the suspension of services or inability to operate its facilities in connection with its Cleared CDS clearance and settlement services.

(8) ICE Clear Europe, directly or indirectly, shall make available to the public on terms that are fair and reasonable and not unreasonably discriminatory: (i) All end-of-day settlement prices and any other prices with respect to Cleared CDS that ICE Clear Europe may establish to calculate mark-to-market margin requirements for ICE Clear Europe Clearing Members; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by ICE Clear Europe.

(b) Exemption From Sections 5 and 6 of the Exchange Act

(1) ICE Clear Europe shall be exempt from the requirements of Sections 5 and 6 of the Exchange Act and the rules and regulations thereunder in connection with its calculation of mark-to-market prices for open positions in Cleared CDS, subject to the following conditions:

(i) ICE Clear Europe shall report the following information with respect to the calculation of mark-to-market prices for Cleared CDS to the Commission within 30 days of the end of each quarter, and preserve such reports during the life of the enterprise and of any successor enterprise:

(A) The total dollar volume of transactions executed during the quarter, broken down by reference entity, security, or index; and

(B) The total unit volume and/or notional amount executed during the quarter, broken down by reference entity, security, or index;

(ii) ICE Clear Europe shall establish adequate safeguards and procedures to protect members' confidential trading information. Such safeguards and procedures shall include: (A) Limiting access to the confidential trading information of members to those employees of ICE Clear Europe who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and (B) implementing standards controlling employees of ICE Clear Europe trading for their own accounts. ICE Clear Europe must adopt and implement adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed; and

(iii) ICE Clear Europe shall satisfy the conditions of the temporary exemption from Section 17A of the Exchange Act set forth in paragraphs (a)(1)–(8) of this Order.

(2) Any ICE Clear Europe Clearing Member shall be exempt from the requirements of Section 5 of the Exchange Act to the extent such ICE Clear Europe Clearing Member uses any facility of ICE Clear Europe to effect any transaction in Cleared CDS, or to report any such transaction, in connection with ICE Clear Europe's clearance and risk management process for Cleared CDS.

(c) Exemption for ICE Clear Europe, ICE Clear Europe Clearing Members, and certain eligible contract participants.

(1) Persons eligible. The exemption in paragraph (c)(2) is available to:

(i) ICE Clear Europe;

(ii) Any ICE Clear Europe Clearing Member (as defined in paragraph (e)(2) of this Order), which is not a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof); and

(iii) Any eligible contract participant (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), other than: (A) An eligible contract participant that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons; (B) an eligible contract participant that is a self-regulatory organization, as that term is defined in Section 3(a)(26) of the Exchange Act; or (C) a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof).

(2) Scope of exemption.

(i) In general. Such persons generally shall, solely with respect to Cleared CDS, be exempt from the provisions of the Exchange Act and the rules and regulations thereunder that do not apply in connection with security-based swap agreements. Accordingly, under this exemption, those persons would remain subject to those Exchange Act requirements that explicitly are applicable in connection with security-based swap agreements (*i.e.*, paragraphs (2) through (5) of Section 9(a), Section 10(b), Section 15(c)(1), paragraphs (a) and (b) of Section 16, Section 20(d) and Section 21A(a)(1) and the rules thereunder that explicitly are applicable to security-based swap agreements). All provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such provisions also remain applicable.

(ii) Exclusions from exemption. The exemption in paragraph (c)(2)(i), however, does not extend to the following provisions under the Exchange Act:

(A) Paragraphs (42), (43), (44), and (45) of Section 3(a);

(B) Section 5;

(C) Section 6;

(D) Section 12 and the rules and regulations thereunder;

(E) Section 13 and the rules and regulations thereunder;

(F) Section 14 and the rules and regulations thereunder;

(G) Paragraphs (4) and (6) of Section 15(b);

(H) Section 15(d) and the rules and regulations thereunder;

(I) Section 15C and the rules and regulations thereunder;

(J) Section 16 and the rules and regulations thereunder; and

(K) Section 17A (other than as provided in paragraph (a)).

(d) Exemption for certain registered broker-dealers.

A broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof) shall be exempt from the provisions of the Exchange Act and the rules and regulations thereunder specified in paragraph (c)(2), solely with respect to Cleared CDS, except:

(1) Section 7(c);

(2) Section 15(c)(3);

(3) Section 17(a);

(4) Section 17(b);

(5) Regulation T, 12 CFR 200.1 *et seq.*;

(6) Rule 15c3–1;

(7) Rule 15c3–3;

(8) Rule 17a–3;

(9) Rule 17a–4;

(10) Rule 17a–5; and

(11) Rule 17a–13.

(e) Definitions.

For purposes of this Order:

(1) "Cleared CDS" shall mean a credit default swap that is submitted (or offered, purchased, or sold on terms providing for submission) to ICE Clear Europe, that is offered only to,

purchased only by, and sold only to eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), and in which:

(i) The reference entity, the issuer of the reference security, or the reference security is one of the following:

(A) An entity reporting under the Exchange Act, providing Securities Act Rule 144A(d)(4) information, or about which financial information is otherwise publicly available;

(B) A foreign private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States;

(C) A foreign sovereign debt security;

(D) An asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; or

(E) An asset-backed security issued or guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae; or

(ii) The reference index is an index in which 80 percent or more of the index's weighting is comprised of the entities or securities described in subparagraph (i).

(2) "ICE Clear Europe Clearing Member" shall mean any clearing member of ICE Clear Europe that submits Cleared CDS to ICE Clear Europe for clearance and settlement exclusively (i) for its own account or (ii) for the account of an affiliate that controls, is controlled by, or is under common control with the clearing member of ICE Clear Europe.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–17990 Filed 7–28–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60370; File No. SR–CBOE–2009–033]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Approving Proposed Rule Change Regarding Statutory Disqualification Procedures

July 23, 2009.

I. Introduction

On May 26, 2009, the Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange") filed with the Securities and Exchange Commission (the "SEC" or "Commission") a proposed rule change pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the "Exchange Act"), and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on June 22, 2009.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

Exchange Act Rule 19h–1 [4] prescribes the form and content of, and establishes the mechanism by which the Commission reviews, proposals submitted by self-regulatory organizations ("SROs"), such as CBOE, to allow a member or associated person subject to a statutory disqualification to become or remain a member or associated with a member. Among other things, Rule 19h–1 provides for Commission review of notices filed by SROs proposing to admit any person to, or continue any person in, membership or association with a member, notwithstanding a statutory disqualification. However, Exchange Act Rule 19h–1(a)(2)[5] and Exchange Act Rule 19h–1(a)(3)[6] provide that for certain persons, and in limited circumstances, a notice does not need to be filed.

CBOE Rule 3.18(a) provides that CBOE may determine not to permit a member or an associated person of a member who is or becomes subject to a statutory disqualification under the Exchange Act,[7] to continue in membership or in association with a member. Under Rule 3.18(b), a member or an associated person who is or becomes subject to a statutory disqualification and wishes to continue in membership or in association with a member must submit an application to the Exchange to do so. When the Exchange receives such an application, or otherwise becomes aware that a member or an associated person is subject to a statutory disqualification, the Exchange is required to appoint a panel to conduct a hearing under the procedures set forth in Rule 3.18 to determine whether to allow the member or associated person to continue in membership or in association with a member.

Interpretation and Policy .03 to Rule 3.18 currently permits the Exchange to waive the hearing provisions of Rule 3.18 when the Exchange intends to grant an associated person's application for continued association and the Exchange is not required to make a notice filing with the Commission under Exchange Act Rule 19h–1(a)(2).[8] The Exchange proposed to expand its ability to waive the hearing provisions of Rule 3.18 when the Exchange intends to grant a member's or associated person's application for continued membership or association and the Exchange is not required to make a notice filing with the Commission under Exchange Act Rule 19h–1(a)(3).

CBOE also proposed to waive the hearing provisions of Rule 3.18 when it determines to allow a member to continue in membership, or an associated person to continue in association with a member, and CBOE determines that it is otherwise appropriate to waive the hearing provisions of Rule 3.18 under the circumstances. For example, a settlement agreement for a disciplinary matter involving CBOE and multiple regulators or SROs could fully address statutory disqualification issues, obviating the need for a CBOE hearing on those same issues. The Exchange might also choose to exercise this waiver authority when no regulatory purpose would be served by conducting a hearing under Rule 3.18, such as when the Commission initiated the proceeding regarding the underlying conduct that resulted in the statutory disqualification and the sanction imposed in the matter does not inhibit the applicable party's ability to continue as an Exchange member or associated person.

Interpretation and Policy .01 to Rule 3.18 ("Rule 3.18.01") provides that the Exchange may waive the provisions of Rule 3.18 when a proceeding is pending before another SRO to determine whether to permit a member or an associated person to continue in

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 60106 (June 12, 2009), 74 FR 29525 (June 22, 2009) ("Notice").

[4] 17 CFR 240.19h–1.

[5] Exchange Act Rule 19h–1(a)(2), 17 CFR 240.19h–1(a)(2), provides that a notice need not be filed with the Commission, pursuant to Exchange Act Rule 19h–1, regarding an associated person subject to a statutory disqualification if the person's activities with respect to the member are solely clerical or ministerial in nature and such person does not have access to funds, securities, or books and records.

[6] Exchange Act Rule 19h–1(a)(3), 17 CFR 240.19h–1(a)(3), provides that a notice need not be filed with the Commission, pursuant to Exchange Act Rule 19h–1, regarding a person or member subject to a statutory disqualification if the person or member proposed for continued association or membership, respectively, satisfies the requirements of Exchange Act Rule 19h–1(a)(3)(i)–(vi).

[7] 15 U.S.C. 78a *et seq.*

[8] *See* Securities Exchange Act Release No. 56614 (October 4, 2007), 72 FR 58132 (October 12, 2007) (SR–CBOE–2007–14).

membership or association with the member notwithstanding a statutory disqualification. When the Exchange exercises this waiver authority, Rule 3.18.01 currently provides that the Exchange Department of Financial and Sales Practice Compliance shall determine whether the Exchange will concur in any the Exchange Act Rule 19h–1 filing made by another SRO. The Exchange proposed to make two clarifying changes to this provision. First, the Exchange proposed to replace the reference to the "Department of Financial and Sales Practice Compliance" with the "Exchange" because the Exchange no longer has a department by that name. Second, the Exchange proposed to include the words "member or" in the last sentence of Rule 3.18.01 to clarify that the Exchange may concur in any Exchange Act Rule 19h–1 filing made by another SRO with respect to a member or an associated person. This change is consistent with the rest of Rule 3.18.01.

III. Discussion

The Commission has carefully reviewed the proposed rule change and finds that it is generally consistent with Section 6(b)[9] of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.[10] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Exchange Act,[11] which requires the rules of a national securities exchange to, among other things, be designed to remove impediments to and perfect the mechanism of a free and open market and, in general, to protect investor and the public interest. The Commission believes that the proposed rule change will enable CBOE to more efficiently administer its statutory disqualification program while at the same time protecting investors and the public interest by allowing CBOE to reallocate resources that would otherwise be spent on unnecessary statutory disqualification hearings.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[12] that the proposed rule change (SR–CBOE–2009–033) be, and hereby is, approved.

[9] 15 U.S.C. 78f.

[10] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78f(5).

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–17992 Filed 7–28–09; 8:45 am]

BILLING CODE 8010–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Request for Comments Concerning Free Trade Agreement With the Republic of Colombia

AGENCY: Office of the United States Trade Representative.

ACTION: Notice and request for comments.

SUMMARY: The United States Trade Representative (USTR) is conducting a review of labor-related issues in the context of the free trade agreement (FTA) between the United States and the Republic of Colombia (Colombia) signed on November 22, 2006, and amended on June 28, 2007. The FTA has not yet entered into effect. As part of that review, the interagency Trade Policy Staff Committee (TPSC) seeks comment from the public to assist the USTR in working with the Colombian government to secure continued progress in ensuring that Colombia's workers can fully exercise their fundamental labor rights.

DATES: Written comments are due by noon, September 15, 2009.

ADDRESSES: Comments should be submitted electronically via the Internet at *http://www.regulations.gov.* For alternatives to on-line submissions please contact Gloria Blue, Executive Secretary, Trade Policy Staff Committee, at (202) 395–3475.

FOR FURTHER INFORMATION CONTACT: For procedural questions concerning written comments, contact Gloria Blue, Executive Secretary, Trade Policy Staff Committee, at (202) 395–3475. All other questions should be directed to Bennett Harman, Deputy Assistant U.S. Trade Representative for Latin America, at (202) 395–9446.

SUPPLEMENTARY INFORMATION: On November 18, 2003, in accordance with section 2104(a)(1) of the Trade Act of 2002, the USTR notified Congress of the President's intent to enter into negotiations on an FTA with Colombia, identified specific objectives for the negotiations, and solicited comment from interested persons on matters relevant to the FTA. 69 FR 7532. On June 23, 2004, the U.S. Department of Labor with the USTR and U.S. Department of State, issued a request for comments from the public regarding labor rights in Andean countries, including Colombia. 69 FR No. 120. On August 24, 2006, the President notified Congress of his intent to enter into an FTA with Colombia, and representatives of the two governments signed the FTA on November 22, 2006. On June 28, 2007, the Parties amended the FTA to reflect the provisions of the May 10, 2007 Congressional-Executive Agreement on Trade Policy. The full text of the FTA is available at *http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text.*

Issues have been raised about the extent to which Colombians are able to exercise their fundamental labor rights, as referenced in the FTA. In that light, the President has asked the USTR to assess what steps can be taken, along with the government of Colombia, to secure continued progress in ensuring that Colombia's workers can exercise their fundamental labor rights. To assist the USTR in fulfilling this task, the Chairman of the TPSC invites interested persons to provide written comments on these questions and requests. Specific questions for comment are:

(1) Are there gaps in Colombia's labor law regime, including its enforcement mechanisms, with respect to providing for the fundamental labor rights of its citizens? If there are gaps, please identify them and provide specific suggestions for improvement.

(2) Is the Colombian government taking adequate steps to protect Colombia's workers from acts of intimidation or violence that impede the exercise of their fundamental labor rights? If there are gaps, please identify them and provide specific suggestions for improvement.

(3) Has the government of Colombia made sufficient progress in its efforts to prosecute the perpetrators of violence and intimidation against unionists exercising their fundamental labor rights? If there are gaps, please identify them and provide specific suggestions for improvement.

The public is also invited to comment on other issues they believe relevant to the FTA, including the potential benefits of the agreement.

Interested persons may submit written comments by noon, September 15, 2009 (see requirements for submission below). Written comments should be submitted in English and must state clearly the position taken and describe with particularity the supporting rationale.

Public Comment: Requirements for Submissions: To ensure the most timely

and expeditious receipt and consideration of comments, USTR has arranged to accept on-line submissions via *http://www.regulations.gov*. To submit comments via *http://www.regulations.gov*, enter docket number USTR–2009–0021 on the home page and click "go". The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting "Notice" under "Document Type" on the left side of the search-results page, and click on the link entitled "Send a Comment or Submission." (For further information on using the *http://www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on "How to Use This Site" on the left side of the home page.)

The *http://www.regulations.gov* Web site provides the option of making submissions by filling in a "General Comments" field, or by attaching a document. We expect that most submissions will be provided in an attached document. If a document is attached, it is sufficient to type "See attached" in the "General Comments" field.

Submissions in Microsoft Word (.doc) or Adobe Acrobat (.pdf) are preferred. If you use an application other than those two, please identify the application in your submission. For any comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters "BC". Any page containing business confidential information must be clearly marked "BUSINESS CONFIDENTIAL" on the top of that page. If you file comments containing business confidential information you must also submit a public version of the comments. The file name of the public version should begin with the character "P". The "BC" and "P" should be followed by the name of the person or entity submitting the comments. If you submit comments that contain no business confidential information, the file name should begin with the character "P", followed by the name of the person or entity submitting the comments. Electronic submissions should not attach separate cover letters; rather, information that might appear in a cover letter should be included in the comments you submit. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments to a submission in the same file as the submission itself and not as separate files.

We strongly urge submitters to use electronic filing. If an on-line submission is impossible, alternative arrangements must be made with Ms. Blue prior to delivery for the receipt of such submissions. Ms. Blue may be contacted at (202) 395–3475. General information concerning the Office of the United States Trade Representative may be obtained by accessing its Internet Web site (*http://www.ustr.gov*).

Carmen Suro-Bredie,

Chairman, Trade Policy Staff Committee.

[FR Doc. E9–17798 Filed 7–28–09; 8:45 am]

BILLING CODE 3190–W9–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket Number: FTA–2009–0036]

Additional Proposed Guidance for New Starts/Small Starts Policies and Procedures and Request for Comments for 2009

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Proposed guidance; request for comments.

SUMMARY: This notice includes, and requests comments on, additional Proposed Guidance on New Starts/Small Starts Policies and Procedures. This guidance continues FTA's efforts to streamline and simplify the New and Small Starts programs. The notice: (1) Proposes modifications to the evaluation and rating process; (2) clarifies existing policies; and (3) solicits public feedback on potential changes to FTA's internal practices for the New and Small Starts programs. Please note this guidance is in addition to, and distinct from, the guidance on New Starts/Small Starts Policies and Procedures published concurrently in this issue of the **Federal Register**.

DATES: Comments on the additional Proposed Guidance on New Starts/Small Starts Policies and Procedures must be received by August 18, 2009.

ADDRESSES: You may submit comments—identified by the docket number FTA–2009–0036—by any of the following methods:

Web site: http://regulations.gov.

Follow the instructions for submitting comments on the DOT electronic docket site.

Fax: 202–493–2251.

Mail: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Ave., 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 Ave., SE., Washington, DC 20590, between 8:30 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: You must include the agency name (Federal Transit Administration) and the docket number (FTA–2009–0036). You should submit two copies of your comments if you submit them by mail. If you wish to receive confirmation that FTA received your comments, you must include a self-addressed stamped postcard. Note that all comments received will be posted without change to the Federal Government Web site located at *http://regulations.gov*. This means that if your comment includes any personal identifying information, such information will be made available to users of the Web site.

FOR FURTHER INFORMATION CONTACT: Elizabeth Day, Office of Planning and Environment, telephone (202) 366–5159 and Christopher Van Wyk, Office of Chief Counsel, telephone (202) 366–1733. FTA is located at 1200 New Jersey Ave., SE., East Building, Washington, DC 20590. Office hours are from 8:30 a.m. to 5 p.m., EST, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: This notice includes, and requests comments on, additional Proposed Guidance on New Starts/Small Starts Policies and Procedures. This guidance continues FTA's efforts to streamline and simplify the New and Small Starts programs. This guidance is in addition to, and distinct from, the Final Guidance on New Starts/Small Starts Policies and Procedures published concurrently in this issue of the **Federal Register**. After reviewing and considering public comment on the guidance proposed below, FTA intends to publish Supplemental Final Guidance on New Starts/Small Starts Policies and Procedures, which will take effect immediately upon publication. Projects approved into final design within 30 days of issuance of the Supplemental Final Guidance or prior to its issuance will not be affected in accordance with the policy established by FTA in 2006 so as to provide more stability for New Starts projects far along in the project development process.

Organization

This notice covers three topic areas: (1) Proposed policy changes; (2) clarification of existing policies and procedures; and (3) potential changes to FTA internal practices for managing the New Starts and Small Starts program. This notice fully articulates the

proposed guidance; the guidance will also be made available on the docket at *http://regulations.gov* and on FTA's public Web site at *http://www.fta.dot.gov/planning/planning_environment_5221.html.*

Proposed Policy Changes

1. Local Financial Commitment Rating

FTA proposes to eliminate the policy of considering the degree to which a project employs innovative contractual agreements in the evaluation and rating of the operating financial plan under the local financial commitment criterion.

In 2007, FTA implemented policy guidance stating that when evaluating local financial commitment it would consider the degree to which a project employs innovative contractual agreements. Specifically, FTA stated it would increase the operating financial plan rating (from "medium" to "medium-high" or from "medium-high" to "high") when project sponsors provide evidence that the operations and maintenance of the project will be contracted out or when there is evidence that an opportunity had been given for contracting out but the project sponsor had substantive reasons for not doing so. FTA has determined that the type of contracting arrangement used or considered by a project sponsor is not useful or appropriate in determining the strength of the overall project. Thus, FTA proposes to eliminate consideration of it in evaluating and rating the operating financial plan.

This change would apply to New Starts projects, as well as to any Small Starts or Very Small Starts projects that do not qualify for the streamlined local financial commitment evaluation enumerated in FTA's Updated Interim Guidance on Small Starts.

2. New Starts and Small Starts Other Factors Criterion

FTA proposes to be less prescriptive on the items considered under the "Other Factors" criterion so as to better accommodate all of the unique project characteristics or circumstances that may justify special treatment in the evaluation of a project.

Existing FTA policy guidance calls out specific items for consideration and rating as "other" factors (*e.g.,* whether the project is a principal element of a congestion management strategy for the region, "make-the-case" documents, reliability of data). FTA proposes not to emphasize specific items it will consider when determining whether to modify a project's rating based on "other" factors pursuant to 49 U.S.C. 5309(d)(3)(K) and 49 U.S.C. 5309(e)(4)(E). Rather, anything related to the project deemed appropriate by FTA under the discretion granted to it in statute can be considered under "other" factors on a project-by-project basis.

Thus, FTA proposes to no longer call out congestion management strategies with automobile pricing schemes in particular or the contents of a "make-the-case" document as items it will specifically consider or formally rate as "other" factors. Under this proposal, project sponsors would be free to submit information on these items voluntarily to assist FTA in its overall evaluation and rating of the project, but would not be required to submit the information. In addition, FTA proposes to no longer formally and explicitly rate the reliability of information provided on costs and travel forecasts, but will still consider reliability of the data as an "other" factor when determining whether the project justification rating should be changed.

3. New Starts Project Planning Horizon Year

FTA proposes to allow New Starts project sponsors to use the adopted planning horizon forecast year of the metropolitan planning organization (MPO) to estimate project ridership, transportation system user benefits, and operations and maintenance costs.

Since 2005, FTA has required project sponsors to submit information on ridership, transportation system user benefits, and operations and maintenance costs based on forecasts representing conditions in 2030. Because many MPOs have now moved to a horizon year of 2035, FTA will allow project sponsors to submit information consistent with the MPO's adopted planning horizon year, whether it is 2030 or 2035. Project sponsors may only use a 2035 planning horizon year if it has been officially adopted by the MPO.

Because of the timing of this guidance relative to the annual review of projects conducted in support of preparing FTA's *Annual Report on Funding Recommendations,* this policy, if adopted, would not go into effect until March 2010.

This proposed change does not impact potential Small Starts or Very Small Starts projects, since they submit information based on the opening year of the project rather than a forecast year.

Clarification of Existing Policies

1. New and Small Starts Documentation of Uncertainties

In August 2008, FTA adopted a policy to require predictions of capital costs and project ridership for the locally preferred alternative to be expressed as ranges with accompanying explanations of the contributing sources of uncertainty that bracket the range. FTA reminds project sponsors that this policy will not be implemented until six months after FTA issues separate guidance concerning this provision, which has not yet been published. As such, the requirement is not yet in effect.

2. Alternate Ridership and Transportation System User Benefits Estimation Methods for New Starts and Small Starts

FTA reminds project sponsors that regional travel forecasting models are not always required for New or Small Starts predictions of ridership and transportation system user benefit estimates.

FTA's evaluation of New Starts and Small Starts projects requires estimates of ridership and user benefits. These estimates are often generated by regional travel demand models, which attempt to represent existing travel patterns and choices in order to predict future travel patterns and choices. Under the right circumstances, quality data paired with straightforward analysis can provide a more direct representation of travel than a regional model.

The following paragraph gives a broad description and example of the "right circumstances" in which data-driven approaches may be preferable to a regional-model-based approach. Approaches outside the broad guidelines presented here may also be appropriate. Project sponsors should contact FTA's Office of Planning and Environment to discuss potential analytical techniques when beginning an alternatives analysis.

Data-driven analytical techniques first require quality data. Further, the corridor should be served by a mature transit system in which existing riders exhibit a variety of behaviors, including travelers choosing transit when a reasonable automobile option is available (so-called "choice riders"). Extensions of existing rail projects typically offer an excellent opportunity to use data-driven, incremental techniques. For example, a two-mile extension of a heavy rail line from the outer-most suburban station. If a large number of transit riders currently travel to the existing outer-most station by bus from the surrounding neighborhood and by car from more distant suburbs, an extension of the rail system would likely represent an incremental improvement to the transit trips in these two well-established travel markets. An

incremental, data-driven approach might well be preferred over a regional model-based approach under these types of circumstances. Several Small Starts projects have already used simplified, data-driven analytical techniques to estimate ridership and user benefits. FTA welcomes New Starts project sponsors to use similar techniques as appropriate.

Changes to Internal FTA Practices

FTA invites comment on certain changes the agency is considering to its own internal practices, described below. Any adoption of these changes would not require public notice-and-comment per 5 U.S.C. Section 553(b)(A), but FTA welcomes any opinions or suggestions whether these proposed changes would help improve FTA's management of the New Starts program.

1. Expanded Pre-Award Authority and/or Expanded Use of Letters of No Prejudice

FTA is considering expanding the activities covered by "automatic" pre-award authority upon completion of the requirements under the National Environmental Policy Act (NEPA) and/or expanding the circumstances under which FTA will issue Letters of No Prejudice (LONPs). Both approaches strive to expedite project delivery by allowing project sponsors to undertake activities covered by the pre-award authority or LONP with non-Federal sources while maintaining eligibility for future Federal reimbursement should an award be forthcoming. Neither pre-award authority nor an LONP is a guarantee of future Federal funding. Thus, project sponsors should understand they undertake the activities at their own risk.

Current FTA practice limits automatic pre-award authority for New and Small Starts projects to the following:

- Upon FTA approval to enter preliminary engineering (PE), FTA extends pre-award authority to incur costs for PE activities;
- Upon FTA approval to enter final design, FTA extends pre-award authority to incur costs for final design activities; and
- Upon completion of the NEPA process, FTA extends pre-award authority to incur costs for the acquisition of real property and real property rights.

FTA is considering expanding the activities covered by automatic pre-award authority at the completion of NEPA to include procurement of items such as vehicles, rails and ties, etc., that are long-lead time items or items for which market conditions play a significant role in the acquisition price.

FTA reminds the public that local funds expended by the project sponsor pursuant to and after the date of the pre-award authority are eligible for credit toward local match or reimbursement only if FTA later makes a grant or grant amendment for the project. Local funds expended by the project sponsor prior to the date of the pre-award authority are not eligible for credit toward local match or reimbursement. Furthermore, the expenditure of local funds on activities such as land acquisition, demolition, or construction prior to the completion of the NEPA process would compromise FTA's ability to comply with Federal environmental laws and may render the entire project ineligible for FTA funding.

Letters of No Prejudice (LONP) also allow a project sponsor to incur costs using non-Federal resources, with the understanding that the costs incurred subsequent to the issuance of the LONP may be reimbursable as eligible expenses or eligible for credit toward the local match should FTA approve the project for funding at a later date.

Currently, before considering an LONP, FTA determines whether a project seeking an LONP is a promising candidate for a Full Funding Grant Agreement (New Starts) or a Project Construction Grant Agreement (Small Starts). Typically, New Starts projects need to be approved into final design to be considered "promising candidates." However, LONP requests have occasionally been approved by FTA for projects prior to entry into final design when the LONP is sufficiently justified based on the cost or schedule impacts of not undertaking the work prior to final design. Currently, approval of LONPs is determined by FTA on a case-by-case basis. FTA is considering expanding the use of LONPs prior to project entry into final design but after completion of NEPA. Decisions on LONPs would still be determined case-by-case based on the justification provided by the project sponsor.

Note that LONPs neither provide Federal funds nor constitute a commitment that Federal funds will be provided in the future. Nonetheless, LONPs are often viewed by project sponsors and/or other stakeholders as a signal of a future Federal commitment because FTA does not generally award them unless it believes the project to be a promising candidate for an FFGA or PCGA. Thus, should FTA move to a practice of awarding LONPs earlier in project development before it has sufficient information to know whether a project is a promising candidate for an FFGA or PCGA, the public should be aware that LONPs may no longer serve as a signal of a future Federal commitment.

Issued on: July 24, 2009.

Peter M. Rogoff,

Administrator, Federal Transit Administration.

[FR Doc. E9–18096 Filed 7–24–09; 4:15 pm]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Advisory Circular 33.87–2, Comparative Endurance Test Method To Show Durability for Parts Manufacturer Approval of Turbine Engine and Auxiliary Power Unit Parts

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of issuance of advisory circular.

SUMMARY: This notice announces the issuance of Advisory Circular (AC) 33.87–2, Comparative Endurance Test Method to Show Durability for Parts Manufacturer Approval of Turbine Engine and Auxiliary Power Unit Parts. This AC describes a comparative endurance test method to be used for certain turbine engine or auxiliary power unit parts when manufactured under Parts Manufacturer Approval (PMA). This method may be used when PMA applicants introduce changes that could affect the durability of their proposed designs. It may also be used when an applicant has insufficient comparative data to show that the durability of their proposed PMA part is at least equal to the type design. The applicant can use this method when requesting PMA under test and computation, per part 21 of Title 14 of the Code of Federal Regulations, and using the comparative test and analysis approach detailed in Federal Aviation Administration Order 8110.42, Part Manufacturer Approval Procedures.

DATES: The Engine and Propeller Directorate issued AC 33.87–2 on June 25, 2009.

FOR FURTHER INFORMATION CONTACT: The Federal Aviation Administration, Attn: Karen M. Grant, Engine and Propeller Standards Staff, ANE–111, 12 New England Executive Park, Burlington, MA 01803–5299; telephone: (781) 238–7119; fax: (781) 238–7199; e-mail: *karen.m.grant@faa.gov.*

We have filed in the docket all substantive comments received, and a report summarizing them. If you wish to review the docket in person, you may go

to the above address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. If you wish to contact the above individual directly, you can use the above telephone number or e-mail address provided.

How to Obtain Copies: A paper copy of AC 33.87–2 may be obtained by writing to the U.S. Department of Transportation, Subsequent Distribution Office, DOT Warehouse, SVC 121.23, Ardmore East Business Center, 3341Q 75th Ave., Landover, MD 20785, telephone 301 322–5377, or by faxing your request to the warehouse at 301–386–5394. The AC will also be available on the Internet at *http://www.faa.gov/regu1atjpjpplicies* (then click on "Advisory Circulars").

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

Issued in Burlington, Massachusetts on June 25, 2009.

Peter White,

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

[FR Doc. E9–17844 Filed 7–28–09; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket Number: FTA–2009–0009]

Final Guidance on New Starts/Small Starts Policies and Procedures

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Response to comments; final guidance.

SUMMARY: The purpose of this notice is to convey the 2009 final guidance on New Starts/Small Starts policies and procedures. On May 20, 2009, FTA announced in the **Federal Register** the availability of proposed guidance and requested public comment. FTA received a total of 29 comments, primarily from transit agencies and metropolitan planning organizations, as well as cities, advocacy groups, State departments of transportation, and other interested parties. After reviewing the public comments, FTA is issuing final guidance, which is included at the end of this notice. Please note that FTA is concurrently publishing a separate notice in today's **Federal Register** that includes additional proposed guidance on the New Starts and Small Starts program for public comment.

DATES: This final guidance is effective July 29, 2009.

FOR FURTHER INFORMATION CONTACT: Elizabeth Day, Office of Planning and Environment, telephone (202) 366–5159 and Christopher Van Wyk, Office of Chief Counsel, telephone (202) 366–1733. FTA is located at 1200 New Jersey Ave., SE., East Building, Washington, DC 20590. Office hours are from 8:30 a.m. to 5 p.m., EST, Monday through Friday, except Federal holidays.

Organization

The proposed guidance issued on May 20, 2009 was developed to implement the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) Technical Corrections Act of 2008 (Pub. L. 110–244), which amends 49 U.S.C. 5309. The guidance covered three distinct topics: Proposed weighting of project justification criteria and evaluative methodology for the economic development effects, operating efficiencies, and transit supportive land use criteria for New Starts projects; Proposed weighting of project justification criteria and evaluative methodology for the economic development effects and transit supportive land use criteria for Small Starts projects; and Proposed procedures for considering the benefits of project alternatives that include a tunnel, as well as certain costs when a tunnel is considered but not selected for a project. Responses to comments on each of these topics are presented below. Following the responses, the final guidance is articulated in full.

Response to Comments

1. New Starts Project Justification Rating

The SAFETEA–LU Technical Corrections Act directed that the project justification criteria for New Starts projects be given comparable, but not necessarily equal, weights. In the proposed guidance, FTA suggested the use of the following weights: mobility improvements (20 percent); environmental benefits (10 percent); cost effectiveness (20 percent); operating efficiencies (10 percent); economic development effects (20 percent); and public transportation supportive land use ("land use") (20 percent). FTA also proposed methods for evaluating the criteria for economic development effects, land use, and operating efficiencies.

Of the 29 respondents, 19 expressed general support for FTA's proposed weighting scheme. Of the remaining respondents, four did not directly address the proposal; three proposed minor changes to the weighting scheme and three others proposed significant changes—modifications to both the weighting scheme and the criteria measures (two of these three respondents proposed identical modifications). Each of the six proposals suggesting different weighting schemes is discussed in the comments and responses below.

Comment: One respondent suggested reducing the weight on operating efficiencies to zero, on the premise that the cost effectiveness measure captures this criterion, and suggested increasing the weight on mobility improvements to 30 percent.

Response: FTA formerly used the operating efficiencies criterion in evaluating projects, but found that the measure did not provide meaningful distinctions between projects. Consistent with the direction in the SAFETEA–LU Technical Corrections Act, FTA will evaluate operating efficiencies as a stand-alone criterion, but, in recognition of the limitation of the current measure for this criterion, will give it less weight than some of the other criteria.

Comment: One respondent suggested modifying the distinction between land use and economic development by: (1) Removing the evaluation of existing land use; (2) considering the transit supportive plans and policies for present and future development as the core of the land use evaluation; (3) considering the transportation performance and impact of land use policies in the land use evaluation (*e.g.*, parking requirement reductions); and, (4) considering the economic performance and impact of land use policies to economic development (*e.g.*, increase in tax base). The respondent stated that existing land use is already captured by the estimates of ridership generated by the travel forecasting model..

Response: For project evaluation and rating, FTA uses travel forecasts based upon forecast year population and employment projections compiled by regional metropolitan planning organizations, not opening year forecasts which would be more reflective of existing transit supportive land use. FTA considers the existence of existing transit supportive land use in the corridor to be relevant to the understanding of the proposed project and a criterion for which credit should be given in the evaluation of the project.

FTA is working with the transit community to develop a more robust methodology for measuring economic development effects and will consider the alternative proposed by the respondent as it continues that work. The proposed measure for economic development effects in this guidance is intended to be an interim approach,

which requires no new data from project sponsors, but which will be useful until a more robust measure can be developed.

Comment: One respondent suggested weights of at least 30 percent for cost effectiveness and land use and no more than 10 percent for each of the other criteria. The respondent stated that the cost effectiveness criterion clearly demonstrates the impact of a project on customer travel time and that existing land use is a very reliable indicator of ridership potential.

Response: FTA agrees that cost effectiveness and existing land use are useful measures in assessing projects. FTA is, however, assigning less disparate weights to all of the project justification criteria than the respondent suggests, consistent with the direction in the SAFETEA–LU Technical Correction Act calling for the assignment of comparable, but not necessarily equal, weights.

Comments: Two respondents proposed changing the criteria weights as well as modifying numerous criteria measures. Highlights of these responses included recommendations to: (1) Increase focus on land use, noting that the weights proposed by FTA reduce the weight of the previously-used land use criterion from 50 to 40 percent (combining land use and economic development effects); (2) gather more information and place greater emphasis on comprehensive land use and transportation strategies that enhance the effectiveness of transit projects, avoid urban sprawl, and reduce local infrastructure costs and produce other benefits of compact development including reductions in vehicle travel and greenhouse gas emissions; (3) simplify the mobility improvements (20 percent weight) measure to consider only ridership and benefits to transit dependents; (4) consider quantifiable reductions in emissions and vehicle miles traveled (VMT) in the environmental benefits criterion (15 percent); (5) use cost per rider for cost effectiveness (10 percent) rather than incremental cost per incremental "user benefit;" and, (6) use incremental system cost per rider for operating efficiencies (5 percent).

Another respondent also suggested changes to the criteria weights as well as to numerous criteria measures. Highlights of the response included recommendations to: (1) Reduce the mobility improvements weight (10 percent weight); (2) consider reductions in VMT and greenhouse gas (GHG) emissions in the environmental benefits criterion (15 percent); (3) compute cost effectiveness by comparing the project to the "no build" alternative rather than the "baseline" alternative (25 percent); (4) include fare box and other revenue recovery considerations in the measurement of operating efficiencies (10 percent); (5) modify the land use evaluation to be more reflective of actual land use policies and decisions that support transit, including steps local governments could take to ensure planning and zoning matched the proposed transit investment (20 percent); and, (6) modify the economic development effects criterion to consider a higher rating for projects that include government action to provide incentives to encourage economic development (20 percent).

Response: It is not clear from the respondents' comments if their proposals for changing the weights are independent of the proposals for changes in the criteria measures. As such, it is difficult to comment on the respondent's proposed changes to the weights, other than to note the suggestions are relatively minor in comparison to those proposed by FTA. The respondents' suggested modifications to the criteria measures, on the other hand, are not minor. FTA's proposal focused primarily on criteria weights. FTA's proposal also distinguished the measures formerly used for land use, separating them into measures for economic development effects and land use because of the statutory direction to treat these two criteria separately. FTA's proposal also intended to meet the requirements of the Technical Corrections Act while limiting the amount of new data and information required from project sponsors at this point in time. FTA will continue to consider the suggestions provided as it develops future performance measures for the project justification criteria and future policy guidance documents.

Comments: Eighteen respondents noted that the proposed guidance omits discussion of whether the funding recommendation practice generally requiring a "medium" cost-effectiveness rating announced in a 2005 "Dear Colleague" letter will continue. These respondents questioned what impact giving comparable weight to each project justification criterion will have if a single criterion continues to be used in general as a go/no-go decision rule in funding recommendations. Fourteen of these respondents explicitly requested that FTA rescind the "Dear Colleague" letter.

Response: This final guidance describes FTA's process of evaluating and rating proposed projects. It does not address the practice generally requiring a "medium" cost-effectiveness rating for a project funding recommendation, announced in the 2005 "Dear Colleague" letter. The evaluation and rating of the statutory criteria determine the eligibility of a project for consideration for a funding recommendation. The Administration is continuing to review the appropriateness, efficacy, and impact of the "Dear Colleague" letter practice.

Comments: Seven respondents inquired as to whether FTA will continue to consider "other factors" in the project justification rating, specifically the "case for the project" document and whether the proposed New Starts project is a principle element of a congestion management strategy in general, and an auto pricing strategy, in particular. Four respondents recommended that FTA remove the provision of improving the rating of projects that are part of an auto pricing strategy.

Response: Based on comments received and FTA's own views on the use of "other factors", FTA has proposed in a concurrent notice published in this issue of the **Federal Register** changes to its review of "other factors". After considering comments received on that notice, FTA will publish 2009 Supplemental Final Policy Guidance.

2. Small Starts Project Justification Rating

The SAFETEA–LU Technical Corrections Act directed that the project justification criteria for Small Starts projects be given comparable, but not necessarily equal, weights. In the proposed guidance, FTA suggested using a weight of 33.3 percent to each of the Small Starts project justification criteria: cost effectiveness, public transportation supportive land use policies ("land use"), and economic development effects. FTA also proposed methods for evaluating the economic development effects and land use criteria.

Comments: Of the 29 comments received, 16 expressed general support for the proposed weighting scheme. Of the remaining respondents, ten did not directly address the proposal; one proposed a minor change to the weighting scheme and two others proposed identical, significant changes. Each of the three proposals for different criteria weights is discussed in the comments and responses below.

Comment: One respondent suggested increasing the weight of the cost effectiveness criteria from 33.3 percent to 50 percent and reducing the weight of the land use and economic

development effects criteria to 25 percent each.

Response: FTA considers its proposed weighting of the criteria for Small Starts to be more consistent with the Technical Corrections Act's direction than the respondent's proposal.

Comment: One respondent agreed with the weights proposed by FTA provided the criteria measures change as follows: (1) Land use should require more information and place greater emphasis on comprehensive land use and transportation strategies that enhance the effectiveness of transit projects, avoid urban sprawl, and reduce local infrastructure costs and produce other benefits of compact development including reductions in vehicle travel and greenhouse gas emissions; (2) cost per rider should be the measure for the cost effectiveness criteria; and, (3) meaningful measures of economic development effects should ultimately be developed.

Comment: One respondent suggested a variety of improvements to the New Starts measures and for Small Starts notes that the same changes should be applied, though with an emphasis on methods that are easier to report and a consideration of only those criteria required by statute.

Response: FTA's proposal intends to meet the requirements of the Technical Corrections Act while limiting the amount of new data and information required from project sponsors. FTA currently attempts to use measures for Small Starts that are easier to report compared to New Starts. FTA will continue to consider the suggestions provided as it develops future performance measures for the Small Starts project justification criteria and on future policy guidance documents.

3. Alternatives With Tunnels

The SAFETEA–LU Technical Corrections Act calls for the analysis, evaluation, and consideration of the congestion relief, improved mobility, and other benefits of transit tunnels in projects that include a tunnel, and the ancillary and mitigation costs to relieve congestion, improve mobility, and decrease air and noise pollution in projects that do not include a tunnel, but where a tunnel was considered. In the proposed guidance, FTA suggested it would require that alternatives analysis studies address these impacts of transit tunnels when a tunnel is part of a project or was considered during the alternatives analysis. FTA proposed to ensure that such information was addressed during alternatives analysis as part of the FTA review of project applications for entry into preliminary engineering.

Comments: One respondent requested that FTA define "tunnel" to clarify when additional analysis is needed, and others noted that a complimentary, realistic surface option is not always available (*e.g.*, commuter rail under Manhattan or light rail beneath an airport runway).

Response: Additional analyses are required when different vertical alignments (*i.e.*, at-grade versus underground) of a proposed reasonable alternative result in disparate impacts to automobile congestion, mobility, air and noise pollution, and/or any other relevant consideration.

Comments: Eight respondents noted that the Technical Corrections Act directs FTA to analyze, evaluate, and consider the benefits of tunnels, but the proposed guidance does not explain how FTA will consider the results of the analysis in their ratings. Three respondents suggested, in the absence of more detailed guidance, that FTA not change how tunnels are currently considered in the evaluation criteria and continue to invite sponsors to use the "case for the project" document and "other factors" section of the New Starts submissions to highlight the benefits of tunnels not captured by the other criteria. One respondent suggested modifying the cost effectiveness measure and project justification rating to better account for tunnel options compared to non-tunnel options, including local traffic and land use issues.

Response: As reflected in the final guidance, FTA concurs with the suggestion of not changing the current evaluation methods. The mobility improvements, operating efficiencies, land use, economic development effects, and cost effectiveness project justification criteria capture much of the benefits provided by tunnels. Additionally, FTA's consideration of "other factors", offers project sponsors the opportunity to present evidence not considered by the aforementioned criteria, including mitigation costs necessary due to the selection of an above-ground alignment.

Comments: Three respondents requested that FTA describe the specific analyses FTA expects project sponsors to perform to meet this requirement. One respondent suggested that the screening of alternatives should be a local process and that FTA should not mandate specific analytical methods.

Response: FTA is not prescribing analysis and evaluation techniques for assessing tunnels. Project sponsors are free to use methods deemed most appropriate for local conditions when evaluating the impacts of a tunnel option to address the transportation problems described in the alternatives analysis. FTA's role is to ensure consistency with the direction in the Technical Corrections Act and to facilitate informed decision making by the public and local officials by ensuring that the analysis is reasonable.

Comment: One respondent suggested extending the consideration of tunnels (or no tunnel) to both the preliminary engineering stage of project development and/or through the final environmental impact statement.

Response: FTA does not wish to mandate that a vertical alignment (be it tunnel or no tunnel) other than the locally-preferred alternative always be considered beyond alternatives analysis. The purpose of the alternatives analysis is for local decision makers to select a mode and general alignment—including vertical alignment. This decision should remain a local one.

4. Broader Comments on New and Small Starts Program

FTA received numerous comments regarding aspects of the New and Small Starts programs not explicitly discussed in the proposed guidance, including some comments that require regulatory or legislative changes. For some time FTA has been considering many of these and other ideas. Consequently, as an initial step, FTA is issuing additional proposed guidance in this issue of the **Federal Register** aimed at streamlining and simplifying the New and Small Starts programs. FTA's efforts to streamline will continue in the future and the comments summarized below will be given consideration moving forward.

Comments: Eight respondents suggested that FTA issue a comprehensive set of guidance so that project sponsors can be fully and accurately informed regarding current FTA requirements. Such guidance could respond to recent actions taken by Congress and be open to public comment.

Comments: Four respondents suggested changes to the Very Small Starts streamlined evaluation requirements, specifically: (1) Removing the total project cost and cost per mile requirements; (2) removing the requirements on daily operations and number of riders; (3) allowing low-floor buses to be purchased as part of an agency-wide purchase, rather than as part of the project; and, (4) defining "substantial long-term corridor investment" (in a non-fixed guideway corridor) per the statute.

Comments: Three respondents suggested that FTA implement the reliability rating change through notice and comment rulemaking.

Comments: Three respondents urged FTA to streamline the planning and project development process. Another asked FTA to completely revamp the program.

Comments: Two respondents suggested that FTA change how local financial commitment is recognized and how local funds can be used. One suggested recognizing all of the local contributions made in the fiscally-constrained long-range plan towards a new fixed-guideway system when considering the financial rating of a New Starts project. Another suggested allowing for so-called "deferred local match," as well as allowing project sponsors that invest more than 20 percent of total project cost to follow local procedures for aspects of the project funded with local funds.

Comments: Besides the previously discussed suggestion to change the existing practice requiring a "medium" cost-effectiveness rating for a project funding recommendation, suggestions on FTA's cost effectiveness index included: (1) Basing cost effectiveness on the amount of the Federal investment rather than the total project cost; (2) replacing the current cost effectiveness measure of cost per hour of transportation system user benefit with cost per new rider; (3) tying the New Starts share to the cost effectiveness measure (*i.e.*, the higher the measure, the higher the allowable New Starts share); and, (4) updating the measure to account for inflation.

Comments: One commenter criticized the current measure of environmental benefits for being biased against areas that are currently less dense but growing. Another commenter suggested that any environmental benefits measure be presented as relative, rather than absolute, to avoid biases against large cities.

Comments: Suggestions regarding land use issues not mentioned previously included: (1) Considering the land acquisition to build transit-oriented developments differently when calculating project cost; and (2) modifying the rating to reward communities that demonstrate implementation of affordable, mixed-income housing preservation and expansion policies and community planning activities. Criticisms of the evaluation of land use included: (1) The practice of fixing land use in the analysis of the transportation benefits associated with the project ignores the effect of the project in promoting higher density; and, (2) the focus on existing land use ignores the inability of density to increase without the project in place.

Comments: Comments on FTA's emphasis on the state of good repair included: (1) One respondent requested that rebuilding and maintaining aging infrastructure be a high priority in the next transportation bill; and (2) two respondents questioned why FTA rates a financial plan for a New Starts project that relies on section 5307 formula funds or section 5309 fixed guideway modernization funds less favorably than financial plans that do not rely on these sources.

Comments: Suggestions regarding broad program changes included: (1) Considering benefits to increasing corridor capacity in the project justification criteria; (2) splitting the program into two categories, new and expansion, to allow for a more level playing field and balanced funding allocation; (3) providing a bonus to metropolitan areas that exceed ridership expectations; (4) reducing the expectations of capital cost and ridership estimates at early stages of project development; (5) allowing flexibility in the timing of when the New Starts share is finalized; (6) keeping the New Starts process distinct from the process required by the National Environmental Policy Act; (7) working with the Federal Highway Administration to develop a uniform project development process for multi-modal projects; and, (8) expanding "warrants", such as those used for Very Small Starts, to larger projects.

Final Guidance

1. New Starts Project Justification Rating

The project justification rating of a project seeking New Starts funding will be based on ratings for the following criteria with the weights shown in parentheses: mobility improvements (20%), environmental benefits (10%), cost effectiveness (20%), operating efficiencies (10%), economic development effects (20%), and public transportation supportive land use (20%).

FTA's approach to the measures and ratings is to base them on existing procedures and information produced by project sponsors to the extent possible. This allows for their immediate implementation because new information, along with the additional time required for project sponsors to develop it, is not required. More significant changes have been postponed until FTA completes development of more robust measures, particularly for environmental benefits and economic development effects. The measures for the mobility improvements, environmental benefits, and cost effectiveness criteria do not change at this time under this guidance. The operating efficiencies criterion will be evaluated and rated as it was in fiscal year 2008 and earlier using the incremental difference in system-wide operating cost per passenger mile between the build and the baseline alternatives. To avoid requiring new information from project sponsors until such time as FTA develops more robust measures, the economic development effects rating will be based on two of the three subfactors previously used to rate public transportation supportive land use—transit supportive plans and policies, and performance and impact of policies. The remaining land use subfactor previously used—existing land use—will be the basis for the public transportation supportive land use rating. Each of these three subfactors, although separated into two separate measures, will be evaluated and rated as they were previously.

The rating for each criterion will be expressed descriptively as "low," "medium-low," "medium," "medium-high," or "high," with a corresponding numerical rating of one to five used in aggregation calculations.

A simple approach was used to determine the magnitude of the weights of all the project justification criteria, but not the simplest. The simplest would be to make all weights equal, meaning between 16 and 17 percent. The lower weights for the environmental benefits and operating efficiencies criteria acknowledge the transit community's lack of consensus about useful, easily reported measures for these criteria that can be used to meaningfully distinguish between projects.

FTA is conducting research to identify useful measures for the environmental benefits criterion. Likewise, in a **Federal Register** notice published on January 26, 2009, FTA issued and sought comments on a discussion paper on new, alternative ways of evaluating economic development effects. FTA is now reviewing comments on that paper.

2. Small Starts Project Justification Rating

The project justification rating of a project seeking Small Starts funding will be based on ratings for the following criteria with the proposed weights shown in parentheses: cost effectiveness (one third), economic development effects (one third), and

public transportation supportive land use policies (one third).

FTA's approach to the project justification measures for Small Starts is identical to that described above for New Starts, meaning that they are based on existing procedures and information produced by project sponsors to the extent possible. The measure and rating for the cost effectiveness criterion does not change under this guidance. The measures and ratings for the economic development effects and public transportation supportive land use criteria are identical to those proposed for New Starts. The economic development effects rating will be based on two of the three subfactors previously used to rate land use (following the data reporting simplifications already in place for Small Starts projects)—transit supportive plans and policies and performance and impact of policies. The remaining land use subfactor previously-used—existing land use—will be the basis for the public transportation supportive land use rating.

The simplest approach was used to determine the magnitude of the weights, with all of them weighted equally.

Projects that qualify for the Very Small Starts streamlined evaluation will continue to receive an automatic "medium" rating for project justification.

3. Alternatives With Tunnels

As a condition of advancement into preliminary engineering, FTA requires that alternatives analysis studies specifically analyze, evaluate, and consider the congestion relief, improved mobility, and other benefits of transit tunnels in those projects that include a transit tunnel and the associated ancillary and mitigation costs necessary to relieve congestion, improve mobility, and decrease air and noise pollution in those projects that do not include a tunnel, but where a transit tunnel was one of the alternatives analyzed. Additional analyses are required when different vertical alignments (*i.e.*, at-grade versus underground) of a proposed reasonable alternative result in disparate impacts to automobile congestion, mobility, air and noise pollution, and/or any other relevant consideration. FTA will ensure that such information has been addressed during the alternative analysis of projects that considered a tunnel as part of the FTA review of project applications for entry into preliminary engineering.

The mobility improvements, operating efficiencies, land use, economic development effects, and cost effectiveness project justification criteria capture much of the benefits provided by tunnels. Additionally, FTA's consideration of "other factors," including the "case for the project" document, offers project sponsors the opportunity to present evidence not considered by the aforementioned criteria, including mitigation costs necessary due to the selection of an above-ground alignment. In evaluating the consequences of a tunnel option compared to a surface option, project sponsors are encouraged to use the full range of FTA project justification criteria to support local decision making during project planning.

Issued on: July 24, 2009.

Peter M. Rogoff,

Administrator, Federal Transit Administration.

[FR Doc. E9–18092 Filed 7–24–09; 4:15 pm]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No FMCSA–1998–4334; FMCSA–2000–7006; FMCSA–2000–7363; FMCSA–2000–8398; FMCSA–2001–9258; FMCSA–2003–14223; FMCSA–2003–14504; FMCSA–2004–19477; FMCSA–2005–20027; FMCSA–2005–20560; FMCSA–2006–26066; FMCSA–2007–27333; FMCSA–2007–27515.]

Qualification of Drivers; Exemption Renewals; Vision

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

ACTION: Notice of final disposition.

SUMMARY: FMCSA previously announced its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 29 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov.*

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The statute also allows the Agency to renew exemptions at the end of the 2-year period. The comment period ended on July 2, 2009.

Discussion of Comments

FMCSA received no comments in this proceeding.

Conclusion

The Agency has not received any adverse evidence on any of these drivers that indicates that safety is being compromised. Based upon its evaluation of the 29 renewal applications, FMCSA renews the Federal vision exemptions for Gary A. Barrett, Ivan L. Beal, Johnny A. Beutler, Daniel R. Brewer, Darryl D. Cassatt, Larry Chinn, Brett L. Condon, Albion C. Doe, Sr., William K. Gullet, Daryl A. Jester, James P. Jones, Clyde H. Kitzan, Larry J. Lang, Spencer E. Leonard, Dennis D. Lesperance, John W. Locke, Herman G. Lovell, Ronald L. Maynard, Donald G. Meyer, William A. Moore, Jr., Earl R. Neugebauer, Danny R. Pickelsimer, Richard S. Rehbein, Bernard E. Roche, David E. Sanders, David B. Speller, Lynn D. Veach, Harry S. Warren, and Michael C. Wines.

In accordance with 49 U.S.C. 31136(e) and 31315, each renewal exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: July 21, 2009.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E9–17975 Filed 7–28–09; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

July 23, 2009.

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 August 28, 2009 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–0190.
Type of Review: Extension.
Form: 4876–A.
Title: Election to be treated as an Interest Charge DISC.
Description: A domestic corporation and its shareholders must elect to be an interest charge domestic international sales corporation (IC–DISC). Form 4876–A is used to make the election. IRS uses the information to determine if the corporation qualifies to be an IC–DISC.
Respondents: Businesses or other for-profits.
Estimated Total Burden Hours: 6,360 hours.

OMB Number: 1545–1995.
Type of Review: Extension.
Title: Notice 2006–27, Certification of Energy Efficient Home Credit.
Description: This notice sets forth a process under which a taxpayer who constructs a dwelling unit (other than a manufactured home) may obtain a certification that the dwelling unit is an energy efficient home that satisfies the requirements of Sec. 45L(c)(1) (A) and (B) of the Internal Revenue Code. This notice is intended to provide (1) guidance concerning the methods by which taxpayers can construct dwelling units to meet the energy efficiency requirements of Sec. 45L and certify such units for purposes of the credit, and (2) guidance concerning which software programs can be used to complete the calculations
Respondents: Individuals and Households.
Estimated Total Burden Hours: 135 hours.

OMB Number: 1545–1251.
Type of Review: Extension.
Title: PS–5–91 (Final) Limitations on Percentage Depletion in the Case of Oil and Gas Wells.
Description: Section 1.613A–3(e)(6)(i) of the regulations requires each partner to separately keep records of the partner's share of the adjusted basis of partnership oil and gas property.
Respondents: Businesses or other for-profits.
Estimated Total Burden Hours: 49,950 hours.

OMB Number: 1545–1990.
Type of Review: Extension.
Title: Application of section 338 to Insurance Companies.
Description: These regulations will allow companies to retroactively apply the regulations to transactions completed prior to the effective data and to stop an election to use a historic loss payment pattern.
Respondents: Businesses or other for-profits.
Estimated Total Burden Hours: 12 hours.

OMB Number: 1545–0973.
Type of Review: Extension.
Form: 8569.
Title: Geographic Availability Statement.
Description: The data collected from this form is used by the executive panels responsible for screening internal and external applicants for the SES Candidate Development Program, and other executive position.
Respondents: Businesses or other for-profits.
Estimated Total Burden Hours: 84 hours.

OMB Number: 1545–1499.
Type of Review: Extension.
Title: Revenue Procedure 2006–10 Acceptance Agents.
Description: Revenue Procedure 2006–10 describes application procedures for becoming an acceptance agent and the requisite agreement that an agent must execute with IRS.
Respondents: Businesses or other for-profits.
Estimated Total Burden Hours: 24,960 hours.

OMB Number: 1545–2133.
Type of Review: Revision.
Title: Rev. Proc. 2009–16, Section 168(k)(4) Election Procedures and Rev. Proc. 2009–XX, Section 168(k)(4) Extension Property Elections.
Description: Rev. Proc. 2009–16 provides the time and manner for making the election to apply section 168(k)(4) of the Internal Revenue Code, for making the allocation of the bonus depreciation amount to increase certain limitation, and for making the election to apply section 3081(b) of the Housing and Economic Recovery Act of 2008. It provides the time and manner for a corporation to make the elections provided under new section 168(k)(4)(H) of the Internal Revenue Code with respect to the acceleration of claiming research or alternative minimum tax credits in lieu of claiming the bonus depreciation deduction.
Respondents: Businesses or other for-profits.
Estimated Total Burden Hours: 5,400 hours.

OMB Number: 1545–0865.
Type of Review: Extension.
Form: 8918.
Title: Material Advisor Disclosure Statement.
Description: The American Jobs Creation Act of 2004, Public Law 108–357, 118 Stat. 1418, (AJCA) was enacted on October 22, 2004. Section 815 of the AJCA amended section 6111 to require each material advisor with respect to any reportable transaction to make a return (in such form as the Secretary may prescribe) setting forth: (1) Information identifying and describing the transaction; (2) information describing any potential tax benefits expected to result from the transaction; and (3) such other information as the Secretary may prescribe.
Respondents: Businesses or other for-profits.
Estimated Total Burden Hours: 3,959 hours.

Clearance Officer: R. Joseph Durbala (202) 622–3634, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.
OMB Reviewer: Shagufta Ahmed, (202) 395–7873, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Celina Elphage,
Treasury PRA Clearance Officer.
[FR Doc. E9–18109 Filed 7–28–09; 8:45 am]
BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

July 23, 2009.

The Department of the 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 11020, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before August 28, 2009 to be assured of consideration.

Office of Foreign Assets Control

OMB Number: 1505–0164.
Type of Review: Extension.
Title: Reporting and Procedures Regulations 31 CFR part 501.
Form: TD–F–90–22.50.
Description: Submissions will provide the U.S. Government with information to be used in enforcing various economic sanctions programs administered by OFAC under 31 CFR Chapter V.
Respondents: Individuals or households.
Estimated Total Reporting Burden: 26,300 hours.
Clearance Officer: Stephanie Petersen, (202) 622–0596, Treasury Annex, Room 2141, Washington, DC 20220.
OMB Reviewer: OIRA Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, *oira_submission@omb.eop.gov.*

Robert Dahl,
Treasury PRA Clearance Officer.
[FR Doc. E9–18114 Filed 7–28–09; 8:45 am]
BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

July 23, 2009.

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 August 28, 2009 to be assured of consideration.

Financial Management Service (FMS)

OMB Number: 1510–0008.
Type of Review: Extension.
Title: Pools and Associations—Annual Letter.
Description: Information collected determines acceptable percent for each pool and association Treasury Certified companies are given credit for on Treasury Schedule F for authorized ceded reinsurance in arriving at each insurance company's underwritting limit.
Respondents: Businesses or other for-profits.
Estimated Total Burden Hours: 126 hours.
Clearance Officer: Wesley Powe (202) 874–7662, Financial Management Service, Room 135, 3700 East West Highway, Hyattsville, MD 20782.
OMB Reviewer: OIRA Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, *oira_submission@omb.eop.gov.*

Robert Dahl,
Treasury PRA Clearance Officer.
[FR Doc. E9–18113 Filed 7–28–09; 8:45 am]
BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

July 24, 2009.

The Department of theTreasury 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 publication date 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, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before August 28, 2009 to be assured of consideration.

Community Development Financial Institutions Fund

OMB Number: 1559–0014.
Type of Review: Revision.
Title: New Markets Tax Credit (NMTC) Program—Community Development Entity (CDE) Certification Application.
Form: CDFI–0019.
Description: The purpose of the NMTC Program is to provide an incentive to investors in the form of a tax credit, which is expected to stimulate investment in new private capital in low income communities. Applicants must be a CDE to apply for allocation.
Respondents: Businesses and other for-profit institutions.
Estimated Total Burden Hours: 1,200 hours.
Clearance Officer: Ashanti McCallum (202) 622–9018, Community Development Financial Institutions Fund, Department of the Treasury, 601 13th Street, NW., Suite 200 South, Washington, DC 20005.
OMB Reviewer: Nicolas 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. E9–18110 Filed 7–28–09; 8:45 am]
BILLING CODE 4810–70–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

July 23, 2009.

The Department of Treasury is planning to 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. 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 11020, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before September 28, 2009 to be assured of consideration.

Office of Financial Stability (OFS)

OMB Number: 1505–0213.
Type of Review: Extension.
Title: Capital Assistance Program (CAP) Application.
Description: The Emergency Economic Stabilization Act provides the Secretary of the Treasury broad authority to purchase and insure mortgage assets, and to purchase any other financial instrument that the Secretary, in consultation with the Federal Reserve Chairman, determines necessary to stabilize our financial

markets. The TARP includes several components including the Capital Assistance Program (CAP) under which the Department may purchase qualifying capital in U.S. banking organizations. The Treasury, through Federal banking agencies, is seeking applicant information for financial institutions that seek participation in the CAP. Treasury is seeking information from financial institutions which include bank holding companies, financial holding companies, insured depository institutions and savings and loan holding companies that engage solely or predominately in activities that are permissible for financial holding companies under relevant law. To qualify, the applicant must be established and operating in the United States and may not be controlled by a foreign bank or company.

Respondents: Businesses and other for-profit institutions.

Estimated Total Reporting Burden: 200 hours.

OMB Number: 1505–0215.

Type of Review: Extension.

Title: Legacy Systems Public-Private Investment Fund Application.

Description: Authorized under the Emergency Economic Stabilization Act (EESA) of 2008 (Pub. L. 110–343), the Department of the Treasury is implementing several aspects of the Troubled Asset Relief Program. The statute provides the Secretary broad authority to purchase and insure mortgage assets, and to purchase any other financial instrument that the Secretary, in consultation with the Federal Reserve Chairman, determines necessary to stabilize our financial markets. The TARP includes several components including a voluntary Legacy Securities Public Private Investment Fund (PPIF). Under this plan the Treasury will contribute equity funding equal to or less than the private capital raised by private investors. In addition Treasury will consider requests for loans from Treasury in amounts of up to 100% of the total equity capital (Treasury plus private) of a Legacy Security PPIF. The Treasury is seeking applicant information for financial institutions that seek participation in the Legacy Securities PPIF.

Respondents: Businesses and other for-profit institutions.

Estimated Total Reporting Burden: 1,200 hours.

Clearance Officer: Suzanne Tosini, (202) 927–9627, 1801 L St, NW., Room 8219, Washington, DC 20036.

Robert Dahl,

Treasury PRA Clearance Officer.

[FR Doc. E9–18111 Filed 7–28–09; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

July 23, 2009.

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 11020, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before August 28, 2009 to be assured of consideration.

Office of Financial Stability (OFS)

OMB Number: 1505–0210.

Type of Review: Extension.

Title: Troubled Assets Relief Program (TARP) Capital Purchase Program (CPP) Monthly Survey.

Description: Authorized under the Emergency Economic Stabilization Act (EESA) of 2008 (Pub. L. 110–343), the Department of the Treasury has implemented several aspects of the Troubled Asset Relief Program. Among these components is a voluntary Capital Purchase Program (CPP) under which the Department may purchase qualifying capital in U.S. banking organizations. The Treasury invested capital through this program in over 250 financial institutions. As part of this program, Treasury would like to track how the capital is being used, and whether these capital injections are having the desired effect of ensuring liquidity within the banking system and thereby increasing lending activity. The Treasury will be conducting evaluations using quarterly Call Report data supplied by these financial institutions to their primary regulator. However, in order to have a more frequent and timely snapshot of the current lending environment, Treasury is requesting the ability to conduct a monthly survey of the 20 largest institutions by loans outstanding in order to supplement the quarterly analysis.

Respondents: Businesses and other for-profit institutions.

Estimated Total Reporting Burden: 200 hours.

Clearance Officer: Suzanne Tosini, (202) 927–9627, 1801 L St, NW., Room 8219, Washington, DC 20036.

OMB Reviewer: OIRA Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, *oira_submission@omb.eop.gov.*

Robert Dahl,

Treasury PRA Clearance Officer.

[FR Doc. E9–18112 Filed 7–28–09; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

Proposed Information Collections; Comment Request

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of our continuing effort to reduce paperwork and respondent burden, and as required by the Paperwork Reduction Act of 1995, we invite comments on the proposed or continuing information collections listed below in this notice.

DATES: We must receive your written comments on or before September 28, 2009.

ADDRESSES: You may send comments to Mary A. Wood, Alcohol and Tobacco Tax and Trade Bureau, at any of these addresses:

- P.O. Box 14412, Washington, DC 20044–4412;
- 202–927–8525 (facsimile); or
- *formcomments@ttb.gov* (e-mail).

Please send separate comments for each specific information collection listed below. You must reference the information collection's title, form or recordkeeping requirement number, and OMB number (if any) in your comment. If you submit your comment via facsimile, send no more than five 8.5 x 11 inch pages in order to ensure electronic access to our equipment.

FOR FURTHER INFORMATION CONTACT: To obtain additional information, copies of the information collection and its instructions, or copies of any comments received, contact Mary A. Wood,

Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412; or telephone 202–453–2265.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau (TTB), as part of their continuing effort to reduce paperwork and respondent burden, invite the general public and other Federal agencies to comment on the proposed or continuing information collections listed below in this notice, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Comments submitted in response to this notice will be included or summarized in our request for Office of Management and Budget (OMB) approval of the relevant information collection. All comments are part of the public record and subject to disclosure. Please not do include any confidential or inappropriate material in your comments.

We invite comments on: (a) Whether this information collection is necessary for the proper performance of the agency's functions, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the information collection's burden; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the information collection's burden on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide the requested information.

Information Collections Open for Comment

Currently, we are seeking comments on the following forms and recordkeeping requirements:

Title: Formula and/or Process for Article Made With Specially Denatured Spirits.

OMB Number: 1513–0011.

TTB Form Number: 5150.19.

Abstract: TTB F 5150.19 is completed by persons who use specially denatured spirits in the manufacture of certain articles. TTB uses the information provided on the form to ensure the manufacturing formulas and processes conform to the requirement of 26 U.S.C. 5273.

Current Actions: We are submitting this information collection as a revision. We are making minor revisions to this form (such as renaming items and eliminating the need for a serial number). These revisions will make the form clearer and easier for the preparer to complete. These revisions will not affect the estimated number of respondents or burden hours. The estimated total annual burden hours and number of respondents remain unchanged.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 2,683.

Estimated Total Annual Burden Hours: 2,415.

Title: User's Report of Denatured Spirits.

OMB Number: 1513–0012.

TTB Form Numbers: 5150.18.

Abstract: Submitted annually by holders of permits to use specially denatured spirits, TTB F 5150.18 summarizes the permittee's manufacturing activities during the preceding year. The information is used by TTB to pinpoint unusual activities that could indicate a threat to the Federal revenue or possible dangers to the public.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 2,765.

Estimated Total Annual Burden Hours: 830.

Title: Power of Attorney.

OMB Number: 1513–0014.

TTB Form Number: 5000.8.

Abstract: TTB F 5000.8 delegates the authority to a specific individual to sign documents on behalf of an applicant or a principal. 26 U.S.C. 6061 authorizes our regulations requiring that an individual signing returns, statements, or other required documents filed by industry members under the provisions of the Internal Revenue Code (IRC) or the Federal Alcohol Administration (FAA) Act have that signature authority on file with TTB.

Current Actions: We are submitting this information collection as a revision. We are making changes to this information collection, however, the estimated number of respondents and estimated total annual burden hours remain unchanged.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 5,000.

Estimated Total Annual Burden Hours: 3,333.

Title: Certification of Tax Determination—Wine.

OMB Number: 1513–0029.

TTB Form Number: 5120.20.

Abstract: Wine that has been manufactured, produced, bottled, or packaged in bulk containers in the U.S. and then exported is eligible for a drawback (refund) of the excise tax paid on that wine. TTB F 5120.20 supports the exporter's claim for drawback, as the producing winery verifies that the wine being exported was in fact exported.

Current Actions: We are submitting this information collection for extension purposes only. We are making minor corrections to this information collection; however, no substantive revisions are being made to the information being collected on this form or the format. Also, the estimated number of respondents and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 1,000.

Estimated Total Annual Burden Hours: 500.

Title: Application for Transfer of Spirits and/or Denatured Spirits in Bond.

OMB Number: 1513–0038.

TTB Form Number: 5100.16.

Abstract: TTB F 5100.16 is completed by distilled spirits plant proprietors who wish to receive spirits in bond from other distilled spirits plants. TTB uses the information to determine if the applicant has sufficient bond coverage for the additional tax liability assumed when spirits are transferred in bond.

Current Actions: We are submitting this information collection for extension purposes only. We are making a minor correction to this information collection; however, no substantive revisions are being made to the information being collected on this form or the format. Also, the estimated number of respondents and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 250.

Estimated Total Annual Burden Hours: 300.

Title: Distilled Spirits Plants Warehousing Record, and Monthly Report of Storage Operations.

OMB Number: 1513–0039.

TTB Recordkeeping Number: 5110/02.

TTB Form Number: 5110.11.

Abstract: TTB uses this information collection to account for a proprietor's tax liability, adequacy of bond coverage, and to protect the revenue. The information also provides data to analyze trends, audit operations, monitor industry activities and compliance in order to provide for efficient allocation of field personnel, and to provide for economic analysis.

Current Actions: We are submitting this information collection for extension purposes only. This information collection, the estimated number of respondents, and the estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business and other for-profit.

Estimated Number of Respondents: 230.

Estimated Total Annual Burden Hours: 5,520.

Title: Distilled Spirits Plants—Excise Taxes.

OMB Number: 1513–0045.

TTB Recordkeeping Number: 5110/06.

Abstract: The collection of information is necessary to account for and verify taxable removals of distilled spirits. The data is used to audit tax payments.

Current Actions: We are submitting this information collection for extension purposes only. This information collection, the estimated number of respondents, and the estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business and other for-profit.

Estimated Number of Respondents: 133.

Estimated Total Annual Burden Hours: 3,458.

Title: Formula for Distilled Spirits under the Federal Alcohol Administration Act.

OMB Number: 1513–0046.

TTB Form Number: 5110.38.

Abstract: TTB F 5110.38 is used to determine the classification of distilled spirits for labeling and for consumer protection purposes. The form describes the person filing, type of product to be made, and restrictions to the label and/or manufacturing process. The form is used by TTB to ensure that a product is made and labeled properly, and to audit distilled spirits operations. Records are kept indefinitely for this information collection.

Current Actions: We are submitting this information collection for extension purposes only. This information collection, the estimated number of respondents, and the estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business and other for-profit.

Estimated Number of Respondents: 200.

Estimated Total Annual Burden Hours: 4,000.

Title: Distilled Spirits Plant (DSP) Denaturation Records, and Monthly Report of Processing (Denaturing) Operations.

OMB Number: 1513–0049.

TTB Recordkeeping Number: 5110/04.

TTB Form Number: 5110.43.

Abstract: This information collection is necessary to account for and verify the denaturation of distilled spirits. It is used to audit plant operations, monitor the industry for the efficient allocation of personnel resources, and compile statistics for government economic planning.

Current Actions: We are submitting this information collection for extension purposes only. This information collection, the estimated number of respondents, and the estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business and other for-profit.

Estimated Number of Respondents: 98.

Estimated Total Annual Burden Hours: 1,176.

Title: Distilled Spirits Plants—Transaction and Supporting Records.

OMB Number: 1513–0056.

TTB Recordkeeping Number: 5110/5.

Abstract: Transaction records provide the source data for accounts of distilled spirits in all DSP operations. They are used by TTB to verify those accounts and consequent tax liabilities.

Current Actions: We are submitting this information collection for extension purposes only. This information collection, the estimated number of respondents, and the estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 278.

Estimated Total Annual Burden Hours: 6,060.

Titles: Application for Permit to Manufacture Tobacco Products or Processed Tobacco or to Operate an Export Warehouse;

Application for Amended Permit to Manufacture Tobacco Products or Processed Tobacco or to Operate an Export Warehouse;

Application for Permit to Import Tobacco Products or Processed Tobacco; and

Application for Amended Permit to Import Tobacco Products or Processed Tobacco.

OMB Number: 1513–0078.

TTB Form Numbers: 5200.6, 5200.16, 5230.4, and 5230.5, respectively.

Abstract: These forms are used by tobacco industry members to obtain and amend permits necessary to engage in business as a manufacturer or importer of tobacco products or processed tobacco, or as an export warehouse proprietor.

Current Actions: We are submitting this information collection for an extension of the 6-month approval. The forms, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit; State, local, and tribal Government.

Estimated Number of Respondents: 1,518.

Estimated Total Annual Burden Hours: 2,277.

Title: Equipment and Structures.

OMB Number: 1513–0080.

TTB Recordkeeping Number: 5110/12.

Abstract: Marks, signs, and calibrations are necessary on equipment and structures at a distilled spirits plant in order to identify the plant's major equipment and to accurately determine the plant's contents.

Current Actions: We are submitting this information collection for extension purposes only. This information collection, the estimated number of respondents, and the estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 281.

Estimated Total Annual Burden Hours: One (1).

Title: Registration and Records of Vinegar Vaporizing Plants.

OMB Number: 1513–0081.

TTB Recordkeeping Number: 5110/9.

Abstract: Data is necessary to identify persons producing and using distilled spirits in the manufacture of vinegar and to account for spirits so produced and used. These records would be maintained in the normal course of operations. The record retention requirement for this information collection is 3 years.

Current Actions: We are submitting this information collection for extension purposes only. This information collection, the estimated number of respondents, and the estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: One (1).

Estimated Total Annual Burden Hours: One (1).

Title: Alternative Methods or Procedures and Emergency Variations from Requirements for Exports of Liquors.

OMB Number: 1513–0082.

TTB Recordkeeping Number: 5170/7.

Abstract: When an exporter seeks to use an alternate method or procedure or seeks an emergency variation from the regulatory requirements of 27 CFR part 28, such exporter requests a variance by letter, following the procedure in 27 CFR 28.20. TTB uses the provided information to determine if the requested variance is allowed by statute and does not jeopardize the revenue. The applicant is informed of the approval or disapproval of the request. TTB also uses the information to analyze what changes should be made to existing regulations. Records must be maintained only while the applicant is using the authorization.

Current Actions: We are submitting this information collection for extension purposes only. This information collection, the estimated number of respondents, and the estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business and other for-profit.

Estimated Number of Respondents: 500.

Estimated Total Annual Burden Hours: 200.

Title: Labeling of Sulfites in Alcoholic Beverages.

OMB Number: 1513–0084.

TTB Form/Recordkeeping Number: None.

Abstract: As mandated by law, and in accordance with our consumer protection responsibilities, TTB requires label disclosure statements on all alcoholic beverage products released from U.S. bottling premises or customs custody that contain 10 parts per million or more of sulfites. Sulfating agents have been shown to produce allergic-type responses in humans, particularly asthmatics, and the presence of these ingredients in alcohol beverages may have serious health implications for those who are intolerant of sulfites. Disclosure of sulfites on labels of alcohol beverages will minimize their exposure to these ingredients.

Current Actions: We are submitting this information collection for extension purposes only. This information collection, the estimated number of respondents, and the estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 4,787.

Estimated Total Annual Burden Hours: 3,159.

Dated: July 23, 2009.

Francis W. Foote,

Director, Regulations and Rulings Division.

[FR Doc. E9–17922 Filed 7–28–09; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0227]

Proposed Information Collection (Nutrition and Food Services Survey); Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision to currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine patients' satisfaction with the quality of food and nutrition services.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before September 28, 2009.

ADDRESSES: Submit written comments on the collection of information through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov;* or to Mary Stout, Veterans Health Administration (193E1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *mary.stout@va.gov.* Please refer to "OMB Control No. 2900–0227" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Mary Stout at (202) 461–5867 or FAX (202) 273–9381.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Customer Satisfaction Survey for Nutritional and Food Service.

OMB Control Number: 2900–0227.

Type of Review: Revision of a currently approved collection.

Abstract: VA will use the data collected to determine the level of patient satisfaction and quality of service resulting from advanced food preparation and advanced food delivery systems. Meals are an integral part of a patient's therapy. VA Form 10–5387 will be used to collect and evaluate information needed to determine whether improvements are needed to enhance patient's nutritional therapy.

Affected Public: Individuals or households.

Estimated Annual Burden: 4,187.

Estimated Average Burden per Respondent: 2 minutes.

Frequency of Response: Quarterly.

Estimated Number of Responses: 125,600.

Dated: July 24, 2009.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. E9–18000 Filed 7–28–09; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Wednesday,
July 29, 2009

Part II

Department of Energy

Federal Energy Regulatory Commission

18 CFR Part 35

Wholesale Competition in Regions With Organized Electric Markets; Final Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM07–19–001; Order No. 719–A]

Wholesale Competition in Regions With Organized Electric Markets

July 16, 2009.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule; order on rehearing.

SUMMARY: In this order on rehearing, the Federal Energy Regulatory Commission (Commission) affirms its basic determinations in Order No. 719, *Wholesale Competition in Regions with Organized Electric Markets*, which amended Commission regulations to improve the operation of organized wholesale electric markets in four areas: Demand response, including pricing during periods of operating reserve shortage; long-term power contracting; market-monitoring policies; and the responsiveness of RTOs and ISOs to their customers and other stakeholders. This order denies in part and grants in part rehearing and clarification regarding certain provisions of Order No. 719.

DATES: *Effective Date:* This is effective on August 28, 2009.

FOR FURTHER INFORMATION CONTACT:

Russell Profozich (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. *Russell.Profozich@ferc.gov.* (202) 502–6478.

Tina Ham (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. *Tina.Ham@ferc.gov.* (202) 502–6224.

SUPPLEMENTARY INFORMATION:

Table of Contents

128 FERC ¶ 61,059

Before Commissioners: Jon Wellinghoff, Chairman; Suedeen G. Kelly, Marc Spitzer, and Philip D. Moeller.

I. Introduction

1. On October 17, 2008, the Commission issued a Final Rule [1] establishing reforms to improve the operation of organized wholesale electric power markets [2] and amended its regulations under the Federal Power Act (FPA) in the areas of: (1) Demand response, including pricing during periods of operating reserve shortage; (2) long-term power contracting; (3) market-monitoring policies; and (4) the responsiveness of RTOs and ISOs to their customers and other stakeholders.[3] The Commission stated that these reforms are intended to improve wholesale competition to protect consumers in several ways: By providing more supply options, encouraging new entry and innovation, spurring deployment of new technologies, removing barriers to comparable treatment of demand response, improving operating performance, exerting downward pressure on costs, and shifting risk away from consumers.

A. Summary of Order No. 719

2. In the area of demand response, the Commission required each RTO and ISO to: (1) Accept bids from demand response resources in RTOs' and ISOs' markets for certain ancillary services on a basis comparable to other resources; (2) eliminate, during a system emergency, a charge to a buyer that takes less electric energy in the real-time market than it purchased in the day-ahead market; (3) in certain circumstances, permit an aggregator of retail customers (ARC) to bid demand response on behalf of retail customers directly into the organized energy market; and (4) modify their market rules, as necessary, to allow the market-clearing price, during periods of operating reserve shortage, to reach a level that rebalances supply and demand so as to maintain reliability while providing sufficient provisions for mitigating market power.[4]

3. Additionally, the Commission recognized that further reforms may be necessary to eliminate barriers to demand response in the future. To that end, the Commission required each RTO or ISO to assess and report on any remaining barriers to comparable treatment of demand response resources that are within the Commission's jurisdiction. The Commission further required each RTO's or ISO's Independent Market Monitor to submit a report describing its views on its RTO's or ISO's assessment to the Commission.[5]

4. With regard to long-term power contracting, the Commission required each RTO and ISO to dedicate a portion of its Web sites for market participants to post offers to buy or sell power on a long-term basis.

5. To improve market monitoring, the Commission required each RTO and ISO to provide its Market Monitoring Unit (MMU) with access to market data, resources and personnel sufficient to carry out their duties, and required the MMU to report directly to the RTO or ISO board of directors.[6] In addition, the Commission required that the MMU's functions include: (1) Identifying ineffective market rules and recommending proposed rules and tariff changes; (2) reviewing and reporting on the performance of the wholesale markets to the RTO or ISO, the Commission, and other interested entities; and (3) notifying appropriate Commission staff of instances in which a market participant's or the RTO's or ISO's behavior may require investigation.

6. The Commission also took the following actions with regard to MMUs: (1) Expanded the list of recipients of MMU recommendations regarding rule and tariff changes, and broadened the scope of behavior to be reported to the Commission; (2) modified MMU participation in tariff administration and market mitigation, required each RTO and ISO to include ethics standards for MMU employees in its tariff, and required each RTO and ISO to consolidate all its MMU provisions in one section of its tariff; and (3) expanded the dissemination of MMU market information to a broader constituency, with reports made on a more frequent basis than in the past, and reduced the time period before energy market bid and offer data are released to the public.

7. Finally, the Commission established an obligation for each RTO and ISO to establish a means for customers and other stakeholders to have a form of direct access to the RTO or ISO board of directors, and thereby, increase its responsiveness to customers and other stakeholders. The Commission stated that it will assess each RTO's or ISO's compliance filing using four responsiveness criteria: (1) Inclusiveness; (2) fairness in balancing diverse interests; (3) representation of minority positions; and (4) ongoing responsiveness.

8. The Commission stated in the Final Rule that its actions in these four areas are consistent with its duty to improve the operation of wholesale power markets.[7] The Commission also reiterated its statement from the underlying Notice of Proposed Rulemaking that the reforms addressed in this proceeding do not represent the Commission's final effort to improve the functioning of competitive markets for the benefit of consumers. Rather, the Commission will continue to evaluate other specific reforms that may strengthen organized markets.[8]

9. In each of the four areas, the Final Rule required each RTO or ISO to consult with its stakeholders and make a compliance filing that explains how its existing practices comply with the Final Rule's reforms, or its plans to attain compliance.[9]

B. Requests for Rehearing

10. The following entities have filed timely requests for rehearing or for clarification of Order No. 719: American Electric Power Corporation (AEP); American Public Power Association (APPA) and California Municipal Utilities Association (CMUA) (jointly, APPA–CMUA); APPA, CMUA and National Rural Electric Cooperative Association (NRECA) (collectively, Joint Petitioners); Illinois Commerce

[1] *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 FR 64,100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008) (Order No. 719 or Final Rule).

[2] Organized market regions are areas of the country in which a regional transmission organization (RTO) or independent system operator (ISO) operates day-ahead and/or real-time energy markets. The following Commission-approved RTOs and ISOs have organized markets: PJM Interconnection, LLC (PJM); New York Independent System Operator, Inc. (NYISO); Midwest Independent Transmission System Operator, Inc. (Midwest ISO); ISO New England, Inc. (ISO New England); California Independent System Operator Corp. (CAISO); and Southwest Power Pool, Inc. (SPP).

[3] In this rulemaking, the Commission also issued an advanced notice of proposed rulemaking, *Wholesale Competition in Regions with Organized Electric Markets*, Advance Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,617 (2007) (ANOPR) and a notice of proposed rulemaking, *Wholesale Competition in Regions with Organized Electric Markets*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,628 (2008) (NOPR).

[4] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 4, 15.

[5] *Id.* P 274.

[6] The use of the phrase "board of directors" herein also includes the board of managers, board of governors, and similar entities. An internal MMU in a hybrid structure may report to management so long as it does not perform any of the core MMU functions.

[7] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 2.

[8] *Id.* P 14.

[9] *Id.* P 8, 578–83.

Commission; Coalition of Midwest Transmission Customers, NEPOOL Industrial Customer Coalition, and PJM Industrial Customers Coalition (collectively, Industrial Coalitions); Minnesota Public Utilities Commission (Minnesota PUC); National Association of Regulatory Utility Commissioners (NARUC); Public Utilities Commission of Ohio (Ohio PUC); Old Dominion Electric Cooperative (Old Dominion); Potomac Economics, Ltd. (Potomac Economics); Pennsylvania Public Utilities Commission (Pennsylvania PUC); Sacramento Municipal Utility District (SMUD); Transmission Access Policy Study Group (TAPS); and Public Service Commission of Wisconsin (Wisconsin PSC). New York Independent System Operator, Inc. (NYISO) submitted an untimely request for clarification. Additionally, PJM Interconnection, L.L.C. filed a motion for leave to respond and response to the requests for rehearing. Joint Petitioners filed an answer to PJM's motion.[10]

11. We dismiss NYISO's untimely request for clarification of Order No. 719 because it is, in essence, an untimely request for rehearing. The courts have repeatedly recognized that the time period within which a party may file a petition for rehearing of a Commission order is statutorily established at 30 days by section 313(a) of the FPA[11] and that the Commission has no discretion to extend that deadline.[12] Accordingly, the Commission has long held that it lacks the authority to consider requests for rehearing filed more than 30 days after issuance of a Commission order.[13]

12. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 CFR 385.713(d)(1) (2008), prohibits answers to requests for rehearing. Accordingly, we reject PJM's motion to respond to requests for rehearing and Joint Petitioners' answer to PJM's motion.

[10] Additionally, Monitoring Analytics, LLC filed an out-of-time motion to intervene in this proceeding, but did not seek rehearing.

[11] 16 U.S.C 825l.

[12] *See, e.g., City of Campbell* v. *FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) ("The 30-day time requirement of [the FPA] is as much a part of the jurisdictional threshold as the mandate to file for a rehearing."); *Boston Gas Co. v. FERC*, 575 F.2d 975, 977–98, 979 (1st Cir. 1978) (describing identical rehearing provision of the Natural Gas Act as "a tightly structured and formal provision. Neither the Commission nor the courts are given any form of jurisdictional discretion.").

[13] *See, e.g., Arkansas Power & Light Co.*, 19 FERC ¶ 61,115 at 61,217–18, *reh'g denied*, 20 FERC ¶ 61,013, at 61,034 (1982). *See also Public Serv. Co. of New Hampshire*, 56 FERC ¶ 61,105, at 61,403 (1991); *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,623 (1991).

II. Discussion

A. Demand Response and Pricing During Periods of Operating Reserve Shortages in Organized Markets

1. Ancillary Services Provided by Demand Response Providers

13. The Final Rule required each RTO or ISO to accept bids from demand response resources, on a basis comparable to any other resources, for ancillary services that are acquired in a competitive bidding process, if the demand response resources: (1) Are technically capable of providing the ancillary service and meet the necessary technical requirements; and (2) submit a bid under the generally-applicable bidding rules at or below the market-clearing price, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate. All accepted bids would receive the market-clearing price.[14] The Commission determined that these requirements would remove barriers to the comparable treatment of demand-side and supply-side resources.

14. In the Final Rule, in response to commenters who asked the Commission to allow energy efficiency resources to bid into the organized markets, the Commission recognized the value of energy efficiency resources. The Commission stated that it has not excluded from eligibility as a provider of ancillary services any type of resource that is technically capable of providing the ancillary service, including energy efficiency resources. However, because this proceeding did not propose to include energy efficiency resources as providers of competitively procured ancillary services, the Commission stated that it did not have an adequate record to address this issue.[15]

a. Request for Rehearing

15. Pennsylvania PUC asserts that the Commission should uphold its "comparable terms and conditions" principle regarding acceptance of demand response resources for ancillary services by requiring each RTO and ISO to file tariff provisions defining energy efficiency resources as resources qualified to bid into energy markets and ancillary services markets upon such terms and conditions as the RTO or ISO may propose. In addition, it asks the Commission to require each RTO and ISO to supply arguments and adequate record evidence in support of such a filing so that the Commission can determine whether energy efficiency resources are being accepted on a comparable basis with any other resources qualified to bid into energy markets and ancillary services markets.[16]

[14] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 47.

[15] *Id.* P 56.

b. Commission Determination

16. The Final Rule does not exclude from eligibility any type of resource that is technically capable of providing an ancillary service, and therefore we disagree with Pennsylvania PUC that the Final Rule leaves in place a barrier to the use of energy efficiency resources that we must remedy on rehearing. An RTO or ISO is free to work with its stakeholders and incorporate energy efficiency resources into its markets on a basis that is appropriate for its region.[17]

2. Aggregation of Retail Customers

17. Order No. 719 required RTOs and ISOs to amend their market rules as necessary to permit an ARC to bid demand response on behalf of retail customers directly into the RTO's or ISO's organized markets, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate. The Commission determined that allowing an ARC to act as an intermediary for many small retail loads that cannot individually participate in the organized market would reduce a barrier to demand response.[18] The Commission directed RTOs and ISOs to submit compliance filings to propose amendments to their tariffs or otherwise demonstrate how their existing tariffs and market rules comply with the Final Rule.[19]

a. Requests for Rehearing

i. Commission Jurisdiction

18. Several petitioners assert that the Final Rule's ARC requirements exceed the Commission's statutory authority under the FPA.[20] TAPS and Joint Petitioners state that under section 201(a) of the FPA, the Commission's jurisdiction is limited to the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate

[16] Pennsylvania PUC at 4.

[17] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 276.

[18] *Id.* P 154.

[19] *Id.* P 163.

[20] *See, e.g.*, TAPS at 9–13; Joint Petitioners at 18–23; NARUC at 3. NARUC states that it incorporates by reference the arguments presented on this issue by Joint Petitioners' request for rehearing. NARUC at 5.

commerce.[21] They argue that a retail customer's reduction of energy consumption is neither a wholesale sale of electric energy nor transmission in interstate commerce, and that retail sales are sales of electric energy to end users that are not sales for resale.[22] Joint Petitioners add that a promise not to consume electric energy at a particular time is a product not covered by the plain language of the FPA.[23] TAPS, therefore, concludes that the Commission lacks jurisdiction to modify retail electricity sales by effectively establishing a new rule that authorizes retail customers purchasing electricity (or non-consumption) to resell that electricity into wholesale markets, either directly or through a third party.[24]

19. Joint Petitioners argue that the Final Rule's ARC requirement violates the separation of Federal and State jurisdiction because it effectively requires public power systems and cooperatives to take affirmative action to consider retail aggregation issues.[25] Joint Petitioners state that the majority of these systems do not have laws or regulations addressing end-use customer aggregation. They argue that the Commission has no jurisdiction to require such affirmative action because it is beyond the scope of its legal authority set out in the FPA.

20. Additionally, TAPS argues that States' and relevant electric retail regulatory authorities' laws and regulations do not grant retail customers either the title or a contract right to resell retail electricity (or any such non-consumption). In that respect, TAPS argues that the Final Rule intrudes into retail electric service rates by requiring RTOs and ISOs to accept demand response bids that may be prohibited by State law, without first obtaining confirmation that such transactions are permitted by the relevant electric retail regulatory authority. Joint Petitioners also note that Congress acknowledged that State and local regulation extends to such consumption decisions when it directed State regulators and non-regulated utilities to consider implementing demand response programs at the State and local level in 2007 amendments to the Public Utility Regulatory Policies Act (PURPA).[26] Further, they argue that the Commission failed to explain how it has jurisdiction over the demand response programs of public power systems and cooperatives that are not public utilities, and are therefore exempt, under FPA section 201(f), from the Commission's FPA section 206 authority.[27] Joint Petitioners contend that the Commission cannot "indirectly" claim jurisdiction over non-jurisdictional entities.[28]

21. Ohio PUC argues that third-party aggregation bids should be subject to State regulatory authority or approval.[29] While it agrees that ARCs should be permitted to aggregate smaller loads, it asserts that retail customers and their representatives should not be classified as wholesale customers subject to the Commission's jurisdiction simply because they provide demand response to the wholesale market. Therefore, Ohio PUC contends that the Final Rule should have acknowledged that all contracts by third-party ARCs are subject to State retail jurisdiction and should be subject to State commission approval prior to providing demand response resources to an RTO or ISO.[30]

22. Joint Petitioners ask the Commission to rule on rehearing that in the case of public power systems and cooperative utilities, RTOs and ISOs should not accept ARCs' demand response bids unless a system's relevant electric retail regulatory authority affirmatively informs the RTO or ISO that it permits aggregation by third-party ARCs.[31] They believe that this approach would allow the Commission to encourage demand response while still respecting the State and local retail regulatory authorities. Similarly, TAPS urges the Commission to modify the opt-out structure of the ARC requirements by changing it to an opt-in structure to remedy the jurisdictional defect and to avoid undue burden to small relevant electric retail regulatory authorities.[32] TAPS argues that such modifications would invite relevant electric retail regulatory authorities to contact the RTO or ISO to provide the necessary notification. Joint Petitioners and TAPS state that absent a notification that permission has been granted, the RTO or ISO should presume that sales of demand response in RTO or ISO markets are not permitted.

23. Additionally, TAPS argues that ARCs and other entities bidding demand response into RTO or ISO markets should be required to certify that their sales are permitted. It asserts that it would be difficult for RTOs or ISOs or relevant electric retail regulatory authorities to identify, independently, whether improper sales or aggregation occur. It states that entities bidding demand response into the RTO or ISO wholesale markets are in the best position to identify the specific retail loads and customers involved and to verify that such bids are permitted by the relevant electric retail regulatory authority. It notes that network customers must provide certification to support designation of network resources.[33] Similarly, individual retail

[21] 16 U.S.C. 824(a).

[22] TAPS at 11–12; Joint Petitioners at 18–19 (citing *United States* v. *Public Utils. Comm'n of California*, 345 U.S. 295, 303 (1953); *Federal Power Comm'n* v. *Southern California Edison Co.*, 376 U.S. 202, 216 (1964)).

[23] Joint Petitioners at 19.

[24] TAPS at 12–13 (citing *N.Y.* v. *FERC*, 535 U.S. 1, 20 (2002); *FPC* v. *Conway Corp.*, 426 U.S. 271, 276–77 (1976)).

[25] Joint Petitioners at 13, 18 (citing *Northern States Power Co.*, 176 F.3d 1090, 1096 (8th Cir. 1999), *reh'g en banc denied* 1999 U.S. App. LEXIS 23493 (8th Cir. Sept. 1, 1999), *cert. denied sub nom.*; *Enron Power Mktg., Inc.* v. *Northern States Power Co.*, 528 U.S. 1182 (2000); *Atlantic City Electric Co.* v. *FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002)).

[26] Section 532 of the Energy Independence and Security Act of 2007 amended PURPA section 111(d) by adding a new standard that requires consideration of rate design modifications to promote energy efficiency investments. 16 U.S.C. 2621(d). To assist in this effort, Joint Petitioners note that APPA and NRECA commissioned a reference manual regarding the new requirements. *Reference Manual and Procedures for Implementation of the PURPA Standards in the Energy Independence and Security Act of 2007*, Dr. Ken Rose and Michael Murphy, *available at http://www.naruc.org/Publications/EISAStandardsManualFINAL.pdf*. Joint Petitioners argue that efforts to have distribution cooperatives or public power distribution systems invest in a demand response program after considering these new federal PURPA standards could be undermined by the activities of third-party ARCs seeking to take the demand response of the public power or cooperative system's retail customers directly to the wholesale market. Joint Petitioners at 21.

[27] 16 U.S.C. 824(f). Joint Petitioners at 21 (citing *Bonneville Power Administration, et al.* v. *FERC*, 422 F.3d 908, 915 (9th Cir. 2005).

[28] Joint Petitioners state that the "Commission cannot bootstrap jurisdiction over * * * non-jurisdictional entities simply by pointing to jurisdiction over their retail customers" and that the Commission "cannot do indirectly what it cannot do directly." *Joint Petitioners* at 21 (citing *Richmond Power & Light* v. *FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978); *Altamont Gas Transmission Co., et al.* v. *FERC*, 92 F.3d 1239, 1248 (D.C. Cir 1996); and *Williams Gas Processing-Gulf Coast Co., L.P.* v. *FERC*, 331 F.3d 1011, 1022 (D.C. Cir. 2003)).

[29] Ohio PUC at 6–7 (stating that "it is the prerogative of each individual state commission to decide to what extent it will expose its retail customers to the wholesale market, and what, if any, advanced technology (*i.e.*, smart meters) its retail customers desire and wish to purchase").

[30] *Id.* at 6. The Wisconsin PSC states that it adopts Ohio PUC's arguments on this issue. Wisconsin PSC at 2. NARUC states that it incorporates by reference the arguments presented on this issue by Ohio PUC's request for rehearing. NARUC at 5.

[31] Joint Petitioners at 15–16.

[32] Specifically, TAPS suggests that the Commission modify the regulatory text to replace: (1) Tho "unless" clause of 18 CFR 35.28(g)(1)(B)(3)(iii) with "if the relevant electric retail regulatory authority expressly permits a retail customer to participate"; and (2) the "unless" clause of 18 CFR 35.28(g)(1)(i)(A) with "if permitted by the laws or regulations of the relevant electric retail regulatory authority." TAPS at 28.

[33] *Id.* at 31. TAPS notes that under Order No. 890, network customers must attest, for each network

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customers and ARCs should be required to certify that their bids and sales of demand response into wholesale markets are permitted under applicable law, and submission by such entities of ineligible demand response bids should be a tariff violation.

24. Further, AEP notes that the Final Rule permits retail customers to participate in an RTO's or ISO's demand program unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate. It seeks clarification as to "whether this exception applies to [s]tate commission-approved tariff provisions that prohibit sales for resale." [34]

25. AEP asserts that a State commission in a non-retail choice State should have the opportunity to fully consider and determine whether an RTO or ISO wholesale demand response program is appropriate for that State. AEP is concerned that RTOs and ISOs may interpret the Final Rule's language on the ARC requirement to mean that RTOs and ISOs may proceed with demand response programs in States where retail customers are provided with State regulated average embedded cost rates, unless States specifically opt out of an RTO's or ISO's wholesale demand response program. AEP argues that such an interpretation would allow: (1) Non-choice retail customers with average embedded cost rates an opportunity to arbitrage their load through sales into wholesale markets to the detriment of remaining retail customers in that State; and (2) an RTO or ISO to set new policy without any consideration of unintended consequences to retail customers.[35]

26. Additionally, AEP notes that a retail customer's action could be considered a "resale" when the customer purchases electric service under a retail tariff and then receives compensation for bidding its load into the wholesale market through a demand response program. Therefore, AEP asks that the Commission either clarify the Final Rule to provide that participation in wholesale demand response programs by retail customers does not constitute a "sale for resale," or require that retail customers seeking to participate in such programs seek such an exception from the applicable State commission.[36]

ii. Burden on Small Entities and Regulatory Flexibility Analysis

27. Several petitioners state that requiring the relevant electric retail regulatory authorities of each public system to consider some type of affirmative action on the ARC issue imposes a significant burden on them.[37] For example, TAPS argues that the Final Rule requires every relevant electric retail regulatory authority, regardless of size, to address whether demand response sales may be bid into an RTO or ISO market and whether ARCs may aggregate demand response within the regulatory authority's jurisdiction.[38] Joint Petitioners argue that, for the majority of retail regulatory authorities, this would be a substantial undertaking requiring a huge learning curve to become familiar with the process and consequently resulting in a lengthy legislative process.[39] Similarly, TAPS asserts that it is a huge undertaking for the city council of every municipal electric system in an RTO or ISO to expressly address this issue through legislation or regulation.[40] TAPS adds that the Final Rule effectively leaves enforcement responsibility with the relevant electric retail regulatory authority by requiring these entities to monitor and challenge any bids and certifications by ARCs that are not permitted within their jurisdiction.

28. Joint Petitioners argue that the Commission erred in certifying that Order No. 719 will not have a significant economic impact on a substantial number of small entities and certifying that the Final Rule complies with the Regulatory Flexibility Act of 1980 (RFA).[41] Joint Petitioners assert that the reasoning underlying this certification is invalid and therefore seek rehearing.[42] They emphasize that, unless public power systems and cooperatives take affirmative action to enact the necessary law or regulation, relevant electric retail authorities could risk having their public power systems' demand response programs undermined and day-to-day system operations disrupted by ARCs' demand response activities. They reiterate that it would be a significant burden for relevant electric retail regulatory authorities of over 1,300 public power systems and 850 distribution cooperatives to take up this issue. Accordingly, Joint Petitioners maintain that the Final Rule's ARC requirement would result in a significant adverse impact on a substantial number of small entities and, therefore, the Commission is required to provide a certification under the RFA.

29. TAPS also argues that by imposing responsibilities on small entities, the Final Rule ignores the RFA's requirements.[43] TAPS disputes the Commission's cite to *American Trucking Associations, Inc.* v. *EPA* (*American Trucking Associations*)[44] to support its position in the Final Rule that the RFA analysis is not required. It contends that, in that case, the Environmental Protection Agency (EPA) was not required to conduct an RFA analysis because whether the small entities at issue would be burdened by the EPA's action depended on the intermediate, discretionary action of the States. Under Order No. 719, however, TAPS asserts that the RTOs and ISOs have no such discretion to mitigate the impact of the Final Rule's requirements.[45] TAPS further contends that *American Trucking Associations* does not relieve the Commission of its obligations under the RFA. Therefore, it suggests that the Commission modify the ARC requirement as stated above, to ensure that any relevant electric retail regulatory authority that wishes to allow third-party demand response aggregation could do so, without unduly

resource identified for designation, that: (1) The transmission customer owns or has committed to purchase the designated network resource; and (2) the designated network resource meets the requirements for designated network resources. *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890–B, 123 FERC ¶ 61,299 (2008).

[34] AEP at 1.

[35] *Id.* at 2.

[36] *Id.* at 2–3.

[37] NARUC states that it incorporates by reference the arguments presented on this issue by Joint Petitioners' request for rehearing. NARUC at 5.

[38] TAPS at 25–26.

[39] For example, Joint Petitioners note that CMUA explained in its NOPR comments that the presumption of implicit authority to allow ARCs to aggregate bids makes no sense in California because direct access was suspended following the 2000–01 market crisis. Accordingly, California no longer has laws or regulations dealing with new direct access, and CMUA has not restructured its retail rules and ordinances with retail choice as an option. Therefore, Joint Petitioners state that to now require an affirmative action would be a substantial undertaking. Joint Petitioners at 16–17.

[40] TAPS notes that its members include: (1) AMP–Ohio, serving 123 municipal electric systems in Midwest ISO and PJM; (2) Indiana Municipal Power Agency, serving 51 municipal electric systems in Midwest ISO and PJM; and (3) Wisconsin Public Power, serving 50 municipal electric systems in Midwest ISO. TAPS at 26.

[41] 5 U.S.C. 601–12.

[42] Joint Petitioners at 23.

[43] TAPS at 26–27.

[44] *American Trucking Ass'ns* v. *EPA*, 175 F.3d 1027, 1044 (DC Cir. 1999), *aff'd in part and rev'd in part sub nom. Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001).

[45] TAPS at 28. TAPS states that the Final Rule "requires [load-serving entities] to either: (1) Invest in the legislative and/or regulatory procedures necessary to obtain an explicit 'out' and enforce it; * * * or (2) undertake the implementation burdens necessary to accommodate ARCs and retail customers directly bidding retail demand response into wholesale markets." *Id.*

burdening hundreds of municipal entities.[46]

30. Joint Petitioners argue that the Commission erred in arbitrarily and capriciously refusing to consider APPA's compromise proposal regarding third-party aggregation.[47] For entities below the RFA size requirement for small utilities, the RTO or ISO would be required to assume that ARC aggregation is not permitted unless the relevant electric retail regulatory authority of such public power system informed the RTO or ISO that it has elected to allow such aggregation. Joint Petitioners note that APPA argued in its NOPR comments that this size-differentiated regime would appropriately balance the Commission's interest in permitting demand-side participation in organized wholesale markets without the undue burden that the Final Rule places on small power systems. Joint Petitioners argue that Order No. 719 noted, but did not address, APPA's compromise proposal.[48]

31. Similarly, TAPS asserts that, at a minimum, any affirmative regulatory action requirement should be restricted to systems that are larger than the RFA threshold of 4 million MWh. An alternative threshold, according to TAPS, would be "those municipals with retail sales of more than 500 million kWh, as used in the PURPA."[49] TAPS contends that limiting the application of the Final Rule's requirements in this manner would minimize the burden on small systems associated with either implementation of the Final Rule or compliance with its express prohibition requirement, consistent with the Final Rule's RFA certification.

iii. Effect on Existing Demand Response Programs and on Rates, Metering, and Billing Protocols

32. TAPS argues on rehearing that the Commission failed to: (1) Adequately address the Final Rule's impact on existing demand response programs; and (2) provide sufficient evidence to justify the disruptions to wholesale and retail service that will be created by authorizing retail customers to sell their demand response in wholesale markets.

33. According to TAPS, it requested in its NOPR comments that the Commission take steps not to undermine the existing tariff and contractual arrangements between load-serving entities and their customers for demand response programs.[50] Yet, TAPS asserts, the Commission imposed new requirements without first independently assessing the Final Rule's impact on existing load-serving-entity-administered demand response programs. It asks the Commission to clarify that the Final Rule's ARC requirement would not undermine or require any changes to existing aggregation programs that already function well.[51]

34. According to TAPS, load-serving entity based programs provide significant value to all of their customers because load-serving entities can integrate their demand response programs into their power supply resource planning. This allows interruptions to be predictable and avoids the need to carry planning reserve for interruptible load. TAPS adds that customers can enjoy the protection of load-serving entity power supply planning and aggregation and average cost rates when they do not want to lower their consumption while wholesale prices are high.

35. TAPS argues that the Commission's attempt to direct demand response into the RTO's or ISO's wholesale energy and ancillary services markets will cause load-serving entities to lose the planning benefits that a load-serving-entity-administered demand response program would normally provide. The load-serving entity would need to include in its planning for firm power supply the full loads of its retail customers who sell into wholesale markets or contract with ARCs, as well as carry full planning reserves to meet that load. Thus, TAPS asserts, the value to the load-serving entity and its other customers of avoiding peak block generation investments and additional reserves would be lost.[52]

36. Similarly, Joint Petitioners note that many public power systems and cooperatives have effectively acted as ARCs for their retail customers. This benefits customers because these not-for-profit entities pass on any savings from demand response measures to their customers in the form of lower rates. Joint Petitioners conclude that ARCs' activities would undercut the demand response regimes their public power systems and cooperatives already have in place or are developing by cherry-picking the demand response potential of specific retail customers, and reducing the savings to the customers of the public power system accruing from such programs.[53] Also, they contend that allowing ARCs to selectively choose load-serving entity demand response resources would also deprive those load-serving entities of important resources used to keep rates down for all consumers. Load-serving entities could no longer control individual customers' loads and engage in risk and portfolio management on behalf of their customers.[54]

37. TAPS further argues that, by authorizing retail customers to sell their non-consumption at high spot prices; the Final Rule changes the financial calculation for retail customers considering demand response. TAPS claims that this reduces load-serving entities' or customers' incentives to make the capital investments necessary to achieve significant, permanent reductions in electricity usage, in favor of short-term, peak-hour reductions that garner premium payments from ARCs and the wholesale market.[55] TAPS argues that the load-serving entity's loss of control over its retail customers' demand response could impair the load-serving entity's ability to plan for its load and harness that demand response to reduce the costs of serving all of its customers.

38. Also, TAPS asserts that permitting direct demand response participation in wholesale markets and aggregation by third-party ARCs will significantly affect billing, metering, and settlement for the municipal system at both the wholesale and retail levels. Specifically, it contends that any system implemented by RTOs and ISOs to prevent double-counting could require major modifications to both RTO and ISO metering and settlement protocols and load-serving entities' metering and billing protocols.[56] For example, TAPS states that municipals that allow individual retail customers and third-party ARCs to sell demand response into wholesale markets may be subject to phantom energy charges,[57] based on

[46] *Id.* at 29.

[47] Joint Petitioners at 27. In its NOPR comments, APPA suggested an alternative approach of differentiating public power systems by their size. Under this alternative, the relevant electric retail regulatory authorities governing public power systems that are located in the RTO or ISO regions and larger than the RFA size requirement (*i.e.*, 4 million MWh or more in total output in one year) would have to consider the issue of third-party ARCs and aggregation of their retail customers, if they had not already done so. They would have the affirmative requirement to inform their RTO or ISO whether their local election was not to permit the aggregation by ARCs on their public power systems, or permit it only under enumerated conditions in order to preclude third-party bidding of their consumers' loads. APPA NOPR Comments at 47–48.

[48] Joint Petitioners at 28–29.

[49] TAPS at 30.

[50] *Id.* at 14 (citing TAPS NOPR Comments at 13–17).

[51] *Id.* at 14–15.

[52] *Id.*

[53] Joint Petitioners at 14–15.

[54] *Id.* at 15.

[55] TAPS at 17.

[56] *Id.* at 18.

[57] TAPS provides the following example to explain "phantom energy":

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the amount of energy that those retail demand responders would otherwise have consumed. Consequently, this could result in deviation charges for load-serving entities for failure to accurately schedule their load. TAPS argues that, if ARC-aggregated load causes an unexpected drop in a load-serving entity's load, the load-serving entity will be subject to uplift charges if its real-time load is below its day-ahead load.[58] Similarly, it adds that a decrease or an increase in a load-serving entity's load, triggered by unexpected, market-price driven demand response, could impose over- and under-scheduling charges on a load-serving entity under the SPP's tariff.[59]

39. Arguing that demand response participation in wholesale markets, either directly or by third-party ARCs, will affect the scheduling and resource planning of the load-serving entities that serve the retail customers providing demand response, TAPS concludes that load-serving entities will need to develop a system for allocating the cost of phantom energy. TAPS believes that load-serving entities should assign those charges only to retail customers whose decision to sell their demand response into the wholesale market caused the load-serving entity to incur those costs. Accordingly, TAPS requests that the Final Rule should be modified to direct RTOs and ISOs to provide detailed information, in real time, to affected load-serving entities on: (1) The identity of all individual retail customer load involved (even if aggregated by an ARC); and (2) the amount of such demand response for each billing interval.[60]

40. TAPS believes that, in total, the costs of accommodating wholesale demand response bids by selected retail customers outweigh the benefits. It asserts that the implementation of the Final Rule to accommodate wholesale demand response bids by retail customers will require RTOs and ISOs and load-serving entities to expend resources for uncertain benefits. For example, TAPS states that RTOs and ISOs will incur significant costs to design brand-new systems to accommodate, track, and verify demand response. Therefore, it asks that the Commission require RTOs and ISOs to evaluate the efficacy of ARC-based demand response programs, especially given the adverse impacts on load-serving-entity-administered demand response programs, and to implement them only if that evaluation demonstrates that the benefits outweigh the costs.[61]

b. Commission Determination

41. In the Final Rule, the Commission adopted the NOPR proposal to require RTOs and ISOs to amend their market rules as necessary to permit an ARC to bid demand response on behalf of retail customers directly into the RTO's or ISO's organized markets, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate. The Commission reasoned that such an action would reduce a barrier to demand response participation in the organized markets subject to Commission jurisdiction.[62] As discussed below, we affirm this broad finding, but deny in part and grant in part requests for rehearing on this issue.

i. Commission Jurisdiction

42. Although the rehearing requests present the issue of Commission jurisdiction from various points of view and with emphasis on various groups of market participants or activities (and we will answer these arguments in turn), they all include the same basic issue: whether the Commission has jurisdiction to make rules requiring the RTOs and ISOs to accept demand response bids.

43. Section 201(b) of the FPA confers jurisdiction on the Commission over the transmission of electric energy in interstate commerce, and sales of electric energy at wholesale in interstate commerce.[63] Sections 205 and 206 of the FPA confer upon the Commission the responsibility to ensure that rates and charges for transmission and wholesale power sales by public utilities, including any rule, regulation, practice or contract affecting them, are just and reasonable and not unduly discriminatory or preferential.[64] While FPA sections 201(f) and 201(b)(2) make clear that the Commission's authorities under Part II of the FPA do not apply to governmental entities and certain electric cooperatives, except as specifically provided, the Commission's regulation of the organized markets operated by RTOs and ISOs (which are public utilities) nevertheless affects governmental and cooperative entities that participate in those markets.

44. In exercising its FPA section 206 authority to regulate public utility wholesale sales, the Commission concluded that well-functioning competitive wholesale electric markets should reflect current supply and demand conditions, and that wholesale markets work best when demand can respond to the wholesale price. Thus, the Commission began this proceeding with the goal of eliminating those barriers to demand response participation in the organized markets, and to ensure comparable treatment of all resources in these markets.[65] The Final Rule's ARC requirement is one element of the Commission's effort to achieve this goal.

45. Courts have recognized that the Commission has broad authority under the FPA to identify practices that "affect" public utility wholesale rates under the FPA.[66] For instance, most recently, the DC Circuit held that it was within the Commission's jurisdiction to review ISO New England's annual calculation of the minimum amount of wholesale electric capacity that must be available to assure reliable service in the New England region.[67] The court stated that "even if all the [Installed Capacity Requirement] did was help to find the right price, it would still amount to a 'practice * * * affecting rates' " for purposes of Commission authority.[68]

[I]f a [transmission-dependent entity] with 100 MW of metered load in a given hour has a retail customer that has sold 5 MW of demand response energy into the RTO's energy imbalance market in that same hour, then to avoid double-counting the demand response that is already reflected in the [load-serving entity's] metered load, the RTO would charge the [load-serving entity] for 105 MWh of energy—*i.e.* as if the 5 MWh of demand response energy had been purchased by the [load-serving entity], delivered to the retail customer, and then re-sold. *Id.* at 19–20.

[58] *Id.* at 22. TAPS notes that such a deviation charge may not apply during an emergency, as provided elsewhere in Order No. 719.

[59] *Id.* (citing Southwest Power Pool, FERC Electric Tariff, Fifth Revised Volume No. 1, Attachment AE, sections 5.3 and 5.4).

[60] *Id.*

[61] *Id.* at 22–23.

[62] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 594; NOPR, FERC Stats. & Regs. ¶ 32,628 at P 83.

[63] 16 U.S.C. 824(b).

[64] Section 205(a) of the FPA charges the Commission with ensuring that rates and charges for jurisdictional sales by public utilities and "all rules and regulations affecting or pertaining to such rates or charges" are just and reasonable. *Id.* 824d(a). Section 206(a) gives the Commission authority over rate and charges by public utilities for jurisdictional sales as well as "any rule, regulation, practice or contract affecting such rates and charges" to make sure that they are just and reasonable and not unduly discriminatory or preferential. *Id.* 824e(a).

[65] In Order No. 890, the Commission found that sales of ancillary services by "load services. * * * should be permitted where appropriate on a comparable basis to service provided by generation resources." Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007).

[66] *See, e.g., City of Cleveland* v. *FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985) ("[T]here is an infinitude of practices affecting rates and service. * * * It is obviously left to the Commission, within broad bounds of discretion, to give concrete application to this amorphous directive.").

[67] *Connecticut Dep't of Public Util. Control* v. *FERC*, No. 07–1375, slip op. at 14–15 (D.C. Cir. June 23, 2009).

[68] *Id.* at 15. The court further stated that "[w]here capacity decisions about an interconnected bulk power system affect [Commission]-jurisdictional

46. The Commission has found on several occasions that demand response affects wholesale markets, rates, and practices and, therefore, issued orders on various aspects of electric demand response in organized markets. Some of these orders approved various types of demand response programs, including programs to allow demand response to be used as a capacity resource [69] and as a resource during system emergencies,[70] to allow wholesale buyers and qualifying large retail buyers to bid demand response directly into the day-ahead and real-time energy markets and certain ancillary services markets, particularly as a provider of operating reserves, as well as programs to accept bids from ARCs.[71]

47. Demand response affects public utility wholesale rates because decreasing demand will tend to result in lower prices and less price volatility.[72] The Commission has noted that demand response has both a direct and an indirect effect on wholesale prices. The direct effect occurs when demand response is bid directly into the wholesale market: lower demand means a lower wholesale price. Demand response at the retail level affects the wholesale market indirectly because it reduces a load-serving entity's need to purchase power from the wholesale market.[73] Demand response tends to flatten an area's load profile, which in turn may reduce the need to construct and use more costly resources during periods of high demand; the overall effect is to lower the average cost of producing energy.[74] Demand response can help reduce generator market power: the more demand response is able to reduce peak prices, the more downward pressure it places on generator bidding strategies by increasing the risk to a supplier that it will not be dispatched if it bids a price that is too high.[75] Moreover, demand response enhances system reliability.[76] Thus, because demand response directly affects wholesale rates, reducing barriers to demand response in the organized wholesale markets helps the Commission to fulfill its responsibility, under sections 205 and 206 of the FPA, for ensuring that those rates are just and reasonable.[77]

48. While the Commission, in regulating public utility wholesale sales under the FPA, may act on demand response participation in the organized markets, we emphasize that this proceeding is a very narrowly-focused rule with respect to demand response resources. It directs an RTO or ISO that operates an organized wholesale electric market—a market subject to the Commission's exclusive jurisdiction—to reduce certain barriers to demand response participation in that market.[78] We anticipate that reducing barriers to demand response participation in wholesale markets also may have beneficial effects as described above, including greater price stability and better information for market participants as to where they need to make grid improvements.

49. Several requests for rehearing argue that the Final Rule exceeds this narrow scope, and violates the separation of Federal and State jurisdiction, by requiring load-serving entities, including public power systems and cooperative utilities, to take affirmative action to consider the issue of retail aggregation by ARCs. However, our Final Rule did not challenge the role of States and others to decide the eligibility of retail customers to provide demand response and, as explained below, we are taking additional steps to address the burden allegedly imposed by our Final Rule on smaller entities.

50. Some rehearing requests, including those from TAPS and Joint Petitioners, ask us to assume that an ARC may not participate in RTO or ISO markets if the relevant State or local laws and regulations are unstated or do not clearly allow ARCs to bid into wholesale markets. We will grant rehearing only to the extent consistent with the compromise proposal by APPA and TAPS based on the RFA threshold of 4 million MWh as modified below. The RTO or ISO should not be in the position of having to interpret when the laws or regulations of a relevant electric retail regulatory authority are unclear. While we leave it to the relevant retail authority to decide the eligibility of retail customers, their decision or policy should be clear and explicit so that the RTO or ISO is not tasked with interpreting ambiguities.

51. However, as discussed below, we agree with APPA and TAPS that it is reasonable to take a different approach here with small utilities.[79] The Commission has previously distinguished small utilities using a 4

transmission rates for that system * * * they come within the Commission's authority," adding that "there is nothing special about capacity decisions that places them beyond the Commission's jurisdiction". *Id.* at 14–15.

[69] *See, e.g., PJM Interconnection, LLC*, 117 FERC ¶ 61,331 (2006); *Devon Power L.L.C.*, 115 FERC ¶ 61,340, *order on reh'g*, 117 FERC ¶ 61,133 (2006).

[70] *See, e.g., New York Indep. Sys. Operator, Inc.*, 95 FERC ¶ 61,136 (2001); *NSTAR Services Co.* v. *New England Power Pool*, 95 FERC ¶ 61,250 (2001); *New England Power Pool and ISO New England, Inc.*, 100 FERC ¶ 61,287, *order on reh'g*, 101 FERC ¶ 61,344 (2002), *order on reh'g*, 103 FERC ¶ 61,304, *order on reh'g*, 105 FERC ¶ 61,211 (2003); *PJM Interconnection, LLC*, 99 FERC ¶ 61,139 (2002).

[71] *See, e.g., New York Indep. Sys. Operator, Inc.*, 95 FERC ¶ 61,223 (2001); *New England Power Pool and ISO New England, Inc.*, 100 FERC ¶ 61,287, *order on reh'g*, 101 FERC ¶ 61,344 (2002), *order on reh'g*, 103 FERC ¶ 61,304, *order on reh'g*, 105 FERC ¶ 61,211 (2003); *PJM Interconnection, LLC*, 99 FERC ¶ 61,227 (2002).

[72] ANOPR, FERC Stats. & Regs. ¶ 32,617 at P 37.

[73] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 29.

[74] *Id.* P 30. Increasing the presence of demand response also provides market participants with better information about where they should and should not construct upgrades. "In current market contexts, constructing new generation facilities in response to a higher [installed capacity requirement] may even feel like an imperative. But petitioners have posited no source for that feeling other than internalization of the true costs of the alternatives, which is not only a requirement for efficient market outcomes, but, again, something the Commission may concededly pursue." *Connecticut Dep't of Public Util. Control* v. *FERC*, No. 07–1375, slip op. at 11 (D.C. Cir. June 23, 2009).

[75] *NOPR*, FERC Stats. & Regs. ¶ 32,628 *at* P 31.

[76] For example, "[b]y reducing electricity demand at critical times (*e.g.*, when a generator or a transmission line unexpectedly fails), demand response that is dispatched by the system operator on short notice can help return electric system (or localized) reserves to pre-contingency levels." Federal Energy Regulatory Commission, *Assessment of Demand Response and Advanced Metering: Staff Report*, Docket No. AD06–2–000, at 11 (Aug. 2006) (2006 FERC Staff Demand Response Assessment); *see also* Federal Energy Regulatory Commission, *Assessment of Demand Response and Advanced Metering: Staff Report*, at 50–53 (Dec. 2008) (describing the use of demand response during system emergencies in 2007 to ensure system reliability).

[77] Where a provision or term directly affects a wholesale rate, it is within the Commission's jurisdiction. *See, e.g., Connecticut Dep't of Public Util. Control* v. *FERC*, No. 07–1375, slip op. at 10 (D.C. Cir. June 23, 2009) (finding that the Commission has jurisdiction to directly or indirectly establish prices for capacity even for the purposes of incentivizing construction of new generation facilities); *Mississippi Industries* v. *FERC*, 808 F.2d 1525 (D.C. Cir. 1987), *vacated in part on other grounds*, 822 F.2d 1103 (D.C. Cir. 1987) (holding that the Commission had jurisdiction over the allocation of a nuclear plant's capacity and costs because it "directly affects costs and, consequently, wholesale rates."); *Municipalities of Groton* v. *FERC*, 587 F.2d 1296, (D.C. Cir. 1978); *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 540–56 (2007) (finding that maintaining adequate resources falls within Commission jurisdiction because it has a direct and significant effect on wholesale rates and services); *ISO New England, Inc.*, 119 FERC ¶ 61,161, at P 18–30 (2007) (same).

[78] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 3; NOPR, FERC Stats. & Regs. ¶ 32,628 at P 282.

[79] The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small business concern" as a business that is independently owned and operated and that is not dominant in its field of operation. *See* 5 U.S.C. 601(3), citing to Section 3 of the Small Business Act, 15 U.S.C. 632. The Small Business Size Standards component of the North American Industry Classification system defines a small utility as one that, including its affiliates is primarily engaged in the generation, transmission, or distribution of electric energy for sale, and whose total electric output for the preceding fiscal year did not exceed 4 million MWh. 13 CFR 121.202 (Sector 22, Utilities, North American Industry Classification System (NAICS)) (2004).

million MWh cutoff for purposes of granting waivers from Order No. 889's [80] standards of conduct for transmission providers [81] or determining whether a specific cooperative should be considered a non-public utility outside the scope of a refund obligation involving the California energy crisis.[82] Similarly, Congress used the 4 million MWh cutoff in EPAct 2005 when amending exclusions in section 201(f) of the FPA to include small electric cooperatives.[83] Congress also used this same cutoff to exempt small utilities from compliance with any rules or orders imposed under section 211A of the FPA, involving open access by unregulated transmitting utilities.[84] We believe the same considerations underlying those actions by Congress and the Commission apply here. Thus, we will grant rehearing and adopt herein APPA's and TAPS's alternative proposal, with modifications. We direct RTOs and ISOs to amend their market rules as necessary to accept bids from ARCs that aggregate the demand response of: (1) The customers of utilities that distributed more than 4 million MWh in the previous fiscal year, and (2) the customers of utilities that distributed 4 million MWh or less in the previous fiscal year, where the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an ARC. RTOs and ISOs may not accept bids from ARCs that aggregate the demand response of: (1) The customers of utilities that distributed more than 4 million MWh in the previous fiscal year, where the relevant electric retail regulatory authority prohibits such customers' demand response to be bid into organized markets by an ARC, or (2) the customers of utilities that distributed 4 million MWh or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an ARC.[85]

52. Petitioners argue that the Commission lacks jurisdiction over demand response because a retail customer's decision to reduce energy consumption does not fall within the Commission's authority under section 201 of the FPA. They assert that a reduction in consumption of energy does not constitute a wholesale sale or transmission of electric energy in interstate commerce. Petitioners miss the point. An RTO's or ISO's market rules are subject to our exclusive jurisdiction. These rules cover market bids from generators and from providers of demand response, which directly affect wholesale prices as discussed above. Accordingly, the Commission has found that it has jurisdiction to regulate the market rules under which an RTO or ISO accepts a demand response bid into a wholesale market.

53. The Commission, in acting within its FPA jurisdiction, is also furthering Congressional policy to encourage demand response programs under EPAct 2005:

> It is the policy of the United States that time-based pricing and other forms of demand response, whereby electricity customers are provided with electricity price signals and the ability to benefit by responding to them, *shall be encouraged*, the deployment of such technology and devices that enable electricity customers to participate in such pricing and demand response systems shall be facilitated, *and unnecessary barriers to demand response participation in energy, capacity and ancillary service markets shall be eliminated*.[86]

54. We recognize that demand response is a complex matter that is subject to the confluence of State and Federal jurisdiction. The Final Rule's intent and effect are neither to encourage or require actions that would violate State laws or regulations nor to classify retail customers and their representatives as wholesale customers, as Ohio PUC asserts. The Final Rule also does not make findings about retail customers' eligibility, under State or local laws, to bid demand response into the organized markets, either independently or through an ARC. The Commission also does not intend to make findings as to whether ARCs may do business under State or local laws, or whether ARCs' contracts with their retail customers are subject to State and local law. Nothing in the Final Rule authorizes a retail customer to violate existing State laws or regulations or contract rights. In that regard, we leave it to the appropriate State or local authorities to set and enforce their own requirements.

55. Finally, with regard to AEP's request for clarification, we note that this proceeding is a very narrowly-focused rule, as discussed above. The clarification that AEP is seeking involves State laws and regulations, and how they are interpreted in relation to the policies contained in this proceeding. It is not within the scope of this rulemaking to interpret individual State laws and regulations.

ii. Burden on Small Entities and Regulatory Flexibility Analysis

56. In regard to arguments concerning the burden of this rule on small entities and the need for RFA analysis, we reiterate that the Final Rule does not require a relevant electric retail regulatory authority to make any showing or to take any action in compliance with the Final Rule.[87] The NOPR specifically stated that those entities directly affected by this proceeding are the six RTOs and ISOs, namely, CAISO, NYISO, PJM, SPP, Midwest ISO, and ISO New England.[88] The Final Rule adopted this approach and established that its requirements, including the ARC requirement, apply only to RTOs and ISOs.[89]

57. TAPS and Joint Petitioners contend that the Commission's requirement that RTOs and ISOs accept bids from ARCs makes it imperative for relevant electric retail regulatory authorities to decide whether ARCs within their jurisdiction may offer demand response into wholesale markets. TAPS and Joint Petitioners argue that it would be a major undertaking for a retail regulator to clarify for an RTO or ISO whether an ARC may aggregate the demand response of retail customers within the service territories of the load-serving entities it regulates. However, these entities have not provided any new arguments on rehearing, and we continue to find that the Final Rule does not require retail regulators to take any action whatsoever. The Final Rule indicated only that the RTO and ISO must accept bids from an ARC unless the laws or regulations of the relevant electric retail regulatory authority do not permit the ARC to bid. It did not require that retail regulators consider this issue or make any representation, nor did it require the RTO or ISO to impose on retail regulators the task of

[80] *Open Access Some-Time Informotion System ond Stondords of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035, *clorified*, 77 FERC ¶ 61,253 (1996), *order on reh'g*, Order No. 889–A, FERC Stats. & Regs. ¶ 31,049, *reh'g denied*, Order No. 889–B, 81 FERC ¶ 61,253 (1997), *off'd in relevant port sub nom. Tronsmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2006).

[81] *See Wolverine Power Supply Coop.*, 127 FERC ¶ 61,159, at P 15 (2009).

[82] *See Son Diego Gas & Elec. Co.* v. *Sellers of Energy ond Ancillory Services in Morkets Operoted by the CAISO*, 125 FERC ¶ 61,297, at P 24 (2008).

[83] 16 U.S.C. 824(f).

[84] 16 U.S.C. 824j–l(c)(1).

[85] In the Final Rule, the Commission allowed RTOs and ISOs to specify certain requirements for an ARC's bids, including certification that participation is not precluded by the relevant electric retail regulatory authority. Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 158g.

[86] EPAct 2005, section 1252(f) (emphasis added).

[87] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 155.

[88] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 291.

[89] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 155, 602.

communicating this lack of permission at all, much less through a complex or burdensome procedure.

58. In its NOPR comments, APPA proposed an alternative approach, which Joint Petitioners and TAPS support on rehearing. APPA suggested that the retail regulators of public power systems that have output of more than 4 million MWh in one year would need to notify their RTOs or ISOs if their local election was to prohibit ARCs from aggregating retail customers. In the case of public power systems that do not meet this size requirement, however, the presumption would be reversed: the RTO or ISO would be required to assume that aggregation was not permitted unless the retail regulator instructed it to do otherwise.

59. In response to those comments, we reiterate that the Commission does not intend to impose any affirmative obligation to act on relevant electric retail regulatory authorities. We will, however, grant rehearing in part and adopt a modified version of APPA's proposal. As indicated above, the Commission believes that using a 4 million MWh cutoff for purposes of distinguishing small utilities is appropriate.[90]

60. Therefore, we direct RTOs and ISOs to amend their market rules as necessary to accept bids from ARCs that aggregate the demand response of: (1) The customers of utilities that distributed more than 4 million MWh in the previous fiscal year, and (2) the customers of utilities that distributed 4 million MWh or less in the previous fiscal year, where the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an ARC. RTOs and ISOs may not accept bids from ARCs that aggregate the demand response of: (1) The customers of utilities that distributed more than 4 million MWh in the previous fiscal year, where the relevant electric retail regulatory authority prohibits such customers' demand response to be bid into organized markets by an ARC, or (2) the customers of utilities that distributed 4 million MWh or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an ARC. Our adoption of a modified version of APPA's alternative proposal provides that relevant electric retail regulatory authorities of small utilities meeting the above-noted criteria need not consider this issue except to permit ARCs to aggregate the demand response of retail customers of such small utilities.

61. With regard to the arguments that the Commission erred by failing to do an RFA analysis, we note that if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, as we have done in the Final Rule, it is not required to conduct an RFA analysis.[91] RFA does not require an agency to assess the impact of a rule on all small entities that may be affected by a rule, only those entities that would be directly regulated by the rule.[92] While State and local laws and regulations will determine whether many utilities—large or small—may be affected by this rule, the rule directly regulates only RTOs and ISOs.

62. Further, we reiterate that in *American Trucking Associations*, the court found that because the States, not EPA, had direct authority to impose regulations on small entities, EPA's rule did not have a direct impact on small entities. Accordingly, based on its holding in *Mid-Tex*, the court held that EPA is not required to conduct an RFA analysis.[93] We reject TAPS's premise that this case is inapplicable to the issue of whether an RFA analysis is required for Order No. 719 because RTOs and ISOs cannot mitigate the burden allegedly placed on small entities. The court in *American Trucking Associations* did not hold that whether the small entities at issue would be burdened by the EPA's action *depended* on the State's intermediate and discretionary action. Rather, the court noted that a State, under its broad discretion to determine how it implements EPA's rule, may choose not to comply with EPA's rule altogether. This would require EPA to adopt an implementation plan of its own and, thereby, impose a direct burden on small entities.[94] The court noted that in such a circumstance, EPA stated that it will do an RFA analysis. Therefore, whether RTOs and ISOs are able to mitigate this burden is not an issue and does not affect the finding that Order No. 719 does not directly impact small entities, as in *American Trucking Associations*.

63. As stated earlier, the Final Rule does not require relevant electric retail regulatory authorities to take any specific action. As such, there was no direct impact on small entities associated with the draft regulations, and the Final Rule did not require a detailed analysis of alternative proposals that would have allegedly mitigated such a burden. We also note that while the requirements in the Final Rule will have no direct impact on small entities, we recognize the concerns raised by APPA and TAPS. Therefore, as noted above, we grant rehearing and adopt a modified version of APPA's alternative proposal.

64. Each RTO or ISO is required to submit, within 90 days of the date that this order on rehearing is published in the **Federal Register**, a compliance filing with the Commission, proposing amendments to its tariffs or otherwise demonstrating how its existing tariffs and market design comply with the revisions adopted herein.

iii. Effect on Existing Demand Response Programs and on Rates, Metering, and Billing Protocols

65. In the Final Rule, we found that aggregating small retail customers into larger pools of resources expands the amount of resources available to the market, increases competition, helps reduce prices to consumers, and enhances reliability.[95] Petitioners have not demonstrated to the contrary. For example, petitioners have failed to present evidence that demand response aggregated by an ARC does not have the effect of lowering prices for all customers and maintaining reliability at a lower cost than would have been the case if the RTO or ISO had instead dispatched a resource that submitted a higher bid.

66. However, petitioners argue that the ARC requirement's effect on the existing demand response program of load-serving entities is substantial, and that the Commission failed to adequately consider such effects and certain protocol modifications needed to accommodate the Final Rule's policy. We note that petitioners have not provided clear evidence of such adverse impacts, but have merely asserted that they would occur if retail customers are permitted to participate in wholesale markets via ARCs. Also, petitioners have not shown why the issues they raise cannot be adequately addressed by each RTO and ISO through the

[90] *See* discussion *supra* P 51.

[91] 16 U.S.C. 605(b).

[92] *Mid-Tex Electric Corp., Inc.* v. *FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (Mid-Tex) ("Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy").

[93] *American Trucking Associations*, 175 F.3d at 1044.

[94] *Id.* at 1044 ("Only if a [s]tate does not submit a [state implementation plan] that complies with [EPA's rule], must the EPA adopt an implementation plan of its own, which would require the EPA to decide what burdens small entities should bear").

[95] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 154.

stakeholder process and included as part of the RTO's or ISO's compliance filing.[96] As a result, we find that petitioners' arguments are speculative; they have not persuaded us that the policy decisions made in the Final Rule were the result of error. Therefore, we deny rehearing.

67. TAPS asks us to clarify that the Final Rule would not undermine or require any changes to existing retail aggregation programs. We reiterate that the Final Rule is designed to eliminate barriers to demand response participation in RTO or ISO markets. To that end, the Final Rule requires an RTO or ISO to accept bids into its markets from an ARC, unless the laws or regulations of the relevant electric retail regulatory authority for utilities that had total electric output for the preceding fiscal year of more than 4 million MWh do not permit a retail customer to participate. For smaller systems under the RFA size requirement, ARCs may aggregate retail customers only if affirmatively permitted to do so by the relevant electric retail regulatory authority. Each RTO or ISO is required to work with its stakeholders to propose methods of implementing this requirement in its region. The intent of the Final Rule is not to interfere with, undermine, or change existing demand response programs. Nothing in the Final Rule would require a State or local regulator to take any action or prevent them from: (1) Preserving existing aggregation programs, in whatever fashion is appropriate for its jurisdictional area; or (2) authorizing retail customers, via an ARC, to participate in wholesale markets.

68. TAPS and Joint Petitioners emphasize that existing retail aggregation programs provide significant benefits that would be adversely impacted or lost by the Final Rule's ARC requirement. This is not the proper forum to address these issues, which are for the relevant electric retail regulatory authority to consider. It is up to the relevant electric retail regulatory authorities, if they so choose, to decide whether existing retail aggregation programs provide benefits and whether retail customer participation in wholesale demand response programs, individually or through an ARC, would adversely affect those programs and, if so, whether and how to permit such participation. Therefore, TAPS and Joint Petitioners may raise these issues with the relevant electric retail regulatory authority.

69. TAPS also contends that the Final Rule's ARC requirement will affect billing, metering, and settlement protocols at both the wholesale and retail level because major system modifications are needed to address double counting, phantom energy, and verification measures. TAPS and others also express concern that a load-serving entity may buy too much power if its retail customer bids in demand response and the load-serving entity is unaware of the bid, creating an over-scheduling penalty for the load-serving entity. We note that several RTOs and ISOs currently have demand response programs where demand response resources participate either individually or through an ARC. Some of these RTOs and ISOs have addressed the type of concerns raised by TAPS with regard to double counting, verification procedures, deviation charges and the like. We will require each RTO or ISO, through the stakeholder process, to develop appropriate mechanisms for sharing information about demand response resources to address the concerns raised by TAPS and others. We direct each RTO and ISO, through the stakeholder process, to develop, at a minimum, a mechanism through which an affected load-serving entity would be notified when load served by that entity is enrolled to participate, either individually or through an ARC, as a demand response resource in an RTO or ISO market and the expected level of that participation for each enrolled demand response resource.[97] Finally, we direct each RTO and ISO to submit a compliance filing no later than 180 days from the date of this order indicating how it has complied with these requirements.

70. Therefore, as stated in the Final Rule, we require each RTO or ISO to work with its stakeholders, including load-serving entities and ARCs, to develop and implement protocols that will address those issues and allow ARCs to operate within the organized market. Those protocols should address those issues raised by petitioners, including double-counting, concerns regarding deviation, underscheduling, and uplift or other charges that may be incurred if real-time load is below that scheduled in the day-ahead market, as well as metering, billing, settlement, information sharing and verification measures to be submitted in an RTO's or ISO's compliance filing ordered above.

71. We again reject the argument that the Commission should require RTOs and ISOs to evaluate the efficacy of ARC-based demand response programs given the costs involved in modifying systems to accommodate bids by retail customers and the adverse impact on load-serving entity administered programs. As stated above, RTOs and ISOs, in conjunction with their stakeholders, including ARCs and load-serving entities, are in the best position to decide whether to incur the costs of conducting such an analysis. In recognition of regional differences, the Final Rule directed each RTO and ISO to work with its stakeholders to discuss and resolve concerns, including demonstrating net benefits of its program and to address these issues in its compliance filing with the Commission.[98]

3. Market Rules Governing Price Formation During Periods of Operating Reserve Shortage

72. In the Final Rule, the Commission found that existing RTO and ISO market rules that do not allow prices to rise sufficiently during an operating reserve shortage to allow supply to meet demand are unjust and unreasonable, and may be unduly discriminatory.[99] The Commission stated that these rules may not produce prices that accurately reflect the true value of energy in such an emergency and, by failing to do so, may harm reliability, inhibit demand response, deter new entry of demand response and generation resources, and thwart innovation.[100]

73. The Commission established reforms to remove barriers to demand response by requiring RTOs and ISOs to reform their market rules in such a way that prices during operating reserve shortages more accurately reflect the value of energy during such shortages. The Final Rule required each RTO or ISO to reform or demonstrate the adequacy of its existing market rules to ensure that the market price for energy reflects the value of energy during an operating reserve shortage.[101] Each RTO or ISO may propose in its compliance filing one of four suggested approaches

[96] The Final Rule provided regional flexibility for each RTO and ISO to work with its stakeholders in proposing market rules appropriate for its region. Id. P 155. Interested parties could participate in that stakeholder process. By filing comments on the RTO's or ISO's subsequent compliance filing, interested parties had an additional opportunity to address the Commission directly on any remaining concerns with the RTO's or ISO's implementation proposal. The Commission will address the merits of such implementation issues on a case-by-case basis.

[97] TAPS requested, among other things, that we direct the RTO or ISO to provide certain detailed information in real-time to affected load-serving entities. TAPS has failed to demonstrate the need for such data in real-time.

[98] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 159.

[99] *Id.* P 192.

[100] *Id.*

[101] *Id.* P 194.

to pricing reform during an operating reserve shortage, or develop its own alternative approach to achieve the same objectives.[102] The Final Rule also required each RTO or ISO to support its compliance filing with adequate factual support. To that end, the Commission outlined six criteria it will consider in reviewing whether the factual record compiled by the RTO or ISO meets the requirements of the Final Rule.[103] The Final Rule also allowed an RTO or ISO to phase in any new pricing rules for a period of a few years, provided that this period is not protracted.

a. *Requests for Rehearing*

i. *Shortage Pricing Proposal*

74. Several petitioners requested rehearing of the Commission's shortage pricing requirement on grounds that the requirement would eliminate price caps during periods when bidders could exercise market power; that customers do not yet have in place the tools to respond to price; that there is not sufficient market mitigation in place to ensure a competitive result; that the Commission did not provide sufficient evidence that its shortage pricing requirement would achieve its stated goals; or that the Commission ignored arguments or evidence provided by NOPR commenters indicating that the Commission's proposal may not achieve the desired results.

75. Joint Petitioners argue that the Commission failed to substantiate its finding that existing RTO and ISO market rules are unjust and unreasonable because they do not allow prices to rise sufficiently during operating reserve shortages. Joint Petitioners state that any higher prices during operating reserve shortages would reflect market power, not efficient shortage pricing.[104] They state that given the existing market power problems in organized markets, raising price caps can result in prices that are inefficiently high. Joint Petitioners note that, in concluding that market power will be adequately mitigated through the shortage pricing requirement, the Commission ignored contrary evidence from APPA and NRECA.[105]

76. Similarly, TAPS states that the Commission must have empirical proof that existing competition would ensure that the actual price is just and reasonable before it permits RTOs and ISOs to remove price caps during emergencies. Yet, according to TAPS, the Final Rule's shortage pricing requirement lacks evidence that existing offer and bid caps actually limit demand response, that lifting such caps will attract investment in generation and demand response sufficient to protect consumers from market power, and that consumers will be able to protect themselves from high prices.[106] In light of contrary evidence, TAPS contends that the Commission must provide evidence that consumers will be able to protect themselves from high prices through demand response programs. For instance, TAPS states that existing evidence indicates that the short-run demand curve for electricity is highly inelastic.[107]

77. SMUD argues that the Commission's decision to lift price and bid caps constitutes an arbitrary and unexplained departure from its precedent.[108] It states that the Commission has previously established that demand response technologies are insufficiently developed to permit the relaxation of bid caps[109] and the Final Rule fails to demonstrate how circumstances are sufficiently different to warrant a change in Commission policy.

78. Joint Petitioners maintain that allowing real-time market-clearing prices to exceed price caps during periods of shortage will increase price volatility, which in turn may increase hedging costs.[110] Industrial Coalitions submit that the Commission should develop metrics for measuring demand elasticity and for evaluating whether higher and more volatile prices actually become a key factor in capital deployment decisions. In support, they argue that demand response infrastructure remains underdeveloped, and therefore cannot serve as a viable check on the exercise of market power.[111]

79. Pennsylvania PUC asserts that without real-time demand response, the Commission's assumption that shortage pricing will represent the true value of supply is false because only supply-side resources will be able to respond to prices and such one-sided markets cannot be protected from the exercise of market power.[112] Joint Petitioners also argue that the Final Rule wrongly concluded that demand response itself will act as a market power mitigation measure based on a faulty assumption that end-use customers will be able to respond to shortage pricing by reducing their demand.[113]

80. Similarly, Old Dominion asserts that the Commission erred in mandating a shortage pricing requirement, without first addressing an approach to eliminate non-price barriers. It contends that the Commission noted, but did not address, its NOPR comments that consumers will face increased prices without the ability to respond to price signals. Old Dominion contends that it is difficult to ascertain whether legitimate market forces or the exercise of market power is the cause of increased prices, and that the solution is not to mandate removal of price protections that are necessary for market-based rates to be just and reasonable. Old Dominion adds that the capacity auction structure under PJM's Reliability Pricing Model is designed to capture scarcity rents; that there should not be double collection through an aggressive shortage pricing construct; and that there is an existing construct that seeks to meet the reliability and incentive goals of the Final Rule.[114] Therefore, it requests that the Commission take up the issue of

[102] The four approaches are: (1) RTOs and ISOs would increase the energy supply and demand bid caps above the current levels only during an emergency; (2) RTOs and ISOs would increase bid caps above the current level during an emergency only for demand bids while keeping generation bid caps in place; (3) RTOs and ISOs would establish a demand curve for operating reserves, which has the effect of raising prices in a previously agreed-upon way as operating reserves grow short; and (4) RTOs and ISOs would set the market-clearing price during an emergency for all supply and demand response resources dispatched equal to the payment made to participants in an emergency demand response program. *Id.* P 208.

[103] The six criteria are: (1) Improve reliability by reducing demand and increasing supply during periods of operating reserve shortages; (2) make it more worthwhile for customers to invest in demand response technologies; (3) encourage existing generation and demand resources to continue to be relied upon during an operating reserve shortage; (4) encourage entry of new generation and demand resources; (5) ensure that the principle of comparability in treatment of and compensation to all resources is not discarded during periods of operating reserve shortage; and (6) ensure market power is mitigated and gaming behavior is deterred during periods of operating reserve shortages including, but not limited to, showing how demand resources discipline bidding behavior to competitive levels. *Id.* P 246–47.

[104] Joint Petitioners at 32–33.

[105] *Id.* at 44 (citing NRECA Affidavit at P 20–55).

[106] TAPS at 33 (citing TAPS NOPR Comments at 24–27).

[107] *Id.* at 39.

[108] For example, SMUD explains that in NYISO, the Commission imposed a bid cap based on its finding that the NYISO market lacks demand-side responsiveness to prices and that it has tight supplies. *Id.* at 5. (citing *New York Indep. System Operator*, 97 FERC ¶ 61,154, at 61,673 (2001)). SMUD also adds that the Commission previously found that price caps are necessary to prevent opportunistic pricing during periods of capacity shortages and that bid caps provide a safety net to contain prices in peak periods when supply is short. SMUD at 4. (citing *ISO New England, Inc.*, 97 FERC ¶ 61,090, at 62,469, 61,470–471 (2001)).

[109] *Id.* at 4. (citing *Nstar Serv. Co.* v. *New England Power Pool*, 92 FERC ¶ 61,065, at 62,198–99 (2000)).

[110] Joint Petitioners at 41.

[111] Industrial Coalition at 7–8.

[112] Pennsylvania PUC at 5.

[113] Joint Petitioners at 48–49.

[114] Old Dominion at 4.

whether to mandate shortage pricing only after it has addressed proposals on eliminating barriers to demand response. In the alternative, Old Dominion renews its request that the Commission adopt a presumption that such pricing incentives are not necessary, and require RTOs and ISOs that believe otherwise to make a factual demonstration in support of their proposal.[115]

81. Ohio PUC states that the Commission adopted a proposal to remove bid caps for generation during periods of operating reserve shortage, but should also consider raising bid caps only for demand bids until market power concerns are alleviated and the market for demand response is more fully developed.[116]

82. Joint Petitioners note that if the Commission is serious about including consumer protections, including meaningful market power mitigation mechanisms in RTO and ISO shortage pricing filings, the Commission should require evidentiary hearings regarding the RTO's and ISO's shortage pricing proposals and the sufficiency of their proposed mitigation mechanisms.[117]

83. TAPS contends that the Commission failed to clarify the definition of operating reserve shortage and ignored TAPS's concern that the definition may be too broad. TAPS also notes that the preamble to the Final Rule suggests that the Commission intended to define an operating reserve shortage as falling short of meeting the operating reserve requirements under the reliability standards approved by the Commission under FPA section 215,[118] yet the regulatory text provides a definition without referring to these reliability standards. Therefore, it suggests that the Commission revise the definition to restrict shortage pricing to instances where the RTO or ISO risks being unable to replenish operating reserves within the period specified in applicable reliability standards.[119]

ii. Four Shortage Pricing Approaches and Criteria Requirements

84. Several petitioners requested rehearing of the Commission's shortage pricing approaches on grounds that the Commission failed to consider evidence presented by NOPR commenters that one or more of the approaches will not achieve the desired results; that the Commission did not adequately consider alternative approaches or criteria presented by NOPR commenters; and that the Commission needed to provide more direction to RTOs and ISOs on how to implement its proposal and to provide evidence of its expected benefits.

85. TAPS states that the Commission ignored NOPR comments regarding the defects of the four shortage pricing approaches. TAPS argues that the four approaches are not just and reasonable because they: (1) Fail to protect consumers from market power; (2) are premised on unsupported assumptions about bidding behavior and consumers; (3) require the adoption of particular wholesale market structures that have not been established in all RTOs and ISOs; and (4) may encourage gaming.[120]

86. Joint Petitioners argue that the Commission acted arbitrarily and capriciously by failing to consider evidence from NOPR comments, including those provided by NRECA, that the four shortage pricing approaches will not achieve the Commission's stated goals.[121] They assert that the four approaches will: (1) Fail to protect consumers and lead to unjust and unreasonable rates; (2) undermine reliability or preserve reliability only by unlawfully shifting rents from consumers to generators; (3) encourage behavior by generators that creates emergencies; and (4) not attract new supply resources to real-time or long-term markets.[122]

87. Joint Petitioners and TAPS argue that the Final Rule failed to discuss the merits of NRECA's alternative approach, which was to allow only demand response resources to bid prices higher than the current bid caps during emergencies. Under this approach, Joint Petitioners state that demand response resources would be paid the highest clearing price bid by demand response resources; however, generators would receive the highest capped price bid by generating resources needed to clear the market.[123] TAPS states that this approach would have potential benefits for emergencies, with fewer adverse consequences than any of the Final Rule's four approaches. Therefore, it asks the Commission to address the merits of NRECA's approach and modify the regulatory text to accommodate this approach.[124] Joint Petitioners argue that the Commission acted arbitrarily and capriciously in failing to consider NRECA's detailed arguments and evidence which they claim show that the four shortage pricing approaches will result in unjust and unreasonable rates and charges, not the beneficial results that the Final Rule anticipates.

88. Joint Petitioners assert that generator resources and demand response resources are not similarly situated and, therefore, it is not unjust and unreasonable or unduly discriminatory under the FPA to compensate them differently. According to Joint Petitioners, during generation scarcity, generators already make all of their generation resources available to the market; hence, they can take no additional actions to balance supply and demand. However, they assert that demand response resources are able to take further action to balance supply and demand by reducing their demand.[125] Therefore, the comparability principle does not require that the same price to be paid to both generators and demand responders to bring supply and demand into balance.

89. Joint Petitioners argue that the Commission failed to address APPA's proposal for eight additional criteria intended to better protect consumers from the exercise of market power and unjust and unreasonable rates.[126] They also contend that the Commission failed to address NRECA's request that the Commission require RTOs and ISOs to quantify the benefits of proposed changes and to demonstrate that they exceed the costs, which should include the expected costs of market power.[127]

90. Similarly, TAPS asserts that the Final Rule ignored its NOPR comments for additional criteria to strengthen the factual showing required for RTOs and ISOs in their shortage pricing compliance filings. TAPS believes that its proposed criteria would address market power and provide accountability.[128]

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[115] *Id.* at 5–6.

[116] Ohio PUC at 7.

[117] They note that the Commission never addressed APPA's request for full evidentiary hearings. *Id.* at 49 (citing APPA NOPR Comments at 54–55, 62, 64).

[118] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 251.

[119] TAPS at 54–56.

[120] *Id.* at 42–45.

[121] Joint Petitioners at 35 (citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 235).

[122] *Id.* at 41.

[123] *Id.* at 49–50 (citing NRECA NOPR Comments at 29).

[124] TAPS states that the Final Rule's regulatory text language in section 35.28(g)(1)(iv)(A) would preclude an RTO or ISO from proposing the NRECA approach or any other beneficial demand response program. Thus, it requests the following modifications:

> Commission-approved ISOs and RTOs must modify their market rules to allow *(1)* the market-clearing price during periods of operating reserve shortage to reach a level that rebalances supply and demand *or (2) payments to demand response resources. In either case, the rules must* [so as to] maintain reliability while providing sufficient provisions for mitigating market power.

TAPS at 48 (citing TAPS NOPR Comments at 3).

[125] Joint Petitioners at 42.

[126] *Id.* at 51–52.

[127] *Id.* at 53.

[128] *Id.* at 49.

91. TAPS also seeks rehearing of the Commission's rejection of Pacific Gas & Electric Corporation's (PG&E) proposed additional criteria, especially with regard to the cost effectiveness of the Final Rule's shortage pricing requirements. TAPS argues that the Commission did not provide a reasoned basis for rejecting PG&E's proposed criteria. It adds that the Commission's failure to require any accountability for the costs imposed by the Final Rule's shortage pricing requirements is contrary to the GAO Report's recommendations.[129]

92. Joint Petitioners request that the Commission vacate the relevant criteria and regulations, and undertake a successor rulemaking with a new record to develop demand response pricing policies that meet the statutory requirements of the FPA.[130]

b. Commission Determination

93. The requests for rehearing do not convince us that the policy decisions made in the Final Rule were the result of error. We therefore affirm our finding in the Final Rule that existing RTO and ISO market rules that do not allow for prices to rise sufficiently during an operating reserve shortage to allow supply to meet demand are unjust, unreasonable, and may be unduly discriminatory. The shortage pricing proposal adopted in the Final Rule is intended to correct this issue while providing protection against the exercise of market power. Therefore, we deny rehearing on this issue.

i. Shortage Pricing Proposal

94. Several petitioners state that the Commission lacked evidence for establishing shortage pricing requirements. We disagree. Based on information gathered from three technical conferences [131] and comments in response to the ANOPR and the NOPR, the Commission found that today's RTO and ISO market rules may not produce rates that accurately reflect the true value of energy during periods of operating reserve shortages. The Commission determined that such inaccurate prices during an emergency may harm reliability, inhibit demand response, deter new entry of demand response and generation resources, and thwart innovation.[132] Therefore, the Commission concluded that RTO or ISO market rules that do not allow for prices to rise sufficiently during an operating-reserve shortage to allow supply to meet demand are unjust, unreasonable, and may be unduly discriminatory.[133]

95. We disagree with the arguments that the Final Rule's shortage pricing requirement will result in the exercise of market power or lead to increased price volatility, or that consumers will not be protected from high prices, or that it is a departure from Commission precedent because it removes bid and price caps that are in place to mitigate market power. As stated in the Final Rule, the Commission is not taking any action to remove bid caps or to remove market power mitigation in regional markets. Rather, the Commission is requiring each RTO and ISO to demonstrate that its market rules accurately reflect the value of energy during reserve shortage periods or to propose changes in its rules to achieve this objective. Each of the Commission's four proposals maintains bid and price caps, but would allow price caps to rise during shortage periods provided that the RTO or ISO demonstrates that adequate market power mitigation provisions are in place. Each RTO or ISO also is free to propose other pricing approaches and associated market power mitigation that meet the purposes and criteria described in the Final Rule.[134] The RTOs' and ISOs' compliance filings are subject to Commission review and approval. Also, to guard the consumer against exploitation by sellers, the Commission required each RTO and ISO to adequately address market power issues in the compliance filing and for MMUs to provide their views to the Commission on any proposed reforms.[135]

96. With regard to arguments that the Final Rule provided no evidence that existing shortage pricing rules are inhibiting investment in demand response resources, we note that the issue is not whether existing market rules remain workable. As we have explained many times, one of the Commission's goals in this proceeding is to eliminate barriers to demand response resources' participation in organized energy markets. If, as petitioners foresee, higher shortage prices result from amending market rules, those prices could be expected to attract investment in both demand response technology and generation by providing opportunities for a higher return on investment—and the entry of demand response over time may lead to lower prices in the long run. We are concerned that such investments may not occur under existing rules because, as at least one commenter observed in response to the NOPR "existing market rules do not accurately reflect the value of energy during periods of shortage and, therefore may deter new entry of demand response and generation resources." [136] Also, we do not find that it is necessary to develop metrics for measuring demand elasticity or for evaluating the impact that volatile prices may have on capital deployment decisions, as Industrial Coalitions claim. As noted above, the Commission's goal in this proceeding is to eliminate barriers to demand response participation in RTO and ISO markets, and it is reasonable to expect that higher shortage prices will encourage investment in additional generation and demand response resources.

97. In response to TAPS's statement that a highly inelastic demand curve means that consumers cannot protect themselves from high prices, the Commission notes first that demand is not necessarily inelastic when customers have appropriate notice and prices,[137] and second that even a relatively small amount of demand response in a shortage can lower market prices significantly for all customers.

98. Several petitioners assert that customers are not able to respond to prices in real-time and, therefore, demand response mechanisms must be in place before changes to mitigation rules are considered. We agree with Pennsylvania PUC, Old Dominion, Industrial Coalitions, and others that demand response infrastructures remain underdeveloped for many regions. Developing mechanisms to allow prices to reflect the true value of energy during an emergency should encourage development of demand response infrastructure. With improved price

[129] *Id.* at 53 (citing United States Government Accountability Office, Report to the Committee on Homeland Security and Governmental Affairs, U.S. Senate, *Electricity Restructuring: FERC Could Take Additional Steps to Analyze Regional Transmission Organizations' Benefits and Performance* (Sept. 2008), *available at http://www.gao.gov/new.items/d08987.pdf*) (2008 GAO Report)).

[130] Joint Petitioners at 54.

[131] The Commission held three technical conferences in 2007 to gather information and address issues on competition at the wholesale level and other related issues. *See* NOPR, FERC Stats. & Regs. ¶ 32,628 at P 2.

[132] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 192; NOPR, FERC Stats. & Regs. ¶ 32,628 at P 107.

[133] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 192.

[134] *Id.* P 195.

[135] *Id.* P 235.

[136] *Id.* P 187 (citing PJM Power Providers NOPR Comments at 3).

[137] For example, a critical peak pricing experiment in California in 2004 determined that small residential and commercial customers are price responsive and will produce significant demand reductions. Participants in the California peak pricing experiment reduced demand by 13 percent on average and by as much as 27 percent when price signals were coupled with automated controls, such as controllable thermostats. 2006 FERC Staff Demand Response Assessment at 13.

signals, more buyers would find it worthwhile to invest in technologies that allow them to respond to prices. As noted in the Final Rule, full deployment of advanced meters and complete participation by all load is not needed to help cope with operating reserve shortages. Demand response programs that currently allow a fraction of the load to respond can have a significant positive effect on system reliability and help reduce prices for all.

99. With regard to Old Dominion's request that the Commission address each RTO's or ISO's proposal for eliminating barriers to demand response before mandating shortage pricing, and Joint Coalitions' concern that existing demand response cannot check the exercise of market power, we note that the Final Rule requires each RTO and ISO to provide evidence regarding the ability of demand resources to mitigate market power and how market power will be monitored.[138] The Commission will examine the shortage pricing proposals submitted in each RTO's and ISO's compliance filing and will approve the proposals only if they meet the criteria established in the Final Rule.

100. Finally, with regard to TAPS's request for revision of the definition of operating reserve shortage in the regulatory text, we decline to revise the regulatory text because we do not believe the definition is either inadequate or inconsistent with the discussion in the preamble of the Final Rule. The regulatory text provided a short general definition of an operating reserve shortage and the preamble declined to provide a detailed specification of when an operating reserve shortage exists, stating that the North American Electric Reliability Corporation already specifies procedures for determining when a system operator is out of compliance with the reliability standard and therefore when it has an operating reserve shortage. These standards are well known to RTOs and ISOs and their stakeholders.[139] Given that the level of operating reserves required by the reliability standards depend on the characteristic of each system and cannot be correctly reduced to a single number that applies to every system, the Commission found that it would be best not to adopt in these regulations a new and separate specification of when an operating reserve shortage exists. The Commission found that if it were to duplicate the provisions of the reliability standard in this rulemaking, it would be cumbersome for reliability organizations to improve their specifications of when such a shortage exists without also having to seek a change in our regulations. Therefore, we deny rehearing of this request.

101. We reject Joint Petitioners' request that we require by rule an evidentiary hearing to determine the justness and reasonableness of each RTO's and ISO's shortage pricing proposal. We find that at this stage it is premature to establish a requirement for such evidentiary hearings. All concerned parties have now had an opportunity to comment on the RTOs' and ISOs' compliance filings, and the Commission will determine on a case-by-case basis whether evidentiary hearings are warranted. We reject Joint Petitioners' request to vacate the rulemaking provisions on shortage pricing and institute a new rulemaking. We find that the Joint Petitioners have not provided any new arguments or evidence that would warrant such action.

ii. Four Shortage Pricing Approaches and Criteria Requirements

102. Several petitioners find fault with the four shortage pricing approaches, stating that they fail to protect customers from the exercise of market power and lead to other adverse consequences. We find that these petitioners have not raised any new arguments on rehearing and deny rehearing on this issue.

103. We emphasize that the Final Rule did not establish the shortage rates to be implemented, or even one particular approach to shortage pricing. In particular, the Final Rule did not require the first approach of raising bid caps, as some petitioners suggest. Rather, it required RTOs and ISOs to make a compliance filing, in consultation with their customers and other stakeholders, to establish an approach to shortage pricing during periods of operating reserve shortage or to show that their existing rules satisfy the Final Rule. Further, this compliance filing must make several of the demonstrations that petitioners contend are lacking in the Final Rule, such as ensuring that market power is mitigated and gaming behavior is deterred during periods of operating reserve shortages.[140] Only after such filings have been submitted will the Commission determine, case by case for each RTO or ISO, if the existing or proposed pricing rules—which could include, but are not required to include, raising bid caps—are just and reasonable and sufficient to meet the stated goals of this proceeding.[141] The Commission provided a menu of options through the four approaches or any other approach that the RTO or ISO deems appropriate. Therefore, an RTO or ISO and its stakeholders are free to consider approaches other than the four approaches in the Final Rule and propose it to the Commission, provided it satisfies the requirements in the Final Rule.

104. With regard to NRECA's alternative approach for pricing reform, we reiterate that the Final Rule did not mandate any specific approach to shortage pricing. It presented four approaches to shortage pricing, but left the RTOs and ISOs with freedom to develop the solutions that best suit their regions.[142] RTOs and ISOs may consider NRECA's alternative proposal, or others not presented in the Final Rule, as they see fit.[143] We therefore disagree with Joint Petitioners' contention that the Commission erred in failing to require NRECA's proposal and in overlooking evidence that the four approaches will result in unreasonable rates and charges. Such analysis is most appropriately left to the compliance process, where the Commission can examine how the RTO's or ISO's chosen approach or approaches to shortage prices will work in its region.

105. Joint Petitioners and TAPS argue that the Final Rule ignored some proposals for additional criteria aimed at addressing their concerns, including market power and accountability. While the Final Rule did not specifically address the merits of each additional criterion proposed, the Commission considered them in adopting and revising the six criteria from the NOPR.[144] The Commission found that many of the suggestions for additional criteria are already implicitly or explicitly addressed in the adopted criteria. For example, the Commission noted that the criteria already included an analysis of market power mitigation and, therefore, did not see the need to adopt an additional criterion to protect consumers against market power.[145] We therefore continue to find that the criteria adopted in the Final Rule are sufficient to provide a general guideline for designing a shortage pricing approach that addresses market power, accountability, gaming behavior, and

[138] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 196.

[139] *Id.* P 251.

[140] *Id.* P 247.

[141] *Id.* P 235.

[142] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 194–95.

[143] *Id.* P 195.

[144] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 239, 249–50.

[145] *Id.* P 249.

other issues raised by petitioners. Therefore, we disagree that the Final Rule ignored proposals for additional criteria.

106. Similarly, we see no basis to reconsider PG&E's proposed criteria which were: (1) A demonstration that any proposed market rule changes are cost effective; (2) an evaluation that the operating reserve shortage pricing mechanism is adequately coordinated with other key market mechanisms; and (3) an assessment of the readiness of the demand response programs that will be called on to reduce the number and severity of shortage pricing requirements and help to mitigate market power.[146] While each of these is a worthy goal, our intent in this proceeding is to establish a set of broad criteria to serve as a general guideline for all RTOs and ISOs on designing a shortage pricing approach. Nothing will prevent RTOs, ISOs and their stakeholders from considering these goals in the process of drafting their compliance proposal, and indeed, we encourage them to do so if these items are of concern to them. Further, we note that the Final Rule required RTOs and ISOs to address market power issues in their compliance filings, and to provide "an adequate factual record demonstrating that provisions exist for mitigating market power and deterring gaming behavior * * * [, which] could include, but is not limited to, the use of demand resources to discipline bidding behavior to competitive levels during an operating reserve shortage."[147] Accordingly, we find that the Commission did not err in rejecting PG&E's narrower request for a readiness assessment.

B. Long-Term Power Contracting in Organized Markets

107. In the Final Rule, the Commission established a requirement that RTOs and ISOs dedicate a portion of their Web sites for market participants to post offers to buy and sell electric energy on a long-term basis. The Commission noted that this requirement was designed to improve transparency in the contracting process so as to encourage long-term contracting for electric power.[148] Requests for rehearing were timely filed with respect to the need to require development of new hedging instruments and to the need for the Commission to address the larger structural causes of problems with the long-term contracting market.

[146] *Id.* P 244.

[147] *Id.* P 196.

[148] *Id.* P 307.

1. Hedging Instruments

108. Several commenters argued in their NOPR comments that the Commission should address the lack of certain financial hedging instruments in organized markets. These commenters argued that providing such hedging instruments would reduce the risk of marginal losses and encourage long-term contracting. In the Final Rule, however, the Commission declined to take any action on hedging instruments.[149]

a. Request for Rehearing

109. SMUD argues in its request for rehearing that exposure to marginal losses, like exposure to congestion charges, poses a substantial risk to market participants interested in long-term bilateral contracts. The absence of a hedging mechanism for marginal losses, SMUD states, is a significant risk factor in long-term contracting. SMUD notes that the Commission encouraged, but did not require, RTOs and ISOs to develop such hedging mechanisms. It argues that this encouragement is not sufficient, and that the Commission should address on rehearing the need for a marginal loss hedging mechanism or explain why one is not needed.[150]

b. Commission Determination

110. The Commission addressed previously SMUD's request for a requirement for a marginal loss hedging instrument in Order No. 681.[151] The Commission found that EPAct 2005 does not require a marginal loss hedge, and that due to the nature of marginal losses, it is more difficult to design a hedge for marginal losses than it is to create one for congestion costs.[152] The Commission again addressed SMUD's request in the order conditionally approving revisions to CAISO's Market Redesign and Technology Upgrade Tariff provisions involving congestion revenue rights.[153] In that order, the Commission found that it would be unreasonable to direct the CAISO to provide a mechanism that is not required by EPAct 2005, and that does not yet exist in workable form elsewhere.[154] In light of the Commission's extensive, and recent, consideration of this issue, and SMUD's failure to propose new arguments here including evidence of a relevant change in circumstances, or a workable hedge for marginal losses, we are not persuaded to grant rehearing. We continue to encourage RTOs and ISOs to explore methods by which they can assist load-serving entities and others to obtain hedges for marginal losses.[155]

[149] *Id.*

[150] SMUD at 7.

[151] *Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, FERC Stats. & Regs. ¶ 31,226, *order on reh'g*, Order No. 681–A, 117 FERC ¶ 61,201 (2006).

[152] Order No. 681–A, 117 FERC ¶ 61,201 at P 105.

[153] *Cal. Indep. Sys. Operator Corp.*, 120 FERC ¶ 61,023, at P 229 (2007), *reh'g denied*, 124 FERC ¶ 61,094 (2008).

[154] *Id.*

2. Structural Issues

111. The Commission received comments prior to the Final Rule arguing that the structure of organized markets was flawed, and advocating that the Commission needed to institute a broader investigation of organized markets to protect consumers. In the Final Rule, the Commission stated that many of the broader issues commenters raised were beyond the scope of the proceeding, and would require further development to be ripe for inclusion in a proceeding. The Commission noted that these issues had been the subject of a technical conference held to discuss the proposals of American Forest & Paper Association and Portland Cement Association.[156] The Commission stated that it continues to review the information it received at the technical conference for possible action.

a. Request for Rehearing

112. APPA–CMUA argue that the Commission erroneously failed to expand the scope of this proceeding to investigate the issue of whether RTO markets are producing just and reasonable rates. They argue that sections 205 and 206 of the Federal Power Act require the Commission to act when it finds evidence of unjust and unreasonable rates.[157]

113. APPA–CMUA note that they, along with other consumer entities, presented evidence to the Commission in this proceeding regarding failures in centralized power markets. These failures include fewer and higher-priced long-term power supply options, the shifting of financial risks to customers, and impediments to construction of new generation resources. APPA–CMUA argue that the Commission did not consider this evidence, but instead found that the scope of the proceeding was limited to four "discrete" areas. APPA filed extensive comments asking the Commission to expand the scope of the proceeding, which it argues were ignored. APPA–CMUA note that APPA also filed comments following the

[155] Order No. 681–A, 117 FERC ¶ 61,201 at P 106.

[156] Supplemental Notice of Technical Conference, *Capacity Markets in Regions with Organized Electric Markets*, Docket No. AD08–4–000 (April 25, 2008).

[157] APPA–CMUA at 3.

technical conference held on May 7, 2008, but that there has been no further activity in that docket.[158]

114. APPA–CMUA argue that the Commission's failure to act violates its obligations under the Federal Power Act, and under administrative law generally. They argue that the Commission has a duty to address unjust and unreasonable rates that extends to systemic, marketwide problems.[159] They also argue that the Commission has a legal obligation to investigate if evidence is presented to it that unjust and unreasonable rates are being charged; if the investigation reveals unjust and unreasonable rates, contracts or practices, the Commission must take remedial action.[160] APPA–CMUA cite to the recent United States Supreme Court case in *Massachusetts* v. *EPA*, in which the Court found that the EPA possessed not only the statutory authority, but also the responsibility, to regulate greenhouse gas emissions.[161] APPA–CMUA state that the Court found that the EPA's refusal to institute a rulemaking to regulate greenhouse gases contradicted the clear terms of the Clean Air Act, and was arbitrary and capricious. Similarly, they argue, the Commission in this proceeding has not only failed to act, it has failed even to look at the many comments, statements, studies and affidavits in the docket alleging unjust and unreasonable rates.[162]

115. APPA–CMUA also argue that the Commission erred in finding that RTO and ISO markets provide demonstrable benefits to customers. They argue that the Commission cites no support for the finding, and point to evidence in the record from wholesale customers and others calling into question the existence of such benefits. APPA–CMUA cite to the 2008 GAO Report, which they argue found that the Commission has not done the analyses necessary to support its assertions that RTO markets provide demonstrable benefits to wholesale customers and consumers.[163]

116. Finally, APPA–CMUA argue that the Commission failed to address the structural causes underlying the lack of long-term contracting in RTO and ISO regions. They note that the Commission received several comments relating to the over-reliance on spot markets and lack of long-term contracts caused by the structure of markets within the RTO system. However, the Commission declined to order any of the broader measures commenters suggested. APPA–CMUA argue that the Commission's statement that these structural issues were beyond the scope of the proceeding was a non sequitur, since the Commission itself had set the scope of the proceeding. They note the Commission's apparent belief that there is no fundamental problem with long-term contracts, that contracts are merely available at higher prices than in the past. However APPA–CMUA argue that the Commission failed to consider the results of the Synapse Study it presented, which found that there were structural reasons beyond changes in fuel supply that drove buyer reluctance to enter into long-term contracts. They also argue that the current turmoil in the credit markets should cause the Commission to reconsider its decision, as it is going to be difficult to finance new generation facilities in the future without long-term contracts to support them.[164] APPA–CMUA conclude that the Commission effectively ignored many comments, statements, studies and affidavits that indicate that many load-side interests believe that RTOs are charging unjust and unreasonable rates, and that those comments never received the due process that the FPA requires.

b. Commission Determination

117. We find that the Commission did not violate the standards of due process or shirk its duty under the FPA in confining the scope of this proceeding to four specific areas of reform related to the operation of competitive wholesale markets. We deny rehearing on the issue of whether the Commission failed to justify its decision not to expand the scope of this proceeding.

118. APPA–CMUA's argument that the Commission has a legal duty to expand this rulemaking proceeding to address whether and how to systemically revise organized markets is mistaken. As the Supreme Court has ruled, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.[165] While APPA–CMUA cite to the Supreme Court's decision in *Massachusetts* v. *EPA*, this decision was based on a specific statute related to EPA action on greenhouse gases, and did not overturn the general rule that agencies have discretion over how to act to carry out their responsibilities.[166] The Supreme Court found that the EPA had refused to act on a specific statutory requirement to regulate greenhouse gases, and that its refusal was not warranted by the statutory text.[167] By contrast, the Commission has not refused its responsibility to ensure just and reasonable rates here. Indeed, FPA sections 205 and 206 form the legal basis for this proceeding.[168]

119. As the Commission stated in the Final Rule, this proceeding was not intended to fundamentally redesign organized markets; rather, the reforms were intended to be incremental improvements to the ongoing operation of organized markets without undoing or upsetting the significant efforts that have already been made in providing demonstrable benefits to wholesale customers.[169] The Commission focused on four discrete areas with the goal of improving competition in organized wholesale electric markets. This determination was based in part upon a desire to create a manageable forum for discussing and implementing those revisions to organized wholesale markets that could be implemented relatively soon. Expanding the scope of the proceeding to encompass the wholesale revision of organized RTO or ISO markets would delay the immediate and necessary market reforms ordered in the Final Rule.

120. We disagree with APPA–CMUA's argument that the Commission has denied it due process by declining to investigate wholesale market operations in general on the basis that doing so is outside the scope of the proceeding that the Commission itself set. If the Commission was obligated to frame every investigation to satisfy commenters' requests, individual commenters would have the power to delay or derail nascent market rules with which they disagreed merely by arguing that the scope of the proceeding was too narrow or too broad. The Commission's goal here is to make improvements to four areas of wholesale market operations.

121. The fact that this proceeding is limited to the four topics addressed above does not indicate that the Commission refuses to act in other areas to ensure just and reasonable rates. For example, the Commission has acted on

[158] *Id.* at 21.

[159] *Id.* at 25 (citing *Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667, 686–87 (D.C. Cir. 2000); *Associated Gas Distribs.* v. *FERC*, 824 F.2d 981, 1008 (D.C. Cir. 1987)).

[160] *Id.* at 26 (citing Order No. 2000, FERC Stats & Regs at 31,043 n.163).

[161] 549 U.S. 497 (2008).

[162] APPA–CMUA at 28.

[163] *Id.* at 32 (citing 2008 GAO Report). *See supra* note 129.

[164] *Id.* at 34–36.

[165] *See Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842–845 (1984).

[166] *See Massachusetts* v. *EPA*, 549 U.S. at 527.

[167] *Id.* at 530.

[168] *See* Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 13.

[169] *Id.* P 2; NOPR, FERC Stats. & Regs. ¶ 32,628 at P 4, 282.

a generic basis and with regard to specific regional markets to, among other things, address transmission planning reforms, interconnection rules, and reform of capacity markets, all areas that improve long-term contracting and organized markets as a whole.[170] The Commission continues to review other proposals for reforms, including additional reforms to remove barriers to demand response and reform organized markets.[171] We have received a wealth of information on all sides of these issues, from comments in this proceeding and others, testimony at technical conferences, and other reports such as the recent GAO Report discussed above. Contrary to the claims of APPA–CMUA, the Commission considered all of the comments, statements, studies and affidavits received in this docket when determining the scope and outcome of this proceeding.[172] We appreciate the time and effort put into those submissions, and we remain receptive to the avenues of reform proposed therein.

122. The Commission's policy continues to be to promote competition in wholesale electric power markets. This policy is in keeping with Commission practice and was ratified by Congress in EPAct 2005.[173] We always welcome suggestions for concrete actions that could be taken to improve competition in wholesale markets.

C. Market-Monitoring Policies

123. The Commission ordered a number of reforms in the Final Rule designed to enhance the market monitoring function and thereby to improve the performance and transparency of the organized markets. These reforms centered upon two areas: ensuring the independence of market monitoring units (MMUs) and expanding their information sharing function.

124. To increase the independence of MMUs, the Final Rule directed that MMUs in most instances report directly to the RTO or ISO board of directors or to a committee of the board, rather than to management; directed tariff inclusion of a duty on the part of the RTO or ISO to provide the MMU with access to the data, resources and personnel needed to perform its duties; required the RTO or ISO to set out the expanded functions of the MMU in its tariff; removed the MMU from tariff administration and modified MMU market mitigation functions; prescribed protocols for the referral to Commission staff by the MMU both of market design flaws and of suspected wrongdoing; and required the RTO or ISO to adopt ethics standards for the MMUs and MMU employees.[174]

125. Within the area of information sharing, the Final Rule required the MMU to make quarterly reports in addition to the annual state of the market report, to expand the recipients for the reports, and to hold regular telephone conferences among the MMU and Commission staff, RTO or ISO staff, interested State commissions, State attorneys general and market participants; established procedures for the MMU to share information with State commissions; and reduced the lag time for the release of offer and bid data by the RTO or ISO.[175]

126. Requests for rehearing or clarification were timely filed with respect to the following issues: MMU involvement in market mitigation, the relationship between the internal and external MMU, State access to MMU information, release of offer and bid data, and the scope of the ethics provisions. In addition, the Commission on its own motion clarifies certain duties of the MMU with respect to the referral of market design flaws. These are discussed below.

1. Market Mitigation

127. In the Final Rule, the Commission modified the proposal made in the NOPR that MMUs should be removed from market mitigation. That proposal had been designed to remove the MMU from subordination to the RTO or ISO, and to eliminate the conflict of interest inherent in an MMU opining on the health of the market while itself influencing the market by conducting mitigation. However, a number of commenters objected that there might be a greater conflict of interest in having the RTO or ISO administer mitigation, as it has a vested interest in accommodating its market participants. Commenters raised a number of other objections, including the arguments that the MMU is better equipped than the RTO or ISO to detect the need for mitigation, and that removing the MMU from mitigation would distance it from the market insights it needs for its monitoring function.

128. In order to preserve the advantages of allowing the MMU to perform mitigation, while avoiding entangling it in a conflict of interest, the Final Rule struck a balance between the extremes of removing the MMU entirely from mitigation and allowing unfettered MMU mitigation. It did this in part by providing that an RTO or ISO with a hybrid MMU structure[176] may permit its internal MMU to conduct mitigation, so long as its external MMU is assigned the task of monitoring the quality and appropriateness of that mitigation. In addition, the Final Rule provided that if the RTO or ISO does not have a hybrid structure, it may still allow its MMU to perform retrospective mitigation, while relegating prospective mitigation to itself. The Final Rule further provided that the MMU could provide the inputs required by the RTO or ISO for prospective mitigation, including the determination of reference levels, the identification of system constraints, calculation of costs, and the like.

a. Requests for Rehearing

129. Old Dominion objects to the removal of prospective mitigation from non-hybrid MMUs, contending that the Commission failed to demonstrate a conflict of interest on the part of MMUs while ignoring what Old Dominion sees as a conflict of interest arising from the RTOs conducting mitigation on what are, in effect, their own customers.[177]

130. Pennsylvania PUC argues that prospective mitigation should not be limited to RTOs and ISOs with hybrid MMUs.[178] It contends that mitigation is performed according to objective tariff criteria, removing the element of discretion, and argues that the record does not establish a need for placing limitations on the performance of mitigation by MMUs.[179]

131. Industrial Coalitions assert that the Commission should not have removed tariff administration and mitigation from the duties of the MMU, arguing that although the Commission intended to strengthen market monitoring, it achieved the opposite effect. They advance the opinion that RTOs and ISOs have demonstrated a

[170] *See* Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 280.

[171] For instance, the Commission recently held a technical conference on credit issues affecting the electric power industry. Technical Conference on Credit and Capital Issues Affecting the Electricity Power Industry, Docket No. AD09–2–000 (Jan. 13, 2009).

[172] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 16–25.

[173] Public Law 109–58, 119 Stat. 594.

[174] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 317 *et seq.*

[175] *Id.* P 395 *et seq.*

[176] A hybrid MMU structure is one with both an internal and an external market monitor. An internal market monitor is one that is composed of RTO or ISO employees, an external market monitor is an independent entity that conducts market monitoring for the RTO or ISO pursuant to a contract.

[177] Old Dominion at 6–7.

[178] Pennsylvania PUC at 5–6.

[179] *Id.* at 3.

preference for unmitigated outcomes, and therefore should not be given total responsibility for identifying and rectifying abuses of market power.[180]

132. The Ohio PUC and Wisconsin PSC object to what they see as the internal MMU within a hybrid MMU structure having greater mitigation authority than an external MMU.[181] The Ohio PUC opines that some (internal) MMUs will not have the necessary tools to accomplish their job function, which will limit their ability to impose prospective mitigation.[182]

b. Commission Determination

133. The Commission affirms the determination made in the Final Rule as to MMU involvement in mitigation. The arguments raised by petitioners were extensively discussed in comments made during the rulemaking process, and were taken into account by the Commission in reaching its resolution of the issue. The MMU's conflict of interest in conducting mitigation, which one petitioner contends has not been demonstrated, is inherent in the nature of the MMU's duties: inasmuch as the MMU must opine on the quality of its own mitigation when it reports on the health and state of the markets, it cannot be expected to be entirely objective. Conflict of interest concerns do not necessarily rely on historical instances of abuse, but rather on the existence of the conflict itself and on the well-known tendency of human nature to see one's own actions in a favorable light. Furthermore, contrary to that same petitioner's assertion, the Commission did take into account the argument that RTOs and ISOs have conflicts of their own in conducting mitigation. That consideration was, in fact, part of the basis for permitting a substantial degree of mitigation to be performed by the MMUs, both internal and external.[183]

134. Pennsylvania PUC claims that mitigation is non-discretionary, and concludes there is no danger of a conflict of interest influencing the MMU in conducting mitigation.[184] The Commission is of the view that the more objective the criteria for mitigation become, the better and fairer their application will be. However, we realize that there is still a degree of judgment involved in determining whether mitigation is appropriate. If this were not so, mitigation could be entirely automatic, which is not the case. Therefore, conflicts of interest must still be a part of the Commission's consideration in fashioning its rules.

135. The assertion of Industrial Coalitions that RTOs and ISOs have demonstrated a preference for unmitigated outcomes has not been substantiated with record evidence. Other factors can have the opposite effect on an RTO's or ISO's decision to mitigate, such as achieving price moderation, ensuring the orderly and fair administration of the markets, and avoiding MMU referrals to Commission staff due to lax administration. In this regard it is important to observe that any mitigation performed by the RTO or ISO will be monitored by the MMU, and, if the RTO or ISO is not performing its job properly, it will be the duty of the MMU to refer the conduct to Commission staff.

136. Ohio PUC and Wisconsin PSC assume that in an RTO or ISO with a hybrid MMU, the internal MMU has been given more authority in the mitigation area than the external MMU. However, the Final Rule's mitigation provisions provide that the external MMU in a hybrid MMU structure must independently evaluate the performance of the internal MMU, if the latter conducts mitigation. Thus, the external MMU arguably has more authority in the mitigation area than the internal MMU, rather than less.

137. For all the foregoing reasons, the Commission concludes that its resolution of the mitigation and tariff administration issues raised in the NOPR struck the correct balance between unfettered MMU mitigation and no mitigation by the MMU. Therefore, we affirm the Final Rule in this regard and decline to grant rehearing on the issue of MMU involvement in market mitigation.

2. Relationship Between Internal and External MMU

138. The Final Rule did not express a preference for a particular market monitoring structure, whether internal, external, or hybrid. The Commission observed that in light of regional variances and preferences in this regard, each RTO and ISO should decide for itself its own MMU structural relationship. However, the Final Rule did make certain distinctions, depending on the particular MMU structure, as to various duties and responsibilities, including reporting to the board of directors and conducting market mitigation.[185]

a. Requests for Rehearing

139. Ohio PUC questions the efficacy of a hybrid MMU, and proposes that an external market monitor's evaluations and recommendations should prevail over those of the internal MMU. It proposes that mitigation authority not be vested in the internal MMU, presumably because it believes that the internal MMU lacks independence.[186] Ohio PUC also suggests that the responsibilities for data collection, analysis, and all market mitigation and referrals should take place at the external MMU level.[187] It argues that RTOs and ISOs should identify in their tariffs all MMU functions that are essential to the effective operation of the MMU, and delegate them to the external or independent MMU.[188] Ohio PUC argues that the Final Rule results in a dysfunctional MMU hierarchy that will make the existing MMU subordinate to any new internal MMU and the RTO or ISO.[189]

140. Wisconsin PSC supports in their entirety the requests of Ohio PUC. It asserts that the Commission erred in supposedly vesting more authority in the internal MMU in a hybrid structure than in the external MMU, and in failing to clarify that all MMU rules and enforcement standards identified in the RTO or ISO tariff be entrusted to the external MMU.[190]

b. Commission Determination

141. The proposals by petitioners favoring an external MMU appear to be predicated on the notion that an internal MMU necessarily lacks independence. However, as we observed in the Final Rule, we have not detected any deficiency in performance by internal MMUs that is attributable to their structure.[191] Furthermore, the proposition that internal MMUs lack independence ignores the very reforms directed in the Final Rule, one of which provides that an internal MMU that is not part of a hybrid structure must report to the board of directors or to a committee of the board, rather than to management. An internal MMU within a hybrid structure may report to management, but only if it does not perform any of the three core MMU functions, those being identifying ineffective market rules, reviewing the performance of the markets, and making

[180] Industrial Coalitions at 12–14.

[181] Ohio PUC at 14–15; Wisconsin PSC at 2–3.

[182] Ohio PUC at 15.

[183] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 370–79.

[184] Pennsylvania PUC at 3.

[185] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 374.

[186] Ohio PUC at 13.

[187] *Id.* at 13–16.

[188] *Id.* at 16–17.

[189] *Id.* at 14. We assume here that "existing MMU" means an external MMU.

[190] Wisconsin PSC at 2–3.

[191] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 327.

referrals to the Commission. This reform was instituted precisely to bolster the independence of the MMU performing the core MMU functions.

142. In addition, in a hybrid MMU structure, the internal MMU may conduct market mitigation only if the external MMU is assigned the responsibility and given the tools to monitor the quality and appropriateness of that mitigation. Thus, the external MMU can determine whether mitigation is being adequately performed and, if any deficiencies persist, refer the situation to the Commission. Consequently, the Commission disagrees that a hybrid MMU, with the internal MMU conducting mitigation, will be inferior in performance and independence to an external MMU.

143. The Commission also disagrees with Wisconsin PSC's contention that the internal MMU in a hybrid structure is vested with more authority than the external MMU. As noted above, mitigation may be assigned to the internal MMU within a hybrid structure only if the external MMU is given the tools and responsibility to monitor it, thus arguably giving the external MMU greater authority than the internal MMU. As to other market monitoring duties, these are to be allocated between an internal and external MMU (in a hybrid structure) by the RTO or ISO, with stakeholder approval. Therefore, if petitioners desire that the external MMU should be assigned more of the core MMU functions, they should raise those concerns in the stakeholder process. But whatever allocation results from such process, the Final Rule provides for checks and balances to ensure oversight over the internal MMU's performance, whether by the external MMU or by the board of directors. For all these reasons, we decline to grant the requests for rehearing on the issue of the relationship between external and internal MMUs.

3. State Access to MMU Information

144. One of the two principal goals of the Final Rule's MMU reforms was to expand the content and dissemination of MMU information. One such expansion consists of providing a means by which State commissions can request tailored information from the MMUs. The Commission placed certain restrictions on this right, such as limiting them to general market trends and information, and prohibiting them from being used for State enforcement purposes.[192] This was done so that the MMUs would not be overwhelmed by such requests at the expense of doing their primary job, and to preserve confidentiality where warranted. Because of confidentiality concerns, and also to encourage cooperation by both existing and potential subjects of investigations, the Commission declined to change its policy providing that MMU referrals to the Commission remain confidential.

a. Requests for Rehearing

145. Illinois Commerce Commission argues that tailored requests for information to the MMU by State commissions should not be restricted to general market trends and information, and further contends that there is no evidence that other requests would be time consuming and burdensome.[193] Illinois Commerce Commission also argues that the Commission should not restrict the dissemination of raw data, or forbid State commissions from obtaining information from MMUs for State enforcement activities, as this may conflict with Illinois Commerce Commission's ability under existing tariffs to request MMU information from Midwest ISO or PJM.[194] Lastly, Illinois Commerce Commission proposes that State commissions be informed when an MMU refers a matter concerning market conduct to the Commission. Illinois Commerce Commission argues that there would be no disincentive to entities to self-report if the Commission did so, and contends that State commissions have a proven track record of properly handling confidential information.[195] Minnesota PUC supports the Illinois Commerce Commission's requests in their entirety.[196]

b. Commission Determination

146. Contrary to the assertions in the requests for rehearing, the new provision granting State commissions the right to make tailored requests for information broadens their access to MMU data, rather than restricting it. Objections of the type expressed by Illinois Commerce Commission were addressed in the Final Rule and rejected.[197] While the information sought in tailored requests for information should relate to general market trends and the performance of the wholesale market, the Commission pointed out that the type of information to be provided by the MMU may vary from region to region, and is governed principally by the workload such requests impose on the MMU. Therefore, as discussed in the Final Rule, unless the information violates confidentiality restrictions regarding commercially sensitive material, is designed to aid State enforcement actions, or impinges on the confidentiality rules of the Commission with regard to referrals, it may be produced, so long as it does not interfere with the MMU's ability to carry out its core functions. Subject to these limitations, granting or refusing such requests will be at the MMU's discretion, based on agreements worked out between the RTO or ISO and the States, and subject to the confidentiality provisions in the RTO's or ISO's tariff and to the Commission's confidentiality restrictions.[198]

147. The Commission respectfully disagrees that the confidentiality provisions of the Commission and of the RTOs and ISOs may be overridden, simply because a State asserts it is subject to statutory or regulatory provisions regulating the release of information coming into its possession. The MMUs should not be placed in the position of researching the intricacies of State law on the subject, or predicting how a court might rule on the disclosure of material once it enters the possession of a State commission. While Illinois Commerce Commission contends that the confidentiality provisions of the Final Rule "may conflict" with existing procedures within Midwest ISO and PJM, it fails to explain how. Therefore, no factual basis has been presented upon which to address this objection.

148. As to the time-consuming nature of requests made for State enforcement purposes, the Commission provided evidence in the record to that effect, citing the agency's own long experience with investigations.[199] Furthermore, it would be difficult if not impossible to provide information tailored for enforcement purposes without breaching confidentiality, as such information would be directed toward the activities of individual market participants. As to raw data, the Commission did not forbid an MMU from providing raw data (properly redacted for confidentiality purposes), but stated that if the gathering, organizing, reviewing, and explaining of such data would be too consuming, the MMU was not required to provide it.[200] This is a subset of the Commission's

[192] *Id.* P 446–59.

[193] Illinois Commerce Commission at 4–5.

[194] *Id.*

[195] *Id.* at 2–4.

[196] Minnesota PUC at 1.

[197] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 446–59.

[198] State commissions have the further safety valve of seeking otherwise proscribed information by filing a request with the Commission. *Id.* P 458.

[199] *Id.* P 452.

[200] *Id.* P 450.

expressed concern that the MMU not be diverted from its primary MMU duties by requests for information and analysis from State actors.

149. In the Final Rule, the Commission declined to change its long-standing policy of maintaining the confidentiality of MMU referrals to Commission staff. Illinois Commerce Commission contends there would be no disincentive to companies to self-report if such referrals were made public, because MMU referrals do not occur as a result of self-reports. We disagree. If an entity sees that formerly non-public investigations are now being made public, it will be discouraged not only from making self-reports in the future, but also from cooperating and providing data in existing and any future investigations, regardless of the origin of that investigation. Furthermore, as pointed out in the Final Rule, such disclosure could also injure innocent persons who might be erroneously implicated or adversely affected by simply being associated with an investigation.[201]

150. For all these reasons, the Commission declines to grant the requests for rehearing on the issue of tailored requests for information and referrals to the Commission.

4. Offer and Bid Data

151. In the Final Rule, the Commission shortened the period for release of offer and bid data to three months,[202] while retaining the policy of masking the identity of the participants. The Final Rule also incorporated flexibility by allowing RTOs and ISOs to propose a shorter release time or, if they could demonstrate a danger of collusion, a four-month instead of a three-month release, or some alternative mechanism if release of a report were otherwise to occur in the same season as reflected in the data.

a. Requests for Rehearing or Clarification

152. TAPS believes that the reduction of the release period to three months is a step in the right direction,[203] but does not think it goes far enough. It requests more rapid release of offer and bid data, as well as the unmasking of identities. TAPS cites to Australia, England and Wales, all of which it states release data on a near-real-time basis,[204] and contends that information transparency can play a role in the potential mitigation of collusion.[205] TAPS theorizes that the early release of data levels the playing field for smaller market participants and enables them to assist with market monitoring,[206] and argues that greater transparency may help expose attempts to manipulate the market.[207]

153. APPA–CMUA, in a joint filing, support the immediate and full disclosure of offer and bid data, the unmasking of the identity of bidders, and disclosure of system lambdas.[208] They cite the Dunn Study,[209] which the Commission discussed in the Final Rule, for the propositions that "the possible benefits" of posting offer and bid data on the day following the operating day "appear to far exceed" the risks of collusion, and that such release may help expose market manipulation.[210] With respect to the unmasking of identities, APPA–CMUA argue that although the Commission provided that RTOs and ISOs may propose a period when such unmasking might be permitted, this will not happen because generators will argue against such disclosure in the stakeholder process.[211] They further argue that requiring the filing of system lambdas would allow direct analysis of RTO and ISO real-time prices in comparison to the relevant underlying variable generation costs.[212]

154. Illinois Commerce Commission objects to the Commission's continuation of the policy of masking the identities of market participants, and proposes as an alternative that identities be unmasked after a four-month lag, asserting that this time lag would eliminate concerns about participant harm and collusive behavior.[213] The Illinois Commerce Commission contends that an entity's bidding strategy is an important piece of market information, useful in analyzing the reasonableness of market outcomes.[214]

155. Minnesota PUC supports the request for rehearing by the Illinois Commerce Commission in its entirety.[215]

b. Commission Determination

156. Petitioners' objections on this issue were addressed in the Final Rule, and the Commission sees no reason to revisit its determination. The Final Rule provided RTOs and ISOs with a good deal of flexibility to propose a lag period that would work best for its particular situation, and that would meet the desires of its stakeholders. Under the Final Rule, RTOs and ISOs, should they desire, are free to propose petitioners' preferred lag period of only one day.[216]

157. APPA–CMUA contend that generators would object to such a proposal, and would be able to sway the stakeholder process against it. This argument implicitly suggests, without evidence, that not only would the stakeholder process reach a biased and unjust result, but that their proposal is the only correct one. It is also quite possible that the stakeholder process will result in a balancing of petitioners' concerns against those of market participants who may have perfectly rational reasons to prefer delaying the release of offer and bid data, and to mask identities. For example, one such reason is the fact that trading strategies, which is exactly the information sought by petitioners, are trade secrets that have considerable value to market participants. While the Illinois Commerce Commission may wish to use the data for enforcement purposes, other entities may use it to give themselves a competitive advantage, or to eliminate the competitive advantage of another entity. Since the various stakeholders have different concerns and interests, balancing those concerns is more suited to exploration and resolution in the stakeholder process than in this proceeding, at least in the first instance.[217]

158. Likewise, the Final Rule affords flexibility in the area of the masking of identities of market participants placing offer and bid data, by providing that RTOs and ISOs may propose a period for the eventual unmasking of such identities.[218] Again, this allows for a balancing of interests in the stakeholder process. The Commission built this flexibility into its determinations in the area of offer and bid data both to take into account regional differences, and to

[201] *Id.* P 465.

[202] Most RTOs and ISOs have a six-month release policy.

[203] TAPS at 56.

[204] *Id.* at 57.

[205] *Id.* at 58.

[206] *Id.* at 59.

[207] *Id.* at 60.

[208] "System lambda" is defined as the variable cost of the last kilowatt produced over a particular hour. APPA–CMUA at 39.

[209] *Id.* at 15–16.

[210] *Id.* at 37–38.

[211] *Id.* at 38.

[212] *Id.* at 39.

[213] Illinois Commerce Commission at 8.

[214] *Id.* at 7.

[215] Minnesota PUC at 1.

[216] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 424.

[217] The fact that ISO–NE proposed reducing the lag time for release of offer and bid data from six months to three months is evidence of the fact that the stakeholder process is not necessarily geared toward less disclosure. *See ISO New England Inc. and New England Power Pool,* 121 FERC ¶ 61,035 (2007).

[218] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 423.

give the industry a chance to work with the release period mandated in the Final Rule before deciding whether to propose an even shorter period. Certainly, if an RTO or ISO believes it desirable to release offer and bid data on the day following the operating day, nothing in the Final Rule prevents it from making such a proposal to the Commission, with appropriate justification; in fact, as indicated in the Final Rule, this may be done in the compliance filing to be made in this docket.

159. For all these reasons, the Commission declines to grant the requests for rehearing on the issue of offer and bid data.

5. Ethics Provisions

160. In the Final Rule, the Commission enumerated a number of minimum ethics standards that the RTOs and ISOs are required to adopt for MMUs and their employees.[219] In response to comments filed by the Midwest ISO and Potomac Economics, both of which had requested clarification that any adopted ethics standards need not prohibit MMU employees from performing monitoring for non-RTO or ISO entities, the Commission drew a distinction in the preamble of the Final Rule between entities within and without the RTO or ISO monitored by the MMU. The Final Rule clarified that a monitoring engagement was permissible if the employing entity were not a market participant in the particular RTO or ISO for which the MMU performs market monitoring, but if the employing entity was a market participant in the RTO or ISO for whom the MMU does perform market monitoring, the proposed work would entail the same conflict of interest as would any other consulting services, and would not be allowed.[220]

a. Request for Rehearing or Clarification

161. Potomac Economics argues that the Commission should allow an MMU to perform independent monitoring of an entity other than the RTO or ISO it monitors, whether or not such entity is a participant in the RTO or ISO markets, arguing that such monitoring does not create a conflict of interest.[221] Potomac Economics contends that the interpretation set forth in the Final Rule would harm the MMUs, the affected RTOs and ISOs, and the non-RTO or ISO monitored entities, and would eliminate synergies that would otherwise result from such monitoring.[222] Alternatively, Potomac Economics requests clarification as to which ethics provision is implicated by such activity, and whether erecting a "Chinese Wall" within the MMU would resolve the concern.[223]

162. In support of its position, Potomac Economics argues that the alleged conflict of interest involved in monitoring a non-RTO or ISO entity is no greater than that which exists with respect to the RTO or ISO itself, inasmuch as in both cases the MMU is compensated by its employer.[224] Potomac Economics further observes that such non-RTO or ISO monitoring is done pursuant to contracts filed with the Commission, which provide protections against undue influence (such as forbidding the entity from using its budget process or the threat of replacing the MMU as a means to exert leverage over it).[225]

163. Potomac Economics also argues that unwinding current arrangements providing for such monitoring would impose needless costs on the MMUs, the RTOs and ISOs, and the monitored entities,[226] and would eliminate the improved understanding of the RTO or ISO markets that the MMU gleans from its knowledge of the activities of the monitored entity.[227]

b. Commission Determination

164. After further consideration, the Commission agrees that the objections of Potomac Economics are well-taken. To be clear, the Commission is concerned that allowing a monitor to oversee both the RTO or ISO as well as a market participant operating in the same RTO or ISO for activity in that RTO or ISO may raise a conflict of interest because the monitor may be called upon to opine on its own oversight. However, the Commission is persuaded that the increased insights into the RTO or ISO markets provided by such monitoring may give the MMU useful information, and results in the synergies that Potomac Economics suggests. Therefore, we grant rehearing as set forth below. In an effort to balance the potential benefit of synergies resulting from the monitor overseeing both the RTO or ISO as well as a market participant operating in the same RTO or ISO with our concern over potential conflicts of interest, the Commission will permit an RTO or ISO MMU to enter into contracts to monitor a market participant operating in the same RTO or ISO for activity in that RTO or ISO, under the following conditions: The relationship between the entity and the MMU and the MMU's scope of work for the entity are both mandated by the Commission in an order on the merits, the contract is filed with the Commission for review and approval, and the contract contains a provision that the entity must notify the Commission of any intention to terminate MMU employment, permission for which may be refused by the Commission.[228]

165. In light of this conclusion, it is unnecessary to examine the alternative requests for clarification submitted by Potomac Economics. Furthermore, inasmuch as the Commission's discussion on this point in the Final Rule was advanced as a matter of clarification rather than being based on the language of the regulatory text, we find it unnecessary to amend the regulatory text promulgated in the Final Rule to reach this result. For all these reasons, the Commission grants rehearing on this issue and clarifies the circumstances under which an MMU may perform monitoring services for non-RTO and ISO entities, as set forth in the foregoing discussion.

6. Referral of Market Design Flaws

166. NYISO filed an out-of-time request for clarification regarding the interpretation of certain language contained in the protocols for the referral of market design flaws to Commission staff, which are included in the regulatory text of the Final Rule. Although NYISO's request has been rejected for untimeliness, the Commission finds that it would be useful to provide certain clarifications as to when an MMU is to make referrals, whether the referral is for suspected wrongdoing or for the identification of market design flaws.

167. The operative language in both the protocols for the referral of suspected wrongdoing and the protocols for the identification of market design flaws is the same; that is, an MMU is to make such a referral "in all instances where the Market Monitoring Unit has

[219] *Id.* P 383–87.

[220] *Id.* P 385.

[221] Potomac Economics at 1.

[222] *Id.*

[223] *Id.* at 6–7.

[224] *Id.* at 2.

[225] *Id.* at 3.

[226] *Id.* at 5.

[227] *Id.*

[228] The purpose of this holding is to prevent potential conflicts of interest that arise when the MMU oversees its own actions. Thus, if an MMU wants to enter into a contract to oversee the activities of a market participant that operates wholly outside of the RTO or ISO the MMU oversees, the conditions in this order would not apply. Likewise, if an MMU wants to enter into a contract with a market participant that has activity inside and outside of an RTO or ISO the MMU oversees, and the MMU would only oversee the market participant's activity outside of that RTO or ISO, the conditions in this order would not apply.

reason to believe" either that a market violation has occurred or market design flaws exist that the MMU believes could effectively be remedied by rule or tariff changes. This language is identical to the language that is contained in the existing protocols for referral of suspected wrongdoing, which were promulgated in the *2005 Policy Statement on Market Monitoring Units*.[229] The MMUs have had a number of years to become accustomed to the interpretation of this language, and can apply what they have learned from the operation of the existing protocols for suspected wrongdoing to the new protocols for referral of market design flaws.

168. More specifically, this means that the MMUs are to exercise judgment and a certain amount of discretion in deciding what to refer to Commission staff. If the RTO or ISO is already aware of the perceived market design flaw and is timely addressing it, there is no need for the MMU to make a referral to the Commission (although the Commission expects the MMU to apprise the Commission staff on an informal basis of important tariff changes being contemplated by the RTO or ISO). Likewise, if the design flaw is *de minimis*, there may well be no need to make a referral. When in doubt, the MMU should simply call the appropriate members of Commission staff and discuss the issue. This procedure will provide the MMU with any needed guidance as to whether a filing needs to be made.

169. We find that the foregoing clarification does not require an alteration to the Final Rule's regulatory text, which as indicated simply repeats the language contained in the current protocols for the referral of suspected wrongdoing to Commission staff, and which has historically been interpreted in the manner indicated above.

D. Responsiveness of RTOs and ISOs to Customers and Other Stakeholders

170. In the Final Rule, the Commission required RTOs and ISOs to establish a means for customers and other stakeholders to have a form of direct access to the board of directors, and thereby to increase the boards of directors' responsiveness to these entities. The Commission required each RTO or ISO to submit a compliance filing demonstrating that it has in place, or will adopt, practices and procedures to ensure that its board of directors is responsive to customers and other stakeholders. The compliance filings will be assessed based on four criteria. The Commission also directed each RTO and ISO to post on its Web site its mission statement or organizational charter.[230] Requests for rehearing were timely filed with respect to: the criteria for responsiveness, including the implementation of cost-benefit analyses by RTOs and ISOs and the inclusion of board members with State regulatory experience; the potential for use of hybrid boards; and the lack of a mandate for specific items in the RTO or ISO mission statement.

1. Criteria for Responsiveness

171. In the Final Rule, the Commission adopted four criteria from the NOPR for assessing the filed practices and procedures of each RTO and ISO:

- *Inclusiveness*—The business practices and procedures must ensure that any customer or other stakeholder affected by the operation of the RTO or ISO, or its representative, is permitted to communicate its views to the RTO's or ISO's board of directors.
- *Fairness in Balancing Diverse Interests*—The business practices and procedures must ensure that the interests of customers or other stakeholders are equitably considered and that deliberation and consideration of RTO and ISO issues are not dominated by any single stakeholder category.
- *Representation of Minority Positions*—The business practices and procedures must ensure that, in instances where stakeholders are not in total agreement on a particular issue, minority positions are communicated to the RTO's or ISO's board of directors at the same time as majority positions.
- *Ongoing Responsiveness*—The business practices and procedures must provide for stakeholder input into the RTO's or ISO's decisions as well as mechanisms to provide feedback to stakeholders to ensure that information exchange and communication continue over time.

The Commission found that additional criteria for responsiveness as proposed by commenters—for example, cost-benefit analyses or cost-containment procedures—were practices and procedures best developed by regional entities and their stakeholders, and therefore not necessary in our regulations.[231] However, many of the other proposed criteria could be considered and, if appropriate, adopted on a regional basis.

a. Requests for Rehearing

172. APPA–CMUA notes that in APPA's comments to the NOPR, it expressed a strong concern that the four criteria proposed by the Commission were so general in nature that it would not be difficult for RTOs to assert that they already satisfy the requirements, and that little change would occur to RTO responsiveness as a result.[232] APPA suggested several concrete measures that the Commission should adopt to ensure responsiveness, including: direct stakeholder access to RTO boards, presentation of minority viewpoints directly to the board, consideration of stakeholder advisory committees and hybrid boards, open RTO board meetings with agendas disclosed in advance, board member attendance at working group/technical meetings where appropriate, elimination of "self-perpetuating" RTO boards, administration of customer satisfaction surveys, development of cost oversight benchmarking for RTOs, and a moratorium on the establishment of new RTO-run markets unless accompanied by an independent cost-benefit analysis or affirmative vote of all RTO stakeholder classes. APPA–CMUA argues that because the Commission declined to adopt additional measures, customers seeking greater RTO responsiveness and accountability will have to participate in RTO stakeholder processes with no clear guidance as to what specific measures will satisfy the four general criteria adopted in the Final Rule. They seek rehearing of this aspect of the Final Rule, and ask the Commission to implement additional measures and criteria to allow for concrete improvements in RTO responsiveness.[233]

173. TAPS also notes that the Commission failed to implement specific requirements for RTO responsiveness or accountability. TAPS points to the suggestions it made in its comments to the NOPR, including requirements for cost-benefit analyses, annual public reporting of RTO performance measurements, requiring RTO management compensation to be tied to consumer-focused performance measures, and an improved budget review process with advance stakeholder review. TAPS also argued that RTOs should be held accountable for fulfilling obligations to plan and expand the transmission system to meet

[229] *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267 (2005).

[230] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 556–57.

[231] *Id.* P 515.

[232] APPA–CMUA at 41 (citing APPA NOPR Comments at 97–103).

[233] *Id.* at 40–43.

customers' needs. TAPS argues that the stakeholder process mandated in the Final Rule will not be sufficient to meet the needs it outlined in its comments, and it notes that a recently-released GAO Report confirms the need for Commission action and oversight.[234] Accordingly, TAPS asks the Commission to implement its suggested requirements, or to institute a new NOPR on this topic.[235]

174. SMUD also argues that the Commission should require RTOs and ISOs to implement performance penalties for managers. It notes that the accountability of RTOs for results is distinct from RTO responsiveness. Since RTOs and ISOs are not-for-profit entities, SMUD argues, they cannot be penalized for imprudence. Accordingly, the Commission should address the need for RTOs and ISOs to adopt performance penalties for imprudent decisions by managers.[236]

175. SMUD further argues that the Commission erred in failing to require RTOs and ISOs to conduct cost-benefit analyses before implementing major initiatives. It believes that such a requirement would impose discipline on RTOs and ISOs and improve accountability to stakeholders. SMUD also asserts that the Commission must clarify that, in specific factual situations, the absence of sector representation or procedures for rejecting majority stakeholder positions would violate the responsiveness criteria.[237]

176. Pennsylvania PUC states that the Commission failed to address its concerns regarding the control of board election procedures by RTO or ISO employees or managers. Pennsylvania PUC argues that this issue touches on board "capture" by RTO or ISO management, and is not sufficiently addressed by the Final Rule.[238]

b. Commission Determination

177. The Commission reviewed the proposals for new criteria and board practices in preparing the Final Rule and found that neither more specific criteria nor additional criteria from the Commission were necessary or appropriate. We deny rehearing on this issue.

178. The criteria established for responsiveness were intended to balance the need to improve RTOs' and ISOs' responsiveness to their stakeholders with the development of practices that best suit the needs of the individual RTO or ISO.[239] We continue to believe that this process best works through collaboration between the RTO or ISO and its stakeholders based on the broad principles laid out by the Commission, rather than through the Commission mandating specific outcomes. Further, RTOs and ISOs are still evolving institutions; they and their stakeholders may want to add, remove, or improve specific responsiveness provisions over time, without being prevented from doing so by Commission codification of today's practices. Many of the specific criteria suggested in the comments prior to the Final Rule and in the requests for rehearing are better addressed through the stakeholder process, where RTOs and ISOs can tailor these ideas to the needs of their regions, and amend them as needed without a change in Commission regulations.

179. In establishing the four criteria for board responsiveness, the Commission's goal was to be sufficiently prescriptive to give RTOs and ISOs a guideline for how to structure their board policies, without being so specific as to micromanage each RTO's and ISO's policy. For instance, although we believe that cost-benefit analyses can be useful in analyzing new projects, we are unconvinced that the Commission should mandate cost-benefit analyses in all circumstances where an RTO or ISO engages in a major initiative. We do not have enough evidence in the record to determine when and how an RTO or ISO should be required to perform a cost-benefit analysis. Instead, in the Final Rule, we encouraged interested parties to raise this idea with individual RTOs or ISOs, and allow the RTO or ISO to work out a policy that is tailored to its needs.[240]

180. The specific requirements raised by APPA, TAPS and others represent the end point of the policy process, and should be the result of a dialogue between RTOs and ISOs and their stakeholders rather than Commission mandate. We are interested here in making sure that stakeholders are able to have a productive dialogue with their RTO or ISO, and the criteria the Commission established in the Final Rule were designed to require that this be done in a way determined by each region.

181. With respect to Pennsylvania PUC's concern regarding the relationship between the RTO or ISO board and the entity's employees, we note that Pennsylvania PUC has not presented any evidence that this is a generic issue for all RTOs and ISOs, and does not make the case that a Commission mandate is necessary or appropriate. Pennsylvania PUC should raise any concerns regarding specific RTO or ISO practices during the stakeholder process for forming the responsiveness practices and procedures for that RTO or ISO. Pennsylvania PUC may raise the issue again with the Commission following the RTO and ISO compliance filings if it believes that its concerns have not been adequately addressed.

182. Similarly, with respect to SMUD's and TAPS' requests for requirements for performance penalties for managers, we continue to encourage, but not require, that executive compensation programs give appropriate weight to responsiveness. As we discuss further below, the Commission mandating specific requirements with respect to board structure or board and management compensation could lead to a slippery slope,[241] and may also be outside the Commission's jurisdiction.[242]

2. Hybrid Boards

183. In the Final Rule, the Commission did not require RTOs or ISOs to adopt a specific form of board structure, whether board advisory committee, hybrid board, or other. The Commission found that a one-size-fits-all approach was not warranted. The Commission did note that it viewed the board advisory committee as a particularly strong mechanism for enhancing responsiveness, and that it expected each RTO and ISO to work with its stakeholders to develop the mechanism that best suits its needs.[243]

184. With respect to hybrid boards, the Commission followed its ruling in Order No. 2000,[244] in which it noted that RTOs and ISOs take many different forms to reflect the various needs of

[234] TAPS at 67 (citing 2008 GAO Report). *See supra* note 129.

[235] TAPS at 67.

[236] SMUD at 9.

[237] *Id.* at 11.

[238] Pennsylvania PUC at 7.

[239] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 505.

[240] *Id.* P 515. *See also* discussion *supra* P 71 (declining to require cost-benefit analysis for ARCs' participation in RTO- and ISO-administered markets but encouraging RTOs and ISOs to evaluate this option individually).

[241] *See infra*, note 254.

[242] *See Cal. Indep. Sys. Operator Corp.* v. *FERC*, 372 F.3d 395 (D.C. Cir. 2004).

[243] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 534.

[244] *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000–A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington* v. *FERC*, 272 F.3d 607 (D.C. Cir. 2001).

each region.[245] The Commission denied requests to disallow hybrid boards in this proceeding, reasoning that a hybrid governance structure could be constructed in a way that allows for the expertise of various groups to inform the decision-making process, while still retaining board independence such that no individual market participant is given undue influence over the decisions of the board. The Commission noted that commenters were free to raise objections to the specific hybrid board proposals made by RTOs and ISOs in their compliance filings.[246]

a. Requests for Rehearing

185. Several parties argue that the Commission erred in allowing RTOs and ISOs to choose to create hybrid boards. For instance, Illinois Commerce Commission argues that board advisory committees are a superior method of promoting responsiveness, and that the Commission should remove the option of hybrid boards based on their many flaws.[247] Pennsylvania PUC argues that allowing hybrid boards would be at odds with the principle of independence established by the Commission in Orders No. 888 [248] and 2000. Pennsylvania PUC argues that hybrid boards are a bad idea for several reasons, including the difficulty hybrid board members would have in fulfilling their fiduciary duties, the potential for confrontation among members of a sector, and the inability to protect confidential information from disclosure or misuse.[249]

186. Industrial Coalitions state that the Commission failed to present adequate evidence that hybrid boards could be appropriately independent and responsive. They argue that an RTO's or ISO's independence depends on the independence of its board members, and that a hybrid board would, by definition, violate this independence requirement. Additionally, Industrial Coalitions argue that a hybrid board structure would expose independent board members to undue influence from stakeholder interests on the board, which could lead to a divisive atmosphere and suspicion. Finally, they note that it is unlikely that a hybrid board would provide adequate representation to end-use customers, and would likely actually diminish customers' voice.[250]

187. The Ohio PUC argues that the Commission erred in not preventing stakeholders from participating in RTO or ISO boards, and that this decision will erode confidence in RTO or ISO boards because they will be perceived to be biased and to lack independence. Both the Ohio PUC and the Wisconsin PSC also argue that the Commission erred in not ensuring that States' interests are adequately represented on RTO or ISO boards, through seating a board member with State regulatory experience.[251]

b. Commission Determination

188. In the Final Rule, the Commission did not mandate a specific form of board structure, but instead allowed RTOs and ISOs to propose their own methods of meeting the four criteria, including through a board advisory committee or a hybrid board.[252] The Commission heard many of the same arguments against hybrid boards made in the requests for rehearing in comments received prior to the Final Rule. We are aware that this is an issue of some controversy, and we take seriously the potential independence issues that may arise from having stakeholder members on an RTO or ISO board of directors. We emphasize that the Final Rule did not repeal any of the requirements for RTO independence in Order No. 2000 or for ISO independence in Order No. 888. However, we are not convinced that it is impossible to structure a hybrid board so as both to meet the board independence requirements of prior orders and to provide for limited stakeholder membership without compromising board independence. Accordingly, we deny rehearing on this issue.

189. Our ruling does not imply that every form of hybrid board would be acceptable to the Commission. As we stated in the Final Rule, any board that includes market participants should be structured to ensure that no one class would be allowed to veto a decision reached by the rest of the board, and that no two classes could force through a decision opposed by the rest of the board.[253] We continue to view the board advisory committee as a particularly strong mechanism for enhancing responsiveness, and we will closely review any RTO or ISO proposal to ensure that it is just and reasonable and the result of a thorough stakeholder process.

190. We also deny the requests to require that RTO and ISO boards include one member with State regulatory experience. While we believe that a variety of backgrounds and experiences may be useful for an RTO or ISO board, we do not see a reason for the Commission to set generic board membership requirements for all RTOs and ISOs regarding any particular specific experience or qualification. The Ohio Commission and the Wisconsin PSC have not convinced us, in their requests for rehearing, that mandating State regulatory membership would be suited to all circumstances, and therefore we prefer to allow RTOs and ISOs the flexibility to propose for Commission approval their own choices regarding board membership.[254] As previously stated, we will evaluate those proposals in light of the four responsiveness criteria enumerated above.

3. Mission Statements

191. The Final Rule required each RTO and ISO to post on its Web site a mission statement or organizational charter. The Commission encouraged each RTO and ISO to include in its mission statement, among other things, the organization's purpose, guiding principles, and commitment to responsiveness to customers and other stakeholders, and ultimately to the consumers who benefit from and pay for electricity services.[255]

a. Requests for Rehearing

192. Both APPA and TAPS argue that the Commission erred in failing to mandate specific statements in the proposed mission statement posted by the RTO or ISO. APPA notes that the FPA requires that rates be just and reasonable, and thus RTO and ISO mission statements should include explicit language requiring RTOs and

[245] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 537 (citing Order No. 2000, FERC Stats. & Regs. 31,089 at 31,073–75).

[246] *Id.*

[247] Illinois Commerce Commission at 9.

[248] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888–A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York* v. *FERC*, 535 U.S. 1 (2002).

[249] Pennsylvania PUC at 9.

[250] Industrial Coalitions at 17.

[251] Ohio PUC at 19; Wisconsin PSC at 3.

[252] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 534–37.

[253] *Id.* P 537.

[254] Indeed, some state regulators may be prohibited by state law from serving on the boards of public utilities, and an RTO or ISO covering one state or a small number of states may be unable to meet such a generic membership requirement. We further note that requiring that any particular class of stakeholders, including state regulators, have membership on RTO and ISO boards is a slippery slope; we do not wish to impose any affirmative requirements for category of board members.

[255] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 556.

ISOs to provide cost reductions and net benefits to the ultimate consumers they serve.[256] TAPS agrees that the required mission statement should be specific and consumer-focused. TAPS argues that the Commission will not fulfill its obligation under the Federal Power Act unless it redefines the RTOs' and ISOs' mission to include provision of reliable service at the lowest possible reasonable rates, and requires RTOs and ISOs to meet these goals.[257]

b. Commission Determination

193. We deny rehearing of the Commission's decision not to mandate specific statements in the mission statements required of each RTO and ISO. We find, however, that a successful mission statement should explain the mission of an RTO or ISO, as developed in a collaborative process with stakeholders, and we do not wish to interfere with this process by mandating specific elements of the mission statement. Indeed, an RTO's or ISO's mission may evolve over time, and it should be able to update its mission statements to reflect new mission elements. (We note in this regard, as discussed elsewhere in this order, that some petitioners would have us reconsider now the existing mission of some RTOs and ISOs.) If parties believe that an RTO or ISO mission statement is not sufficiently consumer-focused, or is otherwise deficient, they should raise those objections during the stakeholder process or in response to the RTO or ISO compliance filing.

III. Document Availability

194. 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.

195. 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.

196. User assistance is available for eLibrary and the FERC'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*.

IV. Effective Date

197. Changes to Order No. 719 made in this order on rehearing will be effective on August 28, 2009.

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

By the Commission. Commissioner Kelly is concurring in part and dissenting in part with a separate statement attached.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

■ In consideration of the foregoing, the Commission amends part 35, Chapter I, Title 18, of the *Code of Federal Regulations*, as follows:

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

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

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

■ 2. In § 35.28, paragraph (g)(1)(iii) is revised as follows:

§ 35.28 Non-discriminatory open access transmission tariff.

* * * * *

(g) * * *

(1) * * *

(iii) *Aggregation of retail customers.* Each Commission-approved independent system operator and regional transmission organization must accept bids from an aggregator of retail customers that aggregates the demand response of the customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year, and the customers of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, where the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an aggregator of retail customers. An independent system operator or regional transmission organization must not accept bids from an aggregator of retail customers that aggregates the demand response of the customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year, where the relevant electric retail regulatory authority prohibits such customers' demand response to be bid into organized markets by an aggregator of retail customers, or the customers of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an aggregator of retail customers.

* * * * *

Note: The following statement will not appear in the Code of Federal Regulations.

KELLY, Commissioner, *concurring in part and dissenting in part:*

As I have noted in my separate statements at each phase of this proceeding, I continue to have misgivings about the potential impacts of several of Order No. 719's directives, including (1) the scarcity pricing measures; (2) the issue of promoting responsiveness of RTOs/ISOs by allowing them to adopt hybrid boards with stakeholder members; and (3) MMUs being removed from tariff administration and mitigation.[1] Despite my ongoing concerns, I believe that some of these proposals have positively evolved over the course of this proceeding. A good deal of that evolution is due to the commenters who have taken the time to participate in our process, thereby moving the debate in a positive direction. I also want to commend Commission staff who have worked tirelessly on these efforts. I believe that the Commission has appropriately used Order No. 719 as a vehicle to move the issue of competition in organized markets in a generally positive direction. Further, as the order states, the Commission will continue to look for ways to strengthen organized markets.

Accordingly, I respectfully concur in part and dissent in part.

Suedeen G. Kelly

[FR Doc. E9–17364 Filed 7–28–09; 8:45 am]

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[256] APPA at 44–45.

[257] TAPS at 60–62.

[1] *See Wholesale Competition in Regions with Organized Electric Markets*, Advance Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,617 (2007), Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,628 (2008), Order No. 719, 73 FR 61,400 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008) (Comm'r Kelly concurring in part and dissenting in part).

Federal Register

Wednesday,
July 29, 2009

Part III

Department of Education

Race to the Top Fund; State Fiscal Stabilization Fund Program; Institute of Education Sciences; Overview Information; Grant Program for Statewide Longitudinal Data Systems; Notice Inviting Applications for New Awards Under the American Recovery and Reinvestment Act of 2009; Notices

DEPARTMENT OF EDUCATION

[Docket ID ED–2009–OESE–0006]

RIN 1810–AB07

Race to the Top Fund

AGENCY: Department of Education.

ACTION: Notice of proposed priorities, requirements, definitions, and selection criteria.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.395A.

SUMMARY: The Secretary of Education (Secretary) proposes priorities, requirements, definitions, and selection criteria for the Race to the Top Fund. The Secretary may use these priorities, requirements, definitions, and selection criteria in any year in which this program is in effect.

DATES: We must receive your comments on or before August 28, 2009. We encourage you to submit comments well in advance of this date.

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 and the term "Race to the Top" at the top of your comments.

- *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." A direct link to the docket page is also available at *http://www.ed.gov/programs/racetothetop.*
- *Postal Mail, Commercial Delivery, or Hand Delivery.* If you mail or deliver your comments about these proposed priorities, requirements, definitions, and selection criteria, address them to Office of Elementary and Secondary Education (Attention: Race to the Top Fund Comments), U.S. Department of Education, 400 Maryland Avenue, SW., Room 3W329, Washington, DC 20202.
- *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: Beth Yeh, U.S. Department of Education, 400 Maryland Avenue, SW., Room 6W219, Washington, DC 20202. Telephone: 202–205–3775 or by e-mail: *racetothetop@ed.gov.* Note that we will not accept comments by e-mail.

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding this notice. To ensure that your comments have maximum effect in developing the notice of final priorities, requirements, definitions, and selection criteria, we urge you to identify clearly the specific proposed priority, requirement, definition, or selection criterion that each comment addresses. We encourage you to submit comments in advance of the date by which they must be received.

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 priorities, requirements, definitions, and selection criteria. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about this notice by accessing Regulations.gov. You may also inspect the comments in person, in Room 3W329, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 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 provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Purpose of Program: The Race to the Top Fund, authorized under the American Recovery and Reinvestment Act of 2009 (ARRA), provides approximately $4.3 billion for competitive grants to States to encourage and reward States that are creating the conditions for education innovation and reform; implementing ambitious plans in the four education reform areas described in the ARRA; and achieving significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers.

Program Authority: American Recovery and Reinvestment Act of 2009, Division A, Section 14006, Public Law 111–5.

Background for Proposed Priorities, Requirements, Definitions, and Selection Criteria

The Statutory Context

On February 17, 2009, President Obama signed into law the ARRA, historic legislation designed to stimulate the economy, support job creation, and invest in critical sectors, including education. The ARRA lays the foundation for education reform by supporting investments in innovative strategies that are most likely to lead to improved results for students, long-term gains in school and school system capacity, and increased productivity and effectiveness.

The ARRA provides $4.3 billion for the Race to the Top Fund (referred to in the statute as the State Incentive Grant Fund). This is a competitive grant program designed to encourage and reward States that are implementing significant education reforms across four "assurance" areas. Specifically, section 14006(a)(2) of the ARRA requires States to have made significant progress in the following four education reform areas in order to receive a grant: implementing standards and assessments, improving teacher effectiveness and achieving equity in teacher distribution, improving collection and use of data, and supporting struggling schools. In addition, as required by section 14006(c) of the ARRA, States that receive a Race to the Top grant must use at least 50 percent of the award to provide subgrants to local educational agencies (LEAs), including public charter schools identified as LEAs under State law, based upon LEAs' relative shares of funding under Part A of Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA). LEAs that choose to participate in their State's Race to the Top proposal must agree to fully implement the State's proposed plan and to use their funding under this grant in support of that plan.

The ARRA also requires that the Governor apply on behalf of a State seeking a Race to the Top grant, and section 14005(c) of the ARRA specifically requires that a Race to the Top application:

- Describe the status of the State's progress in each of the four education reform areas, and the strategies the State is employing to help ensure that students in the subgroups described in section 1111(b)(2)(C)(v)(II) of the ESEA (*i.e.*, economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency) who have not met the State's proficiency targets continue making progress toward meeting the State's student academic achievement standards;
- Describe the achievement and graduation rates (as described in section 1111(b)(2)(C)(vi) of the ESEA and as clarified in 34 CFR 200.19(b)(1)) of public elementary and secondary school students in the State, and the strategies the State is employing to help ensure that all subgroups of students identified in section 1111(b)(2)(C)(v)(II) of the ESEA continue making progress toward meeting the State's student academic achievement standards;
- Describe how the State would use its grant funding to improve student academic achievement in the State, including how it will allocate the funds to give priority to high-need LEAs (as defined in this notice); and
- Include a plan for evaluating the State's progress in closing achievement gaps.

In this notice, we propose additional specific priorities, requirements, definitions, and selection criteria regarding the applications that individual States submit for approximately $4 billion of Race to the Top funds. At a later date, we may announce a separate Race to the Top Standards and Assessment competition, for approximately $350 million, to support the development of assessments by consortia of States.

Structure of Race to the Top

Race to the Top will reward States for having created the conditions for reform (as measured through the State Reform Conditions Criteria proposed in this notice) and for increasing student achievement. Race to the Top will also provide incentives for States to develop and implement comprehensive reform strategies that are integrated across the four ARRA education reform areas and lead to improved student outcomes (as measured through the Reform Plan Criteria proposed herein). The Department expects successful applicants to clear a high bar on both State Reform Conditions and Reform Plan Criteria. Proposed State Reform Conditions and Reform Plan Criteria are described in detail in the Proposed Selection Criteria section of this notice.

To ensure that the State's Race to the Top plans (which the State will describe in its application in response to the Reform Plan Criteria) are comprehensive, coherent, and measurable, we propose that States describe their approaches and, where appropriate, set annual targets for each of the Reform Plan Criteria.

Note: The proposed annual targets are set forth in the Appendix to this notice. These targets are specific to Race to the Top, and they are in addition to, not a replacement for, the existing annual requirements under the ESEA.) The annual targets should be achievable but sufficiently ambitious to support a successful Race to the Top grant application.

Under the statute, at least 50 percent of the funds under a State's Race to the Top grant must be provided to LEAs based on LEAs' relative shares of funding under part A of Title I of the ESEA. The remaining funds are available to the State for State-level activities and for disbursements to LEAs and other eligible entities under such formulas, competitive processes, or other mechanisms as the State may propose in its plan. We propose that a State incorporate into its plan the activities that LEAs will undertake to advance the four education reform areas.

Timing of Applications and Awards

The Department plans to make Race to the Top grants in two phases. States that are ready to apply may do so in Phase 1, which will open in late calendar year 2009. States that need more time—for example, to engage in planning with and secure commitments from superintendents, school boards, principals, teachers, union leaders, and community supporters, or others—may apply in Phase 2, which will open in late Spring of calendar year 2010. States that apply in Phase 1 but are not awarded grants may reapply for funding in Phase 2, together with States that are applying for the first time in Phase 2. Phase 1 grantees may not apply for additional funding in Phase 2. We will announce specific deadlines for both Phase 1 and Phase 2 in subsequent notice(s) inviting applications for funds under this program.

I. Proposed Priorities

Background: The Secretary proposes five priorities for the Race to the Top competition. We are proposing to designate Proposed Priority 1 as an absolute priority, Proposed Priority 2 as a competitive preference priority, and Proposed Priorities 3 through 5 as invitational priorities. We may choose, in the notice of final priorities, requirements, definitions, and selection criteria, to change the designation of any of these priorities to absolute, competitive preference, or invitational priorities, or to include the substance of these priorities in the selection criteria.

Under an absolute priority, as specified by 34 CFR 75.105(c)(3), we would consider only applications that meet the priority. Under a competitive preference priority, we would give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)). With an invitational priority, we would signal our interest in receiving applications that meet the priority; however, consistent with 34 CFR 75.105(c)(1), we would not give an application that meets an invitational priority preference over other applications.

Proposed Priority 1: Absolute Priority—Comprehensive Approach to the Four Education Reform Areas

To meet this priority, the State's application must comprehensively address each of the four education reform areas specified in the ARRA to demonstrate that the State and its participating LEAs are taking a systemic approach to education reform. The State's application must describe how the State and participating LEAs intend to use Race to the Top and other funds to implement comprehensive and coherent policies and practices in the four education reform areas, and how these are designed to increase student achievement, reduce the achievement gap across student subgroups (as described in section 303(b)(2)(G) of the National Assessment of Educational Progress Authorization Act (NAEP) [1]), and increase the rates at which students

[1] This statute, rather than relevant sections of the ESEA, is referenced because it provides the most recent listing of NAEP subgroups. We propose using the NAEP to monitor overall increases in student achievement and decreases in the achievement gap over the course of this grant because the NAEP provides a way to report consistently across Race to the Top grantees as well as within a State over time as the State transitions from its current assessments to the high-quality assessments (as defined in this notice).

graduate from high school prepared for college and careers.

Proposed Priority 2: Competitive Preference Priority—Emphasis on Science, Technology, Engineering, and Mathematics (STEM)

To meet this priority, the State's application must describe plans to address the need to (i) offer a rigorous course of study in mathematics, sciences, technology, and engineering; (ii) cooperate with industry experts, museums, universities, research centers, or other STEM-capable community partners to prepare and assist teachers in integrating STEM content across grades and disciplines, in promoting effective and relevant instruction, and in offering applied learning opportunities for students; and (iii) prepare more students for advanced study and careers in the sciences, technology, engineering, and mathematics, including addressing the needs of underrepresented groups and of women and girls in the areas of science, technology, engineering and mathematics.

Proposed Priorities 3 Through 5: Proposed Priority 3—Invitational Priority— Expansion and Adaptation of Statewide Longitudinal Data Systems

The Secretary is particularly interested in applications in which the State plans to expand statewide longitudinal data systems to include or integrate data from special education programs, limited English proficiency programs, early childhood programs, human resources, finance, health, postsecondary, and other relevant areas, with the purpose of allowing important questions related to policy or practice to be asked and answered.

The Secretary is also particularly interested in applications in which States propose working together to adapt one State's statewide longitudinal data system so that it may be used, in whole or in part, by other State(s), rather than having each State build or continue building such system(s) independently.

Proposed Priority 4—Invitational Priority—P–20 Coordination and Vertical Alignment

The Secretary is particularly interested in applications in which the State plans to address how early childhood programs, K–12 schools, postsecondary institutions, and workforce organizations will coordinate to improve all parts of the education system and create a more seamless P–20 route for students. Vertical alignment across P–20 is particularly critical at each point where a transition occurs (*e.g.*, between early childhood and K–12, or between K–12 and post secondary) to ensure that students exiting one level are prepared for success, without remediation, in the next.

Proposed Priority 5—Invitational Priority—School-Level Conditions for Reform and Innovation

The Secretary is particularly interested in applications in which the State's participating LEAs provide schools, where appropriate, with flexibilities and autonomies conducive to reform and innovation, such as—

(i) Selecting staff;

(ii) Implementing new structures and formats for the school day or year that expand learning time;

(iii) Placing budgets under the schools' control;

(iv) Awarding credit to students based on student performance instead of instructional time; and

(v) Providing comprehensive services to high-need students (*e.g.*, through local partnerships, internal staffing, and contracts with outside providers).

II. Requirements

The Secretary proposes the following requirements for this program. We may apply these requirements in any year in which this program is in effect.

A. Eligibility Requirements

Background: We are proposing two eligibility requirements for Race to the Top applicants. First, we propose that a State must have an approved application under both Phase 1 and Phase 2 of the State Fiscal Stabilization Fund (Stabilization) program of the ARRA in order to be eligible to receive an award from the Race to the Top competition. Section 14005(d) of the ARRA requires a State that receives funds under the Stabilization program to provide assurances in the same four education reform areas that will be advanced by the Race to the Top grant. We therefore believe that it would be inconsistent to award a Race to the Top grant, which requires a determination that a State has made significant progress in the four education reform areas, to a State that has not met requirements for receiving funds under the Stabilization program.

Second, we propose that to be eligible under this program, a State must not have any legal, statutory, or regulatory barriers to linking student achievement or student growth data to teachers for the purpose of teacher and principal evaluation. Research indicates that teacher quality is a critical contributor to student learning and that there is dramatic variation in teacher quality.[2] Yet it is difficult to predict teacher quality based on the qualifications that teachers bring to the job. Indeed, measures such as certification, master's degrees, and years of teaching experience have limited predictive power on this point.[3] Therefore, one of the most effective ways to accurately assess teacher quality is to measure the growth in achievement of a teacher's students;[4] [5] and by aggregating the performance of students across teachers within a school, to assess principal quality. Current law in a number of States presents an obstacle to efforts to improve teacher quality by prohibiting data regarding student achievement from being tied to teachers for the purposes of evaluation. This capability is fundamental to Race to the Top reforms and to the requirement in section 14005(d)(2) of the ARRA that States take actions to improve teacher effectiveness. Without this legal authority, States would not be able to execute reform plans relating to several selection criteria in this notice (see Selection Criteria (C)(2) through (C)(5)), because these plans must require LEAs and schools to determine which

[2] See, *e.g.* Kane, Thomas J., Jonah E. Rockoff, and Douglas O. Staiger (2006), "What Does Certification Tell Us About Teacher Effectiveness? Evidence from New York City," NBER Working Paper No. 12155; Rivkin, Steven G., Eric A. Hanushek, and John F. Kain (2005), "Teachers, Schools, and Academic Achievement," Econometrica, 73(2), 417–458; Rockoff, Jonah. E. (2004), "The Impact of Individual Teachers on Students' Achievement: Evidence from Panel Data," American Economic Review 94(2), 247–52; Organisation for Economic Co-operation and Development (2004), "Teachers Matter: Attracting, Developing and Retaining Effective Teachers", p. 3; Leithwood, Kenneth, Karen Seashore Louis, Stephen Anderson, and Kyla Wahlstrom (2004), "How Leadership Influences Student Learning," Wallace Foundation Learning from Leadership Project; Aaronson, Daniel, Lisa Barrow, and William Sander (2003), "Teacher and Student Achievement in the Chicago Public High Schools," Federal Reserve Bank of Chicago Working Paper 2002–28.

[3] Rivkin, Hanushek, and Kain (2005). Kane, Rockoff, and Staiger (2006). Aaronson, Barrow, and Sander (2003).

[4] For example, Rockoff et al. find that even using a detailed data set on incoming teacher characteristics allows them to predict only about 12 percent of the variance of the expected distribution of teacher effectiveness. Jonah E. Rockoff, Brian A. Jacob, Thomas J. Kane, and Douglas O. Staiger (2008), "Can You Recognize an Effective Teacher When You Recruit One?" NBER Working Paper No. 14485. Similarly, Goldhaber et al. show that the variance in student achievement due to unobservable teacher variables is 40 times greater than the variance due to observable teacher variables. Dan Goldhaber, Dominic Brewer, and Deborah J. Anderson (1999), "A three-way error components analysis of educational productivity," *Education Economics* 7 (3): 199–208.

[5] Kane, Rockoff, and Staiger (2006). Aaronson, Barrow, and Sander (2003).

teachers and principals are effective using student achievement data.

Proposed Eligibility Requirements: We propose the following requirements that a State must meet in order to be eligible to receive funds under this program.

(a) In order for the State to be eligible for the Race to the Top Phase 1 competition, the State's applications for funding under Phase 1 and Phase 2 of the Stabilization program must be approved by the Department by December 31, 2009. In order for the State to be eligible for the Race to the Top Phase 2 competition, the State's application for funding under Phase 1 and Phase 2 of the Stabilization program must be approved by the Department prior to the State submitting its Race to the Top Phase 2 application.

(b) The State does not have any legal, statutory, or regulatory barriers to linking data on student achievement (as defined in this notice) or student growth (as defined in this notice) to teachers and principals for the purpose of teacher and principal evaluation.

B. Application Requirements

Background: Section 14005(c) of the ARRA requires that certain information (as discussed earlier in this notice) be included in States' Race to the Top applications. Consistent with those requirements and the need for additional information that will ensure a fair and accurate peer review of the grant applications, we propose the following requirements for the application a State would submit to the Department for funding under this program.

The Department recognizes that requests for data and information should reflect an integrated and coordinated approach among the various ARRA programs, particularly the State Fiscal Stabilization, Race to the Top, School Improvement Grants, and Statewide Longitudinal Data Systems grant programs. Accordingly, the Department will continue to evaluate our requests for data and information under this program in context with the other ARRA programs.

Proposed Application Requirements

(a) The State's application must be signed by the Governor, the State's chief school officer, and the president of the State board of education.

(b) The State must describe the progress it has made to date in each of the four education reform areas, including how the State has used ARRA and other Federal and State funding over the last several years to pursue reforms in these areas (as described in Overall Selection Criterion (E)(1)).

(c) The State must provide financial data to show whether and to what extent the percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2009 increased, decreased, or remained the same compared to FY 2008 (as described in Overall Selection Criterion (E)(2)).

(d) The State must describe its statewide support from stakeholders and LEAs, including public charter schools identified as LEAs under State law (as described in Overall Selection Criterion (E)(3)).

(e) The State must include a budget that details how it will use grant funds and other resources to meet targets and perform related functions, including how it will use funds awarded under this program to—

(1) Achieve its targets for improving student achievement and graduation rates and for closing achievement gaps (as described in Overall Selection Criterion (E)(4)); and

(2) Give priority to high-need LEAs (as defined in this notice), in addition to providing 50 percent of the grant to participating LEAs based on their relative shares of funding under part A of Title I of the ESEA as required under section 14006(c) of the ARRA.

(f) The State must provide, for each State Reform Conditions Criterion (listed later in this notice), a description of the State's current status in meeting that Criterion, and at a minimum, the information requested as supporting evidence for the Criterion. The Appendix to this notice contains a table listing the proposed evidence.

(g) The State must provide, for each Reform Plan Criterion (listed later in this notice) a detailed plan for use of grant funds that includes, but need not be limited to—

(1) The key activities to be undertaken;

(2) The goals and rationale for the activities, which may include but need not be limited to evidence of the past effectiveness of those activities, as documented in research or through the effective implementation of an activity in one or more States, LEAs, or schools (which may include charter schools);

(3) The timeline for implementing the activities;

(4) The party or parties responsible for implementing the activities;

(5) The resources the State will use to support the activities (*e.g.*, funding, personnel, systems);

(6) The State's annual targets, where applicable, with respect to the performance measures aligned to the Criterion for the four school years beginning with the 2010–2011 school year. The Appendix to this notice contains a table listing the proposed performance measures. Where plans are proposed for reform efforts not covered by a performance measure specified by the Department, States are encouraged to propose performance measures and annual targets for those efforts; and

(7) The information requested as supporting evidence, if any (as described in the Appendix), for the Criterion, together with any additional information the State believes will be helpful to peer reviewers.

(h) The State must submit a certification from the State Attorney General, or other chief State legal officer, that the State's description of, and statements and conclusions concerning, State law (for example, with respect to the Eligibility Requirement regarding teacher effectiveness or any of the applicable Selection Criteria) in its application are complete, accurate, and constitute a reasonable interpretation of State law.

C. Annual Report and Performance Measures

The Secretary proposes core performance measures for evaluating the performance of States receiving funds under this program. See the Appendix to this notice for the proposed performance measures.

In addition, a State receiving funds under this program must submit to the Department an annual report which may include, in addition to the standard elements, a description of the State's and its LEAs' progress to date on their goals, timelines, and budgets, as well as actual performance compared to the annual targets the State established in its application with respect to each performance measure.

Further, a State receiving funds under this program and its participating LEA are accountable for meeting the goals, timelines, budget, and annual targets established in the application; adhering to an annual fund drawdown schedule that is tied to meeting these goals, timelines, budget, and annual targets; and fulfilling and maintaining all other conditions for the conduct of the project.

The Department will monitor a State's and its participating LEAs' progress in meeting its goals, timelines, budget, and annual targets and in fulfilling other applicable requirements. To support a collaborative process between the State and the Department, the Department may require that applicants who are selected to receive an award enter into a written performance or cooperative

agreement with the Department. If the Department determines that a State is not meeting its goals, timelines, budget, or annual targets or is not fulfilling other applicable requirements, the Department will take appropriate action, which could include a collaborative process between the Department and the State, or enforcement measures with respect to this grant such as placing the State in high-risk status, putting the State on reimbursement payment status, or delaying or withholding funds.

D. Other Program Requirements

We propose the following additional requirements for States receiving funds under this program:

(a) The State and its participating LEAs must use funds under this program to participate in a national evaluation of the program, if the Department chooses to conduct one. In addition, the Department is seeking comment on whether a State should, instead of or in addition to a national evaluation, be required to conduct its own evaluation of its program activities using funds under this program. The Department will announce in the notice inviting applications the evaluation approach(es) that will be required.

(b) The State must participate in all applicable technical assistance activities that may be conducted by the Department or its designees.

(c) The State must make freely available all of the outputs (*e.g.*, materials, tools, processes, systems) that it or its designated partners produce related to its grant, including by posting the outputs on any Web site identified or sponsored by the Department.

III. Selection Criteria

The Secretary proposes the following criteria for reviewing applications submitted under this program. We may apply one or more of these criteria in any year in which this program is in effect. In the notice inviting applications, the application package, or both, we will announce the maximum number of points assigned to each criterion.

As discussed elsewhere in this notice, we propose using two types of selection criteria—State Reform Conditions Criteria and Reform Plan Criteria—to rate a State's application for Race to the Top funds. State Reform Conditions Criteria will be used to assess a State's past progress and its success in creating conditions for reform in specific areas related to the four ARRA education reform areas. The Reform Plan Criteria will be used to assess States' plans for future efforts in the four ARRA education reform areas.

In the Appendix, we list both the minimum evidence, if any, that the State must provide to assist the Department and peer reviewers in determining whether a State's application meets each Criterion, and the performance measures, if any, for each Reform Plan Criterion. States may submit additional information if they deem it to be relevant and useful. In addition, States that have submitted the requested information to the Department for other programs are welcome to indicate that they would like a specific previous submission to be used as evidence, or they may provide an updated submission.

For each Reform Plan Criterion, peer reviewers will also consider the extent to which States, where applicable, set ambitious yet achievable annual targets against the performance measure, to support the State's plan. Grantees will report their progress with respect to these performance measures and annual targets as part of their annual reports.

Proposed Selection Criteria

A. Standards and Assessments

Note: Under this reform area, we are proposing several Criteria that will be different for applications submitted under Phase 1 and Phase 2. Where the Criteria are different, we have so indicated.

State Reform Conditions Criteria

(A)(1) Developing and adopting common standards:[6]

(i) For Phase 1 applications: The extent to which the State has demonstrated commitment to improving the quality of its standards by participating in a consortium of States that is working toward jointly developing and adopting, by June 2010, a common set of K–12 standards (as defined in this notice) that are internationally benchmarked and that build toward college and career readiness by the time of high school graduation, and the extent to which this consortium includes a significant number of States.

(ii) For Phase 2 applications: Whether the State has demonstrated commitment to improving the quality of its standards by adopting, as part of a multi-State consortium, a common set of K–12 standards (as defined in this notice) that are internationally benchmarked and that build toward college and career readiness by the time of high school graduation, and the extent to which this consortium includes a significant number of States.

(A)(2) *Developing and implementing common, high-quality assessments:*[7] Whether the State has demonstrated a commitment to improving the quality of its assessments by participating in a consortium of States that is working toward jointly developing and implementing common, high-quality assessments (as defined in this notice) aligned with the consortium's common set of K–12 standards (as defined in this notice) that are internationally benchmarked and that build toward college and career readiness by the time of high school graduation, and the extent to which this consortium includes a significant number of States.

Reform Plan Criteria

(A)(3) *Supporting transition to enhanced standards and high-quality assessments:*[8] The extent to which the State, in collaboration with its participating LEAs, has a high-quality plan for supporting a statewide transition to and implementation of (a) internationally benchmarked K–12 standards that build toward college and career readiness by the time of high school graduation, and (b) high-quality assessments (as defined in this notice) tied to these standards. State or LEA activities might include: Aligning high school exit criteria and college entrance requirements with the new assessments; developing, disseminating, and implementing curricular frameworks and materials, formative and interim assessments (as defined in this notice), and professional development materials; and engaging in other strategies that translate the standards and information from assessments into classroom practice.

B. Data Systems to Support Instruction

State Reform Conditions Criteria

(B)(1) *Fully implementing a statewide longitudinal data system:*[9] The extent to

[6] A State's responses to proposed Indicator (c)(2) and Descriptor (c)(1) in its Stabilization program Phase 2 application may contain information responsive, in part, to this State Reform Conditions Criterion, to which the State may refer and incorporate in its Race to the Top application.

[7] A State's responses to proposed Indicator (c)(2) and Descriptor (c)(1) in its Stabilization program Phase 2 application may contain information responsive, in part, to this State Reform Conditions Criterion, to which the State may refer and incorporate in its Race to the Top application.

[8] A State's responses to proposed Indicators (c)(1)–(c)(13) and Descriptor (c)(1) in its Stabilization program Phase 2 application may contain information related to this Reform Plan Criterion, to which the State can refer and build upon in its Race to the Top application.

[9] The State's responses to proposed Indicator (b)(1) and requirements II.c.1.A and II.c.1.B.(i–iii) in its Stabilization program Phase 2 application may contain information responsive, in part, to this State Reform Conditions Criterion, to which the State can refer and build upon in its Race to the Top application.

which the State has a statewide longitudinal data system that includes all of the elements specified in section 6401(e)(2)(D) of the America COMPETES Act (as defined in this notice).

Reform Plan Criteria

(B)(2) *Accessing and using State data:*[10] The extent to which the State has a high-quality plan to ensure that data from the State's statewide longitudinal data system are accessible to, and used to inform and engage, as appropriate, key stakeholders (*e.g.*, parents, students, teachers, principals, LEA leaders, community members, unions, researchers, and policymakers); that the data support decision-makers in the continuous improvement of instruction, operations, management, and resource allocation; and that they comply with the applicable requirements of the Family Educational Rights and Privacy Act (FERPA).

(B)(3) *Using data to improve instruction:*[11] The extent to which the State, in collaboration with its participating LEAs, has a high-quality plan to—

(i) Increase the use of instructional improvement systems (as defined in this notice) that provide teachers, principals, and administrators with the information they need to inform and improve their instructional practices, decision-making, and overall effectiveness; and

(ii) Make these data, together with statewide longitudinal data system data, available and accessible to researchers so that they have detailed information with which to evaluate the effectiveness of instructional materials, strategies, and approaches for educating different types of students (*e.g.*, students with disabilities, limited English proficient students, students whose achievement is well below or above grade level), in a manner that complies with the applicable requirements of FERPA.

C. Great Teachers and Leaders

State Reform Conditions Criteria

(C)(1) *Providing alternative pathways for aspiring teachers and principals:* The extent to which the State has in place legal, statutory, or regulatory provisions that allow alternative routes to certification (as defined in this notice) for teachers and principals, particularly routes that allow for providers in addition to institutions of higher education; and the extent to which these routes are in use.

Reform Plan Criteria

(C)(2) *Differentiating teacher and principal effectiveness based on performance:*[12] The extent to which the State, in collaboration with its participating LEAs, has a high-quality plan and ambitious yet achievable annual targets to (a) Determine an approach to measuring student growth (as defined in this notice); (b) employ rigorous, transparent, and equitable processes for differentiating the effectiveness of teachers and principals using multiple rating categories that take into account data on student growth (as defined in this notice) as a significant factor; (c) provide to each teacher and principal his or her own data and rating; and (d) use this information when making decisions regarding—

(i) Evaluating annually and developing teachers and principals, including by providing timely and constructive feedback and targeted professional development;

(ii) Compensating and promoting teachers and principals, including by providing opportunities for teachers and principals who are highly effective (as defined in this notice) to obtain additional compensation and responsibilities; and

(iii) Granting tenure to and dismissing teachers and principals based on rigorous and transparent procedures for awarding tenure (where applicable) and for removing tenured and untenured teachers and principals after they have had ample opportunities to improve but have not done so.

(C)(3) *Ensuring equitable distribution of effective teachers and principals:*[13] The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to increase the number and percentage of highly effective teachers and principals (as defined in this notice) in high-poverty schools (as defined in this notice), and to increase the number and percentage of effective teachers (as defined in this notice) teaching hard-to-staff subjects including mathematics, science, special education, English language proficiency, and other hard-to-staff subjects identified by the State or LEA. Plans may include, but are not limited to, the implementation of incentives and strategies in areas such as recruitment, compensation, career development, and human resources practices and processes.

(C)(4) *Reporting the effectiveness of teacher and principal preparation programs:* The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to link a student's achievement data to the student's teachers and principals, to link this information to the programs where each of those teachers and principals was prepared for credentialing, and to publicly report the findings for each credentialing program that has twenty or more graduates annually.

(C)(5) *Providing effective support to teachers and principals:* The extent to which the State, in collaboration with its participating LEAs, has a high-quality plan to use rapid-time (as defined in this notice) student data to inform and guide the support provided to teachers and principals (*e.g.*, professional development, time for common planning and collaboration) in order to improve the overall effectiveness of instruction; and to continuously measure and improve both the effectiveness and efficiency of those supports.

D. Turning Around Struggling Schools

State Reform Conditions Criteria

(D)(1) *Intervening in the lowest-performing schools and LEAs:* The extent to which the State has the legal, statutory, or regulatory authority to intervene directly in the State's persistently lowest-performing schools (as defined in this notice) and in LEAs that are in improvement and corrective action status.

(D)(2) *Increasing the supply of high-quality charter schools:*[14]

(i) The extent to which the State has a charter school law that does not prohibit or effectively inhibit increasing the number of charter schools in the State (as measured by the percentage of total schools in the State that are allowed to be charter schools) or otherwise restrict student enrollment in charter schools.

[10] A State's responses to proposed Indicator (b)(2) and requirements II.c.2.A and II.c.2.B(i–iii) in its Stabilization program Phase 2 application may contain information related to this Reform Plan Criterion, to which the State can refer and build upon in its Race to the Top application.

[11] A State's responses to proposed Indicator (b)(2) and requirements II.c.2.A and II.c.2.B(i–iii) in its Stabilization program Phase 2 application may contain information related to this Reform Plan Criteria, to which the State can refer and build upon in its Race to the Top application.

[12] A State's responses to proposed Indicators (a)(2) and (a)(5) and Descriptors (a)(1) and (a)(2) in its Stabilization program Phase 2 application may contain information related to this Reform Plan Criterion, to which the State can refer and build upon in its Race to the Top application.

[13] A State's response to proposed Indicator (a)(1) in its Stabilization program Phase 2 application may contain information related to this Reform Plan Criterion, to which the State can refer and build upon in its Race to the Top application.

[14] A State's responses to proposed Indicator (d)(6) in its Stabilization program Phase 2 application may contain information related to this Reform Plan Criterion, to which the State can refer and build upon in its Race to the Top application.

(ii) The extent to which the State has statutes and guidelines regarding how charter school authorizers approve, monitor, hold accountable, reauthorize, and close charter schools, including the extent to which such statutes or guidelines require that student academic achievement be a factor in such activities and decisions, and the extent to which charter school authorizers in the State have closed or not renewed ineffective charter schools.

(iii) The extent to which the State's charter schools receive equitable funding, compared to traditional public schools, and a commensurate share of local, State, and Federal program and revenue sources.

(iv) The extent to which the State provides charter schools with facilities funding (for leasing facilities, purchasing facilities, or making tenant improvements), assistance with facilities acquisition, access to public facilities, the ability to share in bonds and mill levies, or other supports; and the extent to which the State does not impose any facility-related requirements on charter schools that are stricter than those applied to traditional public schools.

Reform Plan Criteria

(D)(3) *Turning around struggling schools:*[15] The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to (i) identify at least the lowest-achieving five percent of the persistently lowest-performing schools (as defined in this notice) or the lowest-achieving five schools, whichever is larger; and (ii) support its LEAs in turning around these schools by—

- Putting in place new leadership and a majority of new staff, new governance, and improved instructional programs; and providing the school with flexibilities such as the ability to select staff, control its budget, and expand student learning time; or
- Converting them to charter schools or contracting with an education management organization (EMO); or
- Closing the school and placing the school's students in high-performing schools; or
- To the extent that these strategies are not possible, implementing a school transformation model that includes: Hiring a new principal, measuring teacher and principal effectiveness (as defined in this notice), rewarding effective teachers and principals (as defined in this notice), and improving strategies for recruitment, retention, and professional development; implementing comprehensive instructional reform, including an improved instructional program and differentiated instruction; and extending learning time and community-oriented supports, including more time for students to learn and for teachers to collaborate, more time for enrichment activities, and on-going mechanisms for family and community engagement.

E. Overall Selection Criteria

State Reform Conditions Criteria

(E)(1) *Demonstrating significant progress:* The extent to which the State has, over the past several years—

(i) Made progress to date in each of the four education reform areas;

(ii) Used ARRA and other Federal and State funding to pursue reforms in these areas;

(iii) Created, through law or policy, conditions favorable to education reform and innovation;

(iv) Increased student achievement and decreased the achievement gap, as reported on the NAEP since 2003; and increased graduation rates.

(E)(2) *Making education funding a priority:* The extent to which the percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2009 was greater than or equal to the percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2008.

(E)(3) *Enlisting statewide support and commitment:* The extent to which the State has demonstrated commitment, support, and/or funding from the following key stakeholders:

(i) The State's teachers' union(s) and charter school authorizers;

(ii) Other State and local leaders (*e.g.*, business, community, civil rights, and education association leaders);

(iii) Grant-making foundations and other funding sources; and

(iv) LEAs, including public charter schools identified as LEAs under State law, with special emphasis on the following: High-need LEAs (as defined in this notice); participation by LEAs, schools, students, and students in poverty; and the strength of the Memoranda of Understanding between LEAs and the State, which must at a minimum be signed by the LEA superintendent (or equivalent), the president of the local school board (if relevant), and the local teachers' union leader (if relevant).

Reform Plan Criteria

(E)(4) *Raising achievement and closing gaps:*

(i) *Achievement gains:* The extent to which the State has set ambitious yet achievable targets for increasing its students' achievement results overall and by student subgroup (as described in section 303(b)(2)(G) of the National Assessment of Educational Progress Authorization Act) in reading and mathematics, as reported by the NAEP; annual targets using other assessments may be submitted as well.

(ii) *Gap closing:* The extent to which the State has set ambitious yet achievable targets for decreasing the reading and mathematics achievement gaps between subgroups (as described in section 303(b)(2)(G) of the National Assessment of Educational Progress Authorization Act), as reported, at a minimum, by the NAEP; annual targets using other assessments may be submitted as well.

(iii) *Graduation rate:*[16] The extent to which the State has ambitious yet achievable annual targets for increasing graduation rates (as defined in this notice) overall and by student subgroup (consistent with section 1111(b)(2)(C)(v)(II) of the ESEA).

(E)(5) *Building strong statewide capacity to implement, scale, and sustain proposed plans:* The extent to which the State has a high-quality overall plan that demonstrates how it has, and will continue to build, the capacity to—

(i) Effectively and efficiently oversee the grant, including administering and disbursing funds, and, if necessary, taking appropriate enforcement actions to ensure that participating LEAs comply with the State's plan and program requirements;

(ii) Support the success of participating LEAs, ensure the dissemination of effective practices, and hold participating LEAs accountable for progress;

(iii) Use the economic, political, and human capital resources of the State to continue the reforms funded under the grant after the period of funding has ended;

(iv) Collaborate with other States on key elements of or activities in the State's application; and

(v) Coordinate, reallocate, or repurpose education funds from other

[15] A State's responses to proposed Indicators (d)(3)–(d)(5) in its Stabilization program Phase 2 application may contain information related to this Reform Plan Criterion, to which the State can refer and build upon in its Race to the Top application.

[16] A State's responses to proposed Indicator (c)(11) in its Stabilization program Phase 2 application may contain information related to this Reform Plan Criterion, to which the State can refer and build upon in its Race to the Top application.

sources to align with the State's Race to the Top goals, as outlined in its plans.

IV. Definitions

The Secretary proposes the following definitions for terms not defined in the ARRA (or, by reference, in the ESEA). We may apply these definitions in any year in which this program is in effect.

Proposed Definitions

Alternative certification routes means pathways to certification that are authorized under the State's laws or regulations that allow the establishment and operation of teacher and administrator preparation programs in the State that have the following characteristics: (a) Can be provided by various types of qualified providers, including both institutions of higher education and other providers; (b) provide a clinical/student teaching experience; (c) significantly limit the amount of coursework required or have options to test-out of courses; and (d) award the level of certification that permits a candidate who successfully completes the program to teach or lead in public schools within the State.

Common set of K–12 standards means a set of content standards that define what students must know and be able to do, and that are identical across all States in a consortium. Notwithstanding this, a State may supplement the common standards with additional standards, provided that the additional standards do not exceed 15 percent of the State's total standards for that content area.

Effective principal means a principal whose students, overall and for each subgroup (described in section 1111(b)(2)(C)(v)(II) of the ESEA), demonstrate acceptable rates (*e.g.*, at least one grade level in an academic year) of student growth (as defined in this notice). States may supplement this definition as they see fit so long as principal effectiveness is judged, in significant measure, by student growth (as defined in this notice).

Effective teacher means a teacher whose students achieve acceptable rates (*e.g.*, at least one grade level in an academic year) of student growth (as defined in this notice). States may supplement this definition as they see fit so long as teacher effectiveness is judged, in significant measure, by student growth (as defined in this notice).

Formative assessment means an assessment process that is embedded in instruction and is used by teachers and students to provide instant feedback on student understanding and to adjust ongoing teaching and learning accordingly.

Graduation rate means the four-year adjusted cohort graduation rate as defined by 34 CFR 200.19(b)(1)(i). A State may also use, as a supplement to this rate, extended adjusted cohort graduation rates (consistent with 34 CFR 200.19(b)(1)(v)) that are approved by the Secretary.

Highly effective principal means a principal whose students, overall and for each subgroup (described in section 1111(b)(2)(C)(v)(II) of the ESEA), demonstrate high rates (*e.g.*, more than one grade level in an academic year) of student growth (as defined in this notice). States may supplement this definition as they see fit so long as principal effectiveness is judged, in significant measure, by student growth (as defined in this notice).

Highly effective teacher means a teacher whose students achieve high rates (*e.g.*, more than one grade level in an academic year) of student growth (as defined in this notice). States may supplement this definition as they see fit so long as teacher effectiveness is judged, in significant measure, by student growth (as defined in this notice).

High-need LEA means an LEA with one or more high-poverty schools (as defined in this notice).

High-poverty school means, consistent with section 1111(h)(1)(C)(viii) of the ESEA, a school in the highest quartile of schools in the State with respect to poverty level, using a measure of poverty determined by the State.

High-quality assessment means an assessment designed to measure a student's understanding of, and ability to apply, critical concepts through the use of a variety of item types, formats, and administration conditions (*e.g.*, open-ended responses, performance-based tasks, use of technology). Such assessments are structured to enable measurement of student achievement (as defined in this notice) and student growth (as defined in this notice); are of high technical quality (*e.g.*, are valid, reliable, and aligned to standards); and include the assessment of students with disabilities and limited English proficient students.

Instructional improvement systems means tools that provide teachers, principals, and administrators with meaningful support for a cycle of continuous instructional improvement, including activities such as: instructional planning; gathering information (*e.g.*, through formative assessments (as defined in this notice), interim assessments (as defined in this notice), and looking at student work); analyzing information with the support of rapid-time (as defined in this notice) reporting; using this information to inform decisions on appropriate next steps; and evaluating the effectiveness of the actions taken.

Interim assessment means an assessment given at regular and specified intervals throughout the school year, and designed to evaluate students' knowledge and skills relative to a specific set of academic standards, and the results of which can be aggregated (*e.g.*, by course, grade level, school, or LEA) in order to inform teachers and administrators at the student, classroom, school, and LEA levels.

Persistently lowest-performing schools means Title I schools in improvement, corrective action, or restructuring in the State and the secondary schools (both middle and high schools) in the State that are equally as low-achieving as these Title I schools and are eligible for, but do not receive, Title I funds. When considering which schools are the lowest-achieving, the State must consider both the absolute performance of schools on the State assessments in reading/language arts and mathematics and whether schools have made progress on those assessments.

Rapid-time, in reference to reporting and availability of school- and LEA-level data, means that data is available quickly enough to inform current lessons, instruction, and related supports; in most cases, this will be within 72 hours of an assessment or data gathering in classrooms, schools, and LEAs.

Student achievement means, at a minimum—

(a) For tested grades and subjects: A student's score on the State's assessment under section 1111(b)(3) of the ESEA; and

(b) For non-tested grades and subjects: An alternative measure of student performance (*e.g.*, student performance on interim assessments (as defined in this notice), rates at which students are on track to graduate from high school, percentage of students enrolled in Advanced Placement courses who take Advanced Placement exams, rates at which students meet goals in individualized education programs, student scores on end-of-course exams).

Student growth means the change in achievement data for an individual student between two points in time. Growth may be measured by a variety of approaches, but any approach used must be statistically rigorous and based on student achievement (as defined in this notice) data, and may also include other measures of student learning in

order to increase the construct validity and generalizability of the information.

Total revenues available to the State means either (a) projected or actual total State revenues for education and other purposes for the relevant year; or (b) projected or actual total State appropriations for education and other purposes for the relevant year.

America COMPETES Act elements (as specified in section 6401(e)(2)(D)) means: (1) A unique statewide student identifier that does not permit a student to be individually identified by users of the system; (2) student-level enrollment, demographic, and program participation information; (3) student-level information about the points at which students exit, transfer in, transfer out, drop out, or complete P–16 education programs; (4) the capacity to communicate with higher education data systems; (5) a State data audit system assessing data quality, validity, and reliability; (6) yearly test records of individual students with respect to assessments under section 1111(b) of the ESEA (20 U.S.C. 6311(b)); (7) information on students not tested by grade and subject; (8) a teacher identifier system with the ability to match teachers to students; (9) student-level transcript information, including information on courses completed and grades earned; (10) student-level college readiness test scores; (11) information regarding the extent to which students transition successfully from secondary school to postsecondary education, including whether students enroll in remedial coursework; and (12) other information determined necessary to address alignment and adequate preparation for success in postsecondary education.

Final Priorities, Requirements, Definitions, and Selection Criteria

We will announce the final priorities, requirements definitions, and selection criteria, in a notice in the **Federal Register**. We will determine the final priorities, requirements, definitions, and selection criteria after considering responses to this notice and other information available to the Department. This notice does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This notice does *not* solicit applications. In any year in which we choose to use one or more of these priorities, requirements, definitions, and selection criteria, we invite applications through a notice in the **Federal Register**.

Executive Order 12866

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments, or communities in a material way (also referred to as an "economically significant" rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement 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. Pursuant to the Executive order, it has been determined that this regulatory action will have an annual effect on the economy of more than $100 million because the amount of government transfers provided through the Race to the Top Fund will exceed that amount. Therefore, this action is "economically significant" and subject to OMB review under section 3(f)(1) of the Executive order.

The potential costs associated with this proposed regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this proposed regulatory action, we have determined that the benefits of the proposed priorities, requirements, definitions, and selection criteria justify the costs.

We have determined, also, that this proposed regulatory action does not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

Need for Federal Regulatory Action

These proposed priorities, requirements, definitions, and selection criteria are needed to implement the Race to the Top program. The Secretary does not believe that the statute, by itself, provides a sufficient level of detail to ensure that Race to the Top truly serves as a mechanism for driving significant education reform in the States. The authorizing language is very brief, and we believe the Congress likely expected the Secretary to augment this language, through rulemaking, in order to give greater meaning to the statutory provisions. Additionally, the statute expressly provides the Secretary the authority to require States to include in their application such information as the Secretary may reasonably require and to determine which States receive grants on the basis of other criteria as the Secretary determines appropriate.

In the absence of specific selection criteria for Race to the Top grants, the Department would use the general selection criteria in 34 CFR 75.210 of the Education Department General Administrative Regulations in selecting States to receive grants. The Secretary does not believe the use of those general criteria would be appropriate for the Race to the Top competitions, because they do not focus on the educational reforms that States must be implementing in order to receive a Race to the Top grant, on the specific uses of funds under Race to the Top, or on the plans that the Secretary believes States should develop for their Race to the Top grants.

Regulatory Alternatives Considered

The Department considered a variety of possible priorities, requirements, definitions, and selection criteria before deciding to propose those included in this notice. The proposed priorities, requirements, definitions, and selection criteria are those that best embody the Secretary's concept of how the Race to the Top program should operate. The proposals would provide States (and their LEAs) receiving Race to the Top grants with broad flexibility in the expenditure of those grants, while creating clear criteria for the selection of applications and providing greater clarity (than is provided in the legislation itself) on what must be included in a State application and what progress States would have to make in the four education reform areas in order to receive a grant. The Secretary believes that the proposals, thus, appropriately balance a limited degree of Federal prescription with broad flexibility in State and local implementation. We seek public comment on whether we have achieved the optimal balance.

Summary of Costs and Benefits

The Department believes that the proposed priorities, requirements, definitions, and selection criteria will not impose significant costs on States,

or on the LEAs and other entities that will receive assistance through the Race to the Top Fund. As discussed elsewhere, the proposals are intended to create a framework for the award of approximately $4 billion in support of State and local efforts to implement critical educational reforms and to making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers. Without promulgation of priorities, requirements, definitions, and selection criteria for the Race to the Top competitions, the Department would not have clear and defensible criteria for making very large grants to States.

The Department believes that the costs imposed on States by the proposed priorities, requirements, definitions, and selection criteria will be limited to the paperwork burden discussed elsewhere in this notice. The benefits conveyed on a State through its receipt of a grant will greatly exceed those costs. In addition, even States that apply but are unsuccessful in the competitions may derive benefits, as the process of working with LEAs and other stakeholders on the State application may help accelerate the pace of education reforms in the State.

Accounting Statement

As required by OMB Circular A–4 (available at *http://www.Whitehouse.gov/omb/Circulars/a004/a-4.pdf*), in the following table, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this proposed regulatory action. This table provides our best estimate of the Federal payments to be made to States under this program as a result of this proposed regulatory action. Expenditures are classified as transfers to States.

TABLE—ACCOUNTING STATEMENT CLASSIFICATION OF ESTIMATED EXPENDITURES

Category	Transfers (in millions)
Annual Monetized Transfers.	$3,956.
From Whom to Whom	Federal Government to States.

As previously explained, ARRA provides approximately $4.3 billion for the Race to the Top Fund (referred to in the statute as State Incentive Grants). In this notice, we propose additional specific priorities, requirements, definitions, and criteria regarding the applications that individual States submit for approximately $4 billion of Race to the Top funds. At a later date, we may announce a separate Race to the Top Standards and Assessment competition, for approximately $350 million, to support the development of assessments by consortia of States.

Paperwork Reduction Act of 1995

The application requirements and selection criteria proposed in this notice will require the collection of information that is subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). It is our plan to offer a comment period for the information collection at the time of the notice of final priorities, requirements, definitions, and selection criteria. At that time, the Department will submit the information collection to OMB for its review and provide the specific burden hours associated with each of the requirements and selection criteria for comment. However, because it is likely that the information collection will be reviewed under emergency OMB processing, the Department encourages the public to comment on the estimates we are providing for the burden hours associated with the requirements and selection criteria proposed in this notice.

Proposed Application Requirements

There are eight application requirements that the Department proposes States must meet when submitting their applications. These are:

(a) The State's application must be signed by the Governor, the State's chief school officer, and the president of the State board of education.

(b) The State must describe the progress it has made to date in each of the four education reform areas, including how the State has used ARRA and other Federal and State funding over the last several years to pursue reforms in these areas (as described in Overall Selection Criterion (E)(1)).

(c) The State must provide financial data to show whether and to what extent the percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2009 increased, decreased, or remained the same compared to FY 2008 (as described in Overall Selection Criterion (E)(2)).

(d) The State must describe its statewide support from stakeholders and LEAs, including public charter schools identified as LEAs under State law (as described in Overall Selection Criterion (E)(3)).

(e) The State must include a budget that details how it will use grant funds and other resources to meet targets and perform related functions, including how it will use funds awarded under this program to—

(1) Achieve its targets for improving student achievement and graduation rates and for closing achievement gaps (as described in Overall Selection Criterion (E)(4)); and

(2) Give priority to high-need LEAs (as defined in this notice), in addition to providing 50 percent of the grant to participating LEAs based on their relative shares of funding under part A of Title I of the ESEA as required under section 14006(c) of the ARRA.

(f) The State must provide, for each State Reform Conditions Criterion (listed earlier in this notice), a description of the State's current status in meeting that Criterion, and at a minimum, the information requested as supporting evidence for the Criterion. The Appendix to this notice contains a table listing the proposed evidence.

(g) The State must provide, for each Reform Plan Criterion (listed earlier in this notice) a detailed plan for use of grant funds that includes, but need not be limited to the activities to be undertaken, the goals and rationale for the activities, the timeline for implementation, the party responsible for implementing the activities, the resources the State will use to support the activities, the State's annual targets, if applicable, for the performance measures aligned to the Criterion, and the evidence requested in support of that Criterion (if any). (See the "Proposed Application Requirements" section for a detailed description of these proposed requirements.)

(h) The State must submit a certification from the State Attorney General, or other chief State legal officer, that the State's description of, and statements and conclusions concerning, State law (for example, with respect to the Eligibility Requirement regarding teacher effectiveness or any of the applicable Selection Criteria) in its application are complete, accurate, and constitute a reasonable interpretation of State law.

Proposed Selection Criteria

There are 19 selection criteria that the Department proposes States may address when submitting their applications. These are—

(A)(1) *Developing and adopting common standards;*

(A)(2) *Developing and implementing common, high-quality assessments;*
(A)(3) *Supporting transition to enhanced standards and high-quality assessments;*
(B)(1) *Fully implementing a statewide longitudinal data system;*
(B)(2) *Accessing and using State data;*
(B)(3) *Using data to improve instruction;*
(C)(1) *Providing alternative pathways for aspiring teachers and principals;*
(C)(2) *Differentiating teacher and principal effectiveness based on performance;*
(C)(3) *Ensuring equitable distribution of effective teachers and principals;*
(C)(4) *Reporting the effectiveness of teacher and principal preparation programs;*
(C)(5) *Providing effective support to teachers and principals;*
(D)(1) *Intervening in the lowest-performing schools and LEAs;*
(D)(2) *Increasing the supply of high-quality charter schools;*
(D)(3) *Turning around struggling schools;*
(E)(1) *Demonstrating significant progress;*
(E)(2) *Making education funding a priority;*
(E)(3) *Enlisting statewide support and commitment;*
(E)(4) *Raising achievement and closing gaps;* and
(E)(5) *Building strong statewide capacity to implement, scale, and sustain proposed plans.*

(*Please see* the "Proposed Selection Criteria" section for detailed descriptions.)

We estimate that each SEA would spend approximately 642 hours of staff time to address the application requirements and criteria, prepare the application, and obtain necessary clearances. The total number of hours for all 52 SEAs is an estimated 33,384 hours (52 SEAs (the 50 States plus the District of Columbia and Puerto Rico) times 642 hours equals 33,384 hours.) We estimate the average total cost per hour of the State-level staff who carry out this work to be $30.00 an hour. The total estimated cost for all States would be $1,001,520 ($30.00 × 33,384 hours = $1,001,520).

Regulatory Flexibility Act Certification

The Secretary certifies that this proposed regulatory action will not have a significant economic impact on a substantial number of small entities. The Secretary makes this certification because the only entities eligible to apply for grants are States, and States are not small entities.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR Part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT.**

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: July 22, 2009.

Arne Duncan,

Secretary of Education.

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Appendix - Proposed Evidence and Performance Measures

The table below presents the proposed evidence and performance measures for each criterion, if any. For a Reform Plan Criterion, when evaluating applications, peer reviewers will consider the extent to which applicants set ambitious yet achievable annual targets. In addition, grantees will report annually on their actual performance compared to these targets.

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
Standards and Assessments								
(A)(1) Developing and adopting common standards	(i) For Phase 1 applications: The extent to which the State has demonstrated commitment to improving the quality of its standards by participating in a consortium of States that is working toward jointly developing and adopting, by June 2010, a common set of K-12 standards (as defined in this notice) that are internationally benchmarked and that build toward college and career readiness by the time of high school graduation, and the extent to which this consortium includes a significant number of States.	• A copy of the applicable Memorandum of Agreement among the States participating in the consortium, regarding the standards being developed and adopted. • The list of States participating in the consortium and a description of how the consortium is being led and managed. • A copy of the final standards, or if the standards are not yet final, a copy of the draft standards and anticipated date for completing and adopting the standards. • Documentation that the standards are internationally benchmarked and that, when well-implemented, will help to ensure that students are prepared for college and careers.	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
	(ii) For Phase 2 applications: Whether the State has demonstrated commitment to improving the quality of its standards by adopting, as part of a multi-State consortium, a common set of K-12 standards (as defined in this notice) that are internationally benchmarked and that build toward college and career readiness by the time of high school graduation, and the extent to which this consortium includes a significant number of States.	• A copy of the adopted standards and the State's relevant statutes or policies, if any. • The list of States that have adopted the same common set of K-12 standards (as defined in this notice). • Documentation that the standards are internationally benchmarked and that, when well-implemented, will help to ensure that students are prepared for college and careers.	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA
(A)(2) Developing and implementing common, high-quality assessments	Whether the State has demonstrated a commitment to improving the quality of its assessments by participating in a consortium of States that is working toward jointly developing and implementing common, high-quality assessments (as defined in this notice) aligned with the consortium's common set of K-12 standards (as defined in this notice) that are internationally benchmarked and that build toward college and career readiness by the time of high school graduation, and the extent to which this consortium includes a significant number of States.	Evidence for Phase 1 applications: • A statement of intention to join a consortium and to apply for a grant under the separate Race to the Top Standards and Assessments competition (to be described in a subsequent notice), or other evidence of the State's commitment to developing and adopting common, high-quality assessments (as defined in this notice). Evidence for Phase 2 applications: • A copy of the applicable Memorandum of Agreement among the States participating in the	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
		consortium, regarding the assessments being developed and implemented; • The list of States participating in the consortium and a description of how the consortium is being led and managed. • Documentation that the State's consortium has applied for a grant through the separate Race to the Top Standards and Assessments competition (to be described in a subsequent notice), or other evidence of the State's plan to develop and adopt common, high-quality assessments (as defined in this notice).						
(A)(3) Supporting transition to enhanced standards and high-quality assessments	The extent to which the State, in collaboration with its participating LEAs, has a high-quality plan for supporting a statewide transition to and implementation of (a) internationally benchmarked K-12 standards that build toward college and career readiness by the time of high school graduation, and (b) high-quality assessments (as defined in this notice) tied to these standards. State or LEA activities might include: aligning high school exit criteria and college	No minimum evidence specified here.	State may propose its own performance measure(s) here.					

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
	entrance requirements with the new assessments; developing, disseminating, and implementing curricular frameworks and materials, formative and interim assessments (as defined in this notice), and professional development materials; and engaging in other strategies that translate the standards and information from assessments into classroom practice.							
Data Systems to Support Instruction								
(B)(1) Fully implementing a statewide longitudinal data system	The extent to which the State has a statewide longitudinal data system that includes all of the elements specified in section 6401(e)(2)(D) of the America COMPETES Act (as defined in this notice).	A description of the extent to which the State's statewide longitudinal data system includes each element specified in section 6401(e)(2)(D) of the America COMPETES Act (as defined in this notice). (States that have submitted such information to the Department for other programs are welcome to indicate that they would like a specific previous submission to be used as evidence, or they may provide an updated submission.)	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA
(B)(2) Accessing and using State data	The extent to which the State has a high-quality plan to ensure that data from the State's statewide longitudinal data system are accessible to, and used to inform and engage, as	No minimum evidence specified here.	State may propose its own performance measure(s) here.					

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
	appropriate, key stakeholders (e.g., parents, students, teachers, principals, LEA leaders, community members, unions, researchers, and policymakers); that the data support decision-makers in the continuous improvement of instruction, operations, management, and resource allocation; and that they comply with the applicable requirements of the Family Educational Rights and Privacy Act (FERPA).							
(B)(3) Using data to improve instruction	The extent to which the State, in collaboration with its participating LEAs, has a high-quality plan to— (i) Increase the use of instructional improvement systems (as defined in this notice) that provide teachers, principals, and administrators with the information they need to inform and improve their instructional practices, decision-making, and overall effectiveness; and (ii) Make these data, together with statewide longitudinal data system data, available and accessible to researchers so that they have detailed information with which to evaluate the effectiveness of instructional	No minimum evidence specified here.	State may propose its own performance measure(s) here.					

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
	materials, strategies, and approaches for educating different types of students (e.g., students with disabilities, limited English proficient students, students whose achievement is well below or above grade level), in a manner that complies with the applicable requirements of FERPA.							
Great Teachers and Leaders								
(C)(1) Providing alternative pathways for aspiring teachers and principals	The extent to which the State has in place legal, statutory, or regulatory provisions that allow alternative routes to certification (as defined in this notice) for teachers and principals, particularly routes that allow for providers other than institutions of higher education; and the extent to which these routes are in use.	• A copy of the State's applicable statutes, regulations, or other relevant legal documents. • A list of the alternative certification programs operating in the State under the State's alternative certification routes (as defined in this notice), and the characteristics (as described in the alternative certification routes definition) of each program. • The number of teachers and principals that successfully completed each of these alternative certification programs in the previous academic year. • The total number of teachers and principals certified statewide in the previous year.	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year /SY	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
(C)(2) Differentiating teacher and principal effectiveness based on performance	The extent to which the State, in collaboration with its participating LEAs, has a high-quality plan and ambitious yet achievable annual targets to (a) determine an approach to measuring student growth (as defined in this notice); (b) employ rigorous, transparent, and equitable processes for differentiating the effectiveness of teachers and principals using multiple rating categories that take into account data on student growth (as defined in this notice) as a significant factor; (c) provide to each teacher and principal his or her own data and rating; and (d) use this information when making decisions regarding-	No minimum evidence specified here.	The number and percentage of teachers in participating LEAs who are effective teachers (as defined in this notice) The number and percentage of principals in participating LEAs who are effective principals (as defined in this notice)					
	(i) Evaluating and developing teachers and principals, including by providing timely and constructive feedback and targeted professional development;	No minimum evidence specified here.	Effectiveness information is used as a significant factor when making evaluation decisions - By what number and percentage of LEAs in the State - For what number and percent of					

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
			teachers in participating LEAs - For what number and percent of principals in participating LEAs					
	(ii) Compensating and promoting teachers and principals, including by providing opportunities for teachers and principals who are highly effective (as defined in this notice) to obtain additional compensation and responsibilities; and	No minimum evidence specified here.	Effectiveness information is used as a significant factor when making compensation decisions - By what number and percent of LEAs - For what number and percent of teachers in participating LEAs - For what number and percent of principals in participating LEAs					

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
	(iii) Granting tenure to and dismissing teachers and principals, based on rigorous and transparent procedures for awarding tenure (where applicable) and for removing tenured and untenured teachers and principals after they have had ample opportunities to improve but have not done so.	No minimum evidence specified here.	Effectiveness information is used as a significant factor when making tenure decisions - By what number and percent of LEAs - For what number and percent of teachers in participating LEAs - For what number and percent of principals in participating LEAs					
			Effectiveness information is used as a significant factor when making dismissal decisions - By what number and percent of LEAs - For what number and percent of teachers in participating LEAs					

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
			- For what number and percent of principals in participating LEAs					
(C)(3) Ensuring equitable distribution of effective teachers and principals	The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to increase the number and percentage of effective teachers and principals (as defined in this notice) in high-poverty schools (as defined in this notice), and to increase the number and percentage of effective teachers (as defined in this notice) teaching hard-to-staff subjects including mathematics, science, special education, English language proficiency, and other hard-to-staff subjects identified by the State or LEA. Plans may include, but are not limited to, the implementation of incentives and strategies in areas such as recruitment, compensation, career development, and human resources practices and processes.	No minimum evidence specified here.	• The number and percentage of teachers in high-poverty schools (as defined in this notice) who are effective teachers (as defined in this notice). • The number and percentage of principals in high-poverty schools (as defined in this notice) who are effective principals (as defined in this notice). • The number and percentage of science teachers who are effective teachers (as defined in this notice). • The number and					

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
			percentage of teachers of mathematics who are effective teachers (as defined in this notice).					
(C)(4) Reporting the effectiveness of teacher and principal preparation programs	The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to link a student's achievement data to the student's teachers and principals, to link this information to the programs where each of those teachers and principals was prepared for credentialing, and to publicly report the findings for each credentialing program that has twenty or more graduates annually.	No minimum evidence specified here.	• The number and percentage of teachers in the State whose data are aggregated to produce publicly available reports on the State's credentialing programs. • The number and percentage of principals in the State whose data are aggregated to produce publicly available reports on the State's credentialing programs. • The number and percentage of teacher credentialing programs in the State for which the information					

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
			(as described in the criterion) is publicly reported. • The number and percentage of principal credentialing programs in the State for which the information (as described in the criterion) is publicly reported.					
(C)(5) Providing effective support to teachers and principals	The extent to which the State, in collaboration with its participating LEAs, has a high-quality plan to use rapid-time (as defined in this notice) student data to inform and guide the support provided to teachers and principals (e.g., professional development, time for common planning and collaboration) in order to improve the overall effectiveness of instruction; and to continuously measure and improve both the effectiveness and efficiency of those supports.	No minimum evidence specified here.	State may propose its own performance measure(s) here.					

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
Turning Around Struggling Schools								
(D)(1) Intervening in the lowest-performing schools and LEAs	The extent to which the State has the legal, statutory, or regulatory authority to intervene directly in the State's persistently lowest-performing schools (as defined in this notice) and in LEAs that are in improvement and corrective action status.	• A description of the State's intervention authority and a copy of the State's applicable statutes, regulations, or other relevant legal documents.	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA
(D)(2) Increasing the supply of high-quality charter schools	(i) The extent to which the State has a charter school law that does not prohibit or effectively inhibit increasing the number of charter schools in the State (as measured by the percentage of total schools in the State that are allowed to be charter schools) or otherwise restrict student enrollment in charter schools.	• A description of the State's charter school laws and a link or citation to the relevant statutory or regulatory sections. • The number and types of charter schools currently operating in the State.	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA
	(ii) The extent to which the State has statutes and guidelines regarding how charter school authorizers approve, monitor, hold accountable, reauthorize, and close charter schools, including the extent to which such statutes or guidelines require that student academic achievement be a factor in such activities and decisions, and the extent to which charter school	• A description of the State's approach to charter school accountability and authorization, and a copy of the State's applicable statutes, regulations, or other relevant documents. • The charter schools authorizers' historic performance on accountability, as evidenced by the number of charter schools that have been closed or not renewed annually for each of the	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
	authorizers in the State have closed or not renewed ineffective charter schools.	last five years, and the reasons for each of these closures.						
	(iii) The extent to which the State's charter schools receive equitable funding, compared to traditional public schools, and a commensurate share of local, State, and Federal program and revenue sources.	• A copy of the State's applicable statutes, regulations, or other relevant legal documents. • A description of the State's approach to charter school funding, the amount of funding passed through to charter schools per student, and how those amounts compare with traditional public school per-student funding allocations.	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA
	(iv) The extent to which the State provides charter schools with facilities funding (for leasing facilities, purchasing facilities, or making tenant improvements), assistance with facilities acquisition, access to public facilities, the ability to share in bonds and mill levies, or other supports; and the extent to which the State does not impose any facility-related requirements on charter schools that are stricter than those applied to traditional public schools.	• A copy of the State's applicable statutes, regulations, or other relevant legal documents. • A description of the statewide facilities supports provided to charter schools, if any.	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
(D)(3) Turning around struggling schools	The extent to which the State has a high-quality plan and ambitious yet achievable annual targets to (i) identify at least the lowest-achieving five percent of the persistently lowest-performing schools (as defined in this notice) or the lowest-achieving five schools, whichever number is larger; and (ii) support its LEAs in turning around these schools by— • Putting in place new leadership and a majority of new staff, new governance, and improved instructional programs, and providing the school with flexibilities such as the ability to select staff, control its budget, and expand the learning time; or • Converting them to charter schools or contracting with an education management organization (EMO); or • Closing the school and placing the school's students in high-performing schools; or • To the extent that these strategies are not possible, implementing a school transformation model that includes: hiring a new principal, measuring teacher and principal effectiveness (as defined in this	• The State's historic performance on school turnaround, as evidenced by the total number of Title I schools in restructuring in each of the last five years; and of this total number of schools- • The number each year that have been turned around with new leadership and a majority of new staff and new governance; • The number that have been turned around through conversion to charter schools, CMO-operated schools, or EMO-operated schools; and • The number that have been closed and the students placed in high-performing schools.	The number of schools - from among the lowest-performing five percent of schools (or five schools, whichever number is larger) in improvement, correction action, or restructuring in the State - for which one of the three school transformation strategies described in the criterion will be implemented each year.					

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
	notice), rewarding effective teachers and principals (as defined in this notice), and improving strategies for recruitment, retention, and professional development; implementing comprehensive instructional reform, including an improved instructional program and differentiated instruction; and extending learning time and community-oriented supports, including more time for students to learn and for teachers to collaborate, more time for enrichment activities, and on-going mechanisms for family and community engagement.							
Overall Selection Criteria								
(E)(1) Demonstrating significant progress	The extent to which the State has, over the past several years-- (i) Made progress to date in each of the four education reform areas	A description, by education reform area, of the State's goals, activities and Reform Conditions.	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA
	(ii) Used ARRA and other Federal and State funding to pursue reforms in these areas	A description of how the State has used these funding sources to accomplish its education reform goals. [Footnote: As stated in "Modifications to Questions in the April 2009 Guidance on the State Fiscal Stabilization Fund Program" issued by the Department	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
		on May 11, 2009 (http://www.ed.gov/programs/statestabilization/guidance-mod-05112009.pdf), the Department discourages the use of either Education Stabilization funds or Government Services funds for new construction. If the State has used funds for this purpose, please describe.]						
	(iii) Created, through law or policy, conditions favorable to education reform and innovation	A description of laws or policies (in addition to those highlighted in the State Reform Conditions Criteria) that the State believes have helped create the conditions for education innovation and reform.	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA
	(iv) Increased student achievement and decreased the achievement gap, as reported on the National Assessment of Educational Progress (NAEP) since 2003; and increased graduation rates.	A description of the successes and challenges the State has had over the past several years in increasing student achievement and graduation rates while narrowing the achievement gap.	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA
(E)(2) Making education funding a priority	The extent to which the percentage of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2009 was greater than or equal to the percentage	Financial data to show whether and to what extent expenditures, as a percentage of the total revenues available to the State (as defined in this notice), increased, decreased, or remained the same.	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
	of the total revenues available to the State (as defined in this notice) that were used to support elementary, secondary, and public higher education for FY 2008.							
(E)(3) Enlisting statewide support and commitment	The extent to which the State has demonstrated commitment, support, and/or funding from the following key stakeholders: (i) The State's teachers' union(s) and charter school authorizers.	Letters of strong commitment.	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA
	(ii) Other State and local leaders (e.g., business, community, civil rights, and education association leaders).	Letters of commitment or support.	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA
	(iii) Grant-making foundations and other funding sources.	Letters of commitment, support, or funding.	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
	(iv) LEAs, including public charter schools identified as LEAs under State law, with special emphasis on the following: high-need LEAs (as defined in this notice); participation by LEAs, schools, students, and students in poverty; and the strength of the Memoranda of Understanding between LEAs and the State, which must at a minimum be signed by the LEA superintendent (or equivalent), the president of the local school board (if relevant), and the local teachers' union leader (if relevant).	• The list of LEAs participating with the State in the application. • The number and percentage of the State's LEAs that are participating, the number and percentage of the State's K-12 public schools represented by these LEAs, the number and percentage of the State's K-12 public school students represented by these LEAs, and the number and percentage of the State's K-12 public school students in poverty (based on eligibility for free or reduced-price lunches, or other poverty measures that the State permits the LEAs to use) represented by these LEAs. • For each participating LEA, the Memorandum of Understanding signed by the superintendent (or equivalent), the president of the school board (if relevant), and the teachers' union leader (if relevant), demonstrating strong support and affirming their respective commitments to the goals, activities, timelines, and annual targets outlined in the State's plan. (Note: If the Memoranda of Understanding (MOU) signed by the LEAs are similar, the State may submit an example	Not applicable - this criterion is about past State Reform Conditions, not future plans.	NA	NA	NA	NA	NA

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
		of the Memorandum along with a list including at least the following information for each participating LEA: the name of the LEA, the name and title of each signatory on the MOU, and a description of any differences in the Memorandum from the submitted example.)						
(E)(4) Raising achievement and closing gaps	(i) Achievement gains: The extent to which the State has set ambitious yet achievable targets for increasing its students' achievement results overall and by student subgroup (as described in section 303(b)(2)(G) of the National Assessment of Educational Progress Authorization Act) in reading and mathematics, as reported by the NAEP; annual targets using other assessments may be submitted as well.	• An estimate of the State's expected levels of future performance on the NAEP were the State not to receive funds under this program.	State NAEP scale score in 4th and 8th grade reading and math. [In addition, attach a separate sheet for targets for each student subgroup reported by the NAEP for the State. Indicate how your State addresses students with disabilities and students with limited English proficiency.] [In addition, attach a separate sheet, as desired, for any other tests or					

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
			subject areas on which the State plans to report.]					
	(ii) Gap closing: The extent to which the State has set ambitious yet achievable targets for decreasing the reading and mathematics achievement gaps between subgroups (as described in section 303(b)(2)(G) of the National Assessment of Educational Progress Authorization Act), as reported, at a minimum, by the NAEP; annual targets using other assessments may be submitted as well.	No minimum evidence specified here.	[The Department will use the information provided in (E)(4)(i) to calculate gap closing.]					
	(iii) Graduation rate: The extent to which the State has ambitious yet achievable annual targets for increasing graduation rates (as defined in this notice) overall and by student subgroup (consistent with section 1111(b)(2)(C)(v)(II) of the ESEA).	• An estimate of the State's expected future graduation rates were the State not to receive funds under this program.	Overall Statewide graduation rate (as described in the criterion) [In addition, attach a separate sheet for annual targets by student subgroup]					
(E)(5) Building strong statewide capacity to implement,	The extent to which the State has a high-quality overall plan that demonstrates how it has, and will continue to build, the capacity to-- (i) Effectively and	• A description of how the State's past performance supports the credibility of its plan.	State may propose its own performance measure(s) here.					

Reference	Proposed Selection Criteria	Minimum Proposed Evidence	Proposed Performance Measures	Annual Targets (Applicant to complete)				
				Current School Year (SY)	End of SY '10-11	End of SY '11-12	End of SY '12-13	Grant End-SY '13-14
scale and sustain proposed plans	efficiently oversee the grant, including administering and disbursing funds, and, if necessary, taking appropriate enforcement actions to ensure that participating LEAs comply with the State's plan and program requirements; (ii) Support the success of participating LEAs, ensure the dissemination of effective practices, and hold participating LEAs accountable for progress; (iii) Use the economic, political, and human capital resources of the State to continue the reforms funded under the grant after the period of funding has ended; (iv) Collaborate with other States on key elements of or activities in the State's application; and (v) Coordinate, reallocate, or repurpose education funds from other sources to align with the State's Race to the Top goals, as outlined in its plans.							

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BILLING CODE 4000–01–C

DEPARTMENT OF EDUCATION

[Docket ID ED–2009–OESE–0007]

RIN 1810–AB04

State Fiscal Stabilization Fund Program

Catalog of Federal Domestic Assistance (CFDA) Numbers: 84.394 (Education Stabilization Fund) and 84.397 (Government Services Fund).

AGENCY: Department of Education.

ACTION: Notice of proposed requirements, definitions, and approval criteria.

SUMMARY: The Secretary of Education (Secretary) proposes requirements, definitions, and approval criteria for the State Fiscal Stabilization Fund (Stabilization) program. The Secretary may use one or more of these requirements, definitions, and approval criteria in awarding funds under this program in fiscal year (FY) 2010. The requirements, definitions, and approval criteria proposed in this notice are based on the assurances regarding education reform that grantees are required to provide in exchange for receiving funds under the Stabilization program. We take this action to specify the data and information that grantees must collect and report with respect to those assurances and to help ensure grantees' ability to collect and report the required data and information.

DATES: We must receive your comments on or before August 28, 2009.

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 and the term "State Fiscal Stabilization Fund" at the top of your comments.

- *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 requirements, definitions, and approval criteria, address them to Office of Elementary and Secondary Education (Attention: State Fiscal Stabilization Fund Comments), U.S. Department of Education, 400 Maryland Avenue, SW., Room 3E108, Washington, DC 20202–6200.
- *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: James Butler. Telephone: (202) 260–2274 or by e-mail: *phase2comments@ed.gov*.

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding this notice. To ensure that your comments have maximum effect in developing the notice of final requirements, definitions, and approval criteria, we urge you to identify clearly the specific proposed requirements, definitions, and approval criteria that each comment addresses.

We invite you also 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 requirements, definitions, and approval criteria. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of this program.

During and after the comment period, you may inspect all public comments about this notice by accessing Regulations.gov. You may also inspect the public comments in person in Room 3E108, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Washington, DC, time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Purpose of Program: The State Fiscal Stabilization Fund program provides approximately $48.6 billion in formula grants to States to help stabilize State and local budgets in order to minimize and avoid reductions in education and other essential services, in exchange for a State's commitment to advance essential education reform in key areas.

Program Authority: American Recovery and Reinvestment Act of 2009, Division A, Title XIV—State Fiscal Stabilization Fund, Public Law 111–5.

Proposed Requirements

Note: The proposed requirements are listed following the background for this section.

Background: Section 14005(d) of Division A of the American Recovery and Reinvestment Act of 2009 (ARRA) requires a State receiving funds under the Stabilization program to provide assurances in four key areas of education reform: (a) Achieving equity in teacher distribution, (b) improving collection and use of data, (c) standards and assessments, and (d) supporting struggling schools. For each area of reform, the ARRA prescribes specific action(s) that the State must assure that it will implement. In addition, section 14005(a) of the ARRA requires a State that receives funds under the Stabilization program to submit an application to the Department containing such information as the Secretary may reasonably require. In this notice, we propose specific data and information requirements (the assurance indicators and descriptors) that a State receiving funds under the Stabilization program must meet with respect to the statutory assurances. We also propose specific requirements for a plan that a State must submit (the State plan), as part of its application for the second phase [1] of funding under the Stabilization program, describing its ability to collect and report the required

[1] The Department is awarding Stabilization program funds in two phases. In the first phase, the Department is awarding 67 percent of a State's Education Stabilization Fund allocation, unless the State can demonstrate that additional funds are required to restore fiscal year 2009 State support for education, in which case the Department will award the State up to 90 percent of that allocation. In addition, the Department will award 100 percent of each State's Government Services Fund allocation in Phase I. The Department will award the remainder of a State's Education Stabilization Fund allocation in the second phase. A table listing the allocations to States under the Stabilization program is available at: *http://www.ed.gov/programs/statestabilization/funding.html*.

data and other information. Together, these two sets of proposed requirements aim to provide transparency on the extent to which a State is implementing the actions for which it has provided assurance. Increased access to and focus on this information will better enable States and other stakeholders to identify strengths and weaknesses in education systems and determine where concentrated reform effort is warranted. We also intend to use the data and information that States collect and report in assessing whether a State is qualified to participate in and receive funds under other reform-oriented programs administered by the Department.

As discussed elsewhere in this notice, a proposed assurance indicator or descriptor may relate to data or other information that States currently collect and report to the Department, or to data or other information for which the Department is itself the source. In those cases, we do not propose any new data or information collection requirements for a State; rather, the Department will provide the State with the relevant data or other information that the State would be required to confirm and make publicly available. (In confirming the data or information, the State would not be required to perform any additional analysis or verification.) In the other cases, the proposed requirement would constitute new data or information collection and reporting responsibilities for the State, to the extent the State does not currently collect and report such data or information for other purposes.

Following is a description of the proposed indicators and descriptors in each education reform area and the proposed State plan requirements. The Department recognizes that requests for data and information should reflect an integrated and coordinated approach among the various programs supported with ARRA funds, particularly the Stabilization, Race to the Top, School Improvement Grants, and Statewide Longitudinal Data Systems programs. Accordingly, the Department will continue to evaluate the proposed requirements for this program in context with those other programs.

Achieving Equity in Teacher Distribution

Regarding education reform area (a) (achieving equity in teacher distribution), section 14005(d)(2) of the ARRA requires a State receiving funds under the Stabilization program to assure that it will take actions to improve teacher effectiveness and comply with section 1111(b)(8)(C) of the Elementary and Secondary Education Act of 1965, as amended (ESEA) (20 U.S.C. 6311), in order to address inequities in the distribution of highly qualified teachers between high- and low-poverty schools and to ensure that low-income and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers. In order to provide indicators of the extent to which a State is taking such actions, we propose to require that the State provide data and other information on student access to highly qualified teachers in high- and low-poverty schools, on how teacher and principal performance is evaluated, and on the distribution of performance evaluation ratings or levels among teachers and principals.

With respect to student access to highly qualified teachers in high- and low-poverty schools, States are currently required to collect and report data to the Department, through the ED*Facts* system, on the extent to which core academic courses in such schools are taught by highly qualified teachers. Because such data are currently available, we do not propose to require any new data or information collection by a State in this area; rather, the Department would provide the State with the data it most recently submitted, which the State would be required to confirm and make publicly available.

With respect to evaluation of teacher performance, we propose to require that a State provide descriptive information on the teacher performance evaluation systems used in local educational agencies (LEAs) in the State, including an indication of whether any official systems used to evaluate teacher performance include student achievement outcomes as an evaluation criterion. With respect to teacher performance ratings or levels, we propose to require that a State provide data on the distribution of performance ratings or levels in its LEAs as well as an indication of whether such ratings or levels are available to the public by school for each LEA. When properly developed and implemented, local evaluation systems perform a principal role in measuring teacher effectiveness. We also believe that student achievement outcomes are a central factor in evaluation systems that yield fair and reliable assessments of teacher performance. The data and information on teacher performance ratings or levels, together with the descriptive information on teacher performance evaluation systems, will provide greater transparency on the design and usage of teacher evaluation systems and will serve as an important indicator of the extent to which effective teachers are equitably distributed within LEAs and States.[2] Moreover, this information will help States and other stakeholders correct inequities in the distribution of effective teachers as well as shortcomings in the design and usage of teacher performance evaluation systems.

Regarding evaluation of principal performance, we propose requirements similar to those proposed for evaluation of teacher performance, except that we do not propose to require a State to indicate whether principal performance ratings or levels are available to the public by school in each LEA, as such information may be personally identifiable. Although the ARRA does not explicitly mention principals with respect to the assurance in this reform area, we believe that effective school administration is a key factor in effective teaching and learning. Studies show that school leadership is a major contributing factor to what students learn at school. Studies also show that strong teachers are more likely to teach in schools with strong principals.[3] Information on principal performance will provide another useful snapshot of the steps being taken to ensure that effective school personnel are distributed equitably within LEAs and States.

In order to meet the proposed requirements to describe the teacher and principal performance evaluation systems used in LEAs in the State, a State would not be required itself to develop such descriptions; it would be sufficient for the State to maintain a Web site that contains electronic links to descriptions developed by its LEAs.[4] On such a Web site, the State could also include, by LEA, the data and information the State collects in order to meet the other proposed requirements that relate to evaluation of teacher and principal performance (*i.e.*, the requirements to indicate whether official teacher and principal evaluations systems include student achievement outcomes as an evaluation criterion, to provide the number and percentage of teachers and principals rated at each performance rating or level

[2] We note that descriptions of the teacher performance evaluation systems used in LEAs also provide necessary context for data on teacher performance ratings or levels. When viewed in isolation, data on teacher performance ratings or levels are open to interpretation and may ultimately not be meaningful.

[3] *See* Leithwood, K., Louis, K. S., Anderson, S., and Walhstrom, K., (2004). *How leadership influences student learning.* Minneapolis, MN: University of Minnesota.

[4] If, however, the State requires the use of specific teacher and principal evaluation systems by its LEAs, it could directly provide descriptions of those systems in lieu of individual system descriptions by its LEAs.

in official evaluation systems, and to indicate whether the number and percentage of teachers rated at each performance rating or level in official evaluations systems are publicly available for each school). In such a case, however, the State would be responsible for ensuring, through appropriate guidance or technical assistance, that the descriptions of teacher and principal performance evaluation systems maintained by LEAs contain the required information and are provided in an easily understandable format.

To view a summary of the proposed requirements in this education reform area, please visit: *http://www.ed.gov/programs/statestabilization/applicant.html.*

Improving Collection and Use of Data

Regarding education reform area (b) (improving collection and use of data), section 14005(d)(3) of the ARRA requires a State receiving funds under the Stabilization program to provide an assurance that it will establish a statewide longitudinal data system that includes the elements described in section 6401(e)(2)(D) of the America COMPETES Act (20 U.S.C. 9871). To provide indicators of the extent to which a State is meeting that requirement, we propose that the State provide information on the elements of its statewide longitudinal data system and on whether the State provides teachers with data on student performance that include estimates of individual teacher impact on student achievement in a manner that is timely and informs instruction.

With respect to the elements of statewide longitudinal data systems, we propose to require, consistent with the ARRA, that a State indicate whether its data system contains each of the 12 elements described in section 6401(e)(2)(D) of the America COMPETES Act[5]. For pre-school through postsecondary education, these elements include: (1) A unique statewide student identifier that does not permit a student to be individually identified by users of the system; (2) student-level enrollment, demographic, and program participation information; (3) student-level information about the points at which students exit, transfer in, transfer out, drop out, or complete P–16 education programs; (4) the capacity to communicate with higher education data systems; and (5) an audit system assessing data quality, validity, and reliability. For preschool through grade 12 education, these elements include: (6) yearly State assessment records of individual students; (7) information on students not tested, by grade and subject; (8) a teacher identifier system with the ability to match teachers to students; (9) student-level transcript information, including on courses completed and grades earned; and (10) student-level college readiness test scores. Finally, for postsecondary education, the elements include: (11) information regarding the extent to which students transition successfully from secondary school to postsecondary education, including whether students enroll in remedial coursework; and (12) other information determined necessary to address alignment and adequate preparation for success in postsecondary education. These elements constitute the minimum requirements of a modern statewide longitudinal data system. To measure the progress of students and schools effectively and efficiently, it is imperative that the State's data system contains these elements.

With respect to teachers' receipt of data on student performance that include estimates of individual teacher impact on student achievement, we propose to require a State to indicate whether it provides such data to teachers in grades in which the State administers reading/language arts and mathematics assessments. We believe that teachers' receipt of these data should be a natural product of a statewide longitudinal data system that includes elements (1), (6), and (8) referenced in the preceding paragraph. Moreover, we believe that this is a key example of how reliable, high-quality data from the State's system can drive education reform in general and improvements in the classroom in particular.

To view a summary of the proposed requirements in this education reform area, please visit: *http://www.ed.gov/programs/statestabilization/applicant.html.*

Standards and Assessments

Regarding education reform area (c) (standards and assessments), section 14005(d)(4) of the ARRA requires a State receiving funds under the Stabilization program to assure that it will: (A) Enhance the quality of the academic assessments it administers pursuant to section 1111(b)(3) of the ESEA (20 U.S.C. 6311) through activities such as those described in section 6112(a) of the ESEA (20 U.S.C. 7301a); (B) comply with the requirements of paragraphs (3)(C)(ix) and (6) of section 1111(b) of the ESEA (20 U.S.C. 6311) and section 612(a)(16) of the Individuals with Disabilities Education Act (20 U.S.C. 1412) related to the inclusion of children with disabilities and limited English proficient students in State assessments, the development of valid and reliable assessments for those students, and the provision of accommodations that enable their participation in State assessments; and (C) take steps to improve State academic content standards and student academic achievement standards for secondary schools consistent with section 6401(e)(1)(A)(ii) of the America COMPETES Act (20 U.S.C. 9871). To provide indicators of the extent to which a State is taking these actions, we propose that the State provide data and other information in the following areas:

- Whether students are provided high-quality State assessments.
- Whether the State is engaged in activities to enhance its assessments (with respect to paragraph (A) of the statutory assurance).
- Whether students with disabilities and limited English proficient students are included in State assessment systems (with respect to paragraph (B) of the statutory assurance).
- Whether the State makes available information regarding student academic performance compared to student academic performance in other States.
- The extent to which students graduate from high school in four years with a regular high school diploma and continue on to pursue a college education or technical training (with respect to paragraph (C) of the statutory assurance).

As States prepare to significantly improve the rigor and effectiveness of their standards and assessment systems, we believe this information will, in general, provide stakeholders with vital transparency on the current status of those systems and on the efforts to improve them that are currently underway.

For two of the areas described above, namely, whether students are provided high-quality State assessments and whether students with disabilities and limited English proficient students are included in State assessment systems, States are currently required to collect and report data or other information to the Department. For instance, regarding whether students with disabilities and

[5] The Department is developing guidance to assist States in developing and implementing statewide longitudinal data systems that are consistent with the provisions of the America COMPETES Act and that comply with applicable student privacy requirements, including applicable requirements of the Family Educational Rights and Privacy Act. We expect to issue preliminary guidance in this area in the near future. During the time this guidance is being developed, we expect that States will continue to work toward fully developing and implementing statewide longitudinal data systems.

limited English proficient students are included in State assessment systems, States are currently required to report, through the ED*Facts* system (for the annual ESEA Consolidated State Performance Report), the number and percentage of such students who are included in State reading/language arts and mathematics assessments. Similarly, regarding whether students are provided high-quality State assessments, a State must currently submit information to the Department on its assessment system, which the Department reviews for compliance with the requirements of the ESEA and on the basis of which the Department issues an approval status. We propose to use these and other data and information currently available to the Department [6] as indicators of a State's progress in these two areas; in these cases, the Department would provide the State with the data it most recently submitted, or the most recent determinations of the Department, which the State would be required to confirm and publicly report.

Regarding the extent to which the State is engaged in activities to enhance its assessments, we propose to require, consistent with the statutory assurance, that a State indicate whether it is pursuing any of the activities described in section 6112(a) of the ESEA.[7] These activities include: (1) Working in collaboration or consortia with other States or organizations to improve the quality, validity, and reliability of State academic assessments; (2) measuring student academic achievement using multiple measures of academic achievement from multiple sources; (3) charting student progress over time; and (4) evaluating student academic achievement using comprehensive instruments, such as performance and technology-based assessments. If a State indicates that it is engaged in any such activities, it would be required to briefly describe the nature of that activity.

As a supplement to the data and information currently available to the Department regarding whether students with disabilities and limited English proficient students are included in State assessment systems (as discussed above), we propose to require a State to indicate whether it has completed, within the last two years, an analysis of the appropriateness and effectiveness of the accommodations it provides students with disabilities and limited English proficient students to ensure their meaningful participation in State assessments. This additional information will help provide a comprehensive picture of the effort a State is making to include these students in a valid and reliable assessment system consistent with the statutory assurance. Moreover, we note that States conducting such analyses can use results from those analyses to target resources and identify areas where improvements in the services provided to these students are needed.

Regarding whether the State makes available information on student performance compared to performance of students in other States, Federal regulations require States to include in the annual State report cards required under section 1111(h)(1)(A) of the ESEA (20 U.S.C. 6311), beginning with report cards issued for the 2009–2010 school year, the most recent available student achievement results for the State from the National Assessment of Educational Progress (NAEP) administered by the Department (34 CFR 200.11(c)). Because of this regulatory requirement, we do not propose to require any new data collection by a State in this area; rather, in this case, the State would be required to confirm that its annual State report card contains this information. We believe that, when compared with student achievement results from State assessments (which a State is required by statute also to include in its annual State report card), student achievement results from NAEP provide a perspective on the extent to which a State has developed and is implementing high-quality academic content and student achievement standards.

Regarding the extent to which students graduate from high school and continue on to pursue a college education or technical training, we propose to require that a State provide data on the following topics: The number and percentage of students, by subgroup, who graduate from high school using a four-year adjusted cohort graduation rate as required by 34 CFR 200.19(b)(1)(i); the number of high school graduates (by subgroup) [8] who subsequently enroll in institutions of higher education (IHEs) as defined in section 101(a) of the Higher Education Act of 1965, as amended (HEA); and, of the high school graduates who enroll in public IHEs, the number (by subgroup) who complete at least one year's worth of college credit applicable to a degree. These data will act as key indicators of the extent to which a State has developed and is implementing secondary school academic content and achievement standards that contribute effectively to student preparation for college without the need for remediation.

To view a summary of the proposed requirements in this education reform area, please visit: *http://www.ed.gov/programs/statestabilization/applicant.html.*

Supporting Struggling Schools

Regarding education reform area (d) (supporting struggling schools), section 14005(d)(5) of the ARRA requires a State receiving funds under the Stabilization program to provide an assurance that it will ensure compliance with the requirements of section 1116(b)(7)(C)(iv) and section 1116(b)(8)(B) of the ESEA (20 U.S.C. 6316) with respect to Title I schools identified for corrective action and restructuring. In order to provide indicators of the extent to which a State is implementing the statutory assurance, we propose that the State provide data on the extent to which dramatic reforms to improve student academic achievement are implemented in Title I schools in improvement under section 1116(b)(1)(A) of the ESEA,[9] in corrective action, or in restructuring, and on the extent to which charter schools are operating in the State.

With respect to reforms implemented in Title I schools in improvement, corrective action, or restructuring, we propose to require that a State provide data on the academic progress of such schools as well as on certain kinds of reform actions taken regarding those schools. We believe that these data, a supplement to existing data and information on Title I schools in improvement, corrective action, or restructuring, will serve as useful indicators of the extent to which

[6] See below for the proposed requirements in these areas regarding standards and assessments that use other data and information currently available to the Department; these include Indicators (c)(3), (c)(4), and (c)(8).

[7] These activities are supported by the Grants for Enhanced Assessment Instruments program. See *http://www.ed.gov/programs/eag/index.html* for more information on this program.

[8] States must disaggregate these data by student subgroup consistent with the requirements of section 1111(b)(2)(C)(v)(II) of the ESEA. The student subgroups discussed in that section include: economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency.

[9] Although the statutory assurance concerns only Title I schools in corrective action and restructuring, we propose to require that States include Title I schools in improvement as well when providing data on the extent to which dramatic reforms to improve student academic achievement are being implemented. Making this addition would be consistent with the school reform strategies that States are implementing using funds available under section 1003(g) of the ESEA (School Improvement Grants), which are intended to be applied to schools in improvement as well as to schools in corrective action or restructuring.

effective reforms are being implemented in these schools consistent with the intent of the ESEA and ARRA.

Regarding the operation of charter schools in the State, we propose to require that a State provide data and other information on the number of charter schools that are permitted to operate in the State, the number that are currently operating, the number and identity of charter schools that have closed within the last five years, and the reason(s) (including financial, enrollment, academic, or other reasons) for the closure of any such school.

Under section 1116(b)(8)(B) of the ESEA, LEAs must select and implement an alternative governance arrangement for a school in restructuring, and one allowable alternative is reopening the school as a charter school. Possessing greater autonomy in exchange for greater accountability, charter schools can become engines of innovation and serve as models for school reform. We believe these data will be useful in determining the extent to which opening charter schools is a viable reform option for LEAs with schools in restructuring and other struggling schools, and the extent to which charter schools are held accountable for their performance so that only high-performing options remain available.

With respect to the number of charter schools that are currently operating, States are currently required to collect and report data on this topic to the Department through the ED*Facts* system. Because these data are currently available, we do not propose to require a new data collection by a State; rather, in this case, the Department would provide the State with the data it most recently submitted, which the State would be required to confirm and make publicly available.

To view a summary of the proposed requirements in this education reform area, please visit: *http://www.ed.gov/programs/statestabilization/applicant.html.*

State Plans

In addition to the specific data and information requirements relating to the four ARRA education reform assurances discussed above, we also propose requirements for a plan that a State must submit to the Department. In general, the State plan must describe the State's current ability to collect the data or other information needed for the proposed assurance indicators and descriptors as well as the State's current ability to make the data or information easily available to the public. If the State is currently able to fully collect and report the required data or other information, the State must provide the most recent data or information with its plan. If a State is not currently able to collect or report the data or other information, the plan must describe the State's process and timeline for developing and implementing the means to do so as soon as possible but no later than September 30, 2011, the date by which funds received under the Stabilization program must be obligated. The State plan must describe the State's collection and reporting abilities with respect to each individual indicator or descriptor.

As discussed above, the data or information needed for an assurance indicator or descriptor is in some cases already reported to the Department by the State, or is provided by the Department. In those cases, it is understood that the State is currently able to collect the data or information; the State's plan need only address the State's ability to publicly report the data or information, and the State need not include the data or information with its plan.

The proposed State plan requirements apply generally across the education reform areas discussed above with the exception of education reform area (b) (improving collection and use of data), for which we propose to apply slightly different plan requirements. Specifically, we propose to require that the State describe in the State plan whether the State's data system includes the required elements of a statewide longitudinal data system and, if the data system does not, the State's process and timeline for developing and implementing a system that meets all requirements as soon as possible but no later than September 30, 2011. As this indicator relates to a State's ability to collect and report data, however, these requirements do not in effect differ substantially from the generally applicable State plan requirements (*i.e.*, the requirements that the State describe its abilities to collect and report data or other information for a given indicator or descriptor). Moreover, the development and implementation of such a statewide longitudinal data system is intrinsic to a State's ability to collect and report the data required by certain other indicators (*e.g.*, the indicators on student enrollment and credit completion in institutions of higher education after graduation from high school). Such a statewide longitudinal data system can also produce and manage other data that States may use in developing and improving programs; targeting services; developing better linkages between preschool, elementary and secondary, and postsecondary systems, agencies, and institutions; and holding schools, LEAs, and institutions accountable for their performance. Most importantly, we believe these State plan requirements are supported by the statutory assurance for this education reform area which, as stated above, requires the State to assure that it will develop such a system.

Similarly, regarding teachers' receipt of data on student performance that includes estimates of individual teacher impact on student achievement, we propose to require that the State describe in the State plan whether the State provides teachers with such data and, if the State does not, the State's process and timeline for developing and implementing the means to do so as soon as possible but no later than September 30, 2011. We believe this requirement is likewise supported by the statutory assurance insofar as it provides an illustration of the ways in which data from the State's statewide longitudinal data system can be used to drive education reform. School and LEA leaders can use these data, in particular, in developing and providing professional development opportunities, assigning teachers, and implementing compensation and other human capital policies.

In addition to requirements relating to a State's ability to collect and report data or other information for the respective assurance indicators and descriptors, we propose other general requirements for the State plan relating to the State's institutional infrastructure and capacity, the nature of any technical assistance or other support provided, the plan budget, and the processes the State employs for data and information quality assurance purposes.

Our experience with data collections has shown that the development of a plan by the agency responsible for a collection is highly beneficial to all parties. For the Department and the public, a plan provides transparency on the agency's abilities to collect and report the data and other information, as well as a framework for holding the agency accountable for meeting the respective collection and reporting requirements. For the agency (in this case, the State), the plan presents an opportunity to assess its capacity and resources with respect to the requirements and to develop and implement any processes needed in order to comply with those requirements.

In developing a plan as proposed in this notice, the State is encouraged to consult with key stakeholders such as superintendents, educators, and parents as well as teacher union, business,

community, and civil rights leaders. Such consultation would ensure that these stakeholders are aware of the State's current ability to meet the proposed requirements, can provide input on the means the State will develop to comply with the requirements, and can prepare to assist the State in implementing those means.

Proposed Requirements

The Secretary proposes the following requirements for the Stabilization program. We may apply these requirements in any year in which this program is in effect.

I. *Assurance Indicators and Descriptors:* A State must collect and report data and other information for the following indicators and descriptors regarding the assurances that the State has provided in order to receive funds under the Stabilization program.

(a) *Achieving equity in teacher distribution.* A State must collect and report data and other information on the extent to which students in high- and low-poverty schools in the State have access to highly qualified teachers, on how teacher and principal performance is evaluated, and on the distribution of performance evaluation ratings or levels among teachers and principals. Specifically, a State must—

Indicator (a)(1). Confirm, for the State and for each LEA in the State, the number and percentage (including numerator and denominator) of core academic courses taught, in the highest-poverty and lowest-poverty schools, by teachers who are highly qualified consistent with section 9101(23) of the ESEA;

Descriptor (a)(1). Describe, for each LEA in the State, the systems used to evaluate the performance of teachers;

Indicator (a)(2). Indicate, for each LEA in the State, whether the systems used to evaluate the performance of teachers include student achievement outcomes as an evaluation criterion;

Indicator (a)(3). Provide, for each LEA in the State whose teachers receive performance ratings or levels through an evaluation system, the number and percentage (including numerator and denominator) of teachers rated at each performance rating or level;

Indicator (a)(4). Indicate, for each LEA in the State whose teachers receive performance ratings or levels through an evaluation system, whether the number and percentage (including numerator and denominator) of teachers rated at each performance rating or level are available for each school in the LEA in a manner easily accessible and a format easily understandable by the public;

Descriptor (a)(2). Describe, for each LEA in the State, the systems used to evaluate the performance of principals;

Indicator (a)(5). Indicate, for each LEA in the State, whether the systems used to evaluate the performance of principals include student achievement outcomes as an evaluation criterion; and

Indicator (a)(6). Provide, for each LEA in the State whose principals receive performance ratings or levels through an evaluation system, the number and percentage (including numerator and denominator) of principals rated at each performance rating or level.

(b) *Improving collection and use of data.* A State must collect and report information on the elements of its statewide longitudinal data system and on whether teachers receive data on student performance in a manner that is timely and informs instruction. Specifically, a State must—

Indicator (b)(1). Indicate which of the 12 elements described in section 6401(e)(2)(D) of the America COMPETES Act are included in the State's statewide longitudinal data system; and

Indicator (b)(2). Indicate whether the State provides teachers of reading/language arts and mathematics in grades in which the State administers assessments in those subjects with data on the performance of their students on those assessments that include estimates of individual teacher impact on student achievement, in a manner that is timely and informs instruction.

(c) *Standards and assessments.* A State must collect and report data and other information on whether students are provided high-quality State assessments, on whether the State is engaged in activities to enhance its assessments, on whether students with disabilities and limited English proficient students are included in State assessment systems, on whether the State makes information available regarding student academic performance in the State compared to the academic performance of students in other States, and on the extent to which students graduate from high school in four years with a regular high school diploma and continue on to pursue a college education or technical training. Specifically, a State must—

Indicator (c)(1). Confirm the approval status, as determined by the Department, of the State's assessment system under section 1111(b)(3) of the ESEA with respect to reading/language arts, mathematics, and science assessments;

Indicator (c)(2). Indicate whether the State is engaged in activities consistent with section 6112(a) of the ESEA to enhance the quality of its academic assessments;

Descriptor (c)(1). Briefly describe the nature of any activities indicated in Indicator (c)(2);

Indicator (c)(3). Confirm whether the State has developed and implemented valid and reliable alternate assessments for students with disabilities that are approved by the Department;

Indicator (c)(4). Confirm whether the State's alternate assessments for students with disabilities, if approved by the Department, are based on grade-level, modified, or alternate academic achievement standards;

Indicator (c)(5). Indicate whether the State has completed, within the last two years, an analysis of the appropriateness and effectiveness of the accommodations it provides students with disabilities to ensure their meaningful participation in State assessments;

Indicator (c)(6). Confirm the number and percentage (including numerator and denominator) of students with disabilities who are included in State reading/language arts and mathematics assessments;

Indicator (c)(7). Indicate whether the State has completed, within the last two years, an analysis of the appropriateness and effectiveness of the accommodations it provides limited English proficient students to ensure their meaningful participation in State assessments;

Indicator (c)(8). Confirm whether the State provides native language versions of State assessments for limited English proficient students that are approved by the Department;

Indicator (c)(9). Confirm the number and percentage (including numerator and denominator) of limited English proficient students who are included in State reading/language arts and mathematics assessments;

Indicator (c)(10). Confirm that the State's annual State Report Card (under ESEA section 1111(h)(1)) contains the most recent available State reading and mathematics NAEP results as required by 34 CFR 200.11(c);

Indicator (c)(11). Provide, for the State, for each LEA in the State, for each high school in the State and, at each of these levels, by student subgroup (consistent with section 1111(b)(2)(C)(v)(II) of the ESEA), the number and percentage (including numerator and denominator) of students who graduate from high school using a four-year adjusted cohort graduation rate as required by 34 CFR 200.19(b)(1)(i);

Indicator (c)(12). Provide, for the State, for each LEA in the State, for each

high school in the State and, at each of these levels, by student subgroup (consistent with section 1111(b)(2)(C)(v)(II) of the ESEA), of the students who graduate from high school consistent with 34 CFR 200.19(b)(1)(i), the number who enroll in an IHE as defined in section 101(a) of the HEA; and

Indicator (c)(13). Provide, for the State, for each LEA in the State, for each high school in the State and, at each of these levels, by student subgroup (consistent with section 1111(b)(2)(C)(v)(II) of the ESEA), of the students who graduate from high school consistent with 34 CFR 200.19(b)(1)(i) who enroll in a public IHE, the number who complete at least one year's worth of college credit (applicable to a degree) within two years.

(d) *Supporting struggling schools.* A State must collect and report data and other information on the extent to which reforms to improve student academic achievement are implemented in the State's Title I schools in improvement, corrective action, or restructuring under section 1116(b) of the ESEA, and on the extent to which charter schools are operating in the State. Specifically, a State must—

Indicator (d)(1). Provide, for the State and for each LEA in the State, the number and percentage (including numerator and denominator) of schools in improvement, corrective action, or restructuring that have made progress on State assessments in reading/language arts in the last year;

Indicator (d)(2). Provide, for the State and for each LEA in the State, the number and percentage (including numerator and denominator) of schools in improvement, corrective action, or restructuring that have made progress on State assessments in mathematics in the last year;

Indicator (d)(3). Provide, for the State and for each LEA in the State, the number and percentage (including numerator and denominator) of schools in improvement, corrective action, or restructuring that have been turned around, consolidated, or closed in the last year;

Indicator (d)(4). Provide, for the State, of the schools in improvement, corrective action, or restructuring, the number and identity of schools in the lowest-achieving five percent that have been turned around, consolidated, or closed in the last year;

Indicator (d)(5). Provide, for the State, of the schools in the lowest-achieving five percent of schools in improvement, corrective action, or restructuring that have been turned around, consolidated, or closed in the last year, the number that are secondary schools;

Indicator (d)(6). Provide, for the State and, if applicable, for each LEA in the State, the number of charter schools that are currently permitted to operate;

Indicator (d)(7). Confirm, for the State and for each LEA in the State that operates charter schools, the number of charter schools currently operating;

Indicator (d)(8). Provide, for the State and for each LEA in the State that operates charter schools, the number and identity of charter schools that have closed (including schools that were not reauthorized to operate) within the last five years; and

Indicator (d)(9). Indicate, for each charter school that has closed within the last five years, whether the closure of the school was for financial, enrollment, academic, or other reasons.

II. *State Plans:* A State receiving funds under the Stabilization program must develop and submit to the Department a comprehensive plan that includes the following information.

(a) *Indicator and descriptor requirements.* Except as discussed in paragraph (c) of this section, the State must be able to collect and report the data or other information required by an assurance indicator or descriptor. To this end, the State must describe, for each assurance indicator or descriptor—

(1) The State's current ability to fully collect the required data or other information at least annually;

(2) The State's ability to fully report the required data or other information, at least annually through September 30, 2011, in a manner easily accessible and a format easily understandable by the public;

(3) If the State is not currently able to fully collect, at least annually, the data or other information required by the indicator or descriptor—

(A) The State's process and timeline for developing and implementing, as soon as possible but no later than September 30, 2011, the means to fully collect the data or information, including—

(i) The milestones that the State establishes toward developing and implementing those means;

(ii) The date by which the State expects to reach each milestone; and

(iii) Any obstacles that may prevent the State from developing and implementing those means by September 30, 2011, including but not limited to requirements and prohibitions of State law and policy;

(B) The nature and frequency of reports that the State will provide to the public regarding its progress in developing and implementing those means; and

(C) The amount of funds the State is using or will use to develop and implement those means, and whether the funds are or will be Federal, State, or local funds;

(4) If the State is not able to fully report, at least annually through September 30, 2011, in a manner easily accessible and a format easily understandable by the public, the data or other information required by the indicator or descriptor—

(A) The State's process and timeline for developing and implementing, as soon as possible but no later than September 30, 2011, the means to fully report the data or information, including—

(i) The milestones that the State establishes toward developing and implementing those means;

(ii) The date by which the State expects to reach each milestone; and

(iii) Any obstacles that may prevent the State from developing and implementing those means by September 30, 2011, including but not limited to requirements and prohibitions of State law and policy;

(B) The nature and frequency of reports that the State will provide to the public regarding its progress in developing and implementing those means; and

(C) The amount of funds the State is using or will use to develop and implement those means, and whether the funds are or will be Federal, State, or local funds.

(b) *Data or other information.* If the State is currently able to fully collect and report the data or other information required by the indicator or descriptor, the State must provide the most recent data or information with its plan.

(c) *Requirements for indicators in reform area (b) (improving collection and use of data).*

(1) With respect to Indicator (b)(1), the State must develop and implement a statewide longitudinal data system that includes each of the 12 elements described in section 6401(e)(2)(D) of the America COMPETES Act. To this end, the State must, in its plan—

(A) Indicate which of the 12 elements are currently included in the State's statewide longitudinal data system;

(B) If the State's statewide longitudinal data system does not currently include all 12 elements, describe—

(i) The State's process and timeline for developing and implementing, as soon as possible but no later than September 30, 2011, a statewide longitudinal data system that fully

includes all 12 elements, including the milestones that the State establishes toward developing and implementing such a system, the date by which the State expects to reach each milestone, and any obstacles that may prevent the State from developing and implementing such a system by September 30, 2011 (including but not limited to requirements and prohibitions of State law and policy);

(ii) The nature and frequency of reports that the State will provide to the public regarding its progress in developing and implementing such a system; and

(iii) The amount of funds the State is using or will use to develop and implement such a system, and whether the funds are or will be Federal, State, or local funds.

(2) With respect to Indicator (b)(2), the State must provide teachers with data on the performance of their students that include estimates of individual teacher impact on student achievement consistent with the indicator. To this end, the State must—

(A) Indicate whether the State provides teachers with such data;

(B) If the State does not provide teachers with such data, describe—

(i) The State's process and timeline for developing and implementing, as soon as possible but no later than September 30, 2011, the means to provide teachers with such data, including the milestones that the State establishes toward developing and implementing those means, the date by which the State expects to reach each milestone, and any obstacles that may prevent the State from developing and implementing those means by September 30, 2011 (including but not limited to requirements and prohibitions of State law and policy);

(ii) The nature and frequency of reports that the State will provide to the public regarding its progress in developing and implementing those means; and

(iii) The amount of funds the State is using or will use to develop and implement those means, and whether the funds are or will be Federal, State, or local funds.

(d) *General requirements.* The State must describe—

(1) The agency or agencies in the State responsible for the development, execution, and oversight of the plan, including the institutional infrastructure and capacity of the agency or agencies as they relate to each of those tasks;

(2) The agency or agencies, institutions, or organizations, if any, providing technical assistance or other support in the development, execution, and oversight of the plan, and the nature of such technical assistance or other support;

(3) The overall budget for the development, execution, and oversight of the plan;

(4) The processes the State employs to review and verify the required data and other information; and

(5) The processes the State employs to ensure that, consistent with 34 CFR 99.31(b), the required data and other information are not made publicly available in a manner that personally identifies students, where applicable.

Proposed Definitions

Background

The ARRA contains definitions for several key terms applicable to the Stabilization program. The ARRA does not, however, define all terms relevant to the assurances that States must provide in order to receive funds under the program. In this notice, we propose definitions of key terms not defined in the ARRA (or, by reference, in the ESEA or the HEA) to prevent confusion regarding the assurance indicators and descriptors and to ensure that grantees develop plans that are consistent with the purposes of the ARRA and the Department's requirements and intentions for the program.

Proposed Definitions

The Secretary proposes the following definitions for Stabilization program terms not defined in the ARRA (or, by reference, in the ESEA or the HEA). We may apply these definitions in any year in which this program is in effect.

With respect to the requirement that a State collect and report on the extent to which students in high- and low-poverty schools in the State have access to highly qualified teachers, *highest-poverty school* means, consistent with section 1111(h)(1)(C)(viii) of the ESEA, a school in the highest quartile of schools (at the State and LEA levels, respectively) using a measure of poverty determined by the State. Similarly, *lowest-poverty school* means, consistent with section 1111(h)(1)(C)(viii) of the ESEA, a school in the lowest quartile of schools (at the State and LEA levels, respectively) using a measure of poverty determined by the State.

With respect to the requirements that a State indicate whether the official systems used to evaluate the performance of teachers and principals include student achievement outcomes as an evaluation criterion, *student achievement outcomes* means outcomes including, at a minimum, one of the following: student performance on summative assessments, or on assessments predictive of student performance on summative assessments, in terms of absolute performance, gains, or growth; student grades; and rates at which students are on track to graduate from high school.

With respect to the requirement that a State collect and report the number of high school graduates who enrolled in a public IHE who complete at least one year's worth of college credit (applicable to a degree) within two years, *college credit (applicable to a degree)* is used as that term is defined by the IHE granting such credit.

With respect to the requirements that a State collect and report the numbers of Title I schools in improvement, corrective action, or restructuring that have made progress on State assessments in reading/language arts and in mathematics in the last year, *school that has made progress* means a school whose gains on the assessment, in the "all students" category (as under section 1111(b)(2)(C)(v)(I) of the ESEA), are equal to or greater than the average gains of schools in the State on that assessment.

With respect to the requirements that a State collect and report the number of Title I schools in improvement, corrective action, or restructuring that have been turned around, consolidated, or closed in the last year, *school that has been turned around* means a school that has had a governance change (which must include a change in the school's principal and other school leadership changes), implemented a new instructional focus, and replaced at least 50 percent of its staff as part of a planned intervention; *school that has been consolidated* means a school that has merged with another school so that students from both schools are educated together; and *school that has been closed* includes but is not limited to a school that has been closed and reopened under the management of a charter management organization or an educational management organization.

With respect to the requirement that a State collect and report, of the Title I schools in improvement, corrective action, or restructuring, the number and identity of schools in the lowest-achieving five percent that have been turned around, consolidated, or closed in the last year, *lowest-achieving five percent* is used as that term is defined by the State, except that in defining the term the State must consider both the absolute performance of schools on State assessments in reading/language arts and mathematics and whether schools have made progress on those assessments (see definition of *school*

that has made progress above), and except that, if a State has fewer than 100 schools in improvement, corrective action, or restructuring, the State must include at least five such schools.

Proposed Approval Criteria

Background

Our experience with administering grant competitions and with reviewing proposals from States regarding their compliance with certain requirements of the ESEA (particularly the requirements in Title I of the ESEA relating to standards, assessments, and accountability) recommends the use of explicit criteria for approving the plans we propose to require of States receiving funds under this program. In addition to specifying the areas of focus in the review of these plans, such criteria also usefully indicate to States the qualities in a plan that make it approvable.

In this notice we propose approval criteria relating to the quality and adequacy of the State plans. We intend to make determinations regarding the approval of a State's plan based on the recommendations of a peer review using these criteria. We will issue guidance to peer reviewers providing more specific information on the final criteria as they relate to the respective final requirements.

As noted above, a State must submit its plan as part of its application for the second phase of funding under the Stabilization program, through which the Department will award the remaining portion of a State's total Stabilization allocation. A State that submits a plan that is determined to be sufficiently responsive to each requirement will immediately receive 75 percent of the remainder of its total allocation of funds under the program. A State will receive the remaining 25 percent of its remainder of funds only after its plan is approved in its entirety.

Proposed Approval Criteria

The Secretary proposes the following criteria for approving the plan of a State receiving funds under the Stabilization program. We may apply one or more of these criteria in any year in which this program is in effect.

(a) *Quality of the State plan.* Except as described in paragraph (b), in determining the quality of the plan submitted by a State, we consider the following:

(1) Whether the plan clearly and accurately describes the State's abilities to collect and to report the data or other information required by an assurance indicator and descriptor; and

(2) If the State is not currently able to fully collect and report the data or information required by an indicator or descriptor—

(i) Whether the timeline and process for developing and implementing the means to fully collect and report the data or information are reasonable and sufficient to comply with the requirement;

(ii) Whether any obstacles identified by the State as preventing it from developing and implementing the means to fully collect and report the data or information by September 30, 2011 are sufficient to justify a delay in complying with the requirement; and

(iii) Whether the reports that the State will provide to the public will be appropriately accessible and will sufficiently indicate the State's progress in developing and implementing the means to comply with the requirement.

(b) *Quality of the State plan with respect to indicators in reform area (b) (improving collection and use of data).* In determining the quality of the plan submitted by a State as it relates to the indicators in reform area (b), we consider the following:

(1) Whether the plan clearly and accurately describes the State's ability to meet the plan requirement for the indicator (*i.e.*, in the case of Indicator (b)(1), the requirement to develop and implement a statewide longitudinal data system that includes each of the 12 elements described in section 6401(e)(2)(D) of the America COMPETES Act; and in the case of Indicator (b)(2), the requirement to provide teachers with data on the performance of their students that include estimates of individual teacher impact on student achievement); and

(2) If the State does not currently meet the plan requirement for the indicator—

(i) Whether the timeline and process for developing and implementing the means to meet the requirement are reasonable and sufficient to comply with the requirement;

(ii) Whether any obstacles identified by the State as preventing it from developing and implementing the means to meet the requirement by September 30, 2011 are sufficient to justify a delay in complying with the requirement; and

(iii) Whether the reports that the State will provide to the public will be appropriately accessible and will sufficiently indicate the State's progress in developing and implementing the means to comply with the requirement.

(c) *Adequacy of the State plan.* In determining the adequacy of the plan submitted by a State, we consider the following:

(1) Whether the institutional infrastructure and capacity of the agency or agencies responsible for the development, implementation, and oversight of the plan, together with any technical assistance or other support provided by other agencies, institutions, or organizations, are adequate to comply with the indicator and descriptor requirements individually and as a whole;

(2) Whether the funds the State is using or will use are adequate to comply with the indicator and descriptor requirements both individually and as a whole;

(3) Whether the processes the State employs to review and verify the required data and information are adequate to ensure that the data and information are accurate and of high quality; and

(4) Whether the processes the State employs are adequate to ensure that, where applicable, the required data and other information are not made publicly available in a manner that personally identifies students.

Final Requirements, Definitions, and Approval Criteria

We will announce the final requirements, definitions, and approval criteria for the Stabilization program in a notice in the **Federal Register**. We will determine the final requirements, definitions, and approval criteria after considering any comments submitted in response to this notice and other information available to the Department. This notice does not preclude us from proposing additional requirements, definitions, and approval criteria, subject to meeting applicable rulemaking requirements.

Note: This notice does *not* solicit applications. In any year in which we choose to use one or more of these requirements, definitions, and approval criteria, we invite applications through a notice in the **Federal Register**.

Executive Order 12866

The proposed costs have been reviewed in accordance with Executive Order 12866. Under the terms of the order, the Department has assessed the costs and benefits of this regulatory action.

In assessing the potential costs and benefits—both quantitative and qualitative—of these proposed requirements, the Department has determined that the benefits of the proposed requirements exceed the costs. The Department also has determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

To assist the Department in complying with the requirements of Executive Order 12866, the Secretary invites comments on whether there may be further opportunities to reduce any potential costs or increase potential benefits resulting from these proposed requirements without impeding the effective and efficient administration of the Stabilization program.

Need for Federal Regulatory Action

These proposed requirements, definitions, and approval criteria are needed to implement the State Fiscal Stabilization Fund program in a manner that the Secretary believes will best enable the program to achieve its objectives of supporting meaningful education reforms in the States while helping to stabilize State and local budgets and minimize reductions in education and other essential services. In particular, the proposals included in this notice are necessary to advance the four key educational reforms listed in the ARRA, particularly by ensuring better reporting and more public availability of information on the progress of implementation in each of the four reform areas. The proposed requirement for each State to establish a longitudinal data system that includes the elements specified in the America COMPETES Act will have an especially significant impact on the availability of data that can be used in developing and improving programs; targeting services; developing better linkages between preschool, elementary and secondary schools, and postsecondary systems, agencies, and institutions; and holding schools, LEAs, and institutions accountable for their performance. Establishment of such a system by each participating State is also required under the ARRA.

Further, the proposed requirement for each State to commit to developing procedures for providing teachers of reading/language arts and mathematics with data on the performance of their students that includes estimates of individual teacher impact reflects a need to ensure that teachers have better data on how well they are educating their students and that school and LEA leaders have valuable information that they can use in developing and providing professional development opportunities, assigning teachers, and implementing compensation and other human capital policies.

The proposed definitions included in this notice are necessary to give clearer meaning to some of the terms used in the descriptions of the requirements and approval criteria. The proposed approval criteria themselves are needed in order to provide for a clear and objective set of standards that the Secretary would use in ensuring that each State, before receiving the remainder of its Stabilization program allocation, has in place a plan for collecting and reporting the required data and meeting the other requirements proposed in this notice.

Regulatory Alternatives Considered

A likely alternative to promulgation of the types of requirements, definitions, and approval criteria proposed in this notice would be for the Secretary to release the remaining Stabilization program funds without establishing specific reporting or other requirements. Under such a scenario, participating States would still be required to meet the statutory requirements (that is, to take actions to improve teacher effectiveness and the equitable distribution of highly qualified teachers, to establish longitudinal data systems that include the elements specified in the America COMPETES Act, to enhance the quality of their standards and assessments, to ensure the inclusion of students with disabilities and limited English proficient students in their assessments, and to take steps to improve consistently low-performing schools), but there would be no assurance of consistent and complete reporting of States' progress and no uniform mechanism for measuring and comparing States' performance. Additionally, the need for teachers to obtain better information on their students' educational progress would likely be unfulfilled. While the Department is interested in public comment on the feasibility and advisability of the various requirements proposed herein, the Secretary regards disbursement of the remaining Stabilization program funds without implementation of the reporting and other proposed requirements as a missed opportunity for bringing about needed educational reforms at a critical time.

Summary of Costs and Benefits

The Department has analyzed the costs of complying with the proposed requirements. Some of the costs will be very minimal and others more significant. As an example of a requirement that will result in minimal burden and cost, States are currently required to report annually, through ED*Facts* (the Department's centralized data collection and warehousing system), for the State as a whole and for each LEA, the number and percentage of core academic courses taught, in the highest-poverty and lowest-poverty schools, by teachers who are highly qualified. Proposed indicator (a)(1) would require that they confirm the data they have reported, which should not be a time-consuming responsibility. As a second example, the proposed requirement to confirm the approval status of the State's assessment system under section 1111(b)(3) of the ESEA, as determined by the Department, should also require minimal effort.

Other proposed requirements will impose significant new costs, but the Department believes that the benefits resulting from the requirements will exceed those costs. The major benefit of these requirements, taken in their totality, is better and more publicly available information on the status of activities related to the reform areas identified in the authorizing statute for the Stabilization program. As described in detail below, research indicates or suggests that progress on each of the reforms will contribute to improved student outcomes. The provision of better information (on teacher qualifications, teacher and principal evaluation systems, State student longitudinal data systems, State standards and assessment systems, student success in high school and postsecondary education, efforts to turn around low-performing schools, and charter school reforms) to policymakers, educators, parents, and other stakeholders will assist in their efforts to further the reforms. In addition, State reporting of these data will help the Department determine the impact of the unprecedented level of funding made available by the ARRA. Further, the data and plans that States submit will inform Federal education policy, including the upcoming reauthorization of the ESEA.

States will be able to draw on Federal resources in meeting some of the requirements. The proposed requirements that would result in the most significant costs are related to the implementation of a State data system that can track individual student transitions from high school to college. To support these efforts, States may receive Federal funds from the Statewide Longitudinal Data Systems program, through which the Department has made over $187 million available since fiscal year 2005. The ARRA provided an additional $250 million for that program, and the Administration's budget request for fiscal year 2010 includes an additional $65 million. In addition, it is important to note that States may use funds available through the Stabilization program's Government Services Fund (over $8.8 billion) to develop and implement the systems

necessary to report on these performance indicators.

The following is a detailed analysis of the estimated costs of implementing the specific proposed requirements, followed by a discussion of the anticipated benefits. The costs of implementing specific paperwork-related requirements are also shown in the tables in the Paperwork Reduction Act of 1995 section of this notice.

Distribution of Highly Qualified Teachers

Section 14005(d)(2) of the ARRA requires a State receiving funds under the Stabilization program to assure, in the Stabilization program application, that it will address inequities in the distribution of highly qualified teachers. In response to this requirement, the Department is proposing to require States to confirm, for the State and for each LEA in the State, the number and percentage of core academic courses taught, in the highest-poverty and lowest-poverty schools, by teachers who are highly qualified. Because States will have previously submitted this information to the Department through the ED*Facts* system, we anticipate that the costs of complying with this requirement would be minimal. A State likely would need only to ensure that it had correctly aggregated and reported data received from its LEAs. The Department expects that each State would require one hour of staff time to complete this effort, at a cost of $30 per hour. For the 50 States, the District of Columbia, and Puerto Rico, the total estimated level of effort would be 52 hours at a cost of $1,560.

Teacher and Principal Evaluation Systems

Section 14005(d)(2) also requires States to take actions to improve teacher effectiveness. To accomplish that goal, States must first have a means of assessing teacher success. A limited number of States have implemented statewide teacher and principal evaluation systems, while in the other States the responsibility for evaluating teachers and principals rests with the LEAs or schools. Little is known about the design of these systems across the Nation, but the collection and reporting of additional information would create a resource that additional States and LEAs can draw on in building their own systems. The Department, therefore, proposes to require States to collect and publicly report information about these evaluation systems.

Specifically, the Department is proposing to require that States describe, for each LEA in the State, the systems used to evaluate the performance of teachers and principals. Further, the Department proposes to require States to indicate, for each LEA in the State, whether the systems used to evaluate the performance of teachers and principals include student achievement outcomes as an evaluation criterion.

The level of effort required to respond to these proposed requirements would likely vary depending on the types of teacher and principal evaluation systems in place in a given State or LEA. The Department believes that, if a system is in place at the State level, the response burden would be low, because the State will have the required information readily available. According to the National Council on Teacher Quality, 12 States require LEAs to use a State-developed instrument to evaluate teachers or to develop an equivalent instrument that must be approved by the State.[10] For these 12 States, the Department estimates that a total of 72 hours (6 hours per State) would be required to respond to these proposed requirements, for a total cost, at $30 per hour, of $2,160. The 2,632 LEAs located in these States would not be involved in the response to these proposed requirements.

In the 40 States that do not have statewide teacher and principal evaluation systems in place, the level of effort required would likely be significantly higher. For each of these States, the Department estimates that 360 hours would be required at the State level to develop and administer a survey of LEAs (including designing the survey instrument, disseminating it, providing training or other technical assistance to LEAs on completing the survey, collecting the data and other information, checking accuracy, and public reporting), which would amount to a total of 14,400 hours and a total estimated State cost of $432,000 (assuming, again, a cost per hour of $30). The 12,368 LEAs located in these States would bear the cost of collecting and reporting the data to their States. For the purpose of the burden estimates in this section, the Department estimates that 75 percent of these LEAs (9,276) have official teacher and principal evaluation systems in place. For those LEAs, we estimate that 3 hours would be required to respond to these proposed requirements. For the estimated 3,092 LEAs that do not have an official evaluation system in place, we estimate that 2 hours would be required. The Department, thus, estimates that LEAs would need to spend a total of 34,012 hours to respond to these proposed requirements at a total cost of $850,300. This estimate is speculative because the Department was unable to find information about the prevalence of teacher and principal evaluation systems in LEAs. We invite comments that provide information on the prevalence of these systems in LEAs (so that we may further refine our estimates) and on the potential costs of meeting the requirements for LEAs that have or do not have such a system.

The Department is also proposing to require States to provide, for each LEA in the State whose teachers and principals receive performance ratings or levels through an evaluation system, the number and percentage of teachers and principals rated at each performance rating or level. Finally, the Department proposes to require States to indicate, for each LEA in the State whose teachers receive performance ratings or levels through an official evaluation system, whether the number and percentage of teachers rated at each performance rating or level is publicly available for each school in the LEA in a manner that is easily accessible and in a format easily understandable by the public. We were unable to find information on whether LEAs will have this information readily available in a centralized data system and, therefore, invite comment on this issue. For the purpose of this estimate, we assume that 60 percent of LEAs will have the necessary information in their central office or will be so small that collecting this information will be a simple process. Applying this percentage to the estimated 11,908 LEAs that have in place an official system to evaluate teacher and principal performance (which includes the 2,632 LEAs in States with statewide systems, as well as the estimated 9,276 LEAs in other States that have their own local systems), the Department estimates that the total burden of responding to these proposed requirements would be 59,540 hours (5 hours per affected LEA) and $1,488,500. We estimate that each of the other 4,763 LEAs will need to spend 40 hours to respond. The Department, therefore, estimates the total LEA burden for these requirements to be 260,264 hours across the Nation at an estimated total cost of $6,506,600 (assuming a cost per hour of $25).

States would then need to collect these data, most likely by including these items in the survey instrument that they will develop to respond to the other proposed requirements in this section, and will then need to aggregate

[10] *State Teacher Policy Yearbook: 2008*, page 68. *http://www.nctq.org/stpy08/reports/stpy_national.pdf.*

and publicly report the data. We estimate that this will require 8 hours of effort per State, for a total burden of 416 hours at a cost of $12,480. For more detailed estimates of costs for these proposed requirements, please see the tables in the Paperwork Reduction Act of 1995 section of this notice.

State Data Systems

Section 14005(d)(3) requires States to assure that they will establish a longitudinal data system that includes the elements described in section 6401(e)(2)(D) of the America COMPETES Act. To track State progress in this reform area, the Department proposes to require each State to indicate which of the 12 elements are included in the State's statewide longitudinal data system. The costs of reporting this information should be minimal. Moreover, most States are already reporting information on ten of the 12 elements to the Data Quality Campaign, a national effort to encourage State policymakers to use high-quality education data to improve student achievement. The Department expects that States will be able to readily provide information on whether the two remaining elements are included in their data systems and that it should take little time for the States that have not been reporting to the Data Quality Campaign to provide information on their data systems. We, therefore, estimate that States would need only 2 hours to respond to this requirement, for a total level of effort of 104 hours at an estimated cost of $3,120.

The Department also proposes to require that States report, for each LEA in the State, whether the State provides teachers of reading/language arts and mathematics in the grades in which the State administers assessments in those subjects with data on the performance of their students on those assessments that include estimates of individual teacher impact on student achievement, in a manner that is timely and informs instruction. The Department believes that making such information available would help improve the quality of instruction and the quality of teacher evaluation and compensation systems. Under the State Plan section, we discuss the costs of developing systems for the provision of such information in all States. The costs of merely reporting on whether a State currently provides this information to teachers should be minimal. We estimate that each State would spend one hour to report this information, for a total level of effort of 52 hours at a cost of $1,560.

State Assessments

In response to the section 14005(d)(4)(A) requirement that States enhance the quality of their student assessments, the Department proposes to require that the States confirm certain existing data and other information and submit some new information about their assessment systems. Specifically, the Department proposes to require each State to confirm the approval status, as determined by the Department, of the State's assessment system (with respect to reading/language arts, mathematics, and science assessments) and indicate whether and how the State is engaged in activities authorized under the Grants for Enhanced Assessment Instruments program that would enhance the quality of the State's academic assessments. In addition, States would be required to confirm that their annual State Report Card (issued pursuant to the requirements of ESEA section 1111(h)) contains the most recent available State reading and mathematics NAEP results. The Department estimates that each State would require six hours to respond to these proposed requirements, for a total cost of $9,360.

Section 14005(d)(4)(B) requires States to assure that they will administer valid and reliable assessments for children with disabilities and limited English proficient students. To measure State progress on this assurance, the Department proposes to require States to: Confirm whether the State has developed and implemented valid and reliable alternate assessments for students with disabilities that have been approved by the Department; confirm whether the State's alternative assessments for students with disabilities, if approved by the Department, are based on grade-level, modified, or alternate academic achievement standards; indicate whether the State has completed, within the last two years, an analysis of the appropriateness and effectiveness of the accommodations it provides students with disabilities to ensure their meaningful participation in State assessments; indicate whether the State has completed, within the last two years, an analysis of the appropriateness and effectiveness of the accommodations it provides limited English proficient students to ensure their meaningful participation in State assessments; and confirm whether the State provides native language versions of State assessments for limited English proficient students. To respond to these five proposed indicators, the Department estimates that the 50 States, the District of Columbia, and Puerto Rico would each require five hours, for a total cost of $7,800.

In addition, the Department proposes to require that States confirm the number and percentage of students with disabilities and limited English proficient students who are included in State reading/language arts and mathematics assessments. The Department expects that each State would, on average, require one hour of staff time to complete this effort, at a cost of $30 per hour. The burden estimated for this requirement is minimal because the States will have already submitted this information to the Department through the ED*Facts* system. For the 50 States, the District of Columbia, and Puerto Rico, the total estimated level of effort would be 52 hours at cost of $1,560.

High School and Postsecondary Success

Section 14005 (d)(4)(C) requires States to assure, in their Stabilization Fund applications, that they take steps to improve their State academic content standards and student academic achievement standards consistent with section 6401(e)(1)(A)(ii) of the American COMPETES Act, which calls for States to identify and make any necessary changes to their secondary school graduation requirements, academic content standards, academic achievement standards, and the assessments students take preceding graduation from secondary school in order to align those requirements, standards, and assessments with the knowledge and skills necessary for success in academic credit-bearing coursework in postsecondary education, in the 21st century workforce, and in the Armed Forces without the need for remediation. Several of the indicators and descriptors proposed in this notice are aligned with this provision of the America COMPETES Act.

First, the Department proposes to require each State to report, for the State and each LEA and high school in the State and, at each of these levels, by student subgroup,[11] the number and percentage of students who graduate from high school as determined using the four-year adjusted cohort graduation rate. The Department believes that State efforts to comply with the Department's October 29, 2008 regulation requiring the use of a four-year adjusted cohort graduation rate in the determination of adequate yearly progress under Title I of the ESEA are now underway (see 34

[11] As noted earlier in this notice, the student subgroups include: economically disadvantaged students, students from major racial and ethnic groups, students with limited English proficiency, and students with disabilities.

CFR 200.19(b)(1)(i)). Some additional effort would be required to collect and report these data for all schools as the current regulations apply only to Title I schools.

Based on the Data Quality Campaign's 2008 survey of the 50 States and the District of Columbia, which found that 42 States have the capacity to calculate the National Governors Association longitudinal graduation rate,[12] the Department believes that most States are well-situated to collect and report these data, or have the processes underway to make such reporting possible by September 30, 2011. In fulfillment of the proposed requirement, the Department estimates that States would need to distribute to non-Title I LEAs the survey instrument they are using to collect this information from Title I LEAs and to input the data from these surveys, which would require an estimated 8 hours per State. The new LEA burden to respond to this indicator would be limited to the approximately 976 LEAs that do not receive Title I funds.[13] The Department estimates that these LEAs would spend an average of 40 hours to respond to this indicator for a total LEA effort of 39,040 hours. The total estimated cost is, therefore, $976,000.

In addition, the Department is proposing that States report, for the State, for each LEA in the State, for each high school in the State and, at each of these levels, by student subgroup, the number of students who graduate from high school consistent with 34 CFR 200.19(b)(1)(i) who enroll in an IHE and, of those students who enroll in a public IHE, the number who complete at least one year's worth of college credit (applicable to a degree) within two years. The proposed requirements would entail considerable coordination among high schools, LEAs, SEAs, and IHEs. The Department expects that SEAs would have to develop a system to make this data collection and sharing possible, which they could at least partially achieve by establishing a longitudinal data system that includes the elements described in section 6401(e)(2)(D) of the America COMPETES Act. As discussed above, section 14005(d)(3) of the ARRA requires States to assure, in their Stabilization Fund application, that they will establish such a data system. Because the requirement to establish such a system flows from the statute, not from these proposed requirements, the Department does not include the costs of establishing such a system in the costs of these proposed requirements.[14] In addition, States will be able to use Government Services funds that they receive as part of their Stabilization allocation to support these efforts, and may compete for funds from the Statewide Longitudinal Data Systems program. Further, the efforts of the National Student Clearinghouse, a non-profit organization that provides student enrollment and degree verification services, demonstrate that there is significant interest in information sharing between IHEs and LEAs; more than 3,300 colleges that enroll over 92 percent of US college students and hundreds of LEAs participate in the Clearinghouse's efforts. The Department expects that LEAs and IHEs that currently provide data to this system may require less effort to respond to this proposed requirement.

With respect to the proposed requirement on reporting postsecondary enrollments, the Department expects that LEAs would need to enter, into their State's statewide longitudinal data system, data on each high school graduate's plans after high school, including the IHE where the student intends to enroll, if applicable. According to the *Digest of Education Statistics,* approximately 2,492,000 students who graduated from public high schools enrolled in IHEs as first-time freshmen in fall 2007.[15] Holding that number constant, the Department estimates that LEAs would be able to enter data for these students at a pace of 20 students per hour, which would result in a total level of LEA effort of 124,600 hours at a cost of $3,115,000.

The State would then likely need to request that each IHE in the State confirm a student's enrollment, using the statewide longitudinal data system to obtain data on students who intended to enroll within the State. Based on data from the 2006 Integrated Postsecondary Education Data System (IPEDS), Spring 2007,[16] the Department estimates that 2,043,440 first-time freshmen (82 percent of all first-time freshmen who graduated from public high schools) enroll in IHEs in their home State. The Department estimates that IHEs will be able to confirm enrollment for 20 students per hour, for a total of 102,172 hours of IHE effort at a total cost of $2,554,300 (assuming a cost of $25 per hour).[17]

States would also likely need to request that IHEs outside the State confirm the enrollment of students who indicated that they would enroll in those institutions. Again, based on data from the 2006 IPEDS, Spring 2007, the Department estimates that 448,560 students who graduate from public high schools each year enroll in IHEs in States outside their home State. The Department estimates that it will take States 30 minutes per student to complete this process, including contacting out-of-State IHEs, obtaining the necessary information from them, and including data on those students in their public reports. This element of the proposed requirement, therefore, would result in a national total of 224,280 hours of State effort at a total cost of $6,726,840. As with students who enroll in IHEs in their home State, the Department estimates that IHEs will be able to confirm enrollment for 20 students per hour, for a total of 22,428 hours of IHE effort at a total cost of $560,700.

Finally, to meet the proposed requirement that they publicly report the number of students who enroll in IHEs, States would need to aggregate the data received from all IHEs and would then need to run analyses and publicly post the data for the State, for each LEA, for each high school and, at each of these levels, by student subgroup. The Department estimates that each State would need 40 hours to conduct these analyses and post these data, for a total State burden of 2,080 hours at a cost of $62,400.

The proposed requirement that States report the number of students enrolling in a public IHE who complete at least one year's worth of college credit

[12] *http://www.dataqualitycampaign.org/survey.*

[13] According to data States submitted to the Department through the Consolidated State Performance Report 2007–08, there are a total of 15,016 LEAs across the Nation, 14,040 of which receive Title I, Part A funds.

[14] We do acknowledge, however, that although the statute does not set a deadline for State establishment of the required data systems, item (c)(ii)(A) under State Plans in this notice would require States to have in place State longitudinal data systems that fully include all 12 elements described in the America COMPETES Act by September 30, 2011. Putting a full system in place by that date might increase costs to States or, alternatively, might reduce costs (if the more rapid establishment of a system results in efficiencies). The Department invites comments on the cost implications of the proposed deadline.

[15] According to the *Digest of Education Statistics,* 2008, almost 2.8 million first-time freshmen enrolled in IHEs in fall 2007. See *http://nces.ed.gov/programs/digest/d08/tables/dt08_198.asp.* Also according to the *Digest,* in fall 2005, 6,073,240 students were enrolled in private elementary and secondary schools. At that time, enrollment in public elementary and secondary schools was 49,113,298. Extrapolating from those data, the Department estimates that 11 percent of all first-time postsecondary students graduated from private schools. See *http://nces.ed.gov/programs/digest/d08/tables/dt08_058.asp.*

[16] *http://nces.ed.gov/programs/digest/d08/tables/dt08_223.asp.*

[17] Note that a table in the Paperwork Reduction Act of 1995 section of this notice provides the burden estimates by IHE, but that this narrative provides national estimates using the total number of students included in the data requirement.

applicable toward a degree within two years would also entail a collaborative process between SEAs and IHEs. Again, based on data from the *Digest of Education Statistics*, the Department estimates that 2,492,000 first-time freshmen enroll in public IHEs. Further, the Department estimates that, once a State has established a system for the collection and reporting of these data, IHEs will be able to enter data for 20 students an hour; thus, the total estimated level of effort to respond to this proposed requirement would be approximately 124,600 hours of IHE effort at an estimated cost of $3,115,000, assuming a cost of $25 per hour.

As with the previous indicator, States would likely need to request that IHEs outside the State report whether the students enrolled in those institutions have completed at least one year's worth of college credit. Again, the Department estimates that 448,560 students who graduate from public high schools each year enroll in IHEs in States outside their home State. The Department estimates that it will take States 30 minutes per student to complete this process, including contacting out-of-State IHEs, obtaining the necessary information from them, and including data on those students in their public reports. This element of the proposed requirement, therefore, would result in a national total of 224,280 hours of State effort at a total cost of $6,726,840. As with students who enroll in IHEs in their home State, the Department estimates that IHEs will be able to report whether students obtained a year or more of college credit for 20 students per hour, for a total of 22,428 hours of IHE effort at a total cost of $560,700.

Finally, as with the previous indicator, States would need to aggregate the data received from all IHEs and would then need to run analyses and publicly post the data for at the State, LEA, and school levels and at each of these levels, by student subgroup. The Department estimates that each State would need 40 hours to conduct these analyses and post these data, for a total State burden of 2,080 hours at a cost of $62,400.

Supporting Struggling Schools

A key goal of the ARRA is to ensure that States and LEAs provide targeted, intensive support and effective interventions to turn around schools identified for corrective action and restructuring under Title I of the ESEA. Section 14005(d)(5) requires States to ensure compliance with the Title I requirements in this area. To track State progress, the Department proposes to require States to provide, for each LEA in the State and aggregated at the State level, the number and percentage of schools in improvement, corrective action, or restructuring that have made progress on State assessments in reading/language arts and mathematics in the last year, and the number and percentage of schools in improvement, corrective action, or restructuring that have been turned around, consolidated, or closed in the last year. States would also be required to report the number and identity of schools in the lowest-achieving five percent of the schools in improvement, corrective action, or restructuring that have been turned around, consolidated, or closed in the last year, as well as the number of those schools (*i.e.*, the schools in the lowest-achieving five percent of the schools in improvement, corrective action, or restructuring that have been turned around, consolidated, or closed in the last year) that are secondary schools.

The Department believes that States will already have available the data needed to report on the indicators related to the total number and percentage of schools in improvement, corrective action, or restructuring that have made progress on State assessments, although they might need to run new analyses of the data. However, the Department expects that States would have to collect new data on the schools in improvement, corrective action, or restructuring (in general and in the lowest-achieving five percent) that have been turned around, consolidated, or closed. In addition, the State will need to define the schools in the lowest-achieving five percent. We estimate that this data collection will entail two hours of effort in each of the 1,173 LEAs (the number of LEAs that, according to data reported to ED*Facts*, had at least one school in improvement, corrective action, or restructuring in the 2007–08 school year). As a result, the Department estimates that the total LEA burden for this proposed requirement would be 2,346 hours at a cost of $58,650. States would then need to aggregate these data, in addition to the effort they will spend responding to the other indicators that relate to struggling schools. The Department estimates that each State would require 16 hours of effort to respond, for a total cost of $83,610.

Charter Schools

The Department believes that the creation and maintenance of high-quality charter schools is a key strategy for promoting successful models of school reform. To determine the level of State effort in this area, the Department proposes to require States to provide, at the State level and, if applicable, for each LEA in the State, the number of charter schools that are currently permitted to operate and the number that are currently operating. We expect that this information will be readily available, and that States will need only one hour to respond to this proposed requirement.

In addition, the Department proposes to require States to report, at the State and, if applicable, LEA levels, the number and identity of charter schools that have closed within the last five years and to indicate, for each such school, whether the closure was for financial, enrollment, academic, or other reasons. The Department estimates that SEAs would likely also have this information readily available (although some may need to obtain additional information from their LEAs) and would need five hours to report it. The Department assumes that the effort to respond to these proposed requirements would be limited to the 42 States (including the District of Columbia and Puerto Rico) that allow charter schools. The Department thus estimates that the State effort required to respond to these indicators would total 210 hours at a cost of $6,300.

State Plans

This notice proposes to require States, as a condition of receiving their remaining funding for the Stabilization program, to submit a plan to the Department that describes the State's current ability to fully collect and report data for the proposed indicators and descriptors at least annually and in a manner easily accessible and a format easily understandable by the public. If the State is currently able to fully collect and report the data or other information required by the indicator or descriptor, the State must provide the most recent data or information with its plan. If a State is not currently able to fully collect and report the required data or other information, the plan must describe the process that the State will undertake in order to have the means to fully collect and report such data or information as soon as possible but no later than September 30, 2011.

As a part of this plan, the State would be required to establish milestones and a date by which the State expects to reach each milestone, describe the nature and frequency of publicly available reports that the State will publish on its progress, and identify the amount and source (*i.e.*, whether Federal, State or local) of funds that will support the efforts necessary to collect and report the data or information. The level of effort involved in preparing

these elements of the plan will vary from State to State based on individual State progress in each reform area. For example, according to the Data Quality Campaign's 2008 survey of the 50 States and the District of Columbia, 48 States have "a unique statewide student identifier that connects student data across key databases across years," 28 States have the "[a]bility to match student-level p-12 and higher education data," and 21 States have a "statewide teacher identifier with a teacher-student match." States that have taken these steps have built a foundation for the efforts that would be necessary to meet some of the proposed requirements, and will likely need to spend less time completing these elements of their plans. The Department estimates that, in total, each State will need an average of 396 hours to prepare these sections of the plan; thus, the total hours that would be necessary to meet this proposed requirement for the 50 States, the District of Columbia, and Puerto Rico would be 20,592 hours, for a total cost of $617,760. For more detailed estimates of costs for each specific proposed requirement, please see the tables in the Paperwork Reduction Act of 1995 section of this notice.

As part of the planning requirements, the Department proposes to require each State to indicate whether it provides teachers of reading/language arts and mathematics with data on the performance of their students that includes estimates of individual teacher impact on student achievement and, if the State does not do so, to describe a process and timeline for doing so by September 30, 2011. The Department understands that only a small number of States (approximately three) currently provide this type of information to their teachers. However, most other States that are developing State longitudinal data systems have included teacher identifiers in those systems and, thus, have part of the infrastructure to produce and report these data. The Department also understands that there are currently only a limited number of providers with which States can contract for the development of "value-added" or other mechanisms for using information from the State data systems to produce estimates of individual teacher impact. This limited capacity may make the costs of acquiring this assistance higher than they would be otherwise. However, the Department assumes that as the market grows, more providers will enter the field and costs will come down.

The Department further estimates that 30 percent of all K–12 public school teachers are teaching reading/language arts or mathematics in the grades in which the State administers assessments. Based on this assumption, the Department estimates that the State assessment results for approximately 14,790,000 students (30 percent of all students enrolled in public elementary and secondary schools) would be included in the calculations necessary for States to meet this proposed requirement.[18] The Department estimates that the State cost of analyzing the data, verifying with teachers that the correct teacher-subject-student connection is made in the system, and publishing the information online in a user-friendly format would be 2 dollars per student, for a total State cost of $29,940,000.

The Department also understands that an important element of State efforts to inform teachers of the estimated impact of their teaching on student achievement is providing professional development for principals and teachers on the interpretation and use of those data in raising student achievement. However, since the proposed planning requirements would not require States to provide this professional development, we have not included its cost in the estimated costs of these proposed requirements.

In addition, the Department proposes to require States to describe in their plans the following: the entities responsible for the development, execution, and oversight of the plan; the agencies or organizations that will provide any technical assistance or other support that is necessary; the overall budget for the development, execution, and oversight of the plan; the processes that the State employs to review and verify the required data and other information; and the processes the State employs to ensure that, consistent with 34 CFR 99.31(b), the required data and other information are not made publicly available in a manner that personally identifies students, where applicable. The Department estimates that this management and oversight section of the plan will require 80 hours per State, for a total national estimate of 4,160 hours at a cost of $124,800. The total estimated cost to States of preparing the plans is, thus, $742,560.

Total Estimated Costs

The Department estimates that the total burden of responding to these proposed requirements would be 494,650 hours and $44,779,500 for SEAs, 426,250 hours and $10,656,250 for LEAs, and 249,200 hours and $6,230,000 for IHEs, for a total burden of 1,170,100 hours at a cost of $61,665,750.

Benefits

The principal benefits of the proposed requirements are those resulting from the reporting and public availability of information on each State's progress in the four reform areas described in the ARRA. The Department believes that the information gathered and reported as a result of these requirements will improve public accountability for performance, help States, LEAs, and schools learn from one another and make improvements in what they are doing, and inform the ESEA reauthorization process.

A second major benefit is that better public information on State and local progress in the four reform areas will likely spur more rapid progress on those reforms, because States and LEAs that appear to be lagging in one or more areas may see a need to redouble their efforts. The Department believes that more rapid progress on the essential educational reforms will have major benefits nationally, and that these reforms have the potential to drive dramatic improvements in student outcomes.

For example, statewide longitudinal data systems are essential tools in advancing education reform. With these systems in place, States can assess the effectiveness of specific interventions, schools, principals, and teachers by tracking individual student achievement, high school graduation, and postsecondary enrollment and credit. They can, for example, track the academic achievement of individual students over time, even if those students change schools during the course of their education. By analyzing this information, decision-makers can determine if a student's "achievement trajectory" will result in his or her being college- or career-ready, and can better target services based on the student's academic needs.[19]

The Department also believes that States' implementation of these requirements will lead to more widespread development and implementation of better teacher and principal evaluation systems. In particular, the availability of accurate, complete, and valid achievement data is essential to implementing better systems

[18] According to the *Digest of Education Statistics*, 49,298,945 students were enrolled in public elementary and secondary schools in fall 2006. See *http://nces.ed.gov/programs/digest/d08/tables/dt08_033.asp*.

[19] For example, *see http://dataqualitycampaign.org/files/publications-dqc_academic_growth-100908.pdf* and *http://www.dataqualitycampaign.org/files/Meetings-DQC_Quarterly_Issue_Brief_092506.pdf*.

of teacher and principal evaluation. Value-added models, for example, can provide an objective estimate of the impact of teachers on student learning and achievement.[20] Further, they can be used by schools, LEAs, or States to reward excellence in teaching or school leadership, as a component of performance-based compensation systems, or to identify schools in need of improvement or teachers who may require additional training or professional development.[21]

The proposed requirements will have additional benefits to the extent that they provide States with incentives to address inequities in the distribution of effective teachers, improve the quality of State assessments, and undergo intensive efforts to improve struggling schools. Numerous studies document the substantial impact of improved teaching on educational outcomes and the need to take action to turn around the lowest-performing schools, including high schools (and their feeder middle schools) that enroll a disproportionate number of the students who fail to complete a high school education and receive a regular high school diploma. The Department believes that more widespread adoption of these reforms would have a significant, positive impact on student achievement.

[20] *See:* Braun, Henry I. *Using Student Progress To Evaluate Teachers: A Primer on Value-Added Models.* Educational Testing Service, Policy Information Center, 2005; Marsh, Julie A.; Pane, John F.; Hamilton, Laura S. *Making Sense of Data-Driven Decision Making in Education: Evidence from Recent RAND Research.* Santa Monica, CA: RAND Corporation, 2006; and Sanders, William L. "Value-Added Assessment from Student Achievement Data: Opportunities and Hurdles." Journal of Personnel Evaluation in Education, Vol. 14, No. 4, p. 329–339, 2000.

[21] Center for Educator Compensation Reform: *http://cecr.ed.gov/.*

Although these benefits are not easily quantified, the Department believes they will exceed the projected costs.

Accounting Statement: As required by OMB Circular A–4 (available at *http://www.Whitehouse.gov/omb/Circulars/a004/a-4.pdf*), in the following table, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this proposed regulatory action. This table provides our best estimate of the Federal payments to be made to States under this program as a result of this proposed regulatory action. Expenditures are classified as transfers to States.

TABLE—ACCOUNTING STATEMENT CLASSIFICATION OF ESTIMATED EXPENDITURES

Category	Transfers
Annual monetized transfers.	$12,621,790,599.
From Whom to Whom	Federal Government to States.

The Stabilization program provides approximately $48.6 billion in formula grants to States.[22] As previously noted, the Department is awarding Stabilization program funds in two phases. In the first phase, the Department is awarding 67 percent of a State's Education Stabilization Fund allocation, unless the State can demonstrate that additional funds are required to restore fiscal year 2009 State support for education, in which case the Department will award the State up to 90 percent of that allocation. In addition, the Department will award 100 percent of each State's Government Services Fund allocation in Phase I. The Department will award the remainder of a State's Education Stabilization Fund allocation in the second phase. Thus, depending on the total amount of funds States receive in the first phase, up to $12.6 billion may be available in the second phase.

[22] A table listing the allocations to States under the Stabilization program is available at: *http://www.ed.gov/programs/statestabilization/funding.html.*

Paperwork Reduction Act of 1995

This notice contains information collection requirements that 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). It is our plan to offer a comment period for the information collection at the time of the final notice. At that time, the Department will submit the information collection to OMB for its review and provide the burden hours associated with each requirement for comment. However, because it is likely that the information collection will be reviewed under emergency OMB processing, the Department encourages the public to comment on the burden hours associated with each requirement in this notice.

A description of the specific proposed information collection requirements is provided in the following tables along with preliminary estimates of the annual recordkeeping burden for these requirements. Included in a preliminary estimate is the time for collecting and tracking data, maintaining records, calculations, and reporting. The first table presents the estimated indicators burden for SEAs, the second table presents the estimated indicators burden for LEAs, the third table presents the estimated indicators burden for IHEs, and the fourth table presents the estimated State plan burden for SEAs.

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I. Assurance Indicators and Descriptors Burden Hours/Cost for SEAs

Citation	Description	Number of respondents	Average hours per response *	Total hours	Total cost (total hours x $30.00)
Indicator (a)(1)	Confirm, for the State and for each LEA in the State, the number and percentage (including numerator and denominator) of core academic courses taught, in the highest-poverty and lowest-poverty schools, by teachers who are highly qualified consistent with section 9101(23) of the ESEA	52	1	52	$1,560
Descriptor (a)(1)	Describe, for each LEA in the State, the systems used to evaluate the performance of teachers	52	123	6,388	$191,640
Indicator (a)(2)	Indicate, for each LEA in the State, whether the systems used to evaluate the performance of teachers, if any, include student achievement outcomes as an evaluation criterion	52	16	812	$24,360
Indicator (a)(3)	Provide, for each LEA in the State whose teachers receive performance ratings or levels through an evaluation system, the number and percentage (including numerator and denominator) of teachers rated at each performance rating or level	52	6	312	$9,360
Indicator (a)(4)	Indicate, for each LEA in the State whose teachers receive performance ratings or levels through an evaluation system, whether the number and	52	2	104	$3,120

Citation	Description	Number of respondents	Average hours per response *	Total hours	Total cost (total hours x $30.00)
	percentage (including numerator and denominator) of teachers rated at each performance rating or level are available for each school in the LEA in a manner easily accessible and a format easily understandable by the public				
Descriptor (a)(2)	Describe, for each LEA in the State, the systems used to evaluate the performance of principals	52	123	6,388	$191,640
Indicator (a)(5)	Indicate, for each LEA in the State, whether the systems used to evaluate the performance of principals, if any, include student achievement outcomes as an evaluation criterion	52	16	812	$24,360
Indicator (a)(6)	Provide, for each LEA in the State whose principals receive performance ratings or levels through an evaluation system, the number and percentage (including numerator and denominator) of principals rated at each performance rating or level	52	6	312	$9,360
Indicator (b)(1)	Indicate which of the 12 elements described in section 6401(e)(2)(D) of the America COMPETES Act (20 U.S.C. 9871) are included in the State's statewide longitudinal data system	52	2	104	$3,120
Indicator (b)(2)	Indicate whether the State provides teachers of reading/language arts and mathematics in	52	16	832	$24,960

Citation	Description	Number of respondents	Average hours per response *	Total hours	Total cost (total hours x $30.00)
	grades in which the State administers assessments in those subjects with data on the performance of their students on those assessments that include estimates of individual teacher impact on student achievement, in a manner that is timely and informs instruction				
Indicator (c)(1)	Confirm the approval status, as determined by the Department, of the State's assessment system under section 1111(b)(3) of the ESEA with respect to reading/language arts, mathematics, and science assessments	52	.5	26	$780
Indicator (c)(2)	Indicate whether the State is engaged in activities consistent with section 6112(a) of the ESEA (20 U.S.C. 7301a) to enhance the quality of its academic assessments	52	2	104	$3,120
Descriptor (c)(1)	Briefly describe the nature of any such activities indicated in Indicator (c)(2)	52	3	156	$4,680
Indicator (c)(3)	Confirm whether the State has developed and implemented valid and reliable alternate assessments for students with disabilities that are approved by the Department	52	1	52	$1,560
Indicator (c)(4)	Confirm whether the State's alternate assessments for students with disabilities, if approved by the Department, are based	52	1	52	$1,560

Citation	Description	Number of respondents	Average hours per response *	Total hours	Total cost (total hours x $30.00)
	on grade-level, modified, or alternate academic achievement standards				
Indicator (c)(5)	Indicate whether the State has completed, within the last two years, an analysis of the appropriateness and effectiveness of the accommodations it provides students with disabilities to ensure their meaningful participation in State assessments	52	1	52	$1,560
Indicator (c)(6)	Confirm the number and percentage (including numerator and denominator) of students with disabilities who are included in State reading/language arts and mathematics assessments	52	.5	26	$780
Indicator (c)(7)	Indicate whether the State has completed, within the last two years, an analysis of the appropriateness and effectiveness of the accommodations it provides limited English proficient students to ensure their meaningful participation in State assessments	52	.1	52	$1,560
Indicator (c)(8)	Confirm whether the State provides native language versions of State assessments for limited English proficient students that are approved by the Department	52	1	52	$1,560
Indicator (c)(9)	Confirm the number and percentage (including numerator and denominator) of limited	52	.5	26	$780

Citation	Description	Number of respondents	Average hours per response *	Total hours	Total cost (total hours x $30.00)
	English proficient students who are included in State reading/language arts and mathematics assessments				
Indicator (c)(10)	Confirm that the State's annual State Report Card (under ESEA section 1111(h)(1)) contains the most recent available State reading and mathematics NAEP results as required by 34 CFR 200.11(c)	52	.5	26	$780
Indicator (c)(11)	Provide, for the State, for each LEA in the State, for each high school in the State and, at each of these levels, by student subgroup (consistent with section 1111(b)(2)(C)(v)(II) of the ESEA), the number and percentage (including numerator and denominator) of students who graduate from high school using a four-year adjusted cohort graduation rate as required by 34 CFR 200.19(b)(1)(i)	52	8	416	$12,480
Indicator (c)(12)	Provide, for the State, for each LEA in the State, for each high school in the State and, at each of these levels, by student subgroup (consistent with section 1111(b)(2)(C)(v)(II) of the ESEA), of the students who graduate from high school consistent with 34 CFR 200.19(b)(1)(i), the number who enroll in an IHE as defined in	52	4,353	226,356	$6,790,680

Citation	Description	Number of respondents	Average hours per response *	Total hours	Total cost (total hours x $30.00)
	section 101(a) of the HEA				
Indicator (c)(13)	Provide, for the State, for each LEA in the State, for each high school in the State and, at each of these levels, by student subgroup (consistent with section 1111(b)(2)(C)(v)(II) of the ESEA), of the students who graduate from high school consistent with 34 CFR 200.19(b)(1)(i) who enroll in a public IHE, the number who complete at least one year's worth of college credit (applicable to a degree) within two years	52	4,353	226,356	$6,790,680
Indicator (d)(1)	Provide, for the State and for each LEA in the State, the number and percentage (including numerator and denominator) of schools in improvement, corrective action, or restructuring that have made progress on State assessments in reading/language arts in the last year	52	2	104	$3,120
Indicator (d)(2)	Provide, for the State and for each LEA in the State, the number and percentage (including numerator and denominator) of schools in improvement, corrective action, or restructuring that have made progress on State assessments in mathematics in the last year	52	2	104	$3,120
Indicator (d)(3)	Provide, for the State and for each LEA in the	52	10	520	$15,600

Citation	Description	Number of respondents	Average hours per response *	Total hours	Total cost (total hours x $30.00)
	State, the number and percentage (including numerator and denominator) of schools in improvement, corrective action, or restructuring that have been turned around, consolidated, or closed in the last year				
Indicator (d)(4)	Provide, for the State, of the schools in improvement, corrective action, or restructuring, the number and identity of schools in the lowest-achieving five percent that have been turned around, consolidated, or closed in the last year	52	1	52	$1,560
Indicator (d)(5)	Provide, for the State, of the schools in the lowest-achieving five percent of schools in improvement, corrective action, or restructuring that have been turned around, consolidated, or closed in the last year, the number that are secondary schools	52	1	52	$1,560
Indicator (d)(6)	Provide, for the State and, if applicable, for each LEA in the State, the number of charter schools that are currently permitted to operate	52	1	52	$1,560
Indicator (d)(7)	Confirm, for the State and for each LEA in the State that operates charter schools, the number of charter schools currently operating	52	2	104	$3,120
Indicator (d)(8)	Provide, for the State and for each LEA in the	52	1	52	$1,560

Citation	Description	Number of respondents	Average hours per response *	Total hours	Total cost (total hours x $30.00)
	State that operates charter schools, the number and identity of charter schools that have closed (including schools that were not reauthorized to operate) within the last five years				
Indicator (d)(9)	Indicate, for each charter school that has closed within the last five years, whether the closure of the school was for financial, enrollment, academic, or other reasons	52	1	52	$1,560

*Figures in this column may reflect rounding.

II. Assurance Indicators and Descriptors Burden Hours/Cost for LEAs

Citation	Description	Number of respondents	Average hours per response *	Total hours	Total cost (total hours x $25.00)
Descriptor (a)(1)	Describe the LEA's system used to evaluate the performance of teachers	12,368	1.1	13,914	$347,850
Indicator (a)(2)	Indicate whether the systems used by the LEA to evaluate the performance of teachers include student achievement outcomes as an evaluation criterion	12,368	.25	3,092	$77,300
Indicator (a)(3)	If teachers in the LEA receive performance ratings or levels through an evaluation system, provide the number and percentage (including numerator and denominator) of teachers rated at each performance rating or level	11,908	9	107,172	2,679,300
Indicator (a)(4)	If the LEA's teachers receive performance ratings or levels through an evaluation system, indicate whether the number and percentage (including numerator and denominator) of teachers rated at each performance rating or level are available for each school in the LEA in a manner easily accessible and a format easily understandable by the public	11,908	1	11,908	297,700
Descriptor (a)(2)	Describe the LEA's systems used to evaluate the performance of principals	12,368	1.1	13,914	$347,850
Indicator (a)(5)	Indicate whether the systems used by the LEA	12,368	.25	3,092	$77,300

Citation	Description	Number of respondents	Average hours per response *	Total hours	Total cost (total hours x $25.00)
	to evaluate the performance of principals include student achievement outcomes as an evaluation criterion				
Indicator (a)(6)	If the LEA's principals receive performance ratings or levels through an evaluation system, provide the number and percentage (including numerator and denominator) of principals rated at each performance rating or level.	11,908	9	107,172	2,679,300
Indicator (c)(11)	Provide for each high school in the LEA, disaggregated by student subgroup (consistent with section 1111(b)(2)(C)(v)(II) of the ESEA), the number and percentage (including numerator and denominator) of students who graduate from high school using a four-year adjusted cohort graduation rate as required by 34 CFR 200.19(b)(1)(i)	976	40	39,040	$976,000
Indicators (d)(3), (d)(4), and (d)(5)	Provide a list of the schools in improvement, corrective action, or restructuring in the LEA that have been turned around, consolidated, or closed in the last year	1,173	2	2,346	$58,650

*Figures in this column may reflect rounding.

III. Assurance Indicators and Descriptors Burden Hours/Cost for IHEs

Citation	Description	Number of respondents	Average hours per response *	Total hours	Total cost (total hours x $25.00)
Indicator (c)(12)	Provide for each State information on the students from the State who enrolled in the IHE	4352	28.6	124,600	$3,115,000
Indicator (c)(13)	[For public IHEs only] Provide for each State information on the students from the State who enrolled in the IHE who completed at least one year's worth of college credit (applicable to a degree) within two years	1685	60.6	102,172	$2,554,300

*Figures in this column reflect rounding.

IV. State Plan Burden for SEAs

Citation	Description	Number of respondents	Average hours per response	Total hours	Total cost (total cost x $30.00)
II.a.1.	[Except as discussed in II.c] Describe, for each assurance indicator or descriptor, the State's current ability to fully collect the required data or other information at least annually	52	20	1,040	$31,200
II.a.2.	[Except as discussed in II.c] Describe, for each assurance indicator or descriptor, the State's ability to fully report the required data or other information, at least annually through September 30, 2011, in a manner easily accessible and a format easily understandable by the public	52	10	520	$15,600
II.a.3.A.	[Except as discussed in II.c] Describe, for each assurance indicator or descriptor, if the State is not currently able to fully collect, at least annually, the data or other information required by the indicator or descriptor, the State's process and timeline for developing and implementing, as soon as possible but no later than September 30, 2011, the means to fully collect the data or information, as required	52	40	2,080	$62,400

Citation	Description	Number of respondents	Average hours per response	Total hours	Total cost (total cost x $30.00)
II.a.3.B.	[Except as discussed in II.c] Describe, for each assurance indicator or descriptor, if the State is not currently able to fully collect the data or information required by the indicator or descriptor, the nature and frequency of reports that the State will provide to the public regarding its progress in developing and implementing those means	52	8	416	$12,480
II.a.3.C.	[Except as discussed in II.c] Describe, for each assurance indicator or descriptor, if the State is not currently able to fully collect the data or information required by the indicator or descriptor, the amount of funds the State is using or will use to develop and implement those means, and whether the funds are or will be Federal, State, or local funds	52	20	1,040	$31,200

Citation	Description	Number of respondents	Average hours per response	Total hours	Total cost (total cost x $30.00)
II.a.4.A.	[Except as discussed in II.c] Describe, for each assurance indicator or descriptor, if the State is not able to fully report, at least annually through September 30, 2011, in a manner easily accessible and a format easily understandable by the public, the data or other information required by the indicator or descriptor, the State's process and timeline for developing and implementing, as soon as possible but no later than September 30, 2011, the means to fully report the data or information, as required	52	20	1,040	$31,200
II.a.4.B.	[Except as discussed in II.c] Describe, for each assurance indicator or descriptor, if the State is not able to fully report, by September 30, 2009 and at least annually through September 30, 2011, in a manner easily accessible and a format easily understandable by the public, the data or other information required by the indicator or descriptor, the nature and frequency of reports that the	52	8	416	$12,480

Citation	Description	Number of respondents	Average hours per response	Total hours	Total cost (total cost x $30.00)
	State will provide to the public regarding its progress in developing and implementing those means				
II.a.4.C.	[Except as discussed in II.c] Describe, for each assurance indicator or descriptor, if the State is not able to fully report, by September 30, 2009 and at least annually through September 30, 2011, in a manner easily accessible and a format easily understandable by the public, the data or other information required by the indicator or descriptor, the amount of funds the State is using or will use to develop and implement those means, and whether the funds are or will be Federal, State, or local funds	52	20	1,040	$31,200
II.b.	If the State is currently able to fully collect and report the data or information required by the indicator, the State must provide the most recent data or information with its plan	52	20	1,040	$31,200

Citation	Description	Number of respondents	Average hours per response	Total hours	Total cost (total cost x $30.00)
II.c.1.A.	[With respect to Indicator (b)(1)] Indicate which of the 12 elements described in section 6401(e)(2)(D) of the America COMPETES Act are currently included in the State's statewide longitudinal data system	52	.5	26	780
II.c.1.B.i.	[With respect to Indicator (b)(1)] If the State's statewide longitudinal data system does not currently include all 12 elements, describe, as required, the State's process and timeline for developing and implementing, as soon as possible but no later than September 30, 2011, a statewide longitudinal data system that includes all 12 elements	52	80	4,160	$124,800
II.c.1.B.ii.	[With respect to Indicator (b)(1)] If the State's statewide longitudinal data system does not currently include all 12 elements, describe the nature and frequency of reports that the State will provide to the public regarding its progress in developing and implementing such a system	52	2	104	$3,120

Citation	Description	Number of respondents	Average hours per response	Total hours	Total cost (total cost x $30.00)
II.c.1.B.iii.	[With respect to Indicator (b)(1)] If the State's statewide longitudinal data system does not currently include all 12 elements, describe the amount of funds the State is using or will use to develop and implement such a system, and whether the funds are or will be Federal, State, or local funds	52	20	1,040	$31,200
II.c.2.A.	[With respect to Indicator (b)(2)] Indicate whether the State provides teachers with data on the performance of their students that includes estimates of individual teacher impact on student achievement consistent with the indicator	52	.5	26	780
II.c.2.B.i.	[With respect to Indicator (b)(2)] If the State does not provide teachers with such data, describe, as required, the State's process and timeline for developing and implementing, as soon as possible but no later than September 30, 2011, the means to provide teachers with such data	52	80	4,160	$124,800

Citation	Description	Number of respondents	Average hours per response	Total hours	Total cost (total cost x $30.00)
II.c.2.B.ii.	[With respect to Indicator (b)(2)] If the State does not provide teachers with such data, describe the nature and frequency of reports that the State will provide to the public regarding its progress in developing and implementing the means to provide the data	52	8	416	$12,480
II.c.2.B.iii.	[With respect to Indicator (b)(2)] If the State does not provide teachers with such data, describe the amount of funds the State is using or will use to develop and implement the means to provide the data, and whether the funds are or will be Federal, State, or local funds	52	20	1,040	$31,200
II.d.1.	Describe the agency or agencies in the State responsible for the development, execution, and oversight of the plan, including the institutional infrastructure and capacity of the agency or agencies as they relate to each of those tasks	52	10	520	$15,600

Citation	Description	Number of respondents	Average hours per response	Total hours	Total cost (total cost x $30.00)
II.d.2.	Describe the agency or agencies, institutions, or organizations, if any, providing technical assistance or other support in the development, execution, and oversight of the plan, and the nature of such technical assistance or other support	52	10	520	$15,600
II.d.3.	Describe the overall budget for the development, execution, and oversight of the plan	52	40	2,080	$62,400
II.d.4.	Describe the processes the State employs to review and verify the required data and information	52	10	520	$15,600
II.d.5.	Describe the processes the State employs to ensure that, consistent with 34 CFR 99.31(b), the required data and other information are not made publicly available in a manner that personally identifies students, where applicable	52	10	520	$15,600

Regulatory Flexibility Act Certification:

The Secretary certifies that this proposed regulatory action will not have a significant economic impact on a substantial number of small entities. The small entities that this proposed regulatory action will affect are small LEAs receiving funds under this program and small IHEs.

This proposed regulatory action will not have a significant economic impact on small LEAs because they will be able to meet the costs of compliance with this regulatory action using the funds provided under this program.

With respect to small IHEs, the U.S. Small Business Administration Size Standards define these institutions as "small entities" if they are for-profit or nonprofit institutions with total annual revenue below $5,000,000 or if they are institutions controlled by small governmental jurisdictions, which are comprised of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000. Based on data from the Department's Integrated Postsecondary Education Data System (IPEDS), up to 532 small IHEs with revenues of less than $5 million may be affected by this proposed requirement. These small IHEs represent only 15 percent of degree-granting IHEs. In addition, only 161,155 students (0.7 percent) enrolled in degree-granting IHEs in fall 2007 attended these small institutions. As the burden for indicators (c)(12) and (c)(13) is driven by the number of students for whom IHEs would be required to submit data, small IHEs will require significantly less effort to adhere to these proposed regulations than would be the case for larger IHEs. Based on IPEDS data, the Department estimates that 18,050 of these students are first-time freshmen. As stated earlier in the Summary of Costs and Benefits section of this notice, the Department estimates that, as required by proposed indicator (c)(12), IHEs will be able confirm the enrollment of 20 first-time freshmen per hour. Applying this estimate to the estimated number of first-time freshmen at small IHEs, the Department estimates that these IHEs would need to spend 8,058 hours to respond to this proposed requirement at a total cost of $201,450 (assuming a cost of $25 per hour).

The effort involved in reporting the number of students enrolling in a public IHE who complete at least one year's worth of college credit applicable toward a degree within two years as required by indicator (c)(13) would also apply to small IHEs. For this proposed requirement, the Department also estimates that IHEs will be able to report the credit completion status of 20 first-time freshmen per hour. Again applying this data entry rate to the estimated number of first-time freshmen at small IHEs, the Department estimates that these IHEs would need to spend 8,058 hours to respond to this proposed requirement at a total cost of $201,450. The total cost of these proposed requirements for small IHEs is, therefore, $402,900, and the estimated cost per small IHE is $757. The Department has, therefore, determined that the regulations would not represent a significant burden on small not-for-profit IHEs.

It is also important to note that States may use their Government Services Fund allocations to help small IHEs meet the costs of complying with the requirements that affect them, and public IHEs may use Education Stabilization Fund dollars they receive for that purpose.

In addition, the Department believes the benefits provided under this proposed regulatory action will outweigh the burdens on these institutions of complying with the proposed requirements. One of these benefits will be the provision of better information on student success in postsecondary education to policymakers, educators, parents, and other stakeholders. The Department believes that the information gathered and reported as a result of these requirements will improve public accountability for performance; help States, LEAs, and schools learn from one another and improve their decision-making; and inform Federal policymaking.

A second major benefit is that better public information on State and local progress in the four reform areas will likely spur more rapid progress on those reforms, because States and LEAs that appear to be lagging in one area or another may see a need to redouble their efforts. The Department believes that more rapid progress on the essential educational reforms will have major benefits nationally, and that these reforms have the potential to drive dramatic improvements in student outcomes. The proposed requirements that apply to IHEs should, in particular, spur more rapid implementation of P–16 State longitudinal data systems.

The Secretary invites comments from small IHEs and small LEAs as to whether they believe this proposed regulatory action would have a significant economic impact on them and, if so, requests evidence to support that belief.

Assessment of Educational Impact:

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Department invites comment on whether these requirements do not require transmission of information that any other agency or authority of the United States gathers or makes available.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism. The Executive Order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT.**

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: July 22, 2009.

Arne Duncan,

Secretary of Education.

[FR Doc. E9–17906 Filed 7–24–09; 11:15 am]

BILLING CODE 4000–01–C

DEPARTMENT OF EDUCATION

Institute of Education Sciences; Overview Information; Grant Program for Statewide Longitudinal Data Systems; Notice Inviting Applications for New Awards Under the American Recovery and Reinvestment Act of 2009.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.384A.

Dates:

Applications Available: July 24, 2009 (Request for Applications [RFA]); August 10, 2009 (Application Package).

Deadline for Transmittal of Applications: November 19, 2009.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of assistance under this program is to enable State educational agencies to design, develop, and implement statewide, longitudinal data systems to efficiently and accurately manage, analyze, disaggregate and use individual student data. The goal of the program is to enable all States to create comprehensive systems that permit the generation and use of accurate and timely data, support informed decision-making at all levels of the education system, increase the efficiency with which data may be analyzed to support the continuous improvement of education services and outcomes, facilitate research to improve student achievement and close achievement gaps, and support education accountability systems and public reporting.

This competition is being conducted with funds appropriated under the American Recovery and Reinvestment Act of 2009, Public Law No. 111–5 (ARRA). The purposes of the ARRA include the following:

(a) To preserve and create jobs and promote economic recovery.

(b) To assist those most impacted by the recession.

(c) To provide investments needed to increase economic efficiency by spurring technological advances in science and health.

(d) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefit.

(e) To stabilize State and local government budgets in order to minimize and avoid reductions in essential services and counterproductive State and local tax increases.

Funding provided under this competition is to be used for statewide data systems that, in addition to P–12 data, also include postsecondary and workforce information. Grants will support the development and implementation of P–20 systems that have the capacity to link individual student data across time and across databases, including matching teachers to students, promote interoperability for easy matching and linking of data across institutions and States, and protect student privacy consistent with applicable privacy protection laws. This additional one-time funding provided by the ARRA will permit grantee State educational agencies (SEAs) to accelerate the development of their data systems, to include not only data related to K–12 education, but also data on preschool and postsecondary education and workforce information, and to promote linkages with other data systems where such linkages may inform education policy and practice.

Program Authority: 20 U.S.C. 9607; American Recovery and Reinvestment Act of 2009, Division A, Title VIII, Public Law No. 111–5.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 77, 80, 81, 82, 84, 85, 97, 98, and 99. In addition, the regulations in 34 CFR part 75 are applicable, except for the provisions in 34 CFR 75.100, 75.101(b), 75.102, 75.103, 75.105, 75.109(a), 75.200, 75.201, 75.209, 75.210, 75.211, 75.217, 75.219, 75.220, 75.221, 75.222, and 75.230.

II. Award Information

Type of Award: Cooperative agreements.

Available Funds: $245,000,000.

Estimated Average Size of Awards: Grants will range from $2,000,000 to $20,000,000 for the entire project period.

Estimated Number of Awards: The number of awards made under this competition will depend upon the nature and quality of the applications received.

Note: The Department is not bound by any estimates in this notice.

Project Period: Not to exceed 3 years.

III. Eligibility Information

1. *Eligible Applicants:* Eligible applicants are limited to SEAs.

2. a. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

b. *Supplement-Not-Supplant:* This competition involves supplement-not-supplant funding requirements. Funds made available under this grant program are to be used to supplement, and not supplant, other State or local funds used for developing State data systems.

IV. Application and Submission Information

1. *RFA and Other Information:* Information regarding program and application requirements for this competition will be contained in the RFA package, which will be available on July 24, 2009, at the following Web site: *http://ies.ed.gov/funding.*

2. *Application Package:* The application package with forms and instructions for applying to this competition will be available no later than August 10, 2009, at the Department's e-Grants Web site at: *http://e-grants.ed.gov.*

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) by contacting the person listed under *Accessible Format* in section VIII of this notice.

Note: Interested potential applicants should periodically check the Institute's Web site at *http://ies.ed.gov/funding.*

3. *Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Statewide Longitudinal Data Systems competition, CFDA Number 84.384A, must be submitted electronically using e-Application, accessible through the Department's e-Grants Web site at: *http://e-grants.ed.gov.*

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

While completing your electronic application, you will be entering data online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

- You must complete the electronic submission of your grant application by 4:30:00 p.m., Washington, DC time, on the application deadline date. E–Application will not accept an application for this competition after 4:30:00 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.
- The hours of operation of the e-Grants Web site are 6:00 a.m. Monday until 7:00 p.m. Wednesday; and 6:00 a.m. Thursday until 8:00 p.m. Sunday,

Washington, DC time. Please note that, because of maintenance, the system is unavailable between 8:00 p.m. on Sundays and 6:00 a.m. on Mondays, and between 7:00 p.m. on Wednesdays and 6:00 a.m. on Thursdays, Washington, DC time. Any modifications to these hours are posted on the e-Grants Web site.

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .PDF (Portable Document) format. If you upload a file type other than the file type specified in this paragraph or submit a password protected file, we will not review that material.

• Your electronic application must comply with any page limit requirements described in this notice.

• Prior to submitting your electronic application, you may wish to print a copy of it for your records.

• After you electronically submit your application, you will receive an automatic acknowledgment that will include a PR/Award number (an identifying number unique to your application).

• Within three working days after submitting your electronic application, fax a signed copy of the SF 424 to the Application Control Center after following these steps:

(1) Print SF 424 from e-Application.

(2) The applicant's Authorizing Representative must sign this.

(3) Place the PR/Award number in the upper right hand corner of the hard-copy signature page of the SF 424.

(4) Fax the signed SF 424 to the Application Control Center at (202) 245–6272.

• We may request that you provide us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of e-Application Unavailability: If you are prevented from electronically submitting your application on the application deadline date because e-Application is unavailable, we will grant you an extension of one business day to enable you to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) You are a registered user of e-Application and you have initiated an electronic application for this competition; and

(2) (a) E-Application is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) E-Application is unavailable for any period of time between 3:30 p.m. and 4:30:00 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgment of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (see VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930. If e-Application is unavailable due to technical problems with the system and, therefore, the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application. Extensions referred to in this section apply only to the unavailability of e-Application.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through e-Application because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to e-Application; and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Elizabeth Payer, U.S. Department of Education, 555 New Jersey Avenue, NW., room 602C Capital Place, Washington, DC 20208. FAX: (202) 219–1466.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.384A), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.384A), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington,

DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number for this competition, 84.384A; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this grant notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) by contacting the person listed under *Accessible Format* in section IX of this notice.

Note: Interested potential applicants should periodically check the Institute's Web site at *http://ies.ed.gov/funding.*

V. Application Review Information

Selection Criteria: Information regarding selection criteria and review procedures for this competition will be provided in the RFA package.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

In addition, the GAN includes terms and conditions necessary for effective implementation of data collection and accountability requirements under the ARRA.

3. *Reporting:* The ARRA requires accountability and transparency in the use of funds provided under the law. To meet the reporting requirements under the ARRA, you must (a) ensure that funds provided by the ARRA are clearly distinguishable from other funds and (b) no later than ten days after the end of each calendar quarter, starting on July 10, 2009, submit a report to the Department that contains—

(1) The total amount of recovery funds received from the Department;

(2) The amount of recovery funds that were expended or obligated to projects or activities;

(3) A detailed list of all projects or activities for which recovery funds were expended or obligated, including—

(i) The name of the project or activity;

(ii) A description of the project or activity;

(iii) An evaluation of the completion status of the project or activity;

(iv) An estimate of the number of jobs created and the number of jobs retained by the project or activity; and

(v) For infrastructure investments made by State and local governments, the purpose, total cost, and rationale of the agency for funding the infrastructure investment with funds made available under the ARRA, and the name of the person to contact at the agency if there are concerns with respect to the infrastructure investment; and

(4) Detailed information on any subcontracts or subgrants that you awarded to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006, allowing aggregate reporting on awards below $25,000 or to individuals, as prescribed by the Director of the Office of Management and Budget.

More specific and detailed reporting requirements will be included in the terms and conditions of the grant contained in the GAN. At the end of your project period, you also must submit a final performance report, including financial information, as directed by the Secretary. For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The Request for Applications for this competition outlines seven data system capabilities and 12 data system elements that are required of all statewide, longitudinal data systems developed with funds under this program. To evaluate the overall success of the program, the Institute will consider two performance measures. For the first measure, the Institute will determine annually and at the end of your grant whether you have in operation a statewide, longitudinal (P–20) data system that has achieved each of the seven required system capabilities set out in the RFA, and based on this information, we will determine how many States have achieved each capability. For the second measure, the Institute will determine annually and at the end of your grant whether your system includes each of the 12 elements required by the RFA, and based on this information, how many States have included each element in its system. The 12 required data system elements are those prescribed by the America COMPETES Act.

States will be reporting on the implementation of these elements in the context of reporting for the State Fiscal Stabilization Fund, and these State reports will be one source of data for the second measure. In your annual performance reports for a grant under this program, you will be expected to report on the status of your achievement of each of the required data system capabilities and on the inclusion of each of the required data system elements. In your final performance report, you will be expected to report on whether you have achieved each of the capabilities and whether you have included each of the elements in your operational data system. The Institute will also collect information on your progress with these requirements via its monitoring over the course of your grant.

The Department recognizes that requests for data and information should reflect an integrated and coordinated approach among the various Recovery Act programs, particularly the Stabilization, Race to the Top, School Improvement Grants, and Statewide, Longitudinal Data Systems grant programs. Accordingly, the Department will continue to evaluate our requests for data and information under this program in context with other Recovery Act programs.

5. *Grant Administration:* Applicants should budget for a two-day meeting for project directors to be held in Washington, DC.

VII. Agency Contact

For Further Information Contact: Tate Gould, U.S. Department of Education, National Center for Education Statistics, 1990 K Street, NW., room 9023, Washington, DC 20006–5651. Telephone: (202) 219–7080 or via Internet: *Tate.Gould@ed.gov.*

If you use a TDD, call the Federal Relay Service, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or computer diskette)

on request to the program contact person listed here under **FOR FURTHER INFORMATION CONTACT.**

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: July 22, 2009.

John Q. Easton,

Director, Institute of Education Sciences.

[FR Doc. E9–17908 Filed 7–24–09; 11:15 am]

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Federal Register

Wednesday,
July 29, 2009

Part IV

Department of Transportation

National Highway Traffic Safety Administration

49 CFR Parts 512 and 599

Requirements and Procedures for Consumer Assistance To Recycle and Save Program; Final Rule

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 512 and 599

[Docket No. NHTSA–2009–0120]

RIN 2127–AK53

Requirements and Procedures for Consumer Assistance To Recycle and Save Program

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

ACTION: Final rule.

SUMMARY: This final rule sets forth requirements and procedures for the voluntary vehicle trade-in and purchase/lease program under the Consumer Assistance to Recycle and Save Act of 2009. This program helps consumers pay for a new, more fuel efficient car or truck from a participating dealer when they trade in a less fuel efficient car or truck. The rule establishes a process by which dealers can register in order to participate in the program and establishes the criteria this agency will use to determine which disposal facilities are eligible to receive and either crush or shred the trade-in vehicles. It also sets forth the criteria that trade-in vehicles and new vehicles must meet in order for purchases and leases to qualify for assistance under this program and establishes the requirements that must be met by consumers, dealers, disposal facilities and others. Finally, the rule sets forth enforcement procedures and provisions for punishing fraud and other violations of the program requirements.

DATES: This final rule is effective July 29, 2009. *Petitions:* If you wish to petition for reconsideration of this rule, your petition must be received by September 14, 2009.

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

The petition will be placed in the public docket. Anyone is able to search the electronic form of all documents received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, *etc.*). You may review the complete User Notice and Privacy Notice for Regulations.gov at *http://www.regulations.gov/search/footer/privacyanduse.jsp.*

FOR FURTHER INFORMATION CONTACT: You may obtain additional information about the CARS program by calling the CARS Hotline at 1–866–CAR–7891. It is dedicated to calls about the program. For non-legal issues, you may call, Mr. Frank Borris, NHTSA Office of Enforcement, telephone (202) 366–8089. For legal issues, you may call David Bonelli, NHTSA Office of Chief Counsel, telephone (202) 366–5834.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

On June 24, 2009, the President signed into law the Consumer Assistance to Recycle and Save Act of 2009 (the CARS Act or the Act) (Pub. L. 111–32). The Act establishes, within the National Highway Traffic Safety Administration (NHTSA or the agency), a temporary program under which an owner of a motor vehicle meeting statutorily specified criteria may trade in the vehicle and receive a monetary credit from the dealer toward the purchase or lease of a new motor vehicle meeting statutorily specified criteria.

Generally, the trade-in vehicle must have a combined fuel economy, as determined by the Environmental Protection Agency (EPA), below a specified value and the new vehicle must have an EPA combined fuel economy above a higher specified value. (Combined fuel economy is an EPA calculation representing the weighted average of a vehicle's city and highway fuel economy as determined according to the method described in EPA regulations at 40 CFR 600.210–08(c)). The program covers qualifying transactions that occur between July 1, 2009 and November 1, 2009, so long as funds appropriated by Congress are not exhausted. If all of the conditions of eligibility are met and the dealer provides NHTSA with sufficient documentation relating to the transaction, NHTSA will make an electronic payment to the dealer equal to the amount of the credit extended by the dealer to the consumer, not exceeding the statutorily authorized amount. The dealer must agree to transfer the trade-in vehicle to a disposal facility that will crush or shred it so that it will never be returned to the road, although parts of the vehicle, other than the engine block and drive train (unless the drive train is sold in separate parts), may be sold.

The CARS Act requires the Secretary of Transportation, acting through NHTSA, to issue final regulations within 30 days after enactment (*i.e.*, by July 24, 2009), "notwithstanding" the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 553). The regulations must, among other things: (1) Provide for a means of registering dealers for participation in the program; (2) establish procedures for reimbursement of dealers participating in the program; (3) require that dealers use the credit in addition to any other rebate or discount advertised by the dealer or offered by the manufacturer and prohibit the dealer from using the credit to offset any such other rebate or

discount; (4) require that dealers disclose to the person trading in an eligible vehicle the best estimate of the scrappage value of such vehicle and permit dealers to retain $50 of the amount paid for the scrappage value as payment for any administrative costs of participation in the program; (5) establish requirements and procedures for the disposal of eligible trade-in vehicles; and (6) provide for the enforcement of penalties for violations of the program requirements.

Separate from the rulemaking requirement, the CARS Act directs the agency to establish a Web site to convey information about the program, including instructions on how to determine if a vehicle is an eligible trade-in vehicle, how to participate in the program and how to determine if a dealer is participating in the program. The agency established this Web site at *http://www.cars.gov*. Among other things, the Web site contains an interactive tool for determining eligible vehicles, a list of participating dealers and disposal facilities, responses to frequently asked questions, and information on how to determine the EPA combined fuel economy of trade-in vehicles and of new vehicles. In addition, NHTSA set up a hotline ((866) 227–7891) to answer questions about the program and, on July 2, 2009, published a document in the **Federal Register** (74 FR 31812) providing additional useful information, in advance of issuance of this final rule.

The Act provides that the program covers eligible transactions beginning on July 1, 2009, prior to today's final rule. NHTSA advised the public through the July 2 **Federal Register** document, the Web site, and the hotline that it was prudent to wait until the details of the program were specified in today's final rule. Nevertheless, if transactions occurring on or after July 1, 2009, but before today's final rule, meet all of the requirements identified in this final rule, registered dealers may follow the application procedures of the rule and apply for reimbursement for those transactions. To expedite processing, the rule relies, wherever possible, on electronic submissions through secure agency Web sites.

In order to implement this new program, NHTSA has had to quickly create a new organization. NHTSA has established the Office of the Car Allowance Rebate System within the Office of Enforcement. The new office will consist of three divisions. The Transaction Oversight Division will work closely with the contractor NHTSA has retained to review incoming requests for payment from dealers to ensure that those requests are reviewed correctly and in a timely way. The Data Analysis and Reporting Division will review data generated in connection with the program to help ensure the system's efficiency and detect problems with the process or indications of potential compliance issues. That division will also produce reports on all aspects of the system. The Compliance Division will work to detect and deter possible noncompliance related to the program and coordinate closely with NHTSA's Office of Chief Counsel when possible violations are found. That division will also coordinate closely with the DOT's Office of Inspector General on issues related to possible fraud in connection with the program.

The agency also has decided to use the name Car Allowance Rebate System (CARS) for its program implementing the Act. The use of the term "rebate" in the name NHTSA has chosen for the program is not intended to have any effect on how CARS transactions are treated under State or Federal tax laws. The CARS Act provides that the credit is not income to the purchaser, but does not address any other possible tax issues. NHTSA lacks expertise and authority in tax matters and makes no attempt here to provide any guidance on those matters.

II. Questions and Comments From the Public About the CARS Program

During the period between enactment of the CARS Act and publication of today's rule, the agency received numerous questions and comments about various provisions of the Act. The final rule seeks to address these comments and questions, and details appear later in this document. However, the agency provides here a brief summary discussion of some of the issues raised. As noted earlier, NHTSA's Web site for the CARS program contains responses to frequently asked questions by members of the public.

The CARS program assists consumers who trade in their older, less fuel efficient vehicles for new, more fuel efficient vehicles. The program is designed to remove these older, less fuel efficient vehicles from the road, by requiring the trade-in vehicle to be crushed or shredded. Some consumers were unaware that their trade-in vehicle must be destroyed as a statutory condition of participating in this program. Because of that condition, consumers purchasing or leasing a new vehicle under this program should not expect to receive the full trade-in value of their old vehicle when negotiating with a dealer.

As detailed below, the program has different requirements for different types of trade-in vehicles (*e.g.*, passenger cars, SUVs and vans, pickups, and trucks) because these vehicles have varying levels of EPA combined fuel economy. In general, passenger cars have the highest combined fuel economy. Therefore, even though a passenger car may be quite old and/or in poor condition, it may not be an eligible trade-in vehicle under the program because its combined fuel economy at the time of its manufacture (as measured by the EPA) exceeds statutory limits. Some consumers have expressed surprise at this result. However, the agency must follow the requirements of the statute. Larger, older pickups and SUVs, on the other hand, do not typically have very high fuel economy. The statutory requirements for trading in these vehicles are less strict than for trading in passenger cars. Consumers may find that more of the vehicles in these categories are eligible as trade-in vehicles under the program.

Questions have arisen as to which persons are eligible to participate in the program and whether a person can trade in a vehicle owned by someone else, such as a family member. The agency has concluded that individuals as well as legal entities, such as corporations and partnerships, may participate in the program. However, a person may not trade in a vehicle owned by someone else under the program. The Act's one-year insurance requirement is satisfied so long as the trade-in vehicle is insured, irrespective of the identity of the person holding the insurance policy. The specifics of these requirements are explained later in this document.

The agency has received questions regarding the value and disposition of the trade-in vehicle. The CARS Act specifies that while many parts of the trade-in vehicle are permitted to be removed and sold, in the end the residual vehicle, including the engine block, must be crushed or shredded. Therefore, the trade-in value of the vehicle is not likely to exceed its scrap value. Purchasers should not expect to receive the same trade-in value as they might if the vehicle were to remain on the road. The Act also requires dealers to disclose to purchasers the scrap value of the trade-in vehicle at the time of the trade-in and allows dealers to retain up to $50 of the scrap value of the vehicle for their administrative costs of participation in the program.

Some consumers have expressed concern that the combined fuel economy value of their vehicles, as determined on the *http://fueleconomy.gov* Web site of the EPA, is

not an accurate measure of the actual fuel economy they experience. EPA determines these values for each make, model, and model year with regard to each vehicle at the time of its manufacture. These consumers contend that if another means were used to calculate combined fuel economy, their vehicle would be an eligible trade-in vehicle under the program. The CARS Act is prescriptive in this regard, and requires NHTSA to use the EPA calculation, and not any other calculation, to determine whether a trade-in vehicle is eligible under the program.

Some consumers have asked whether they may participate in more than one reimbursed transaction, either singly or as joint-registered owners of a vehicle. The CARS Act specifies that each person may receive only one credit and that only one credit may be issued to the joint-registered owners of a single trade-in vehicle under the program. Consequently, a person may participate in a transaction that receives a credit under this program only once.

The CARS Act is specific as to the characteristics of the vehicle that may be traded in and the characteristics of the new vehicle that may be purchased or leased, and these two requirements are interdependent (*i.e.*, whether a new vehicle is eligible under the program depends, in part, on the characteristics of the trade-in vehicle). For example, the trade-in requirements for a large work truck differ from those of passenger cars under the program. Similarly, some vehicles—notably motorcycles—simply are not eligible under the CARS Act, either as trade-in vehicles or for purchase or lease, even though consumers have noted that transactions involving those vehicles might reduce fuel use and improve the environment.

III. Public Outreach and Consultation

The extremely short time afforded by the Act to develop and complete this rulemaking precluded publishing a proposed rule for notice and comment. Therefore, the agency took a variety of steps to obtain public input as it moved forward to develop this rule. It established a Web site that invited public inquiries. As it received inquiries, it posted a steadily growing list of questions and answers, which in turn led to additional inquiries. It hosted a "webinar" that elicited hundreds of inquiries. In addition, it met with representatives of a wide variety of environmental interest groups.

The agency also directly consulted with organizations representing original equipment manufacturers (OEMs), including the Alliance of Automobile Manufacturers and the Association of International Automobile Manufacturers, to obtain information on franchised dealerships. The agency involved the OEMs because they possess comprehensive and readily available lists of new vehicle dealers licensed under State law. As detailed below, the agency is using lists of franchised dealers provided by the OEMs to aid in the process of registering dealers under the program.

NHTSA met with automobile dealers and dealer organizations, including the National Automobile Dealers Association and the American International Automobile Dealers Association, to better understand the typical vehicle trade-in and purchase/lease transaction. The agency consulted with groups representing disposal facilities, salvage auctions, and reporting entities, including the American Salvage Pool Association, the Automotive Recyclers Association, CoPart, Mannheim, Insurance Auto Auctions, the Institute of Scrap Recycling Industries, Inc., and the National Salvage Vehicle Reporting Program, to learn about the processes involved in recycling and scrapping old vehicles. The information learned by the agency from dealer and disposal facility organizations was critical to an informed rulemaking process.

The agency also consulted with officials from Texas, California and Germany. These officials provided valuable information to the agency, based on their experience administering and enforcing similar vehicle purchase and trade-in programs. Each of these officials cautioned NHTSA that it would need to be vigilant to guard against fraud.

Finally, as required under the CARS Act, the agency coordinated with appropriate Federal agencies. With respect to the National Motor Vehicle Title Information System (NMVTIS), the agency met with the Department of Justice and its NMVTIS program administrator, the American Association of Motor Vehicle Administrators, to develop procedures for updating the NMVTIS to reflect the crushing or shredding of trade-in vehicles under the program. The agency consulted with the EPA on the listing of categories of eligible vehicles and on the listing of disposal facilities and requirements and procedures for the proper disposal of refrigerants, antifreeze, mercury switches, and other substances prior to crushing or shredding the trade-in vehicle. The agency also consulted with EPA concerning a method to disable the engines of the vehicles that are traded in.

Memoranda providing the dates and summaries of meetings with these organizations and various other groups are included in the docket for this rule.

IV. The Regulation

As directed by the CARS Act, today's final rule sets forth requirements and procedures for registering participating dealers and listing participating disposal facilities, reimbursing dealers for qualifying transactions, disposing of trade-in vehicles, and enforcing penalties for program violations.

The rule is being issued without first providing a notice and an opportunity for public comment. As noted above, the Act provides that the rule shall be issued within 30 days after enactment, "notwithstanding" the requirements of 5 U.S.C. 553, the Federal law requiring notice and comment. Further, given that schedule and the necessity of quickly beginning to implement this 4-month program with a statutorily fixed end date, the agency finds for good cause that providing notice and comment is impracticable and contrary to the public interest. Drafting and issuing a proposed rule, providing a period for public comment, and addressing those comments in the final rule would have been highly impracticable in the time available and would have substantially delayed issuance of this final rule beyond the legislatively mandated issuance date of July 24. We think the public interest is best served by issuing this rule on the mandated date so that its requirements are known and can be followed by all participants. This is especially true because transactions since July 1 have been potentially eligible for credits under this program.

The CARS Act prescribes a rulemaking period of just 30 days before the program is to be fully implemented and capable of accommodating a potentially very large number of transactions. Mindful of this requirement, the agency placed significant emphasis on efficient transaction processes and data exchange. To that end, most of the transactional requirements imposed by today's rule are met through electronic online submissions. Where this is so, the rule identifies the particular data or information required in the electronic submission and, in one case, refers to an appendix with a facsimile of the electronic form for easy reference.

The Act requires the agency to develop certain lists to assist consumers and dealers (*e.g.*, a comprehensive list of new fuel efficient vehicles meeting the program requirements, a list of disposal

entities to which dealers may transfer eligible trade-in vehicles). Here, the rule makes use of references to the CARS Web site for convenient reference to these helpful lists.

Much of the CARS Act is specific and directive. However, where a statutory term or provision is not clear or gives the agency discretion, the rule generally strikes the balance in favor of an interpretation that promotes smooth and expeditious completion of transactions or one that decreases opportunities for fraud.

a. Definitions (§ 599.102)

The CARS Act defines a dealer as a person licensed by a "State" and identifies an eligible trade-in vehicle in terms of its insurance and registration status under "State" law. Read together, these statutory provisions restrict the transactions that are eligible for a credit under the CARS program. More specifically, a dealer must be a United States dealer and a trade-in vehicle must be insured and registered in the United States. However, nothing in the Act excludes U.S. territories from the reach of the program. Consequently, in section 599.102, the agency has defined "State" to include the 50 United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

The CARS Act uses the term "person" to describe those eligible to purchase or lease a new vehicle under the Program. *See* Sections 1302(c–d). In the absence of a definition of this term in the CARS Act, the agency relies on the universal definition that appears in 1 U.S.C. 1, which includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals. The agency adopts this definition for the term "person" in Section 599.102, and also defines a "purchaser" in that section as a person purchasing or leasing a new vehicle under the CARS program. Of course, each person is subject to the statutory restriction that precludes participation by any person in this program more than once.

b. Registration of Dealers (§ 599.200)

The Act requires the agency to provide for a means of registering dealers for participation in the program. (Section 1302(d)(1)). A dealer is defined under the Act as a person licensed by a State who engages in the sale of new automobiles to ultimate purchasers (Section 1302(i)(6)), a definition we have restated in Section 599.102. After consultation with dealer and OEM organizations, the agency is implementing the dealer registration requirement through a several step process. First, on June 30, 2009, the agency requested and later received a list of franchised dealers from their respective OEMs, including each dealer's legal business name, doing-business-as name, mailing address, point of contact, and OEM franchise identifier.[1] OEM franchised dealers, as a group, satisfy the requirement for State licensing. The agency has learned that, without an active OEM franchise agreement, a dealer is unable to offer manufacturer purchasing incentives and may not be able, in some cases, to extend the full manufacturer warranty to the new vehicles it sells. For this reason, the agency includes the requirement for a currently active OEM franchise agreement as part of the dealer registration process. (The OEMs have agreed to update this list weekly, to add newly franchised dealerships and remove dealerships that are no longer under franchise agreement.) The agency then contacted all listed dealers by mail, providing instructions on how to register under the program. Dealers received separate letters and were instructed to register separately for each make of vehicle they sell. Section 599.200(b) identifies the required dealer qualifications for registration, which flow from the statutory requirement for State licensing and from the need to perform transactions electronically. OEM franchised dealers should easily satisfy these requirements.

As set forth in section 599.200(c), dealers that have been contacted by mail by the agency and that wish to participate must register to do so electronically, using the authorization code and following the instructions provided in the mailing, and fill out an electronic screen providing, among other things, name and contact information and bank account and routing data for receiving payment under the program.[2] The agency will review this information to ensure completeness, and verify that the dealer has a still active franchise agreement (based on the continuously updated list provided by OEMs). Section 599.200(d) sets forth the procedures for approving and disapproving registration applications. Section 599.200(d)(1) provides that, where an application for registration is approved, the agency will notify the dealer of approval by e-mail, providing a user identification and password with which to conduct transactions, and add the dealer to the list of registered dealers on its Web site at *http://www.cars.gov*. Consumers may consult this list to identify registered dealers in their locality. Section 599.200(d)(2) provides that, where an application for registration is rejected, the agency will notify the dealer by e-mail, and provide the reasons for rejection. The agency anticipates that, unless rejected, confirmation of registration and addition to the list should occur within 2 to 4 business days after a dealer submits the required information.

Section 599.200(e)(1) provides that the agency may automatically revoke a registration as a matter of course for termination or discontinuance of a franchise but the dealer's registration may be reinstated upon a dealer's showing of proper and adequate license to sell new vehicles to ultimate purchasers. Section 599.200(e)(2) states that the agency may suspend or revoke a dealer's registration under the procedures in Section 599.504. Section 599.200(f) requires a registered dealer to immediately notify the agency of any change in the registration information it submitted or any change in the status of its State license or franchise. Finally, section 599.200(g) accommodates transactions that occurred after July 1, 2009, but prior to the publication of today's final rule, by permitting registration after a qualifying sale or lease transaction has occurred.[3]

The agency believes that this process is the most efficient and appropriate method to register dealers consistent with the requirements of the CARS Act. The Act requires that a dealer be licensed under State law, and the list provided by OEMs ensures that this is so. Using this list also allows the agency to verify dealer registration information in a timely manner. Since the OEMs have agreed to provide weekly updated lists, this process also will allow for registration of newly franchised dealers as they come into existence and the discontinuance of registrations for dealers that are no longer franchised. Newly franchised dealers will be contacted by mail with an authorization code, as the agency becomes aware of them from the weekly updated lists. A dealer whose franchise has been discontinued will be removed from the agency's list, and will no longer be eligible to receive credits for transactions under the program.

[1] The agency chose to involve the OEMs in this process to eliminate the opportunity for unscrupulous individuals or entities to identify themselves as franchised dealers.

[2] The registration process was made available to dealers beginning on July 24, 2009.

[3] As discussed later in this document, other requirements apply to these earlier transactions as well.

c. Identification of Disposal Facilities (§ 599.201)

Under the Act, the agency is required to provide a list of entities to which dealers may transfer eligible trade-in vehicles for disposal. (Section 1302(d)(5)). The Act also requires the Secretary to coordinate with the Attorney General to ensure that the National Motor Vehicle Title Information System (NMVTIS) is timely updated to reflect the crushing or shredding of trade-in vehicles and appropriate reclassification of their titles. (Section 1302(c)(2)(C)).

The agency met with groups representing auto recyclers and other disposal facilities and salvage auctions, as well as officials from AAMVA and the Department of Justice responsible for administering the NMVTIS, to get an understanding of the vehicle salvage and disposal process. From those meetings, the agency learned that there is a wide range of entities involved in various aspects of the vehicle salvage and disposal business. The agency also consulted with the EPA about the CARS program and the requirement to produce a list of disposal facilities for disposition of the trade-in vehicles. Mindful of environmental issues, NHTSA sought to identify a universe of disposal facilities that was attentive to these concerns, while achieving the objectives of the CARS program.

In the course of these consultations and based on advice from EPA, the agency identified the National Vehicle Mercury Switch Recovery Program (NVMSRP) as a comprehensive source of disposal facilities generally committed to meeting State and Federal environmental laws. The NVMSRP was established in 2006 under a memorandum of understanding (MOU) among the EPA, environmental groups, manufacturers and disposal facilities, to recover and recycle mercury switches from end-of-life vehicles before they are scrapped, crushed or shredded. This purpose is in alignment with the CARS Act's requirement for proper vehicle disposition, including the removal of mercury switches. The MOU authorizes the End of Life Vehicle Solutions (ELVS), a corporation established by vehicle manufacturers to carry out responsibilities of the NVMSRP, including establishing a process for participants to enroll in the program and maintaining a database of participants who recover and submit mercury switches.

Participants may enroll in the program by registering with ELVS. Information about ELVS can be found on its Web site at *http://www.elvsolutions.org*. Currently, approximately 7,700 disposal facilities are participants, and EPA estimates that approximately 1,500 of these facilities actively turn in the switches. The agency has determined that disposal facilities that are participants on the ELVS list present the best assurance of compliance with State and Federal environmental laws.

With this in mind, NHTSA has identified disposal facilities that are ELVS participants for listing as approved disposal facilities under this program, and these disposal facilities are listed on the agency's Web site at *http://www.cars.gov/disposal*. However, some entities on this list may dispose of mercury switches as part of their business (for example, auto repair businesses) but do not actually engage in dismantling or recycling of vehicles. Therefore, the fact that a facility is on the list does not automatically ensure that it is equipped to dispose of vehicles properly. To be eligible for participation in the CARS Program, a facility on the ELVS list must be able to crush or shred motor vehicles, either with its own equipment or by use of a mobile crusher. NHTSA was not able to obtain accurate lists of all entities that have this capacity within the time allowed, but is informed that many of the entities on the ELVS list are capable of at least obtaining the services of a mobile crusher. Dealers will have to inquire of specific entities concerning their capacity to crush or shred the vehicle. Any facility that does participate will have to certify that it has that capacity to crush or shred and will dispose of the vehicle through crushing or shredding.

These facilities must additionally agree to turn in mercury switches in accordance with the NVMSRP from any CARS trade-in vehicles they accept (to the extent the vehicles have such switches), by certifying that they will do so. In addition, because the CARS Act directs the agency to ensure that pollutants are removed from vehicles and properly disposed of, that vehicles are crushed or shredded, and that NMVITS is updated to reflect the disposition of the vehicle, as a condition of participation in the program, the listed participants must also agree to remove pollutants from the CARS trade-in vehicles in compliance with State and Federal law, crush or shred the vehicle, update NMVTIS to reflect the disposition of the vehicle, and certify to having done so. The certification requires the disposal facility to certify that it will dispose of refrigerants, antifreeze, lead products, mercury switches, and other toxic or hazardous vehicle components prior to crushing or shredding, in accordance with applicable Federal and State requirements. The rule does not impose additional requirements; for example, it does not require removal of all lead products such as lead solder connections that are ordinarily not removed during the shredding process.

NHTSA is aware, from consultations with EPA, that the State of Maine and the U.S. territories are not participants in the NVMSRP and that the ELVS list contains no disposal facilities in these areas. Maine has its own program for recycling mercury switches, which is comparable to the NVMSRP. Under Maine law, a vehicle may not be crushed without first removing and properly disposing of mercury switches, and disposal facilities are covered by that law. NHTSA obtained a list of disposal facilities in Maine from the State Bureau of Motor Vehicles, and these facilities are included along with the ELVS facilities from other states, on the agency's Web site at *http://www.cars.gov/disposal*. As a condition of participating, these Maine facilities must make the same certifications as required of the ELVS facilities.

In the case of the U. S. Territories, the agency is informed that participation in ELVS is currently impracticable for cost reasons related to sending mercury switches to the Continental United States. Therefore, the rule does not include disposal facilities on the list for the Territories, but allows dealers to select disposal facilities within the territories that are able to make the same certifications required of the ELVS and Maine facilities.

The agency plans to update this disposal facility list periodically, to add entities that become ELVS participants and to remove entities that are no longer ELVS participants or for other reasons discussed elsewhere in this document. The rule requires dealers to consult this list on the CARS Web site at the time of the transfer of the trade-in vehicle, as an entity that does not appear on the list on that date is not eligible to receive the vehicle for crushing or shredding.[4]

One issue that has arisen is the participation of entities that shred vehicles in the CARS process. Shredders turn crushed vehicles into materials useful in various industrial processes. Shredders are relatively few in number, with less than 300 shredding machines distributed nationwide. Disposal facilities with shredders may be ELVS participants and, if they are, they can

[4] Participants in the CARS program are cautioned to consult the list on NHTSA's CARS Web site, *http://www.cars.gov/disposal*, for eligible disposal facilities, not the list on the ELVS Web site.

participate fully in the CARS program. To the extent these facilities are not ELVS participants, they may still play a role in the ultimate disposition of the vehicle. The final rule places no restrictions on a trade-in vehicle once it is crushed. Once crushed, the agency assumes the vehicle will be transferred to a shredder so that its materials can be recycled. The rule does not require any tracking of this ultimate shredding of a crushed vehicle, so the entity receiving the crushed vehicle for shredding does not have to submit a CARS certification form.

Because of the requirement, discussed later in this document, that dealers must disable the trade-in vehicle's engine prior to transferring the vehicle to a disposal facility, the agency believes that the statutory interest in ensuring that the vehicle is not returned to use on the road in this or any other country is largely met before it leaves the dealer's possession. Prior engine disablement reduces the likelihood that a trade-in vehicle will be returned to use as an on-road automobile. With the extra assurance provided by engine disablement, the smooth operation of the program is better served if limitations on participation in the disposal stream are kept to a minimum, ensuring a reasonable geographic distribution of entities that may receive trade-in vehicles from dealers under the program.

With these points in mind, the agency consulted with representatives of the salvage auction industry. The agency believes it is practicable to provide for the participation of salvage auctions in the transfer of trade-in vehicles to disposal facilities under the CARS program, in order to broaden the avenues of disposal available to dealers. Therefore, salvage auctions may receive a CARS trade-in vehicle, provided that, as a condition of participation, these entities agree to limit their auction sales of CARS trade-in vehicles to the disposal facilities described above that appear on the agency's list. We believe that including listed disposal facilities, and requiring salvage auctions to sell at auction the scrap trade-in vehicles only to approved disposal facilities strikes the appropriate balance between program and environmental accountability, on the one hand, and geographic distribution and dealer access, on the other.

NHTSA was unable to develop a comprehensive list of salvage auctions within the time allowed. Although we heard from representatives of some of the largest auctions and their associations (including CoPart, Mannheim, the Insurance Auto Auctions, and the Automotive Salvage Pool Association), we concluded that simply listing their members, absent more information, would not be appropriate. However, we understand from representatives of those organizations and companies that they and their members are willing to restrict the sale of CARS trade-in vehicles to just those entities on the CARS program disposal facility list and make the necessary certifications about the disposal of those vehicles. Any other salvage auctions willing to abide by these restrictions and submit the necessary forms and certifications under penalty of law may participate in the CARS program. All participants must understand the specific requirements of this rule and the substantial penalties they may incur if they violate it or submit false information in connection with the program. Also, all who participate must understand that their records, premises, and CARS vehicles in their possession are subject to inspection by NHTSA and the DOT Office of Inspector General.

Section 599.201 implements the requirements for identification of salvage auctions and disposal facilities. Section 599.201(a) identifies the participating entities, including salvage auctions, disposal facilities listed on the agency's Web site, and disposal facilities in the U.S. territories. Section 599.201(b) describes the conditions these entities must follow in order to participate in the program.

d. Determining Eligibility of Trade-in Vehicles and New Vehicles (§ 599.300)

The CARS Act prescribes detailed requirements concerning eligible trade-in vehicles and eligible new vehicles for qualifying transactions under the Program. This final rule implements these requirements in close adherence to the statutory language.

1. Vehicle Definitions

The CARS Act divides eligible trade-in vehicles and new vehicles into four groups: passenger automobiles, category 1 trucks, category 2 trucks, and category 3 trucks.[5] The term "passenger automobile" and its definition are taken from the agency's fuel economy statute. The definition excludes vehicles that NHTSA has determined are (1) not manufactured primarily for transporting persons and (2) vehicles that are capable of off-highway operation. Vehicles not manufactured primarily for transporting persons include pickup trucks and certain vehicles that permit expanded use of the vehicle for cargo-carrying purposes, including vehicles which are designed to transport more than 10 persons; provide temporary living quarters, transport property on an open bed, provide greater cargo-carrying than passenger-carrying volume, or permit expanded use of the automobile for cargo-carrying purposes or other nonpassenger-carrying purposes. (*See* 49 CFR 523.5(a)).

Vehicles that are capable of off-highway operation include three groups of vehicles. (*See* 49 CFR 523.5(b)). The first includes vehicles that have 4-wheel drive and have at least four out of five specified physical characteristics relating to ground clearance.[6] The second includes vehicles that are rated at more than 6,000 pounds gross vehicle weight and have at least four out of five specified physical characteristics relating to ground clearance, but do not have 4-wheel drive. The third includes 2-wheel drive SUVs (regardless of GVWR) which came in a 4-wheel drive version that met four of five specified physical characteristics related to ground clearance. Beginning with the 2011 model year, NHTSA will reclassify this third group of vehicles as passenger cars. *See* Average Fuel Economy Standards—Passenger Cars and Light Trucks—Model Year 2011, Section XI (Vehicle Classification); 74 FR 14419, March 30, 2009. Although neither specified nor prohibited in the CARS Act, the agency has concluded that it is most appropriate to define passenger

[5] Section 1302(i) of the CARS Act defines those categories largely with reference to statutory categories of vehicles subject to the Corporate Average Fuel Economy (CAFE) Standards as follows: "passenger automobile" means a passenger automobile, as defined in section 32901(a)(18) of title 49, United States Code, that has a combined fuel economy value of at least 22 miles per gallon; "category 1 truck" means a non-passenger automobile, as defined in section 32901(a)(17) of title 49, United States Code, that has a combined fuel economy value of at least 18 miles per gallon, except that such term does not include a category 2 truck; "category 2 truck" means a large van or a large pickup, as categorized by the Secretary using the method used by the Environmental Protection Agency and described in the report entitled "Light-Duty Automotive Technology and Fuel Economy Trends: 1975 through 2008"; "category 3 truck" means a work truck, as defined in section 32901(a)(19) of title 49, United States Code. Under regulations implementing the CAFE program (*see* 49 CFR Part 523), "passenger automobiles" currently include all passenger cars and "non-passenger automobiles" include all SUVs, vans and pickup trucks up to 8,500 pounds GVWR.

[6] The five ground clearance characteristics are: (1) An approach angle of not less than 28 degrees; (2) a breakover angle of not less than 14 degrees; (3) a departure angle of not less than 20 degrees; (4) a running clearance of not less than 20 centimeters; and (5) front and rear axle clearances of not less than 18 centimeters each. These characteristics are calculated when the automobile is at curb weight, on a level surface, with the front wheels parallel to the automobile's longitudinal centerline, and the tires inflated to the manufacturer's recommended pressure. *See* 49 CFR Part 523.5(b)(2).

cars using the NHTSA regulations and policy which are applicable to 2010 and earlier model year vehicles. Therefore, the third group of vehicles will continue to be classified as trucks for CARS purposes (and will be excluded from the definition of a passenger automobile).

A "category 1 truck" is a non-passenger automobile. This category includes sport utility vehicles (SUVs), medium-duty passenger vehicles,[7] small and medium pickup trucks, minivans, and small and medium passenger and cargo vans. It does not include vehicles that are defined as category 2 trucks.[8]

A "category 2 truck" is a large van or a large pickup truck, based upon the length of the wheelbase (more than 115 inches for pickup trucks and more than 124 inches for vans). If the vehicle nameplate contains a variety of wheelbases, the size classification is determined by considering only the shortest wheelbase produced. In addition, some pickup trucks and cargo vans which exceed these thresholds are treated as category 3 trucks instead of category 2 trucks.

A "category 3 truck" is a work truck and is rated between 8,500 and 10,000 pounds gross vehicle weight. This category includes very large pickup trucks (those with cargo beds 72 inches or more in length) and very large cargo vans.

As previously stated, for category 1 and 2 trucks with a variety of wheelbases, the size classification is determined by considering only the shortest wheelbase produced. If a secondary manufacturer modifies and introduces into commerce a vehicle with only a limited portion of the wheelbases offered by the original equipment manufacturer (OEM), the size classification for the secondary manufacturer will be determined by (and consistent with) the size classification determined for the OEM. For example, if General Motors produces 2008 model year Chevrolet Colorado pickup trucks with wheelbases of 111, 119 and 126 inches, Colorado pickup trucks would be classified as category 1 trucks for CARS purposes (because the shortest wheelbase Colorado pickup truck was less than or equal to 115 inches). If a secondary manufacturer introduces into commerce 2008 model year Colorado ZZZ vehicles (high performance Colorado pickups with 126 inch wheelbase only), Colorado ZZZ models would also be classified as a category 1 pickup trucks.

The rule defines these four groups of vehicles in section 599.102 and makes use of these categories throughout sections 599.300(f) and 599.300(g).

2. Eligibility of Trade-in Vehicles

The CARS Act establishes four criteria for an eligible trade-in vehicle. The trade-in vehicle must:

(1) Be in drivable condition;

(2) Have been continuously insured, in accordance with State law, and registered in the same owner's name for the one-year period immediately prior to the trade-in;

(3) Have been manufactured not earlier than 25 years before the date of trade-in[9] and, in the case of a category 3 vehicle, also be from a model year not later than model year 2001; and

(4) Have a combined fuel economy value of 18 miles per gallon or less,[10] if it is a passenger automobile, a category 1 truck, or a category 2 truck.[11]

The agency must have a means of evaluating these criteria as it determines whether a transaction qualifies under this program.

(i) "Drivable Condition"

The agency intends that "drivable condition" be demonstrated by several means. First, it must be confirmed by the trade-in vehicle being operated, under its own power, by the dealer on public roads on the date the vehicle is traded in. The dealer must then certify to the operation of the vehicle when it submits its request for reimbursement. Separately, the person trading in the vehicle must certify that it is in drivable condition. This latter certification also must be submitted by the dealer with its application requesting reimbursement. This approach is adopted in section 599.300(b)(1) of the final rule, and the required dealer and purchaser certifications are contained in the Summary of Sale/Lease and Certifications (Appendix A, certifications section). Note that the Summary of Sale/Lease and Certifications form has two components—a section for the dealer to input information summarizing the terms of the sale or lease transaction and a section containing certifications that must be made by both the dealer and the purchaser. The section summarizing the transaction is discussed later in this notice.

(ii) Insurance

In addressing the requirement that the trade-in vehicle be "continuously insured consistent with the applicable State law" for a period of not less than one year prior to the transaction, the agency notes the complication that not all States require vehicle owners to purchase automobile insurance coverage. Several States provide vehicle owners with the option, for example, to post a surety bond, leave a cash deposit or self-insure in lieu of purchasing automobile insurance. Two States have little or no insurance requirements.

The agency recognizes that insurance requirements differ throughout the country. However, the agency believes that the Act requires the continuous one-year insurance condition to be met as a threshold matter, with respect to any trade-in vehicle under the program. In a State where the conditions and requirements of insurance are specified in law (*e.g.*, liability minimums, deductible requirements), the insurance coverage would then need to be in accordance with those conditions and requirements. To qualify under this requirement, a purchaser must provide proof of insurance covering the trade-in vehicle for a period of at least one year prior to the date of the trade-in.

The agency is aware that, in some cases, consumers may have insurance cards that state clearly the period of insurance coverage, while in other cases, an insurance card is unavailable or does not convey the period-of-coverage information. To provide for an alternative, the agency consulted with several insurance associations, including the Insurance Information Institute, American Insurance

[7] Medium-duty passenger vehicles are defined in 49 CFR 523.2.

[8] As noted in footnote 2, the statutory definition of the term "category 2 truck" is based on the categorization method used by the Environmental Protection Agency and described in the report entitled "Light-Duty Automotive Technology and Fuel Economy Trends: 1975 through 2008." (A copy of this report has been placed in the docket for this rule.) Based on that method of categorization, large vans and pickup trucks, which would otherwise fall within category 1, instead fall within category 2. The method is based primarily on published wheelbase data according to the following criteria: A small pickup is less than 105", a midsize pickup is 105" to 115", a large pickup is more than 115"; A small van is less than 109", a midsize van is 109" to 124", a large van is more than 124"; A small SUV is less than 100", a midsize SUV is 100" to 110", a large SUV is more than 110". This classification scheme is similar to that used in many trade and consumer publications.

For those vehicle nameplates with a variety of wheelbases, the size classification was determined by considering only the smallest wheelbase produced. The classification of a vehicle for this report is based on the author's engineering judgment and is not a replacement for definitions used in implementing automotive standards legislation. [Emphasis added.]

[9] This means that all pre-model year 1984 vehicles, and most model year 1984 vehicles, are not eligible as trade-in vehicles.

[10] As discussed in later in this preamble, under "Requirements for qualifying transactions," the combined fuel economy of the trade-in vehicle must satisfy the statutory requirements related to the difference between its fuel economy and that of the new vehicle, as well as meeting this 18 miles per gallon absolute threshold.

[11] There is no minimum for category 3 trucks because they do not have fuel economy ratings.

Association, National Association of Mutual Insurance Companies, and Property Casualty Insurers Association of America. These entities agreed to assist the agency through their member insurance companies. They indicated that purchasers could contact their insurers to obtain proof of insurance in a form that provides the details needed to identify the insured vehicle and the one year period of coverage required under the program.

To implement this process, the agency is requiring the owner of the trade-in vehicle to provide proof, at the time the vehicle is traded in, that the trade-in vehicle has been insured continuously for one year prior to the trade-in. This proof may take one of three forms. The proof may consist of one or more insurance cards containing the make, model, model year, and vehicle identification number (VIN) of the insured vehicle, but only if, taken together, the cards display on their face a continuous one-year period of insurance coverage. The proof may also consist of insurance policy documents (*e.g.*, declarations pages) showing the same information. Finally, the proof may consist of a signed letter, on insurance company letterhead, identifying the same vehicle identification information (*i.e.*, make, model, model year, and VIN) of the insured vehicle and the period of continuous coverage, which must be for at least one year prior to the date of the trade-in. In addition, for each of the three options, the consumer must certify that the trade-in vehicle has been continuously insured for the requisite period. This proof of insurance, along with the consumer certification, must be submitted by the dealer in its application to the agency requesting reimbursement. Section 599.300(b)(2) and Appendix A, certifications section, implement these requirements.

(iii) Registration

The requirement that the trade-in vehicle be registered to the same owner for a continuous period of one year prior to the transaction requires clarification. The agency interprets this provision as requiring the trade-in vehicle to be registered to and owned by the person purchasing or leasing the new vehicle under the program. In a transaction involving more than one person, the trade-in vehicle must have been registered to and owned by at least one of the persons purchasing or leasing the vehicle under the program.

To qualify under this requirement, the purchaser will need to provide proof of registration covering the trade-in vehicle for a period of at least one year prior to the date of the trade-in. The agency recognizes that this proof of registration presents complications for purchasers. In several States, registration cards or documents do not indicate a period of coverage of more than one year. In some of these States, purchasers have a difficult time obtaining prior registration information from the State. Seeking a less burdensome alternative, the agency evaluated the capabilities of commercial vehicle information services, such as Polk and Experian, to determine the type of vehicle information that is readily available to consumers. The agency discovered that purchasers may obtain a history of vehicle registration information from these services.

To implement this process, the agency has determined that proof of registration may be demonstrated by any of the following: a current State registration document or series of registration documents in the name of the purchaser evidencing registration for a period of not less than one year immediately prior to the trade-in; a current State registration document showing registration in the name of the purchaser and a document of title that confers title on the purchaser not less than one year immediately prior to the trade-in; or a current State registration document showing registration in the name of the purchaser and a document from a commercially available vehicle history provider evidencing registration for a period of not less than one year immediately prior to the trade-in. Changes in ownership during this period to delete a co-owner due to death or divorce do not interrupt the continuity of the registration, so long as the purchaser has been shown as an owner on the registration for the entire period. In addition, for each of the three options, the consumer must certify that the trade-in vehicle was continuously registered for the requisite period. This proof of registration, along with the consumer certification, must be submitted by the dealer in its application to the agency requesting reimbursement. Section 599.300(b)(3) and Appendix A, certifications section, implements these requirements.

(iv) Manufacture Date

The requirement that the trade-in vehicle be manufactured not earlier than 25 years before the date of trade-in is straightforward, and is implemented in section 599.300(b)(4). Ordinarily, the model year of the vehicle, which appears on the title, will serve to satisfy this requirement. Where that information is inconclusive (*e.g.*, certain model year 1984 and 1985 vehicles), the month and year of manufacture may be retrieved from the safety standard certification label that appears on the frame or edge of the driver's door in most vehicles. The rule allows the 25-year period to be satisfied provided it falls any time within the month that the vehicle is traded in. Section 599.300(f) implements the additional requirement, in the case of a category 3 vehicle, that the trade-in vehicle be manufactured not later than model year 2001. The dealer must certify that the trade-in vehicle meets this manufacturing date requirement. (Appendix A, certifications section).

(v) Combined Fuel Economy

The specified combined fuel economy rating of 18 mpg or less for the trade-in vehicle (excepting category 3 vehicles) is implemented throughout sections 599.300(f) and 599.300(g).[12] Under the Act, combined fuel economy for an eligible trade-in vehicle is defined as the number posted under the words "Estimated New EPA MPG" and above the word "Combined" for vehicles of model year 1984 through 2007, or posted under the words "New EPA MPG" and above the word "Combined" for vehicles of model year 2008 or later on the fueleconomy.gov Web site of the Environmental Protection Agency for the make, model, and year of such vehicle. (Section 1302(i)(5)(B)). The agency adopts this definition in section 599.102, but includes language limiting its application to combined fuel economy based on gasoline. This treatment of trade-in vehicles is consistent with the CARS Act requirements for defining the combined fuel economy of new vehicles.[13]

EPA changed the way it calculated fuel economy ratings starting in Model Year 2008, and has estimated the revised ratings for Model Years 1985–2007. Therefore, as described above, eligibility is determined by the revised ratings rather than the original EPA sticker on the vehicle. Since the revised ratings reflect a lower fuel economy, vehicles that would not be eligible under their original EPA rating may qualify for trade-in.

3. Eligibility of New Vehicles

The Act specifies that a new vehicle must be a passenger automobile, a category 1 truck, a category 2 truck, or

[12] The trade-in vehicle is also subject to statutory requirements related to the difference between its combined fuel economy and that of the new vehicle.

[13] As described later in this document, the combined fuel economy of new vehicles is derived from the Monroney label, which lists only fuel economy based on gasoline.

a category 3 truck. The characteristics of these vehicles were described earlier under Section c.1, "Vehicle Definitions," and they are defined in section 599.102. To further assist consumers in determining the eligibility of new vehicles, the CARS Web site, at *http://www.cars.gov,* contains an interactive tool. Consumers may identify their trade-in vehicle, select a new vehicle, and determine whether the transaction qualifies for a credit (and the amount of the credit) under the program.

In addition to the definitional categories, the new vehicle purchased or leased under the program must achieve a minimum combined fuel economy level. For new passenger automobiles the combined fuel economy must be at least 22 miles per gallon, for category 1 trucks it must be at least 18 miles per gallon, and for category 2 trucks it must be at least 15 miles per gallon. Category 3 trucks have no minimum fuel economy requirement. Under the Act, combined fuel economy for new vehicles is defined as the number, expressed in miles per gallon, centered below the words "Combined Fuel Economy" on the label required to be affixed or caused to be affixed on a new automobile pursuant to subpart D of part 600 of title 40 Code of Federal Regulations ("Monroney Label"). (Section 1302(i)(5)(A)). The agency adopts this definition, without change, in section 599.102.

The new vehicle must also have a manufacturer's suggested retail price (MSRP) of $45,000 or less to be eligible for purchase or lease under the program. The agency interprets this requirement to be the base MSRP—the price on the Monroney label affixed to the vehicle before any dealer accessories, optional equipment, taxes or destination charges are added to the price. This interpretation is consistent with the Automobile Information Disclosure Act, which identifies the retail price separately from the retail delivered price with optional equipment. *See* 15 U.S.C. 1232(f)(1). To implement this approach, we have added a definition of the term MSRP in section 599.102 and stated the limitation in section 599.300(c)(2).

The CARS Act allows the new vehicle to be either purchased or leased. In the case of a lease, the Act requires the lease to be for a period of not less than 5 years. The agency implements this requirement in section 599.300(c)(1). Additionally, the agency has added a definition of "lease" in section 599.102, specifying its minimum duration and making clear that a lease that incorporates a balloon payment at any time prior to five years does not meet the statutory requirement.

e. Requirements for Qualifying Transactions (§§ 599.300 and 301)

1. Vehicle Categories and Credit Amounts

The preceding section described eligibility requirements for the trade-in vehicle and for the purchased or leased new vehicle. Under the CARS Act, a transaction does not qualify for a credit unless the trade-in vehicle and the new vehicle, considered together, satisfy all requirements. In addition, the amount of the credit (either $3,500 or $4,500) is dependent on the category and fuel economy of the two vehicles making up the transaction.

For example, in a transaction involving a trade-in vehicle that is a passenger automobile, a category 1 truck, or a category 2 truck and a new vehicle that is a passenger automobile, each meeting the eligibility criteria discussed in the last section, if the new vehicle has a combined fuel economy that is 4 to 9 miles per gallon higher than the trade-in vehicle, the credit is $3,500. If the new vehicle has a combined fuel economy that is at least 10 miles per gallon higher than the trade-in vehicle, the credit is $4,500.

If the transaction involves a trade-in vehicle that is a passenger automobile, a category 1 truck, or a category 2 truck and a new vehicle that is a category 1 truck each meeting the eligibility criteria, a gain of 2 to 4 miles per gallon results in a credit of $3,500; a gain of at least 5 miles per gallon results in a credit of $4,500.

In the case of a new category 2 or category 3 truck, the trade-in vehicle categories are different. For a new category 2 truck, the trade-in vehicle must be a category 2 or a category 3 truck. If the transaction involves two category 2 trucks each meeting the eligibility criteria, a gain of 1 mile per gallon results in a credit of $3,500; a gain of at least 2 miles per gallon results in a credit of $4,500. A category 3 truck that is traded in for a new category 2 truck is entitled to a $3,500 credit, without fuel economy restriction. (Category 3 trucks are not rated for fuel economy by EPA.) A category 3 truck that is traded in for another category 3 truck is entitled to a $3,500 credit if the new vehicle is "smaller or similar in size." In view of the fact that Congress has not spoken directly to the precise meaning of this term, consistent with available information, NHTSA has incorporated this statutory requirement as satisfied if the gross vehicle weight rating of the new category 3 truck is no greater than that of the trade-in category 3 truck.

The full universe of qualifying transactions, together with the corresponding amount of the credit, is set forth in sections 599.300(f) and 599.300(g).

The CARS Act limits the amount of funds that can be used to provide credits for purchases or leases of work trucks (category 3 trucks) to 7.5 percent of the funds appropriated for the program. Once that limit is reached, NHTSA will stop making payments for these transactions. The total amount available for the program is $1 billion, with $50 million available to the agency to administer the program. NHTSA intends to provide ongoing information about the balance of funds remaining available for these and all other categories of transactions under the program.[14]

2. Special Requirements for Trade-in Vehicles

The CARS Act requires dealers to disclose to purchasers trading in an eligible vehicle the best estimate of the scrap value of the vehicle, and permits the dealer to retain $50 of any amount paid to the dealer for scrappage of the vehicle as payment for the administrative costs of participation in the program. The agency has restated this requirement in section 599.300(d)(1) and in the dealer certifications in Appendix A, certifications section.

The CARS Act requires a dealer that receives an eligible trade-in vehicle under the program to certify to the Secretary of Transportation, as prescribed by rule, that the dealer will transfer the vehicle (including the engine block), "in such manner as the Secretary prescribes," to a entity that will ensure that the vehicle will be crushed or shredded, and will not be sold, leased, or exchanged. While Congress authorized the agency to promulgate a rule, it did not define "manner" or otherwise speak directly to its meaning. NHTSA interprets "manner" [15] to include the methods

[14] NHTSA intends to maintain an up-to-date running balance of available funds on the Web site at *http://www.cars.gov.*

[15] We note that a definition of manner is "the mode or method in which something is done or happens." *Webster's Third New International Dictionary* 1376 (2002). Among the definitions of mode are "a condition or state of being," "a particular form or variety of something" and "a manner of doing something or of performing a particular function or activity." Ibid. at 1451. We further note generally that, to the extent that there are ambiguities or questions of interpretation in statutes within an agency's jurisdiction to administer, Congress has delegated authority to the

applied by the dealer and the condition of the vehicle transferred by the dealer. Specifically, the agency is prescribing in today's rule that the dealer is to transfer the trade-in vehicle with its engine permanently disabled, as detailed below.

In enacting the CARS Act, the Congress was concerned about fraud. *See* Section 1302(a)(4). The agency is aware of the significant disparity in value that exists between a vehicle that is in "drivable condition," as the trade-in vehicle must be under this program, and a vehicle that is scrapped and ultimately destroyed, which is the required disposition for that trade-in vehicle. A substantial opportunity exists for fraudulent diversion of the trade-in vehicle, largely because its still-functioning engine makes it attractive to return the vehicle to the road rather than relegate it to the scrap yard.[16] Moreover, continued use of the trade-in vehicle completely defeats the environmental purpose of the CARS Act, which is to remove these vehicles from the road permanently.

The CARS Act contains an explicit Congressional instruction to take measures to prevent fraud and the statute's clear environmental objective is to ensure that the fuel inefficient parts of the vehicle are never again used on the highway. Taking the above considerations into account, including the Secretary's authority to prescribe the manner in which the trade-in vehicle, including its engine block, is transferred to a disposal facility, the agency has determined that the prudent course of action, consistent with Congressional concerns about crushing or shredding, resale and fraud, is to require permanent disablement of the trade-in vehicle's engine block as a part of the qualifying transaction under this program.

In this context, we note that the statutory term engine block is not defined and that Congress did not speak directly to its meaning. In general, the term engine block may refer to the block casting, or to a short block or long block. The short and long blocks contain the block casting and, among others, a crank shaft, connecting rods, bearings and pistons. Long blocks also include the cylinder head(s) and the cam(s). In a pushrod engine, the short block contains the cam. We interpret "engine block" to mean the part of the engine containing the cylinders and typically incorporating water cooling jackets and also including the crank, rods, pistons, bearings, cam(s) and cylinder heads. In the case of a rotary engine, the block includes the rotor housing and rotor. In light of the statute's purpose of removing fuel inefficient vehicles from the nation's highways, which of course are powered by engines that consume substantial amounts of fuel the agency believes it is reasonable to read the word "engine block" in a way that includes engine parts traditionally considered part of the "long block." We do not believe that parts from the engine such as the pistons and cylinder head that could be removed and used to reconstruct the engine from the trade in-vehicle should remain available to recreate the fuel consuming engine. Finally, the engine disabling procedure using sodium silicate can not be performed if the engine parts such as the head(s) are removed.

The agency has determined that a quick, inexpensive, and environmentally safe process exists to disable the engine of the trade-in vehicle while in the dealer's possession. Removing the engine oil from the crankcase, replacing it with a 40 percent solution of sodium silicate (a substance used in similar concentrations in many common vehicle applications, including patching mufflers and radiators), and running the engine for a short period of time at low speeds renders the engine inoperable. Generally, this will require just two quarts of the sodium silicate solution. The retail price for two quarts of this solution (enough to disable the largest engine under the program) is under $7, and the time involved should not substantially exceed that of a typical oil change. The agency has tested this method at its Vehicle Research and Test Center and found it safe, quick, and effective. As with many materials used in the vehicle service area of a dealership, certain common precautions need to be taken when using sodium silicate. The same is true with regard to workers who may come in contact with the substance during the crushing or shredding of the engine block. We have discussed the matter with the EPA and the Occupational Safety and Health Administration (OSHA) and are aware of no detrimental effects related to the disposal of the engine block with this material in it.

The agency considered several possible methods of rendering the engine inoperable. The agency was looking for a method that was safe for workers involved, completely effective, environmentally sound, and relatively inexpensive for a dealer to use. NHTSA's Vehicle Research and Test Center (VRTC) tested various methods and prepared a report (placed in the docket) summarizing the tests. VRTC evaluated four options: (1) The use of sodium silicate solution in the manner the agency has now adopted; (2) destroying the oil filter sealing land and threaded fastener boss; (3) drilling a hole in the engine block; and (4) running the engine without oil. VRTC concluded that the sodium silicate method was the best option. The other methods all had significant problems related to their effectiveness, practical limitations based on vehicle variations, and/or safety risks for workers involved.

Sodium Silicate solution is a mixture of water and sodium silicate solids. When, after draining the oil, it is introduced into the engine oil system, the oil pump is able to distribute the solution throughout the engine oiling system. The heat of the operating engine then dehydrates the solution leaving solid sodium silicate distributed throughout the engine's oiled surfaces and moving parts. These solids quickly abrade the bearings causing the engine to seize while damaging the moving parts of the engine and coating all of the oil passages. Only a small amount of sodium silicate remains in solution after completion of the process. Many of the engine parts will be unaffected by this process such as: intake and exhaust manifolds, bolt-on components, and fuel system components.

The agency reviewed available information about sodium silicate and its properties, including a toxicology report and material safety data sheets that are available in the docket. Sodium silicate is a commonly used substance found in a wide range of products, including even dishwasher detergent. The Food and Drug Administration lists it as a GRAS (Generally Regarded as Safe) substance. It is used to treat hazardous wastes, and is frequently used in the automotive industry as a rust inhibitor in cooling systems, and to seal leaks in cooling systems, head gaskets, and exhaust systems. Neither our review of available information nor our discussions with other agencies (EPA and OSHA) gave the agency reason to be concerned about the use of sodium silicate as a significant health or environmental issue.

It is important to note that there are many varieties of sodium silicates, which are differentiated by weight ratio (the ratio of the silicon dioxide and sodium oxide that make up the compound). The weight ratios range from 1.0 to 3.5, with the higher ratio formulations being less irritating for humans and less corrosive in an engine environment. The material that dealers will be required to use under this rule

agency to fill the statutory gap or make an interpretation in a reasonable fashion.

[16] We understand that this very kind of continued use of the vehicle as an automobile has occurred in at least Germany's program despite certifications that the vehicle had been disposed of.

is at the higher end of the range—3.2—which means that it is far less of a potential health or environmental issue than other lower range formulations of the product.

Like many household and workplace products, sodium silicate solution can be harmful if swallowed or inhaled and can cause irritation to the eyes or respiratory tract if used improperly. Employers whose employees may come in contact with the material need to provide them with adequate warning of these risks and appropriate protection. Because sodium silicate has been used in automotive repair for decades, it has long been present both in repair shops and in vehicles at various stages of recycling. It is reasonable to assume, therefore, that dealerships, scrap yards, and shredder facilities are well equipped to take appropriate measures to protect their workers.

Nor did we find reason to have significant concerns about the environmental effects of sodium silicate in this application. The EPA does not regulate it as a hazardous substance. Given the high weight ratio of the formulation that will be used to disable the engines, the risk of its causing corrosion is very low. In a report prepared for the agency, a toxicology expert reviewed the process required by this rule concluded: "Provided adequate safety equipment is used by personnel in dealerships and shredder operations, and dust control measures are employed at shredder operations to minimize airborne particulates, the use of sodium silicate solutions to disable automobile engines is not expected to adversely affect occupationally exposed workers, nor are sodium silicate particulates expected to harm the environment." [17]

The agency has decided to implement this process in the rule, requiring a dealer that receives an eligible trade-in vehicle under the CARS program to disable that vehicle's engine prior to transferring the vehicle to a disposal facility, and to provide a certification to the agency that it has done so at the time the dealer submits its request for reimbursement. Section 599.300(d)(2) specifies the requirement for the dealer to disable the engine, Appendix B sets forth, in a simple and precise manner, the procedures that the dealer must follow to disable the engine and the workplace precautions that should be taken, and Appendix A, certifications section, contains the required dealer certification.

The rule contains one exception to the general requirement that the dealer disable the engine prior to transferring the vehicle to the disposal facility. With regard to transactions that occurred prior to the effective date of this rule, the dealer may have already transferred the vehicle to a disposal facility, whether or not using a salvage auction to transfer the vehicle. In that case, the rule permits the dealer to locate the vehicle at the disposal facility and either disable the engine at that location or, if the vehicle, including the engine block and drive train (unless the transmission, drive shaft, and rear end are sold separately), has already been crushed or shredded, to obtain proof, in the form of the affidavit, from the disposal facility that the crushing or shredding has occurred. Section 599.300(e) implements this exception. The agency is making this allowance only to accommodate dealers who, rather than waiting for the final rule to be issued as the agency had advised, proceeded to conduct transactions that were otherwise completely in accordance with this final rule. Dealers should note that all other requirements of this rule, except for the disposal facility certifications, apply to these transactions.

Although there was not time to provide notice and an opportunity to comment prior to issuance of this final rule, NHTSA did engage in extensive outreach prior to its issuance with representatives of those entities most knowledgeable about the subject matter. In those discussions, the method NHTSA has now chosen for disabling the engine block was identified as an option NHTSA might adopt. Several of the organizations that participated in the discussions wrote to NHTSA concerning that methodology. (These letters are in the docket.)

In its letter of July 21, 2009, NADA contends that Congress did not assign the task of making the engine inoperable to the dealers, and that if required to accomplish this task the dealers should be compensated. As discussed above, the agency interprets the CARS Act as giving NHTSA substantial discretion in determining the manner in which the vehicle, including the engine block, is to be transferred for ultimate disposal. We believe that having the engine permanently disabled at the dealer greatly reduces the risk of fraud and helps ensure that the statute's environmental objectives will be achieved. We believe that the dealers can disable the engine using the prescribed method at very low cost, which we estimate to be no greater than $30. It is possible that the total of the cost of performing this task and the dealer's other costs related to the program may exceed the $50 the dealer is allowed to retain from the trade-in's scrappage value to cover its administrative costs. Nevertheless, we think the importance of having this task performed by the dealer is sufficient reason to require dealers to perform it. The CARS Act does not preclude NHTSA from imposing costs necessary to the proper implementation of the program.

The Automotive Recyclers Association (ARA), which represents more than 4,500 scrap and junk yards, wrote to NHTSA on July 20. ARA argues that the use of sodium silicate will damage more than the engine block and jeopardize the resale of parts such as pistons, cams, and cylinder heads. ARA apparently believes that "block" has only one meaning, *i.e.*, the so-called "short block," which generally refers only to the cast iron or aluminum casting. As discussed above, NHTSA has defined "engine block" in a way that includes the engine parts that ARA contends are not part of the block. NHTSA's definition is a reasonable reading of the term "block," and is consistent with a Congressional purpose to prevent these fuel inefficient engines from ever being operated again. Moreover, even if ARA's more restrictive reading of "block" were to prevail, the statute merely permits the disposal facility to sell parts that are not part of the block; it does not preclude NHTSA from requiring measures that might affect some of those parts. ARA also contends that use of sodium silicate would contaminate the recycling of motor oil. ARA seems not to understand that, under the procedure set out in this rule, the dealer would drain the oil and recycle it as it would normally do.

The Institute of Scrap Recycling Industries (ISRI) represents, among others, companies that shred vehicles that have previously been crushed, either at their facility or at another disposal facility that lacks a shredder. ISRI wrote to NHTSA on July 20. ISRI contends, based on the judgment of its own director of environmental management, that the use of sodium silicate could pose hazards to workers at shredders and could cause certain metals to corrode, which could lead to excess metal ions in storm water runoff, which in turn could make storm water compliance more challenging. ISRI's contentions appear to be based on an incorrect assumption as to the quantity of sodium silicate that would be in each CARS trade-in vehicle; the procedure in most cases will require no more than two quarts, while ISRI assumes three to four quarts. ISRI asserts that a substantial portion of the material will

[17] Expert Report of Margaret H. Whittaker, Ph.D., M.P.H., D.A.B.T., July 23, 2009.

remain unreacted after the procedure, which is not the case.

As discussed previously, NHTSA has no reason to believe that the use of sodium silicate will expose any workers, including those at shredders, to unreasonable risks. Those who manage the shredders will simply need to require their employees to take the precautions necessary to protect themselves from exposure to sodium silicate. Presumably those who work at shredders are appropriately trained and equipped to deal with hazards that may be related to the materials with which they are working. More importantly, sodium silicate has been present in motor vehicles for decades because of its common use in the repair of mufflers, radiators—and engines. We assume that shredders have taken note of the presence of the material before now. The use of dust respirators would be advisable.

With regard to the potential environmental risks, ISRI has not made an effective case, and NHTSA has no reason to believe that any such risk exists with regard to sodium silicate. The heart of ISRI's argument is that the unreacted portion of the sodium silicate could cause corrosion of metals during the shredding process. As noted above, the formulation of sodium silicate used in the engine disablement procedure is among those least likely to have a severe corrosive effect. In fact, sodium silicate is used in vehicle cooling systems to inhibit corrosion and is used in metal pipes to help prevent corrosion that could increase lead levels in drinking water. In any event, the agency has no reason to believe that the untoward environmental effects that ISRI suggests may occur are a realistic possibility.

The rule also requires that, prior to submitting a copy of the title along with its request for reimbursement, the dealer clearly mark the title on both sides with the words, "Junk Automobile, CARS.gov." Section 599.300(d)(3) implements this requirement. The marking must be placed so as not to obscure the vehicle owner's name, VIN, or other writing. Having this special label or brand on the title will inform all who subsequently handle it that the vehicle is a trade-in under this program and should not be registered or titled for further use as an automobile. State registration officials should pay special attention to this marking on a title because it indicates that the vehicle has been traded in under the CARS program with the understanding that it would never again be used as an automobile in this or any other country and is suitable only to be used for scrap or parts.

3. Restrictions and Limitations on Transactions

The CARS Act places some restrictions and limitations on qualifying transactions under the program. Section 1302(c)(1)(A) of the Act provides that a credit may be issued only for a qualifying transaction that occurs between July 1, 2009 and November 1, 2009. Additionally, section1302(c)(1)(B) provides that not more than 1 credit may be issued for a single person and not more than 1 credit may be issued for the joint registered owners of a single eligible trade-in vehicle, and § 1302(c)(1)(C) provides that only 1 credit issued under the Program may be applied toward the purchase or qualifying lease of a single new vehicle. Reading these requirements together, the agency has determined that only one credit may be issued for each transaction under the program and that once a person participates in a transaction, whether as an individual owner or a joint-registered owner of either an eligible trade-in vehicle, a new vehicle, or both, the person may not receive another credit or be named in a transaction receiving a credit under the program. These time and transaction limitations are specified in sections 599.301(a), (b), and (c).

One additional restriction, although not specifically stated in the CARS Act, flows naturally from its operation. The agency has concluded that in order to be entitled to reimbursement under the program, a dealer must obtain clear title to the trade-in vehicle. Without clear title, the dealer is not in a position to make the statutorily required legal certification as to disposal of the trade-in vehicle that serves as a prerequisite to reimbursement. Similarly, disposal facilities would generally be unable to crush or shred the trade-in vehicle, as required under the Act. The agency is informed that in many new car purchases involving trade-in vehicles, the title to the trade-in vehicle is not immediately available, either because it is held by a lienholder or for some other reason. Nevertheless, the dealer proceeds with the transaction, even though title is obtained and transferred to the dealer at a later time. In some small percentage of such transactions, the dealer is unable to obtain clear title to the trade-in vehicle. Were that to occur under this program, the dealer would not be able to ensure that the trade-in vehicle would be disposed of in accordance with the Act. If NHTSA had already reimbursed the dealer for the credit amount, NHTSA would have provided the credit under circumstances beyond its authority under the statute and would have to recover the funds. NHTSA does not believe it has a duty to fund any such tentative deal and will not do so. Such a transaction does not qualify for reimbursement under the program until the dealer obtains the title (assuming that other eligibility criteria are met). Consequently, the dealer may not submit an application for reimbursement (discussed later in this document) until title to the trade-in vehicle, free of all liens and encumbrances, is transferred to it. If the title to the trade-in vehicle has been lost, the owner will need to acquire duplicate title from the State. Section 599.301(d) implements this requirement for transfer of the trade-in title.

The agency recognizes that five States—Georgia, Maine, New Hampshire, Rhode Island and Vermont—do not issue titles in transactions involving some older vehicles that may be eligible for trade-in under this program. In some of these States, liens may be documented on the registrations. In these States and for these vehicles, a current registration in the name of the person intending to purchase the new vehicle, with no evidence of lien, and a bill of sale conferring ownership of the trade-in vehicle from the purchaser of the new vehicle to the dealer, serves in lieu of the title. Section 599.301(e) of the rule allows use of a current registration and bill of sale in lieu of a title in these limited situations.

f. Requirements for Dealer Reimbursement (§§ 599.302–304)

As a precondition for reimbursing a dealer for a qualifying transaction under the Program, NHTSA must have a means of verifying that all the statutory conditions have been met. The rule requires a dealer to submit an application for reimbursement to NHTSA, containing the information and certifications necessary for NHTSA to do so. The dealer must use its user account and password (discussed earlier) to access a secure Web site and submit an application. The application consists of an electronic transaction form (portion reproduced in Appendix C) that requires inputting of information into relevant fields, attaching electronic copies of supporting documents, and making applicable certifications.

The electronic form requires the dealer to input and attach several pieces of information about the vehicle purchaser, trade-in vehicle, and new vehicle. For a purchaser, a dealer must collect individual or entity name, address and State or corporate identification number (*e.g.*, driver's license number, State identification

number, corporate tax identification number). This information is used to verify the identity of the purchaser and to confirm no prior participation in the program. For the trade-in vehicle and new vehicle, the dealer must input characteristics of the vehicle (*e.g.*, make, model, model year, combined fuel economy, odometer reading, VIN, base MSRP, engine and transmission description), and input and attach evidence of vehicle insurance, registration and title. This information is used to determine that each of these vehicles is eligible under the Program and that the transaction meets the requirements for fuel economy improvement.

The dealer must also attach additional information to verify the transaction, including a copy of the purchase contract or lease agreement, the Manufacturer's Certificate of Origin or Manufacturer's Statement of Origin, and certifications from the salvage auction or disposal facility. The dealer must also complete and attach a Summary of Sale/Lease and Certifications Form (Appendix A, certifications section). This form conveys that the dealer has extended a CARS credit, as well as any other rebate and manufacturer incentive, and has disclosed the scrappage value of the trade-in vehicle to the purchaser. The form also sets forth required dealer and purchaser certifications. The dealer and purchaser must sign this form, attesting that each has followed the requirements of the CARS Act and its implementing regulations. In addition to the certifications on this form, the dealer must also make required certifications listed on the electronic transaction form. Finally, the agency requests that the dealer attach a completed customer survey (Appendix D). This survey should be presented to the customer for completion prior to the submission of an application for reimbursement. The information in the survey is important for the agency to meet its Congressional reporting requirement. The requirements associated with dealer applications are implemented in section 599.302.

Upon receipt of the application, the agency will review the application to determine whether it is complete and satisfies all the requirements of a qualifying transaction. An application that meets the requirements of the CARS Program will be approved for payment and the agency will reimburse the dealer, by electronic transfer to the account identified under the registration process in section 599.200.

If an application is incomplete or otherwise fails to meet all the requirements of for a qualifying transaction, the application will be rejected and the submitter will be informed electronically of the reason for rejection. A dealer may correct and resubmit a rejected application for reimbursement without penalty, but the application will be treated as a new application as of the date it is resubmitted. The requirements concerning application review and payment of dealers are implemented in sections 599.303 and 304.

g. Disposal of Trade-In Vehicles (§§ 599.400–403)

In addressing the trade-in vehicle disposal process (Section III.b., Identification of Disposal Facilities), the agency decided to include disposal facilities participating in the ELVS program (currently numbering approximately 7,700)[18] on the list of facilities that may participate in the disposal process, subject to certain conditions and certifications. As a condition of accepting transfer of the trade-in vehicle, the disposal facility must certify that it meets all applicable State and Federal laws and has a currently active State license to operate as a disposal facility in that State. The disposal facility must also certify that it will not sell, lease, exchange, or otherwise dispose of the vehicle for use as an automobile in the United States or any other country, that the vehicle will be crushed or shredded onsite within six months after the date of its transfer from the dealer, and that the vehicle will not be transferred to another disposal facility prior to being crushed or shredded. Finally, it must certify that it will update NMVTIS, within 7 days after receiving the trade-in vehicle and again within 7 days after crushing or shredding the vehicle. During the six-month period prior to the required crushing or shredding of the trade-in vehicle, the disposal facility may sell any parts of the vehicle other than the engine block[19] or drive train (unless the drive train is dismantled and sold in parts). These requirements for disposal facilities are implemented in sections 599.400(b) and 401 and Appendix E.

The agency also has determined that, in lieu of direct transfer to a disposal facility that appears on the agency's list, the dealer may opt to transfer the trade-in vehicle to a salvage auction, subject to certain conditions and certifications. As a condition of accepting transfer of the trade-in vehicle, the salvage auction must certify that it meets all applicable State and Federal laws and has a currently active State license to conduct business as a salvage auction in that State. The salvage auction must also certify that it will not sell, lease, exchange, or otherwise dispose of the vehicle for use as an automobile in the United States or any other country. It must certify that it will limit participation in the auction of a trade-in vehicle under the CARS program to a disposal facility that currently appears on the agency's CARS list of disposal facilities and will obtain from the disposal facility the same certification the disposal facility would have provided upon direct transfer of a trade-in vehicle from the dealer, and provide that certification to NHTSA. Finally, the salvage auction must certify that it will update NMVTIS, within 3 days after receipt of the trade-in vehicle from the dealer, or prior to auction, whichever is earlier. These requirements for salvage auctions are implemented in sections 599.400(c) and 402 and Appendix F. Finally, a dealer receiving certifications from a disposal facility or a salvage auction under these procedures is required to send them to the agency within 7 days of receipt. Section 599.403 sets forth this requirement.

It is important to note that the requirement under the CARS Act and its implementing regulations for disposal facilities and salvage auctions participating in the CARS program to update NMVTIS are distinct from the monthly reporting requirement imposed on junk and salvage yards pursuant to 49 U.S.C. 30504. In accordance with regulations implemented by the Department of Justice at 28 CFR 25.56, any individual or entity engaged in the business of operating a junk yard or salvage yard within the United States shall provide, or cause to be provided on its behalf, to the operator of NMVTIS and in a format acceptable to the operator, an inventory of all junk automobiles or salvage automobiles obtained in whole or in part by that entity in the prior month. Updates by junk and salvage yards to NMVTIS under the CARS Act and its implementing regulations, however, may fulfill this separate NMVTIS monthly reporting requirement regarding such vehicles, provided the updates contain all of the information required by the Department of Justice under 28 CFR Part 25.

The procedures described above allow a trade-in vehicle to be transferred no more than two times subsequent to the

[18] The agency also decided to include certain disposal facilities in the State of Maine, as explained earlier in this document. The list does not include disposal facilities for the territories. However, disposal facilities in the territories must make the certification discussed in this paragraph.

[19] Section 599.102 contains a definition of the term "engine block."

dealer taking title and prior to its crushing or shredding, either directly to an entity currently appearing on the list of eligible disposal facilities, where the vehicle must remain until it is crushed or shredded, or to a salvage auction that subsequently transfers the vehicle to that entity. This approach for the vehicle disposal process is adopted in Subpart D and the required certifications appear in Appendices E and F. Nothing in the rule proscribes further transfer of a crushed vehicle to another disposal facility, including a shredder.

h. Enforcement (§§ 599.500–517)

1. Prevention of Fraud

The funds Congress provided for the CARS program are intended only for qualifying transactions, and the requirement to destroy the trade-in vehicle is an important part of the program. To protect the taxpaying public, NHTSA will enforce the Act and this implementing regulation strictly and will work with the DOT Inspector General, the Department of Justice, and other government agencies to punish violations and fraud.

In the rule being issued today, NHTSA has taken a number of steps to minimize the potential for fraud in the first instance. Among other things, NHTSA has created a system that will provide payments only for qualifying transactions under the CARS program. NHTSA will make electronic funds transfers only to a registered dealer that has submitted the required proof and made the required certifications under penalty of law. The rule establishes a registration system to identify licensed, franchised new vehicle dealers and to obtain the information necessary for making secure electronic transfers. Only registered dealers will have access to the payment system.

At the time of the transaction at the dealer, a purchaser who is trading in a vehicle will need to provide evidence of ownership and proof that the vehicle has been continuously registered to that owner and insured throughout the last 12 months. To prevent repeated use of the program by the same person, the consumer will need to provide evidence of identity and permit that information to become part of the documentation of the transaction.

We believe that dealers will have every reason to avoid entering into a transaction for which the dealer cannot be reimbursed under this program. Dealers will be expected to verify that the trade-in vehicle and the vehicle being purchased or leased are both eligible under the program. For both vehicles, the dealer will need to verify the combined fuel economy. With regard to the trade-in vehicle, the dealer will need to verify that the registration and insurance information is accurate and that the vehicle is in drivable condition.

Also, this rule provides measures to ensure that the trade-in vehicle is never used again as an automobile in this or any other country. These measures include requiring the dealer to disable the trade-in vehicle's engine prior to transferring the vehicle, requiring binding certifications from all entities involved in handling these vehicles, updating the NMVTIS system at all crucial junctures to ensure the availability of information about the vehicle's status, and labeling the title of those vehicles as "junk automobiles" to defer further sale of them as vehicles authorized for on-road use.

The process set out in this rule includes obtaining certifications from purchasers, dealers, salvage auctions, and disposal facilities involved with CARS transactions. Those certifications will be made on paper or electronic forms that make clear that there are significant penalties for submitting false information. NHTSA, working with DOT's Office of Inspector General and the Department of Justice, will vigorously pursue actions against anyone it believes has submitted false information in connection with this program.

The agency will conduct inspections of records, premises and vehicles to detect possible violations. Should NHTSA identify a violation or fraud, we intend to enforce the CARS Act's requirements vigorously. The public is encouraged to contact NHTSA if it suspects any fraud is occurring in connection with the CARS program. Please call 1–866–CAR–7891, which is NHTSA's dedicated hotline for calls about the program, Monday–Friday 8 a.m. to 10 p.m., TTY: 1–800–424–9153.

Anyone who thinks illegal activity related to this program has occurred may also call the Hotline of the Office of the Inspector General (OIG) at the U.S. Department of Transportation. The toll free number is 1–800–424–9071. The OIG Hotline is an important tool for reporting allegations of fraud, waste, abuse, or mismanagement in the Department's programs or operations, including the CARS program. The Hotline is set-up to receive allegations in a variety of forms, including by e-mail (*hotline@oig.dot.gov*), regular mail (DOT Inspector General, P.O. Box 708, Fredericksburg, VA 22404), fax (540–373–2090), and the toll free number identified above. The OIG Hotline is open 24 hours a day, seven days a week.

Those who think the Internet has been used to commit a crime related to this program may also contact the Internet Crime Complaint Center (IC3), a partnership among the Federal Bureau of Investigation *http://www.fbi.gov* (FBI), the National White Collar Crime Center *http://www.nw3c.org/* (NW3C), and the Bureau of Justice Assistance *http://www.ojp.usdoj.gov/BJA/* (BJA). IC3's mission is to serve as a vehicle to receive, develop, and refer criminal complaints regarding the rapidly expanding arena of cyber crime. The IC3 gives the victims of cyber crime a convenient and easy-to-use reporting mechanism that alerts authorities of suspected criminal or civil violations.

2. Civil Penalties and Other Sanctions

While NHTSA expects that the vast majority of activities under the CARS Act will comply with it and the implementing regulations, NHTSA intends to penalize violators. Section 1302(d)(6) of the CARS Act requires NHTSA's regulations implementing the program to provide for the enforcement of the penalties described in Section 1302(e). Section 1302(e)(1) provides that it shall be unlawful for any person to violate any provision under this section (*i.e.*, under the CARS Act) or any regulations issued pursuant to the CARS Act.

Section 1302(e)(2) provides that any person who commits a violation described in Section 1302(e)(1) shall be liable to the United States Government for a civil penalty of not more than $15,000 for each violation, and that the Secretary shall have the authority to assess and compromise such penalties and to require from any entity the records and inspections necessary to enforce this program. In determining the amount of the civil penalty, the severity of the violation and the intent and history of the person committing the violation shall be taken into account.

As authorized by Section 1302(e)(2) of the CARS Act, which grants NHTSA the authority to require from any entity the records and inspections necessary to enforce this program, NHTSA will use information gathering mechanisms comparable to those it currently employs under other statutes the agency administers.

In the rule being issued today, NHTSA has established administrative procedures to assess civil penalties quickly and fairly once a likely violation is identified. These procedures are set forth at subpart E. Under these procedures, any person may report an apparent violation to NHTSA. When a

report of an apparent violation is received, or when an apparent violation has been detected by any person working for NHTSA, the matter may be investigated or evaluated by NHTSA enforcement personnel. If NHTSA enforcement personnel believe that a violation may have occurred, a report of the investigation will be prepared and sent to the NHTSA Chief Counsel for review. The Chief Counsel will review the report to determine if there is sufficient information to establish a likely violation. If the Chief Counsel determines that a violation has likely occurred, the Chief Counsel may issue a Notice of Violation to the party, or make other enforcement recommendations, such as suspensions or revocations. The alleged violator will have an opportunity to present its views to NHTSA and reach a settlement of the civil penalty case. If the alleged violator instead requests a hearing, the Chief Counsel will forward a case file to a Hearing Officer, with a recommended action. The Hearing Officer's functions are separate from those of NHTSA's enforcement personnel and Chief Counsel, and the Hearing Officer has no other responsibility, direct or supervisory, for the investigation of cases referred for the assessment of civil penalties.

A party receiving the Notice of Violation may pay the proposed penalty or decline the Notice of Violation. If the Notice of Violation is timely declined, the regulations provide for a hearing prior to a final assessment of a penalty by the Hearing Officer. Failure to either pay the proposed penalty on the Notice of Violation or request a hearing within 30 days of the date shown on the Notice of Violation will result in a finding of default, and NHTSA will assess the civil penalty in the amount proposed on the Notice of Violation without a hearing.

The hearings will be held at the headquarters of the U.S. Department of Transportation in Washington, DC, either telephonically or in person, before a Hearing Officer. Unlike another statute administered by NHTSA, the CARS Act does not require a hearing on the record before assessing civil penalties. For example, Section 508(a)(1) of the Motor Vehicle Information and Cost Savings Act (formerly 15 U.S.C. 2008 (1994), and now codified at 49 U.S.C. 32911), provided that if fuel economy calculations indicate that any manufacturer has violated specified provisions, the Secretary shall commence a proceeding. Section 508(a)(2) of the Cost Savings Act then went on to state that, if on the record after opportunity for agency hearing, the Secretary determines that such manufacturer has violated provisions, the Secretary shall assess the penalties provided for under subsection (b). This provision was recodified at 49 U.S.C. 32911(b) and 32912 so as to clearly provide for "an opportunity for a hearing on the record" to decide whether a violation has been committed. In view of the language in the Cost Savings Act, NHTSA adopted regulations establishing formal Administrative Procedure Act (APA) adjudicative hearing procedures before an administrative law judge (ALJ), which may result in civil penalties. *See* 49 CFR Part 511, Adjudicative Procedures. In view of the absence of any statutory requirement in the CARS Act for an on-the-record hearing or, in fact, for any hearing, as set forth in the regulatory text, the formal APA adjudication procedures set forth at 5 U.S.C. 554, 556 and 557 do not apply to civil penalty proceedings under the CARS Act and NHTSA need not employ an ALJ as the hearing officer. There is no right to discovery. In receiving evidence, the Hearing Officer is not bound by strict rules of evidence. At the conclusion of the hearing, the Hearing Officer assesses civil penalties, if appropriate. If civil penalties are in excess of $100,000.00, the Hearing Officer's decision may be appealed to the NHTSA Administrator.

NHTSA also has the authority under the CARS Act to compromise (*i.e.*, settle) civil penalties, and parties receiving notices of violations will be given the opportunity early in the process to settle with the Government, should they choose to do so. Finally, we note that these penalties are not exclusive. For example, violators could also face penalties under the False Claims Act or criminal prosecution.

V. Confidential Information and Privacy

Administration of the CARS program requires that information about qualifying transactions be submitted to NHTSA from different entities and individuals. Some of this data is sensitive. As discussed below, NHTSA is amending its existing regulations governing confidential treatment, found at 49 CFR Part 512, to address these issues.

a. Determinations of the Confidentiality of CARS Data Based on FOIA Exemptions 4 and 6

The confidentiality of most CARS data is based on Freedom of Information Act (FOIA) Exemptions 4 and 6, 5 U.S.C. 552(b)(4) and (b)(6). FOIA Exemption 4 allows withholding of trade secrets and commercial or financial information obtained from a person and privileged or confidential. Under Exemption 4, the standard for assessing the confidentiality of information that parties are required to submit to the government is whether disclosure of the information is likely to have either of the following effects: (1) To impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial competitive harm to the competitive position of the person from whom the information was obtained.[20] *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Because of the nature of the information at issue here, our discussion is limited to examination of the competitive harm test even though other standards could justify non-disclosure.[21]

Under the competitive harm test of *National Parks*, there must be actual competition and a likelihood of substantial competitive injury from disclosure of the information. *CNA Financial Corp.* v. *Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987). This standard requires only that disclosure of information would "likely" cause competitive harm. *McDonnell Douglas Corp.* v. *U.S. Dept. of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004); *see also Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 341 (D.C. Cir. 1989). Under this test, the agency assesses the likelihood of substantial injury; it does not make that assessment and then further balance it against other matters such as the public's interest in the information. *Public Citizen Health Research Group* v. *FDA*, 185 F.3d 898, 904–05 (D.C. Cir. 1999).

Exemption 6 of the FOIA addresses the withholding of "personnel and

[20] The term "trade secrets" has been narrowly defined by the Court of Appeals for the District of Columbia Circuit for the purpose of FOIA Exemption 4 as encompassing a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort. *Public Citizen Health Research Group* v. *FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

[21] Impairment to the Government's ability to obtain the information in the future serves as an independent basis for withholding under Exemption 4. *See National Parks*, 498 F.2d at 770. Case law also strongly points to the availability of a "third prong" protecting other governmental interests, such as compliance and program effectiveness. *See Critical Mass* v. *NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (noting that Exemption 4 can protect interests beyond impairment and competitive harm. *See also 9 to 5 Org. for Women Office Workers* v. *Bd. of Governors of the Fed. Res. System*, 721 F.2d 1, 11 (1st Cir. 1983) (adopting a third prong under Exemption 4 based on the government's interest in administrative efficiency and effectiveness).

medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" to the subject of those files. *See* 5 U.S.C. 52(b)(6). The first inquiry in examining withholding information under Exemption 6 is a determination of what data is at stake and the nature and degree of any privacy interest in the information. The second step is an assessment of the public interest in disclosure. Under Exemption 6, the concept of public interest is limited to shedding light on the government's performance of its statutory duties. *U.S. Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989); *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989); *cf., DOD* v. *FLRA*, 510 U.S. 487, 497 (1994). Finally, there is a weighing of the privacy interests at stake against the public interest in disclosure. *Ripkis* v. *Dept. Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984).

Data submitted under the CARS program includes personally identifying information for consumers. This information falls within the classification of "similar files" under Exemption 6. In *Center for Auto Safety* v. *National Highway Traffic Safety Administration*, 809 F. Supp. 148 (D.D.C. 1993), an advocacy group sought the release of names and addresses of consumers filing complaints directly to NHTSA. The Court found that the complainant's names and addresses invoked a privacy interest within the scope of Exemption 6 and ruled in favor of non-disclosure because there was no ascertainable public interest of sufficient significance or certainty to outweigh a complainant's privacy right justifying release of the information.

b. Approach—Class Determinations vs. Individual Assessments

As employed in the agency's regulations governing confidentiality determinations (49 CFR Part 512), class determinations declare that certain categories of data submitted to NHTSA will be kept confidential. Under this approach, submitters need not request confidential treatment; such treatment is given automatically.

NHTSA is promulgating class determinations on the confidentiality of some categories of CARS data. In adopting this approach, we have considered a number of matters. First, NHTSA may adopt categorical rules to manage the tasks Congress assigned to it under the CARS Act. *Public Citizen* v. *Mineta*, 427 F. Supp. 2d 7, 13 (D. D.C. 2006). Second, we have identified and assessed the alternatives. One alternative is to require entities to submit individual requests for confidentiality for each transaction. A second alternative is presumptive categorical determinations of confidentiality. A third alternative is to adopt binding class determinations. Concerns involved in considering these alternatives include providing clear direction to CARS participants, predictability, consistency and efficiency.

Requiring individual requests for confidential treatment of CARS data would force thousands of entities, almost all of them small businesses, to submit requests for confidentiality for each transaction. These entities, having virtually no experience in making such requests, would likely submit a wide variety of documents written in different ways. Some requests would meet the applicable standards for confidential treatment and some would not. Given our past experience with first-time requests, many would not meet procedural requirements, would be denied and would then be followed by reconsideration requests. The burden imposed on entities requesting confidential treatment and on the agency would be substantial. NHTSA already receives about 550 requests for confidential treatment every year. Adding the expected number of CARS submissions to the existing confidentiality request workload would overwhelm the agency and lead to a huge backlog. Consistent with our practice, information would be withheld until NHTSA decides if it is confidential. Disclosure of rightfully public information would be delayed and the public interest would be impacted, particularly if other agency resources were diverted to address the backlog. In view of the foregoing, requiring and processing individual requests for confidential treatment for CARS data is not a viable alternative.

A second alternative is presumptive class determinations. Presumptive determinations are a middle ground between ad hoc determinations and binding class determinations. Unlike the latter, that operate automatically, presumptive determinations require submitters to provide abbreviated written requests and supporting justifications. In our view, presumptive confidentiality determinations are inappropriate for CARS. While presumptive determinations would provide direction to NHTSA's clients and avoid inconsistent confidentiality determinations, they would not eliminate individual confidentiality requests and the significant burdens those requests would impose.

A third alternative is to proceed by binding rule. Binding determinations for CARS data are appropriate mechanisms to address the confidentiality of sensitive data. CARS reports are submitted by filling out standardized electronic templates that are used repeatedly. Each manufacturer, dealer and salvage yard files the same reports as other CARS participants in the same category.

Binding determinations provide direction to the regulated community. They also assure consistency and avoid resource burdens, particularly for small businesses. They conserve agency resources that would otherwise be used to respond to thousands of individual confidentiality requests and allow more rapid disclosure of information that is not confidential. This is in the public interest. In view of the foregoing, NHTSA believes that binding determinations are appropriate.

c. Class Determinations Based on FOIA Exemption 4

FOIA Exemption 4 covers commercial or financial information obtained from a person that is privileged or confidential. 5 U.S.C. 552(b)(4). The terms "commercial" or "financial" information are given their ordinary meanings. *Public Citizen Health Research Group* v. *FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Some CARS data meet this element of Exemption 4.[22] Second, the information must be obtained from a "person." The word "person" encompasses business establishments, including corporations. *See FlightSafety Servs.* v. *Dep't of Labor*, 326 F.3d 607, 611 (5th Cir. 2003). CARS data from manufacturers, dealers and salvage auctions and disposal facilities is obtained from persons within the meaning of Exemption 4. Third, the information must be confidential. As noted above, the *National Parks* Court declared that commercial or financial data is "confidential" for the purposes of Exemption 4 if disclosure of the information would be likely to cause substantial competitive harm to the competitive position of the person from whom the information was obtained. 498 F.2d at 770. Actual competitive harm need not be demonstrated; actual competition and a likelihood of substantial competitive injury is all that need be shown. *CNA Financial Corp.* v.

[22] *See* the discussion of the categories of CARS information below. Those discussions demonstrate that the submitters have a commercial interest in the data.

Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987).

We now turn to certain categories of information that manufacturers, dealers and disposal facilities must submit under the CARS rule.

d. Data Submitted to NHTSA for the CARS Program

1. Manufacturer Data

Vehicle manufacturers will provide NHTSA with both dealer and vehicle information needed for administration of the CARS program. The dealer information is used to identify dealers and determine if they are authorized new car dealers for a particular make. Manufacturers will provide NHTSA with information about the vehicles they manufacture.

2. Dealer Information and Transaction Data

New car dealers participating in the CARS program must submit information related to their business as well as data for individual sales. To take part in the CARS program, dealers must register with NHTSA. The required registration data includes identifying information and the identity and contact information for a designated CARS contact person. Once registered, dealers have to submit information needed to establish a CARS account. This includes the registration data discussed above and additional data needed for financial transactions. For each individual sale, dealers also submit dealer data, new vehicle purchaser data, trade-in vehicle data, and new vehicle data.

3. Disposal Facility Information and Destruction Data

Disposal Facilities are required to submit certifications to NHTSA regarding their business operations and to verify proper destruction of CARS trade-in vehicles.

e. CARS Data Class Determinations Based on FOIA Exemption 4

With a few exceptions, the data submitted by businesses participating in the CARS program is already a matter of public record. Dealer addresses, telephone numbers, fax numbers and e-mail addresses are freely given. Other information, such as a dealer or salvage yard business license number, legal name and legal address, are available through public records. Still more data can be ascertained through publicly available search engines. For example, Employer Identification Numbers (EINs) for businesses are routinely released on tax forms, public filings and, in some instances, on employee pay stubs. As a result, an employer's EIN may be searched and retrieved by name from a number of Web based providers for a nominal fee. Nonetheless, some data provided to NHTSA under the CARS program is not publicly available and entitled to confidential treatment. This data is discussed below.

1. Manufacturer Assigned Dealer Identification

Vehicle manufacturers assign identification codes to their individual dealers. One manufacturer, Ford, indicates that these codes are confidential and that release of this information would be likely to cause competitive harm by increasing the possibility of fraud perpetrated by impostors using dealer codes. Because fraudulent use of this information would be likely to cause competitive harm, this final rule establishes a class determination extending confidential treatment to these manufacturer assigned dealer codes.

2. Dealer Bank Name, ABA Routing Number, Bank Account Number

Participating dealers will be identifying their bank, its American Banking Association (ABA) routing number and a bank account number in forms submitted to NHTSA. This information is kept confidential by these dealers and its release would cause substantial harm to those dealers. Public disclosure of this information presents an open and obvious potential for fraud or abuse that could result in serious financial loss. Indeed, even the inadvertent disclosure of a bank account number and a subsequent change to another account can cause significant disruption in business operations. The agency believes that a class determination is an appropriate means for protecting this information.

3. CARS Dealer ID and CARS Authorization Codes

NHTSA will provide participating dealers with unique identifiers for CARS purposes and issue CARS authorization codes for individual CARS transactions. Dealers must use this unique identifier and authorization code when submitting requests for reimbursement. Public disclosure of a dealer's unique CARS ID and authorization code increases the potential that this identifier will be used improperly or to perpetuate fraud. Unauthorized and improper use of the unique CARS ID and code would be likely to cause the "owner" of the ID to suffer competitive harm. The legitimate "owner" of the ID and authorization code may be subject to financial claims, suspension or removal from the CARS program and other costs associated with improper use of a CARS code and ID. Accordingly, this final rule establishes a class determination according confidential treatment to this data.

f. Class Determination Based on FOIA Exemption 6

The CARS rule requires dealers to provide NHTSA with the name, address, telephone number, state identification number, trade-in vehicle VIN, trade-in insurance information and new vehicle VIN for consumers participating in the CARS program. NHTSA has long held the view that Exemption 6 of the FOIA authorizes confidential treatment of consumer personally identifying information. *See* 5 U.S.C. 552(b)(6). Accordingly, consumer names, addresses and telephone numbers are routinely accorded confidential treatment. The agency's policy has been to redact personal identifiers from owner complaints (whether filed directly with the agency or from documents obtained from manufacturers in the course of a defect investigation) before placing them on the public record.

The privacy interest in protecting personal identifiers and contact information is no less compelling when a consumer purchases a new vehicle under the CARS program. Furthermore, disclosure of personal identifiers and the erosion of privacy that would result might dissuade consumers from participating in CARS. This would frustrate achievement of the program's principal goal—to encourage replacement of older less fuel efficient vehicles with new more fuel-efficient cars and trucks.

The consumer data at issue—name, address, telephone number, state identification number and vehicle identification number (VIN)—is within the scope of Exemption 6. VINs, when coupled with other data, can be used to identify vehicle owners and obtain other personal data. As this data has privacy implications, the next inquiry is an assessment of the public interest in disclosure. Congress has directed the disclosure of trade-in vehicle VINs to the commercial market to help verify destruction of these vehicles. For the remaining personal data, the concept of public interest under Exemption 6 is limited to shedding light on the government's performance of its statutory duties. *United States Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989); *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989); cf., *DOD* v. *FLRA*, 510 U.S. 487, 497 (1994).

With the limited redaction of part of the VIN under this rulemaking, the public would be able to review identification of the make, model and model year of the new vehicle. This apprises the public of information central to the core purpose of the CARS program. Disclosing additional VIN information, with the sequential number unique to the vehicle, that would enable someone to identify the owner of the new vehicle and other personal information would not, however, further serve the public interest. If disclosed, it would not answer the question of "what the government is up to." *Reporters Comm.*, 489 U.S. at 773 (1989).

The final step in an Exemption 6 analysis is weighing the competing privacy and public interests against one another. *See Ripskis* v. *HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). In the case of the CARS VIN information, there is a privacy interest in not being contacted about a new vehicle purchase, such as by companies selling warranties. On the other hand, the public interest, in terms of information that reveals "what the government is up to" is better served by other publicly available information. On balance, NHTSA has concluded that the privacy interests in non-disclosure of consumer personal identifying information outweigh the limited public interest served by disclosing this information when other data is available to better address public concerns.

NHTSA is amending 49 CFR Part 512 by revising Appendix E to provide new class determinations applying to information provided for the CARS program. These class determinations do not apply as a rule of general application to the agency's treatment of similar information in other instances. Revising Appendix E requires addition of a new Appendix F to accommodate information previously found in Appendix E.

VI. Costs and Benefits

The CARS Act will have various economic, employment, safety and environmental effects. The employment impacts of the Act will affect NHTSA, and may affect manufacturer and dealer employment. At this time, NHTSA is planning to hire 30 employees and over 200 contractor employees to handle this program over a period of 6 months. Manufacturers' and dealers' employment levels are unlikely to be impacted by the Act. The impact of the Act will most likely not be large enough to increase production by manufacturers, and dealers on average will only be selling an additional 12 vehicles (250,000 estimated number of vehicles sold during the program divided by 19,700 dealers as of early 2009) during the course of the program.

Another benefit of the program is the increased incorporation of improved fuel efficiency into the on-road vehicle fleet. This will decrease greenhouse gases and criteria pollutants by decreasing fuel consumption, resulting in air pollution benefits. These benefits are ultimately dependent upon which types of vehicles consumers purchase.

Certain costs may be incurred by dealers. However, the CARS Act provides that dealers may retain up to $50 from the scrap value of trade-in vehicles to offset any administrative costs of participating in the program. Disposal facilities and salvage auctions will also incur some costs in complying with the Act. Related industries, such as auto repair shops, may lose some profit due to foregone repairs by vehicle owners. Additionally, the Act may shorten the vehicle life cycle depending on the age and condition of the trade-in vehicles.

Cost and benefit information associated with this rulemaking is set forth in the final regulatory impact analysis prepared by NHTSA and included in the public docket.

VII. Statutory Basis for This Action

This final rule implements the Consumer Assistance to Recycle and Save Act (Cars Act) (Pub. L. 111–32), which directs the Secretary to issue final regulations within 30 days after enactment.

VIII. Effective Date

Section 1302(d) of the CARS Act provides that notwithstanding the requirements of section 553 of title 5, United States Code, the Secretary shall promulgate final regulations to implement the Program not later than 30 days after the date of the enactment of this Act. The agency finds that it has good cause to make this rule effective fewer than 30 days after the publication in the **Federal Register**. The CARS program is a short-term program that Congress expected NHTSA to implement promptly. Under the CARS Act, a credit issued under the Program may be used only in connection with the purchase or qualifying lease of new fuel efficient automobiles that occur between July 1, 2009, and November 1, 2009. In view of the fact that the regulations being published today have not been previously available, sales of new vehicles under the program have not begun in volume. It would, therefore, be inconsistent with Congressional intent, impracticable, and contrary to the public interest, to delay the effective date of the regulations, which would, in turn, delay the implementation of the program and effectively compress its applicability.

This rulemaking is also major under Chapter 8 of 5 U.S.C. (Congressional Review of Agency Rulemakings) because it has an annual effect on the economy of $100,000,000 or more. For the same reasons noted in the prior paragraph, we find good cause under section 808 of Title 5 that notice and public procedure are impracticable and contrary to the public interest, and that the rule shall take effect upon publication in the **Federal Register**.

Accordingly, the effective date of this final rule is July 29, 2009.

IX. Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and to the requirements of the Executive Order. The Order defines a "significant regulatory action" as one 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.

This rulemaking is economically significant. Accordingly, OMB reviewed it under Executive Order 12866. The rule is also significant within the meaning of the Department of Transportation's Regulatory Policies and Procedures. The agency has prepared a Final Regulatory Impact Analysis (FRIA) and placed it in the docket and on the agency's Web site.

B. National Environmental Policy Act

NHTSA has considered this rulemaking action for the purposes of the National Environmental Policy Act (NEPA). It is established law that NEPA compliance is required unless there is a clear conflict of statutory authority.

Calvert Cliffs' Coordinating Committee, inc. v. *Atomic Energy Commission,* 449 F.2d 1109 (D.C. Cir 1971). NEPA analysis is not required where, as here, a statutorily-mandated time frame for the Government's action does not permit it. *See, e.g., Flint Ridge Development Co.* v. *Scenic Rivers Ass'n of Oklahoma,* 426 U.S. 776 (1976) and *Kandra* v. *U.S.,* 145 F. Supp.2d 1192 (D. Or. 2001). The Consumer Assistance to Recycle and Save Act of 2009 requires the Secretary of Transportation, through NHTSA, to issue final regulations within 30 days after enactment (*i.e.,* by July 24, 2009) and since it is impossible to perform a NEPA analysis within this tight time frame, no NEPA analysis is required prior to issuing the final regulation.

C. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to provide for notice and comment for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). The agency has not prepared a final regulatory flexibility analysis for this final rule because the Regulatory Flexibility Act does not require such an analysis when a final rule was not required to be preceded by an NPRM.[23] As noted elsewhere in this preamble, the agency determined that an NPRM was not required for this rulemaking. Nevertheless, the agency has examined impacts on small entities, including small businesses, and included them in its regulatory analysis for this final rule.

D. Executive Order 13132, Federalism

Executive Order 13132, "Federalism" (64 FR 43255, August 10, 1999), requires NHTSA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local governments in the process of developing the proposed regulation. The agency also may not issue a regulation with federalism implications that preempts a State law without consulting with State and local officials.

NHTSA has examined today's final rule pursuant to Executive Order 13132 and concluded that consultation with States, local governments, or their representatives is not required. The agency has concluded that the rule does not have federalism implications, because the rule does 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 the responsibilities among the various levels of government. This rule will have no effect on the ability of States to adopt and/or implement their own incentive plans.

E. Executive Order 12988

Pursuant to Executive Order 12988, "Civil Justice Reform" the agency has considered whether this final rule would have any retroactive effect. Agencies may promulgate retroactive rules pursuant to the express authority of Congress to do so. *See, e.g., Bowen* v. *Georgetown Univ. Hospital,* 488 U.S. 204, 208 (1988); *National Mining Association* v. *Dep't of Labor,* 292 F.3d 849, 859 (D.C. Cir. 2002). On June 24, 2009, the President signed the CARS Act into law (Pub. L. 111–32). The CARS Act required the Secretary of Transportation, acting through NHTSA, to issue final regulations to implement the program within 30 days after enactment (*i.e.,* by July 24, 2009). However, the CARS Act provides that the program covers eligible transactions beginning on July 1, 2009, prior to today's final rule. Accordingly, as set forth in today's final rule, if transactions occurring on or after July 1, 2009 but prior to July 29, 2009 meet all of the requirements identified in this final rule, registered dealers may follow the application procedures of the rule and apply for reimbursement for those transactions.

F. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. As part of this final rule, the agency must among other matters, request information from persons to register as participating dealers, provide a list of eligible vehicles and process credit transactions under the program.

The agency has received approval from OMB to collect the following information:

Title: CARS Program; Dealer Information, OMB Control No. 2127–0657, *Expiration Date:* December 31, 2009.

This approval covers NHTSA Form 1070. NHTSA has been given OMB approval to collect 57,000 responses, for a total of 11,395 burden hours.

Title: CARS Program; Disposal Facility and Salvage Auction Information, OMB Control No. 2127–0658, *Expiration Date:* January 31, 2010.

This approval covers NHTSA Form 1073, "Disposal Facility Certification Form" and NHTSA Form 1074, "Salvage Auction Certification Form." NHTSA has been given OMB approval to collect 3,750,000 responses, for a total of 31,248 burden hours.

Title: CARS Program; Survey of Customer Response to CARS Initiative, OMB Control No. 2127–0659, *Expiration Date:* January 31, 2010.

This approval covers NHTSA Form 1075, "Survey of Consumer Response to CARS Initiative." NHTSA has been given OMB approval to collect 168,750 responses, for a total of 9,375 burden hours.

Title: CARS Program; Dealer and Buyer Transaction Information, OMB Control No. 2127–0660, *Expiration Date:* January 31, 2010.

This approval covers NHTSA Form 1071 "Transaction Form" (an electronic form) and NHTSA Form 1072 "Certifications and Summary of Sale Language." NHTSA has been given OMB approval to collect 500,000 responses, for a total of 108,334 burden hours.

G. The Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate

[23] The initial sentence of subsection (a), Section 604, Final regulatory flexibility analysis, of the Regulatory Flexibility Act provides that when an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis.

likely to result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted for inflation with a base year of 1995). This requirement, however, only applies to "a final rule for which a general notice of proposed rulemaking was published"; as noted earlier in this final rule, an NPRM was not published.

H. Regulatory Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) 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. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

I. Privacy Act

Please note that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review the complete User Notice and Privacy Notice for Regulations.gov at *http://www.regulations.gov/search/footer/privacyanduse.jsp.*

List of Subjects

49 CFR Part 512

Administrative procedure and practice, Confidential business information, Freedom of information, Motor vehicle safety, Reporting and record keeping requirements.

49 CFR Part 599

Fuel economy, Motor vehicle safety.

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

PART 512—CONFIDENTIAL BUSINESS INFORMATION

■ 1. The authority citation for Part 512 continues to read as follows:

Authority: 49 U.S.C. 322; 5 U.S.C. 552; 49 U.S.C. 30166, 49 U.S.C. 30167; 49 U.S.C. 32307; 49 U.S.C. 32505; 49 U.S.C. 32708; 49 U.S.C. 32910; 49 U.S.C. 33116; delegation of authority at 49 CFR 1.50.

■ 2. Revise Appendix E to Part 512 to read as follows:

Appendix E to Part 512—Consumer Assistance to Recycle and Save (CARS) Class Determinations

(a) The Chief Counsel has determined that the following information required to be submitted to the agency under 49 CFR part 599, if released, is likely to cause substantial harm to the competitive position of the entity submitting the information:

(1) Vehicle Manufacturer Issued Dealer Identification Code;

(2) Dealer Bank Name, ABA Routing Number and Bank Account Number; and

(3) CARS Dealer Code and Authorization Code.

(b) The Chief Counsel has determined that the disclosure of the new vehicle owner's name, home address, telephone number, state identification number and last six (6) characters, when disclosed along with the first eleven (11) characters, of the new vehicle identification numbers reported in transactions submitted to the agency under 49 CFR Part 599 will constitute a clearly unwarranted invasion of personal privacy within the meaning of 5 U.S.C. 552(b)(6).

■ 3. Add Appendix F to part 512 to read as follows:

Appendix F to Part 512—OMB Clearance

The OMB clearance number for this part 512 is 2127–0025.

■ 4. Add part 599 to read as follows:

PART 599—REQUIREMENTS AND PROCEDURES FOR CONSUMER ASSISTANCE TO RECYCLE AND SAVE ACT PROGRAM

Subpart A—General

Subpart B—Participating Dealers, Salvage Auctions and Disposal Facilities

Subpart C—Qualifying Transactions and Reimbursement

Subpart D—Disposal of Trade-in Vehicle

Subpart E—Enforcement

Authority: 49 U.S.C. 32901, Notes; delegation of authority at 49 CFR 1.50.

Subpart A—General

§ 599.100 Purpose.

This part establishes requirements and procedures implementing the program authorized under the Consumer Assistance to Recycle and Save Act of 2009.

§ 599.101 Scope.

The requirements of this part apply to new vehicle purchase or lease transactions, in combination with trade-in vehicle transactions that occur on or after July 1, 2009 up to and including November 1, 2009, and to the disposal of trade-in vehicles under the CARS Act.

§ 599.102 Definitions.

As used in this part—

Agency or NHTSA means the National Highway Traffic Safety Administration.

CARS Act means the Consumer Assistance to Recycle and Save Act of 2009, Public Law 111–32, 123 Stat. 1859 (June 24, 2009).

CARS Program means the program authorized under the Consumer Assistance to Recycle and Save Act of 2009, which NHTSA refers to as the Car Allowance Rebate System.

Category 1 truck means a non-passenger automobile, as defined in section 49 U.S.C. 32901(a)(17) and 49 CFR 523.3, except that such term does not include a category 2 truck.

Category 2 truck means a large van with a wheelbase of 124 inches or more, or a large pickup with a wheelbase of 115 inches or more.

Category 3 truck means a work truck, as defined in 49 U.S.C. 32901(a)(19).

Clear title means title to a vehicle that is free from all liens and encumbrances.

Combined Fuel Economy means—

(1) With respect to an eligible new vehicle, the number, expressed in miles per gallon, centered below the words "Combined Fuel Economy" on the label required to be affixed or caused to be affixed on a new automobile pursuant to subpart D of 40 CFR part 600.

(2) With respect to an eligible trade-in vehicle of model year 1985 or later, the number posted under the words "Estimated New EPA MPG" or "New EPA MPG" and above the word "Combined," except that for a bi-fuel, dual fuel, or flexible fueled vehicle, that number must also be below the word "Gasoline," on the fueleconomy.gov Web site of the Environmental Protection Agency for the make, model, and year of such vehicle.

Credit means an electronic payment to a dealer for a qualifying transaction under the program.

Dealer means a person licensed by a State who engages in the sale of a new automobile to a person who in good faith purchases such automobile for purposes other than resale.

Disposal facility means a facility listed on *http://www.cars.gov/disposal* as eligible to receive a trade-in vehicle for crushing or shredding under the CARS program, except in the case of a U.S. territory.

End-of-Life Vehicle Solutions or ELVS means an entity established under the National Vehicle Mercury Switch Recovery Program for the collection, recycling and disposal of elemental mercury from automotive switches.

Engine block means the part of the engine containing the cylinders and typically incorporating water cooling jackets and also including the crank shaft, connecting rods, pistons, bearings, cam(s), and cylinder head(s). In a rotary engine, the block includes the rotor housing and rotor.

GVWR means gross vehicle weight rating.

Lease means a lease of a new vehicle for a period of not less than 5 years, excluding any lease with a balloon payment due prior to the elapsing of 5 years.

Manufacturer's Suggested Retail Price or *MSRP* means the base Manufacturer's Suggested Retail Price, excluding any dealer accessories, optional equipment, taxes and destination charges.

National Motor Vehicle Title Information System or *NMVTIS* means the online system established under the oversight of the Department of Justice that enables consumers and others to access vehicle history information, including salvage history, total loss information, and title branding and odometer information, and to which insurance companies and salvage yards must report vehicle status information. (*http://www. nmvtis.gov.*)

New Vehicle means an automobile or work truck, the equitable or legal title of which has not been transferred to any person other than the purchaser.

Non-titling Jurisdiction means a State that does not issue a title for certain typically older vehicles.

Passenger automobile means a passenger automobile, as defined in section 49 U.S.C. 32901(a)(18) and 49 CFR 523.4.

Person means an individual, corporation, company, association, firm, partnership, society, or joint stock company.

Purchaser means a person purchasing or leasing a new vehicle under the CARS Program.

Salvage auction means an entity that receives a CARS trade-in vehicle from a dealer and is authorized to sell it only to a disposal facility on the Disposal Facility List and that will make all the necessary certifications for salvage auctions under the CARS program.

State means any one of the 50 United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands.

Subpart B—Participating Dealers, Salvage Auctions and Disposal Facilities

§ 599.200 Registration of participating dealers.

(a) *In general.* A dealer may apply for a credit under the CARS Program only if it meets the Required Dealer Qualifications for Registration under this subpart, is registered in accordance with this subpart, and is currently registered at the time it submits an application for reimbursement.

(b) *Required dealer qualifications for registration.* A dealer seeking to register must have:

(1) A currently operating new automobile dealership and business address within a State in the United States;

(2) A currently active business license under the law of the State where the new automobile dealership is located to operate that dealership;

(3) A currently active franchise agreement to sell new automobiles with an original equipment manufacturer of automobiles;

(4) A bank account in a U.S. bank in a State and a bank account routing number for electronic transfer of funds;

(5) The ability to submit application materials and perform transactions electronically using the Internet; and

(6) Not been convicted of a crime involving motor vehicles or any fraud or financial crime under State or Federal law.

(c) *Registration procedures.*

(1) Using comprehensive lists of franchised dealers provided by original equipment manufacturers, as updated by these manufacturers, the agency will mail a letter to each listed dealer describing a secure electronic process and providing an authorization code by which the dealer, following the process in paragraph (c)(2) of this section, can effect registration.

(2) A dealer contacted in accordance with paragraph (c)(1) of this section may register electronically as a participating dealer under the CARS Program by using the authorization code and following the instructions provided in the letter mailed under paragraph (c)(1) of this section, and submitting the following information electronically or validating the information, where it exists already on an electronic form:

(i) Dealer's Federal Tax Identification Number (TIN) and OEM assigned dealer franchise number;

(ii) Legal business name, doing business as name (if applicable), dealership physical and mailing address, telephone number, and fax number;

(iii) Name and title of dealer representative authorized to submit transactions under this program, and phone number and e-mail address of representative; and

(iv) Name of U.S. bank used by dealership, bank account number, and bank account routing number.

(3) A dealer must register separately, following the process under paragraph (c)(2) of this section, for each make of vehicle it sells, using the authorization code associated with that vehicle make.

(d) *Disposition of registration application.* The agency will review the registration application for compliance

with this part, including completeness, and notify the dealer as follows:

(1) For an approved registration:

(i) By e-mail notification to the authorized dealer representative, with a user identification and password that will allow the submission of transactions; and

(ii) By listing the "doing business as" name, physical address, and general telephone number of the dealer on the agency Web site at *http://www.cars.gov.*

(2) For a disapproved registration, by withholding the dealer identification information from the agency's Web site and providing e-mail notification to the authorized dealer representative of the reasons for rejecting the application.

(e) *Revocation of Dealer Registration.*

(1) *Termination or Discontinuance of Franchise.*

(i) A dealer whose franchise agreement with an original equipment manufacturer (OEM) has expired without renewal, has been terminated, or otherwise is no longer in effect shall be automatically removed as a matter of course, subject to paragraph (e)(1)(iii), from the agency's list of registered dealers and may no longer receive a credit for new transactions under the CARS Program submitted for repayment on or after the date that the franchise expired or no longer is in effect.

(ii) Paragraph (e)(1)(i) of this section does not preclude a dealer registered under other franchise agreements from receiving a credit for transactions under those agreements that have not expired or been discontinued.

(iii) A dealer whose name is removed from the agency's list of registered dealers under paragraph (e)(1)(i) shall be reinstated to the list of registered dealers upon a showing to NHTSA of proper and adequate license to sell new vehicles to ultimate purchasers.

(2) *Other suspension or revocations actions.* The agency may also suspend or revoke the registration of a dealer as provided in § 599.504.

(f) *Notification of changes.* A registered dealer shall immediately notify the agency of any change to the information submitted under this section and any change to the status of its State license or franchise.

(g) *Pre-registration transactions.* An otherwise qualifying transaction that occurs during the time period prescribed under § 599.301(a) is not a non-complying transaction solely because a dealer is not registered at the time of the transaction, except that the dealer must be eligible to register and must register under § 599.200 in order to be entitled to reimbursement for a credit extended under the CARS program.

§ 599.201 Identification of salvage auctions and disposal facilities.

(a) *Participating entities.* Subject to the conditions and requirements of paragraph (b), participation in the transfer and disposal of a trade-in vehicle under the CARS program is limited to the following entities:

(1) A salvage auction that will transfer trade-in vehicles received under this program only to a disposal facility identified in paragraph (b)(2) or (b)(3) of this section.

(2) A disposal facility listed on the Web site at *http://www.cars.gov/disposal;* or

(3) A facility that disposes of vehicles in Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands.

(b) *Conditions of Participation.* A participating entity identified in paragraph (a) of this section must:

(1) Comply with all the provisions and restrictions and make all the required certifications contained in subpart D of this part.

(2) In the case of a disposal facility identified in paragraph (a)(2) of this section, be currently listed on the Web site at *http://www.cars.gov/disposal,* as of the date of its participation in the disposal of the trade-in vehicle.

(c) *Removal of authority to participate.*

(1) A disposal facility that qualifies as such by active membership in ELVS and that fails to maintain active ELVS membership may be automatically removed as a matter of course from the agency's list of disposal facilities maintained at *http://www.cars.gov/disposal* authorized to participate in the CARS program.

(2) The agency may also suspend or remove a salvage auction's or disposal facility's authority to participate in the CARS program in accordance with the procedures of § 599.504.

Subpart C—Qualifying Transactions and Reimbursement

599.300 Requirements for qualifying transactions.

(a) *In general.* To qualify for a credit under the CARS Program, a dealer must sell or lease a new vehicle that meets eligibility requirements to a purchaser, obtain a trade-in vehicle that meets eligibility requirements from the purchaser, satisfy combined fuel economy requirements for both the new and trade-in vehicles, disable the engine of the trade-in vehicle, satisfy the limitations and restrictions of the program, arrange for disposal of the trade-in vehicle at a qualifying disposal facility or through a qualifying salvage auction, and register and submit a complete application for reimbursement to NHTSA, demonstrating that it meets all the requirements of this part.

(b) *Threshold eligibility requirements that apply to all trade-in vehicles.* The trade-in vehicle must be:

(1) In drivable condition, as demonstrated by actual operation of the motor vehicle on public roads by the dealer and by certification by the dealer and by the purchaser, as provided in Appendix A to this part, certifications section, that the vehicle was in drivable condition on the date of the qualifying transaction;

(2) Continuously insured consistent with the applicable State law for a period of not less than 1 year immediately prior to the trade-in, as demonstrated by:

(i) One or more current insurance cards specifying the make, model, model year, and vehicle identification number (VIN) of the insured vehicle and displaying a continuous one-year period of insurance coverage; or a copy of an insurance policy document (*e.g.,* a declarations page or pages) showing a continuous one-year period of insurance coverage for the vehicle; or a signed letter, on insurance company letterhead, specifying the same vehicle identification information (*i.e.,* make, model, model year, and VIN) of the insured vehicle and identifying the period of continuous coverage, which must be for at least one year prior to the date of the trade-in; and

(ii) By certification by the purchaser, as provided in Appendix A to this part, certifications section, that the vehicle was so insured;

(3) Continuously registered in a State to the purchaser for a period of not less than one year immediately prior to the trade-in, as demonstrated by:

(i) A current State registration document or series of registration documents in the name of the purchaser evidencing registration for a period of not less than one year immediately prior to the trade-in; or a current State registration document showing registration in the name of the purchaser and a title that confers title on the purchaser not less than one year immediately prior to the trade-in; or a current State registration document showing registration in the name of the purchaser and a document from a commercially available vehicle history provider evidencing registration for a period of not less than one year immediately prior to the trade-in; and

(ii) By certification by the purchaser, as provided in Appendix A to this part,

certifications section, that the vehicle was so registered;

(4) Manufactured less than 25 years before the date of the trade-in, as demonstrated by model year information on the title or, where that information is inconclusive, by direct observation by the dealer of the month and year of the vehicle's manufacture, which appears on the safety standard certification label of the vehicle, provided that on the 25th year, the 25-year requirement is satisfied if the manufacture date falls anytime within the month 25 years before the date of trade-in, and by certification by the dealer, as provided in Appendix A to this part, certifications section, that the manufacture date is less than 25 years before the date of trade-in.

(c) *Threshold eligibility requirements that apply to all new vehicles.* The new vehicle must:

(1) Be either purchased or leased for a lease period of not less than 5 years;

(2) Have a manufacturer's suggested retail price of $45,000 or less.

(d) *Trade-in vehicle—disclosure of scrap value, engine disablement, and title marking.* As part of a qualifying transaction under this part, and prior to submitting an application for reimbursement under § 599.302, the dealer shall:

(1) During the transaction, disclose to the person purchasing or leasing an eligible new vehicle and trading in an eligible trade-in vehicle, the best estimate of the scrap value of the trade-in vehicle, inform that person that the dealer is authorized to retain $50 of this amount as payment for its administrative costs of participation in the program, and certify, as provided in Appendix A to this part, certifications section, that it has made such disclosure;

(2) Except as provided in paragraph (e) of this section, disable the engine of the eligible trade-in vehicle, following the procedures set forth in Appendix B to this part, and certify, as provided in Appendix A to this part, certifications section, that it has disabled the engine; and

(3) Legibly mark the front and back of the trade-in vehicle's title in prominent letters that do not obscure the owner's name, VIN, or other writing as follows: "Junk Automobile, CARS.gov."

(e) *Dealer transfers prior to July 24, 2009.*

(1) Subject to the provisions of paragraph (e)(2) of this section, if the dealer transferred the vehicle prior to July 24, 2009, the dealer may either:

(i) Locate the vehicle, disable its engine following the procedures set for the in Appendix B to this part, and provide the certification in Appendix A to this part, certifications section, that it has disabled the engine; or

(ii) Obtain a sworn affidavit from a disposal facility that it has crushed or shredded the vehicle, including the engine block, and provide supporting documents sufficient to establish that fact.

(2) The dealer and disposal facility must comply with all other requirements of this part, including the requirement that the trade-in vehicle be crushed or shredded, except that the affidavit and supporting documents provided for under paragraph (e)(1)(ii) of this section may substitute for the disposal facility certification form.

(f) *Qualifying transactions ($3,500 Credit).* Subject to the requirements of paragraphs (b), (c), and (d), and, if applicable, paragraph (e) of this section and the additional requirements of §§ 599.301, 599.302, and 599.303 of this subpart, each of the following transactions qualifies for a credit of $3,500 under this program:

(1) The new vehicle is a passenger automobile with a combined fuel economy of at least 22 mpg, the eligible trade-in vehicle has a combined fuel economy of 18 mpg or less and is a passenger automobile, category 1 truck, or category 2 truck, and the combined fuel economy of the new vehicle is at least 4 mpg, but less than 10 mpg higher than the combined fuel economy of the eligible trade-in vehicle.

(2) The new vehicle is a category 1 truck with a combined fuel economy of at least 18 mpg, the eligible trade-in vehicle has a combined fuel economy of 18 mpg or less and is a passenger automobile, category 1 truck, or category 2 truck, and the combined fuel economy of the new vehicle is at least 2 mpg, but less than 5 mpg higher than the combined fuel economy of the eligible trade-in vehicle.

(3) The new vehicle is a category 2 truck with a combined fuel economy of at least 15 mpg, the eligible trade-in vehicle has a combined fuel economy of 18 mpg or less and is a category 2 truck, and the combined fuel economy of the new vehicle is 1 mpg higher than the combined fuel economy of the eligible trade-in vehicle.

(4) The new vehicle is a category 2 truck with a combined fuel economy of at least 15 mpg and the eligible trade-in vehicle is a category 3 truck of model year 2001 or earlier.

(5) The new vehicle is a category 3 truck, the eligible trade-in vehicle is a category 3 truck of model year 2001 or earlier, and the new fuel efficient vehicle has a GVWR less than or equal to the GVWR of the eligible trade-in vehicle.

(g) *Qualifying transactions ($4,500 Credit).* Subject to the requirements of paragraphs (b), (c), and (d), and, if applicable, paragraph (e) of this section and the additional requirements of §§ 599.301, 599.302, and 599.303 of this subpart, each of the following transactions qualifies for a credit of $4,500 under this program:

(1) The new vehicle is a passenger automobile with a combined fuel economy of at least 22 mpg, the eligible trade-in vehicle has a combined fuel economy of 18 mpg or less and is a passenger automobile, category 1 truck, or category 2 truck, and the combined fuel economy of the new vehicle is at least 10 mpg higher than the combined fuel economy of the eligible trade-in vehicle.

(2) The new vehicle is a category 1 truck with a combined fuel economy of at least 18 mpg, the eligible trade-in vehicle has a combined fuel economy of 18 mpg or less and is a passenger automobile, category 1 truck, or category 2 truck, and the combined fuel economy of the new vehicle is at least 5 mpg higher than the combined fuel economy of the eligible trade-in vehicle.

(3) The new vehicle is a category 2 truck with a combined fuel economy of at least 15 mpg, the eligible trade-in vehicle has a combined fuel economy of 18 mpg or less and is a category 2 truck, and the combined fuel economy of the new vehicle is at least 2 mpg higher than the combined fuel economy of the eligible trade-in vehicle.

(h) *No other qualifying transactions.* Transactions described under paragraphs (f) and (g) of this section are the only transactions that qualify for payment of a credit to a dealer under the CARS Program.

§ 599.301 Limitations and restrictions on qualifying transactions.

(a) *Date of transaction.* A qualifying transaction may not occur on a date before July 1, 2009 or after November 1, 2009, and is subject to available agency funds for the CARS Program.

(b) *One credit per transaction.* Only one credit may be applied towards the purchase or lease price of each new vehicle.

(c) *One credit per person.* A person that participates in a transaction for which a credit is issued under the CARS Program, whether as a single owner or a joint-registered owner of either an eligible trade-in vehicle, a new vehicle, or both, may not participate or be named in another transaction for which a credit is issued under the CARS program, either as a registered owner of

the trade-in vehicle or as a purchaser of the new vehicle.

(d) *Transfer of title.*

(1) Except as provided in paragraph (d)(2) of this section, a dealer may not apply for or receive reimbursement for a credit extended to a purchaser under a CARS program transaction unless it has been conveyed clear title and physically possesses the title to the trade-in vehicle.

(2) In the case of a trade-in vehicle registered in a State that is a non-titling jurisdiction and that, in accordance with State law, has no title, the requirement in paragraph (d)(1) of this section that clear title be conveyed is satisfied if the purchaser shows proof of registration in the purchaser's name and provides a bill of sale conferring ownership of the trade-in vehicle to the dealer.

§ 599.302 Dealer application for reimbursement—submission, contents.

(a) *In general.* A dealer's application for reimbursement must demonstrate that the requirements and limitations governing qualifying transactions in § 599.300 and § 599.301 of this subpart have been met, and must comply with the submission and contents requirements of this section.

(b) *Electronic submission.* The application for reimbursement must be submitted by using the login and password provided under § 599.200(d)(1) and following the procedures provided in the letter mailed under § 599.200(c)(1) of this part.

(c) *Application contents.* An application shall consist of an electronic transaction form (portion reproduced in Appendix C to this part) requiring input of information into relevant fields, electronic copies of supporting documents, and applicable certifications, as provided in Appendix A to this part, certifications section. As its application for each transaction, the dealer shall:

(1) Input the following information into relevant fields on the transaction form:

(i) *Purchaser information.*

(A) *Name.* The first name, middle initial and last name of each purchaser, if an individual, or the full legal name of the company, association or other organization that is the purchaser.

(B) *Residence address (or, for an organization, business address).* The full address of each purchaser.

(C) *Driver's license or State identification number.* The State driver's license or State identification number of each purchaser or, for an organization, its tax identification number.

(ii) *Trade-in vehicle information.*

(A) *Make.* The make of the vehicle.

(B) *Model.* The model of the vehicle.

(C) *Model year.* The model year of the vehicle.

(D) *Vehicle identification number (VIN).* The 17 digit VIN of the vehicle.

(E) *CARS Act vehicle category.* The category of vehicle as defined under the CARS Act. (Enter, as applicable, passenger automobile, category 1 truck, category 2 truck or category 3 truck.)

(F) *State of title.*

(G) *State of registration.*

(H) *Start date of registration.*

(I) *Start date of insurance.*

(J) *End date of registration.*

(K) *Odometer reading.* The odometer reading of the vehicle at the time of the trade-in.

(L) *EPA combined fuel economy.* The listed EPA combined fuel economy of the vehicle.

(M) *Vehicle description.* The exact "vehicle description" for the vehicle found on *http://www.fueleconomy.gov.*

(iii) *New vehicle information.*

(A) *Make.* The make of the vehicle.

(B) *Model.* The model of the vehicle.

(C) *Model year.* The model year of the vehicle.

(D) *Vehicle identification number (VIN).* The 17 digit VIN of the vehicle.

(E) *EPA combined fuel economy.* The listed EPA combined fuel economy of the vehicle.

(F) *CARS Act vehicle category.* The category of vehicle as defined under the CARS Act. (Enter, as applicable, passenger automobile, category 1 truck, category 2 truck or category 3 truck.)

(G) *Base manufacturer's suggested retail price (MSRP).* The price of the new vehicle affixed to the Monroney label prior to the addition of any options, features, taxes or destination charges.

(H) *Vehicle description.* The exact "vehicle description" for the vehicle found on *http://www.fueleconomy.gov.*

(iv) *Trade-in vehicle disposition information.*

(A) *Identification of entity.* The name, address and telephone number of the disposal facility or salvage auction to which the vehicle will be or has been transferred or consigned.

(B) *Disposal facility number.* The unique identifier assigned to the disposal facility identified on the CARS Web site, and to which the vehicle is being transferred or consigned.

(v) *Transaction information.*

(A) *Date of sale or lease.* The date on which the vehicle transaction with the purchaser occurred.

(B) *Transaction request amount.* The amount of the credit for which the dealer is applying.

(2) Attach the following supporting documentation in electronic format (pdf, tif, jpeg) in the following order:

(i) *Proof of title.* A copy of the front and back of the title of the trade-in vehicle, showing assignment to the dealer free and clear of any lien or encumbrance on the vehicle's title, with the "Junk Automobile, CARS.gov" marking on both sides.

(ii) *Proof of insurance.* A copy of insurance policy cards or documents for the trade-in vehicle to confirm that the trade-in vehicle insurance was continuous for a period of not less than one year prior to trade in.

(iii) *Proof of registration.* A copy of the registration card or documents for the trade-in vehicle identifying the owner, the vehicle, and dates of registration to confirm that the vehicle was registered to the purchaser for a period of not less than one year prior to trade in.

(iv) *Purchaser identification.*

(v) *Summary of sale/lease and certifications form* (Appendix A to this part, summary section).

(vi) *Manufacturer certificate of origin or manufacturer statement of origin of the new vehicle.*

(vii) *CARS purchaser survey.*

(viii) *Fueleconomy.gov side-by-side comparison of the trade-in vehicle and the new vehicle.*

(ix) *Certification from salvage auction or disposal facility.*

(x) *Copy of vehicle sales or lease contract.*

(3) Make the certifications provided in Appendix A to this part, certifications section.

599.303 Agency disposition of dealer application for reimbursement.

(a) *Application review.* Upon receipt of an application for reimbursement, the agency shall review the application to determine whether it is complete and satisfies all the requirements of this subpart.

(b) *Complying application.* An application that is determined to meet all the requirements of this subpart shall be approved for payment, in accordance with the provisions of § 599.304.

(c) *Non-complying application.* An application that is incomplete or that otherwise fails to meet all the requirements of this subpart shall be rejected, and the submitter shall be informed electronically of the reason for rejection. NHTSA shall have no obligation to correct a non-conforming submission.

(d) *Electronic rejection.* An application is automatically rejected, with system notification to the tendering dealer, if the transaction falls

outside of the permissible time period, exceeds the permissible MSRP, identifies a purchaser that has participated in a previous transaction, or identifies the vehicle identification number of a new or trade-in vehicle that was involved in a previous transaction.

(e) *Correction and resubmission.* A dealer may correct and resubmit a rejected application for reimbursement, without penalty.

§ 599.304 Payment to dealer.

Upon completion of review of an application for reimbursement from a registered dealer that satisfies all the requirements of this part, the agency shall reimburse the dealer, by electronic transfer to the account identified under the process in § 599.200(c) of this part.

Subpart D—Disposal of Trade-in Vehicle

§ 599.400 Transfer or consignment by dealer of trade-in vehicle.

(a) *In general.*

(1) A trade-in vehicle accepted as part of an eligible transaction may be provided for disposal by a dealer either to a disposal facility or to a salvage auction, as described in and subject to the conditions of § 599.201 of this part.

(2) Dealers, disposal facilities, and salvage auctions involved in the disposal of the trade-in vehicle must each comply with the applicable provisions of this subpart.

(b) *Transfer by dealer or salvage auction to a disposal facility.* If the trade-in vehicle is transferred by the dealer or salvage auction to a disposal facility, the disposal facility must, as a condition of the transfer:

(1) Make the certifications contained in the Disposal Facility Certification Form in Appendix E to this part, signed by an official with authority to bind the disposal facility;

(2) At the time of the transfer, deliver the signed Disposal Facility Certification Form to the dealer or salvage auction that transferred the trade-in vehicle; and

(3) Comply with the requirements and limitations of § 599.401.

(c) *Consignment by dealer to a salvage auction.* If the trade-in vehicle is consigned by the dealer to a salvage auction, the salvage auction must, as a condition of the consignment:

(1) Make the certifications contained in the Salvage Auction Certification Form in Appendix F to this part, signed by an official with authority to bind the salvage auction;

(2) At the time of the consignment, deliver the signed Salvage Auction Certification Form to the dealer that authorized the salvage auction to sell the trade-in vehicle.

(1) Make the certifications contained in the Salvage Auction Certification Form to the dealer that authorized the salvage auction to sell the trade-in vehicle; and

(3) Comply with the requirements and limitations of § 599.402.

§ 599.401 Requirements and limitations for disposal facilities that receive trade-in vehicles under the CARS program.

(a) The disposal facility must:

(1) Not more than 7 days after receiving the vehicle, report the vehicle to NMVTIS as a scrap vehicle.

(2) Remove and dispose of all refrigerants, antifreeze, lead products, mercury switches, and such other toxic or hazardous vehicle components prior to crushing or shredding in accordance with applicable Federal and State requirements;

(3) Crush or shred the trade-in vehicle onsite, including the engine block and the drive train (unless with respect to the drive train, the transmission, drive shaft, and rear end are sold separately), using its own machinery or a mobile crusher, within 180 days after receipt of the vehicle from the dealer or salvage auction;

(4) Not more than 7 days after the vehicle is crushed or shredded, report the vehicle to NMVTIS as crushed or shredded.

(b) The disposal facility may not sell or transfer the engine block of the vehicle or, except as allowed under paragraph (c)(2) of this section, the drive train before they are crushed or shredded or otherwise allow the vehicle to leave the disposal facility before it is crushed or shredded.

(c) The disposal facility may:

(1) Sell any part of the vehicle other than the engine block or drive train;

(2) Notwithstanding paragraph (c)(1) of this section, sell the drive train provided the transmission, drive shaft, and rear end are sold as separate parts;

(3) Retain the proceeds from parts sold under this paragraph.

§ 599.402 Requirements and limitations for salvage auctions that are consigned trade-in vehicles under the CARS program.

(a) The salvage auction must:

(1) Within 3 days after the date the dealer consigns the vehicle or prior to auctioning the vehicle, whichever is earlier, report the status of the vehicle to NMVTIS;

(2) Limit participation in the auction to disposal facilities that, when the auction is held:

(i) Appear on the list identified in § 599.201(a)(2) or are described in § 599.201(a)(3); and

(ii) Agree to make the certifications in the Salvage Auction Certification Form (Appendix F to this part).

(3) As a condition of transferring title to the disposal facility, obtain from that facility the signed Disposal Facility Certification Form (Appendix E to this part), insert on the top of the form the appropriate CARS invoice number received from the dealer, if known, and provide the form to NHTSA at *disposal@cars.gov,* and include that invoice number in the e-mail subject line.

(b) [Reserved]

§ 599.403 Requirements and limitations for dealers.

A dealer receiving a Disposal Facility Certification Form or Salvage Auction Certification Form under § 599.400(b)(2) or (c)(2) shall insert on the top of the form the appropriate CARS invoice number, if known, and within 7 days of receipt, submit such certification form to NHTSA at *disposal@cars.gov.*

Subpart E—Enforcement

§ 599.500 Definitions.

As used in this subpart—

Administrator means the Administrator of the National Highway Traffic Safety Administration, or his or her designee.

Chief Counsel means the NHTSA Chief Counsel, or his or her designee.

Hearing Officer means a NHTSA employee who has been delegated the authority to assess civil penalties.

NHTSA Enforcement means the NHTSA Associate Administrator for Enforcement, or his or her designee.

Notice of violation means a notification of violation and preliminary assessment of penalty issued by the Chief Counsel to a party.

Party means the person alleged to have committed a violation of the CARS Act, regulations thereunder, or other applicable law, and includes an individual, a public or private corporation, and a partnership or other association.

Violation means any non-conformance with the CARS Act or the regulations in this part except § 599.200(e)(1)(i) and § 599.201(c)(1), the submission of incomplete or inaccurate information to NHTSA or an entity identified under this part, or the failure to maintain records, to permit access to records or to update information that has been submitted to NHTSA under this part, but does not include a clerical error. In the context of dealer registration and disposal facility or salvage auction participation eligibility, *violation* also includes any

conviction of a crime involving motor vehicles or any fraud or financial crime under State or Federal law.

§ 599.501 Generally.

The provisions of 5 U.S.C. 554, 556 and 557 do not apply to any proceedings conducted pursuant to this subpart.

§ 599.502 Record retention.

(a) Manufacturers, dealers, salvage auctions, and disposal facilities shall keep records of all transactions under the CARS Act and regulations thereunder for a period of five calendar years from the date on which they were generated or acquired by the manufacturer, salvage auction, dealer, or disposal facility, and shall promptly make those records available to NHTSA Enforcement or DOT's Office of the Inspector General upon request.

(b) Records to be retained under this subpart include all documentary materials and other information-storing media that contain information concerning transactions under the CARS Program, including any material generated or communicated by computer, electronic mail, or other electronic means. Such records include, but are not limited to, lists, compilations, certifications, dealer application information, salvage auction or disposal facility information, owner eligibility information, vehicle eligibility information (including vehicle fuel economy), dealer applications for reimbursement under the program, vehicle identification number data, vehicle ownership information, vehicle title, registration and insurance information, sales agreements, bills of sale, lease agreements, manufacturer's certificate or statement of origin, other rebate and/or incentive programs used in conjunction with transactions under the program, bank account and routing number information, electronic funds transfer and payment information, reports made to the National Motor Vehicle Title Information System (NMVTIS), reports regarding vehicle scrappage values and payment, reports in connection with the transfer of vehicles to salvage auctions and disposal facilities; reports from disposal facilities in connection with the crushing or shredding of vehicles under the program, and any other documents that are related to transactions.

(c) Duplicate copies need not be retained. Information may be reproduced or transferred from one storage medium to another (*e.g.*, from electronic format to CD–ROM) as long as no information is lost in the reproduction or transfer, and when so reproduced or transferred the original form may be treated as a duplicate.

§ 599.503 Access to records.

The Administrator shall have the right to enter onto the premises of manufacturers, dealers, salvage auctions and disposal facilities during normal business hours in order to: access, inspect and audit records and other sources of information maintained by any of these entities under this Program; to inspect vehicles traded in or sold under this program, including taking all actions necessary to determine whether trade-in vehicles have operative engines; and/or to interview persons who may have relevant knowledge.

§ 599.504 Suspension, revocation, and reinstatement of registration and participation eligibility.

(a) *Suspension or revocation of dealer registration, or salvage auction or disposal facility participation eligibility.*

(1) When the NHTSA Chief Counsel determines that a violation has likely occurred, the Administrator may notify the dealer, salvage auction or disposal facility in writing of the facts giving rise to the allegation of a violation and the proposed length of a suspension, if applicable, or revocation of registration, in the case of a dealer, or participation eligibility in the case of a salvage auction or disposal facility.

(2) The notice shall afford the dealer, salvage auction or disposal facility an opportunity to present data, views, and arguments, in writing and/or in person, within 30 days of the date of the notice, as to whether the violation occurred, why its registration or participation eligibility ought not to be suspended or revoked, or whether the suspension should be shorter than proposed. The Administrator may, for good cause, reduce the time allowed for response.

(3) If the Administrator decides, on the basis of the available information, that the dealer, salvage auction or disposal facility has committed a violation, the Administrator may suspend or revoke the dealer registration or the participation eligibility of the salvage auction or disposal facility.

(4) The Administrator shall notify the dealer, salvage auction or disposal facility in writing of the decision, including the reasons for it. The decision shall reflect the gravity of the offense.

(5) A suspension or revocation is effective as of the date of the Administrator's written notification, unless another date is specified therein.

(6) The Administrator shall state the period of any suspension in the notice to the dealer, salvage auction or disposal facility.

(7) There shall be no opportunity to seek reconsideration of the Administrator's decision issued under this paragraph (a).

(b) *Reinstatement of suspended registration or participation eligibility.*

(1) When a registration or participation eligibility has been suspended under this subpart, the registration or participation eligibility will be reinstated after the expiration of the period of suspension specified by the Administrator, or such earlier date as the Administrator may subsequently decide is appropriate.

(2) Reinstatement is automatically effective as of the date previously set forth in the Administrator's written notification of suspension, unless another date is specified by the Administrator in writing.

(c) *Effect of suspension or revocation of registration or participation eligibility.*

(1) If a dealer's registration or a salvage auction or disposal facility's participation eligibility is suspended or revoked, as of the date of suspension or revocation, the dealer, salvage auction or disposal facility will not be considered registered or eligible to participate in the CARS Program, and must cease participating in the program.

(2) A dealer whose registration has been suspended will not be entitled to any rights or reimbursement of funds for new transactions submitted as of the effective date of the suspension or revocation.

(3) NHTSA may take such action as appropriate, including publication, to provide notice that a dealer's registration, or salvage auction's or disposal facility's participation eligibility has been suspended or revoked.

§ 599.505 Reports and investigations.

(a) Any person may report an apparent violation of the CARS Act or regulations issued thereunder to NHTSA.

(b) NHTSA may independently monitor for violations of the CARS Act or regulations issued thereunder.

(c) When a report of an apparent violation has been received by NHTSA, or when an apparent violation has been detected by any person working for NHTSA, the matter may be investigated or evaluated by NHTSA Enforcement. If NHTSA Enforcement believes that a violation may have occurred, NHTSA Enforcement may prepare a report and send the report to the NHTSA Chief Counsel.

(d) The NHTSA Chief Counsel will review the reports prepared by NHTSA Enforcement to determine if there is sufficient information to establish a likely violation.

(1) The matter may be returned to NHTSA Enforcement for further investigation, if warranted.

(2) The Chief Counsel may close a matter. A matter may be closed if, for example, the investigation has established that a violation did not occur, the alleged violator is unknown, there is insufficient information to support the existence of a violation and little likelihood of discovering additional relevant facts, or the magnitude of the matter is, under the circumstances, including availability of resources, insufficient to be pursued further.

(3) If the Chief Counsel determines that a violation has likely occurred, the Chief Counsel may:

(i) Issue a Notice of Violation to the party, and/or

(ii) In the case of a dealer recommend that the Administrator suspend or revoke registration in the program or in the case of a salvage auction or disposal facility, recommend that the Administrator suspend or revoke participation eligibility in the program.

(4) In the case of either paragraphs (d)(3)(i) or (ii) of this section, the NHTSA Chief Counsel will prepare a case file with recommended actions. A record of any prior violations by the same person or entity, shall be forwarded with the case file.

§ 599.506 Notice of Violation.

(a) The agency has the authority to assess a civil penalty for any violation of the CARS Act or this part. The penalty may not be more than $15,000 for each violation.

(b) The Chief Counsel may issue a Notice of Violation to a party. Notice of Violation will contain the following information:

(1) The name and address of the party;

(2) The alleged violation and the applicable law or regulations violated;

(3) The amount of the maximum penalty that may be assessed for each violation;

(4) The amount of proposed penalty;

(5) A statement that payment of the proposed penalty within 30 days will settle the case without admission of liability;

(6) The place to which, and the manner in which, payment is to be made;

(7) A statement that the party may decline the Notice of Violation and that if the Notice of Violation is declined, the party has the right to a hearing prior to a final assessment of a penalty by a Hearing Officer.

(8) A statement that failure to either pay the proposed penalty on the Notice of Violation or to decline the Notice of Violation and request a hearing within 30 days of the date shown on the Notice of Violation will result in a finding of violation by default and that NHTSA will proceed with the civil penalty in the amount proposed on the Notice of Violation without processing the violation under the hearing procedures set forth in this subpart.

(c) The Notice of Violation may be delivered to the party by:

(1) Hand-delivery to the party or an employee of the party;

(2) Mailing to the party (certified mail is not required);

(3) Use of an overnight or express courier service; or

(4) Facsimile transmission or electronic mail (with or without attachments) to the party or an employee of the party.

(d) If a party submits a written request for a hearing as provided in the Notice of Violation within 30 days of the date shown on the Notice of Violation, the case file will be sent to the Hearing Officer for processing under the hearing procedures set forth in this subpart.

(e) If a party pays the proposed penalty on the Notice of Violation or an amount agreed on in compromise within 30 days of the date shown on the Notice of Violation, a finding of "resolved with payment" will be entered into the case file. Such payment shall not be an admission of liability.

(f) If the party agrees to pay the proposed penalty, but has not made payment within 30 days of the date shown on the Notice of Violation, NHTSA will enter a finding of violation by default in the matter and NHTSA will proceed with the civil penalty in the amount proposed on the Notice of Violation without processing the violation under the hearing procedures set forth in this subpart.

(g) If within 30 days of the date shown on the Notice of Violation a party fails to pay the proposed penalty on the Notice of Violation; and fails to request a hearing, then NHTSA will enter a finding of violation by default in the case file, and will assess the civil penalty in the amount set forth on the Notice of Violation without processing the violation under the hearing procedures set forth in this subpart.

(h) NHTSA's order assessing the civil penalty following a party's default is final agency action.

§ 599.507 Disclosure of evidence.

The alleged violator may, upon request, receive a free copy of all the written evidence in the case file, except material that would disclose or could lead to the disclosure of the identity of a confidential source. Following a timely request for a hearing, other evidence or material, if any, of whatever source or nature, may be examined at the Hearing Officer's offices or such other places and locations that the Hearing Officer may, in writing, direct, if there are adequate safeguards to prevent loss or tampering.

§ 599.508 Statements of matters in dispute and submission of supporting information.

(a) Within 30 days of the date shown on the Notice of Violation, the party, or counsel for the party, shall submit to NHTSA at the person or office listed in the Notice of Violation two complete copies via hand delivery, use of an overnight or express courier service, facsimile or electronic mail of:

(1) A detailed statement of factual and legal issues in dispute; and,

(2) All statements and documents supporting the party's case.

(b) One copy of the party's submission set forth above shall be labeled "For Hearing Officer."

(c) Failure to specify any non-jurisdictional issue in the party's submission will preclude its consideration.

§ 599.509 Hearing Officer.

(a) If a party timely requests a hearing after receiving a Notice of Violation, the Hearing Officer shall hear the case.

(b) The Hearing Officer is solely responsible for the case referred to him or her. The Hearing Officer has no other responsibility, direct or supervisory, for the investigation of cases referred for the assessment of civil penalties.

(c) The Hearing Officer decides each case on the basis of the information before him or her, and must have no prior connection with the case.

§ 599.510 Initiation of action before the Hearing Officer.

(a) After the Hearing Officer receives a case file from the Chief Counsel, the Hearing Officer notifies the party in writing of:

(1) The date, time and location of the hearing and whether the hearing will be conducted telephonically or at the DOT Headquarters building in Washington, D.C.;

(2) The right to be represented at all stages of the proceeding by counsel as set forth in § 599.511; and,

(3) The right to a free copy of all written evidence in the case file as set forth in § 599.507.

(b) On the request of a party, or at the Hearing Officer's direction, multiple proceedings may be consolidated if at any time it appears that such consolidation is necessary or desirable.

§ 599.511 Counsel.

A party has the right to be represented at all stages of the proceeding by counsel. A party electing to be represented by counsel must notify the Hearing Officer of this election in writing, after which point the Hearing Officer will direct all further communications to that counsel. A party represented by counsel bears all of its own attorneys' fees and costs.

§ 599.512 Hearing location and costs.

(a) Unless the party requests a hearing at which the party appears before the Hearing Officer in Washington, DC, the hearing shall be held telephonically. The hearing is held at the headquarters of the U.S. Department of Transportation in Washington, DC.

(b) The Hearing Officer may transfer a case to another Hearing Officer at a party's request or at the Hearing Officer's direction.

(c) A party is responsible for all fees and costs (including attorneys' fees and costs, and costs that may be associated with travel or accommodations) associated with attending a hearing.

§ 599.513 Hearing procedures.

(a) There is no right to discovery in any proceedings conducted pursuant to this subpart.

(b) The material in the case file pertinent to the issues to be determined by the Hearing Officer is presented by the Chief Counsel or his or her designee.

(c) The Chief Counsel may supplement the case file with information prior to the hearing. A copy of such information will be provided to the party no later than 3 days before the hearing.

(d) At the close of the Chief Counsel's presentation of evidence, the party has the right to examine, respond to and rebut material in the case file and other information presented by the Chief Counsel.

(e) In receiving evidence, the Hearing Officer is not bound by strict rules of evidence. In evaluating the evidence presented, the Hearing Officer must give due consideration to the reliability and relevance of each item of evidence.

(f) A party may present the testimony of any witness either through a written statement or a personal appearance. If a party wishes to present testimony through a personal appearance, the party is responsible for obtaining that personal appearance, including any costs associated with such appearance. The Hearing Officer may, at his or her discretion, accept a stipulation in lieu of testimony.

(g) At the close of the party's presentation of evidence, the Hearing Officer may allow the introduction of rebuttal evidence that may be presented by the Chief Counsel. The Hearing Officer may allow the party to respond to any such evidence submitted.

(h) The Hearing Officer may take notice of matters which are subject to a high degree of indisputability and are commonly known in the community or are ascertainable from readily available sources of known accuracy. Prior to taking notice of a matter, the Hearing Officer shall give the party an opportunity to show why notice should not be taken. In any case in which notice is taken, the Hearing Officer places a written statement of the matters as to which notice was taken in the record, with the basis for such notice, including a statement that the party consented to notice being taken or a summary of the party's objections.

(i) After the evidence in the case has been presented, the Chief Counsel and the party may present argument on the issues in the case. The party may also request an opportunity to submit a written statement for consideration by the Hearing Officer and for further review. If granted, the Hearing Officer shall allow a reasonable time for submission of the statement and shall specify the date by which it must be received. If the statement is not received within the time prescribed, or within the limits of any extension of time granted by the Hearing Officer, the Hearing Officer prepares the decision in the case.

(j) A verbatim transcript of the hearing will not normally be prepared. A party may, solely at its own expense, cause a verbatim transcript to be made. If a verbatim transcript is made, the party shall submit two copies to the Hearing Officer not later than 15 days of the hearing. The Hearing Officer shall include such transcript in the record.

§ 599.514 Assessment of civil penalties.

(a) Not later than 30 days following the close of the hearing, the Hearing Officer shall issue a written decision on the Notice of Violation, based on the hearing record. The decision shall set forth the basis for the Hearing Officer's assessment of a civil penalty, or decision not to assess a civil penalty. In determining the amount of the civil penalty, the severity of the violation and the intent and history of the party committing the violation shall be taken into account. The assessment of a civil penalty by the Hearing Officer shall be set forth in an accompanying final order.

(b) If the Hearing Officer assesses civil penalties in excess of $100,000.00, the Hearing Officer's decision contains a statement advising the party of the right to an administrative appeal to the Administrator. The party is advised that failure to submit an appeal within the prescribed time will bar its consideration and that failure to appeal on the basis of a particular issue will constitute a waiver of that issue in its appeal before the Administrator.

(c) The filing of a timely and complete appeal to the Administrator of a Hearing Officer's order assessing a civil penalty shall suspend the operation of the Hearing Officer's penalty.

(d) There shall be no administrative appeals of civil penalties of $100,000.00 or less.

§ 599.515 Appeals of civil penalties in excess of $100,000.00.

(a) A party may appeal the Hearing Officer's order assessing civil penalties over $100,000.00 to the Administrator within 21 days of the date of the issuance of the Hearing Officer's order.

(b) The Administrator will affirm the decision of the Hearing Officer unless the Administrator finds that the Hearing Officer's decision was unsupported by the record as a whole.

(c) If the Administrator finds that the decision of the Hearing Officer was unsupported, in whole or in part, then the Administrator may:

(1) Assess or modify a civil penalty;

(2) Rescind the Notice of Violation; or

(3) Remand the case back to the Hearing Officer for new or additional proceedings.

(d) In the absence of a remand, the decision of the Administrator in an appeal is a final agency action.

§ 599.516 Collection of assessed or compromised civil penalties.

(a) Payment of a civil penalty, whether assessed or compromised, shall be made by check, postal money order, or electronic transfer of funds, as provided in instructions by the agency. A payment of civil penalties shall not be considered a request for a hearing.

(b) The party must remit payment of any assessed civil penalty to NHTSA within 30 days after receipt of the Hearing Officer's order assessing civil penalties or, in the case of an appeal to the Administrator, within 30 days after receipt of the Administrator's decision on the appeal. Failure to make timely payment may result in the institution of appropriate action under the Federal Claims Collection Act, as amended, the

regulations issued thereunder, and other applicable law.

(c) The party must remit payment of any compromised civil penalty to NHTSA on the date and under such terms and conditions as agreed to by the party and NHTSA. Failure to pay a compromised civil penalty to NHTSA on the date and under such terms and conditions as agreed to by the party and NHTSA may either result in the institution of appropriate action under the Federal Claims Collection Act, as amended, the regulations issued thereunder, and other applicable law, or NHTSA entering a finding of violation by default and assessing a civil penalty in the amount proposed in the Notice of Violation without processing the violation under the hearing procedures set forth in this part.

§ 599.517 Other sanctions.

The procedures and penalties described in this subpart are not the only procedures and penalties that may apply to someone who violates the CARS Act or submits a false certification required by this rule. Anyone who submits false information on these forms or otherwise violates the CARS Act or this part may not only be subject to the procedures and penalties described in this subpart, but also civil and criminal penalties. Such civil and criminal penalties may include penalties three times any amount falsely claimed to be due from the United States pursuant to the False Claims Act (31 U.S.C. 3729), or imprisonment of up to 5 years and fines of up to $250,000 (18 U.S.C. 1001). In addition, NHTSA may request that the Attorney General seek appropriate injunctive relief to address violations of the CARS Act or this part.

BILLING CODE 4910–59–P

Appendix A to Part 599 – Summary of Sale/Lease and Certifications

NHTSA www.nhtsa.gov

CARS car allowance rebate system

Summary of Sale/Lease & Certifications Form

SUMMARY OF SALE OR LEASE

OMB 2127-0660 Exp. 1/31/2009

Date of Sale or Lease	
Purchaser Name(s)	
Purchaser Address	
Purchase or Lease (please specify)	
Make	
Model	
Model Year	
New Vehicle VIN	
Trade-In Vehicle VIN	
New Vehicle Base MSRP	
CARS Credit Applied ($3,500 or $4,500)	
Dealer's Best Estimate of Trade-In Vehicle Scrappage Value	
Dealer Rebate(s) or Discount(s) (please specify; if none, enter "none.")	
Manufacturer Rebate(s) or Discount(s) (please specify; if none, enter "none.")	
Other available Federal, State, or local incentive(s) or State-issued voucher(s) (please specify; if none, enter "none.")	
Other Rebate(s) or Discount(s) (please specify; if none, enter "none.")	

WARNING

This is a legal document that contains certifications under penalty of law. There are significant civil and criminal penalties for submitting false information. Please read each certification and ensure that the information that you are certifying by signing this document is, to the best of your knowledge and belief, true, accurate, and complete.

DEALER CERTIFICATIONS

The person signing this document as "Dealer" certifies under penalty of law that:

Registration in the CARS Program

- The dealer has been approved as a registered dealer under the CARS program.
- The dealer has a currently active business license under State law to operate a new automobile dealership.
- The dealer has a currently active franchise agreement with an original equipment manufacturer to sell new automobiles.

Summary of Sale or Lease

- The summary of sale or lease set forth above is true and correct.

Purchaser and Trade-In Vehicle Eligibility for the CARS Program

- I have verified the identity of the person signing this document under "Purchaser" (hereinafter simply "Purchaser").
- I have verified that the trade-in vehicle is in drivable condition, and I or an employee under my direction or supervision has operated the trade-in vehicle to confirm that the trade-in vehicle is in drivable condition.
- I have verified that the trade-in vehicle has been continuously insured for a period of not less than one (1) year prior to the date of this transaction.
- I have verified that the Purchaser has been the registered owner of the trade-in vehicle continuously for a period of not less than one (1) year prior to the date of this transaction.
- I have observed the trade-in vehicle's date of manufacture (both month and year) as it appears on the trade-in vehicle's safety standard certification label, and have verified that the trade-in vehicle was manufactured less than 25 years before the date of the trade-in.
- I have verified that the trade-in vehicle's fuel economy is eligible for the CARS program.

New Vehicle Eligibility for the CARS Program

- The new vehicle is being purchased or, in the case of a lease, leased for a period of not less than five (5) years.
- I have verified that the CARS program credit amount requested (i.e., either $3,500.00 or $4,500.00, as applicable) corresponds to the difference between the trade-in vehicle's fuel economy and the new vehicle's fuel economy under the requirements of the CARS program.
- The new vehicle has a base manufacturer's suggested retail price (MSRP) as shown on the Monroney label affixed to the new vehicle of $45,000 or less (exclusive of any accessories, optional equipment, taxes or destination charges).

Transaction Conforms to the Requirements of the CARS Program

- I have reduced the price of the new vehicle that is being purchased or leased by the CARS Program credit amount requested (i.e., either $3,500.00 or $4,500.00, as applicable).

- I have disclosed to the Purchaser the best estimate of the scrappage value of the trade-in vehicle.
- I have retained no more than $50.00 of the scrappage value as payment for any of the dealer's administrative costs in connection with this CARS transaction.
- I have not charged the Purchaser any additional fees for participating in the CARS program in this transaction.
- I have applied the credit under the CARS program in addition to any other rebate or discount advertised by the dealer or offered by the manufacturer for the new vehicle, and have not used the CARS program credit to offset any such other rebate or discount.
- I have not reduced the value of the CARS program credit amount requested (i.e., either $3,500.00 or $4,500.00, as applicable) by any other available Federal, State, or local incentive or a State-issued voucher for the purchase or lease of a new fuel efficient automobile.

Disposal of the Trade-in Vehicle

- The trade-in vehicle has not been, and will not be, sold, leased, exchanged or otherwise disposed of for use as an automobile in the United States or in any other country.
- I have either: (a) rendered the engine block of the trade-in vehicle inoperable under the procedures of the CARS Program prior to further transfer of the trade-in vehicle; or, (b) this transaction occurred prior to July 24, 2009, and I have submitted to NHTSA the necessary proof as attachments under Miscellaneous Documents that the engine block has been crushed or shredded.
- I have transferred or will transfer the trade-in vehicle, including the engine block, to either: (a) a CARS program participating disposal facility that will crush or shred the trade-in vehicle; or, (b) to a participating salvage auction that will transfer the vehicle to such a disposal facility.
- I have provided the disposal facility and/or salvage auction information and written notice that it is responsible for the removal and appropriate disposition of refrigerants, antifreeze, lead products, mercury switches, and such other toxic or hazardous vehicle components prior to the crushing or shredding of an eligible trade-in vehicle, in accordance with all applicable Federal and State requirements.

PURCHASER CERTIFICATIONS

All persons signing this document as "Purchaser" certifies under penalty of law that:

Summary of Sale or Lease

- The summary of sale or lease set forth above is true and correct.

Purchaser and Trade-In Vehicle Eligibility for the CARS Program

- The information I have provided to the dealer verifying my identity is true and correct.
- I have not previously participated in the CARS program.
- The trade-in vehicle is in drivable condition, and an employee of the dealer has operated the trade-in vehicle to confirm that the trade-in vehicle is in drivable condition.
- The trade-in vehicle has been continuously insured for a period of not less than one (1) year prior to the date of this transaction.
- I have been the registered owner of the trade-in vehicle continuously for a period of not less than one (1) year prior to the date of this transaction.
- The trade-in vehicle was manufactured less than 25 years before the date of this transaction.
- The trade-in vehicle's fuel economy is eligible for the CARS program.

- The trade-in vehicle has not been a part of any previous CARS program transaction.

I certify under penalty of law that:

- ***I have authority to execute this document,***
- ***I have read each of the foregoing certifications,***
- ***I understand that payment of the CARS program credit amount is conditioned on compliance with these certifications,***
- ***This document, and all attachments, were either prepared by me or prepared under my direction or supervision,***
- ***The information set forth in this document, and all attachments, is, to the best of my knowledge and belief, true, accurate, and complete,***
- ***I am aware that there are significant penalties for submitting false information, including the possibility of civil penalties under the CARS program, suspension or revocation of continued participation in the CARS program, as well as fines and/or imprisonment.***

DATE: _____, 2009 DEALER

_____
(signature)

_____
(print name)

DATE: _____, 2009 PURCHASER

_____
(signature)

_____
(print name)

DATE: _____, 2009 PURCHASER
(ADDITIONAL) (if any)

_____
(signature)

_____
(print name)

Privacy Act Statement

This notice is provided pursuant to the Privacy Act of 1974, 5 USC § 552a: This information is solicited under the authority of Public Law 111-32, 123 Stat. 1859. Furnishing the information is voluntary, but failure to provide all or part of the information may result in disapproval of your request for a credit on this purchase or lease transaction under the Cars Program. The principal purposes for collecting the information are to determine if purchase or lease transactions are eligible for credits under the CARS Program, to ensure proper disposal of trade-in vehicles, to

prevent, identify and penalize fraud in connection with the Program, and to update an existing government database of Vehicle Identification Numbers. If you complete the optional survey, the survey information will be used to report to Congress on the Program. Other routine uses are published in the Federal Register at 65 F.R. 19476 (April 11, 2000), available at: www.dot.gov/privacy.

Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2127-0660. Public reporting for this collection of information is estimated to be approximately XX minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, National Highway Traffic Safety Administration, 1200 New Jersey Ave, S.E., Washington, DC, 20590.

Appendix B to Part 599 - Engine Disablement Procedures for the CARS Program

Engine Disablement Procedures for the CARS Program

THIS PROCEDURE IS NOT TO BE USED BY THE VEHICLE OWNER

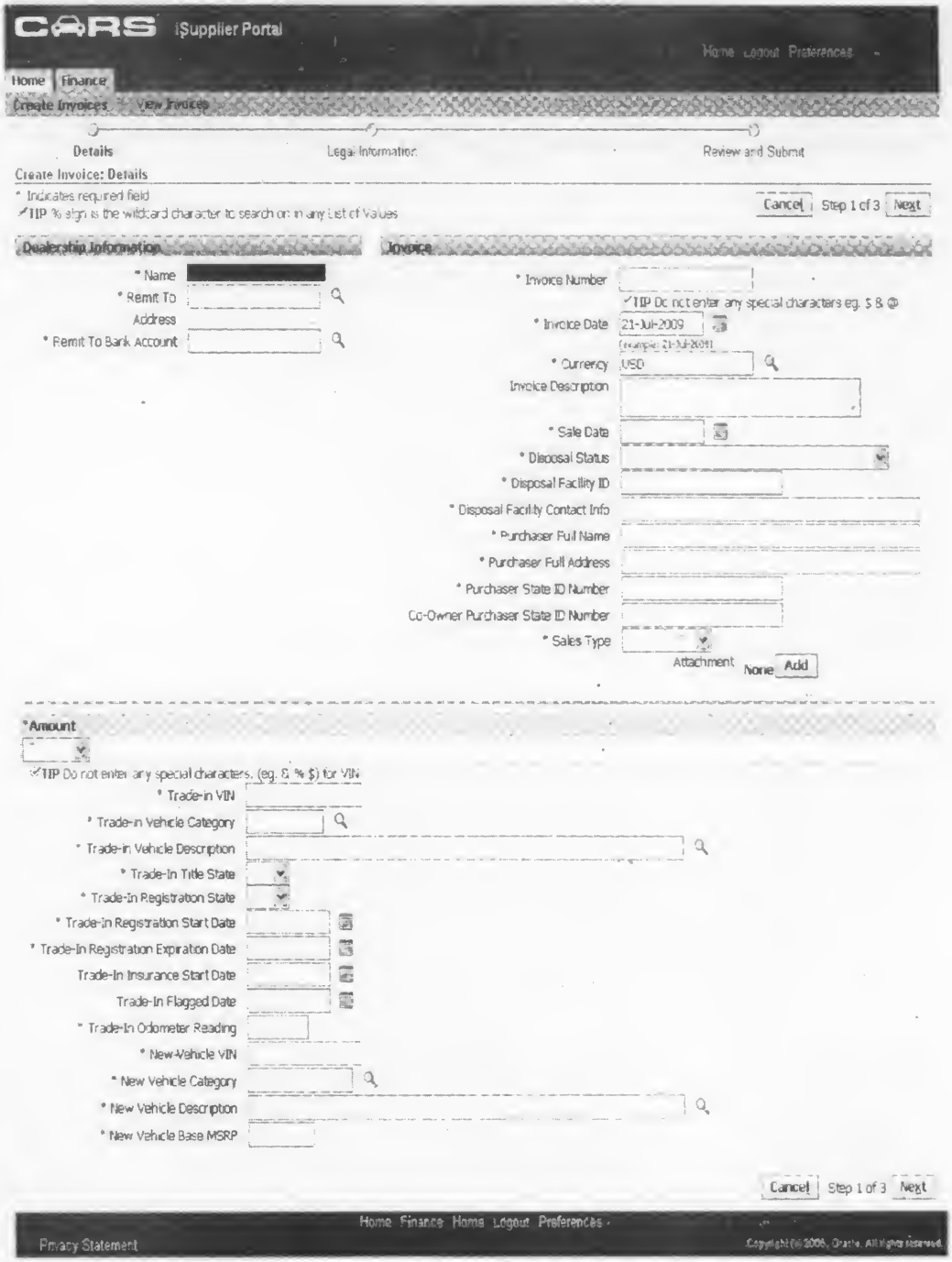
Perform the following procedure to disable the vehicle engine.

Since the vehicle will not be drivable after this procedure is performed, consider where the procedure will be performed and how the vehicle will be moved after the procedure is complete.

1. Obtain solution of 40% sodium silicate/60% water. (The Sodium Silicate (SiO_2/Na_2O) used in the solution must have a weight ratio of 3.0 or greater.)
2. Drain engine oil for environmentally appropriate disposal.
3. Install the oil drain plug.
4. Pour enough solution in the engine through the oil fill for the oil pump to circulate the solution throughout the engine. Start by adding 2 quarts of the solution, which should be sufficient in most cases.
   CAUTION: Wear goggles and gloves. Appropriate protective clothing should be worn to prevent silicate solution from coming into contact with the skin.
5. Replace the oil fill cap.
6. Start the engine.
7. Run engine at approximately 2000 rpm (for safety reasons do not operate at high rpm) until the engine stops. (Typically the engine will operate for 3 to 7 minutes. As the solution starts to affect engine operation, the operator will have to apply more throttle to keep the engine at 2000 rpm.)
8. Allow the engine to cool for at least 1 hour.
9. With the battery at full charge or with auxiliary power to provide the power of a fully charged battery, attempt to start the engine.
10. If the engine will not operate at idle, the procedure is complete.
11. If the engine will operate at idle, repeat steps 6 through 10 until the engine will no longer idle.
12. Attach a label to the engine that legibly states the following:

> This engine is from a vehicle that is part of the Car Allowance Rebate System (CARS). It has significant internal damage caused by operating the engine with a sodium silicate solution (liquid glass) instead of oil.

Appendix C to Part 599 – Electronic Transaction Screen



CARS car allowance rebate system

Appendix D to Part 599 – CARS Purchaser Survey

Survey of Consumer Response to

(Commonly known as 'Cash for Clunkers')

NHTSA www.nhtsa.gov

OMB 2127-0659 Exp. 1/31/2009

Please answer the following 3 questions regarding your trade-in transaction. Your answers are for program evaluation purposes only and will not influence your eligibility in any way. Please put an X in the box by the appropriate answer.

Question #1: If you were not offered the CARS program trade-in incentive, would you still have traded in your current vehicle to purchase a new or used vehicle this month?

☐ a) Yes

☐ b) No

If no, when were you planning to trade-in, sell or dispose of your vehicle?

☐ Within the next year	☐ 4 years	☐ 8 years
☐ In about 1 year	☐ 5 years	☐ 9 years
☐ 2 years	☐ 6 years	☐ 10 years
☐ 3 years	☐ 7 years	☐ More than 10 years

Question # 2: If you were not offered the CARS program trade-in incentive, when you disposed of this vehicle, would you have purchased another vehicle?

☐ a) No

☐ b) Yes, a new vehicle (Please select one type below)

☐ c) Yes, a used vehicle (Please select one type below)

☐ a) **a subcompact car** (for example a Honda Fit, or a Toyota Yaris, etc.)
☐ b) **a compact car** (ex. Ford Focus, Nissan Sentra, Toyota Corolla, Honda Civic, etc.)
☐ c) **a mid-sized car** (ex. Chevrolet Malibu, Nissan Altima, Toyota Camry, etc.)
☐ d) **a large car** (ex. Chrysler 300, Ford Crown Victoria, etc.)
☐ e) **a small SUV** (ex. Honda CR-V, Ford Escape, etc.)
☐ f) **a mid-sized SUV** (ex. Ford Explorer, Honda Pilot, etc.)
☐ g) **a large SUV** (ex. Chevrolet Suburban, Ford Expedition, etc.)
☐ h) **a small pickup** (ex. Ford Ranger, etc.)
☐ i) **a mid-sized pickup** (ex. Dodge Dakota, Toyota Tacoma, etc.)
☐ j) **a large pickup** (ex. Chevrolet Silverado, Ford F-150, etc.)
☐ k) **a full sized passenger van** (ex. Ford E-Series, Chevrolet Express, etc.)
☐ l) **a full sized cargo van** (ex. Chevrolet Express, Dodge Sprinter, etc.)
☐ m) **a mini-van** (ex. Toyota Sienna, Dodge Caravan, etc.)
☐ n) **other type** (specify) _____

Question #3: What is your best estimate of the number of miles you drove the traded-in vehicle during the past 12 months?

☐ 0 – 2,499	☐ 7,500 – 9,999	☐ 15,000 – 17,499
☐ 2,500 – 4,999	☐ 10,000 – 12,499	☐ 17,500 – 19,999
☐ 5,000 – 7,499	☐ 12,500 – 14,999	☐ 20,000 or more

Thank you for participating in the CARS Initiative Consumer Response Survey!
Please contact the CARS Hotline at (866)-CAR-7891 or TTY at (800)-424-9153 if you wish to provide any comments.

Appendix E to Part 599 - Disposal Facility Certification Form

NHTSA www.nhtsa.gov

Disposal Facility Certification Form

OMB 2127-0658 Exp. 1/31/2009

CARS car allowance rebate system

Disposal Facility Information
CARS Invoice No. (if available)
End of Life Vehicle Solutions (ELVS) Identification No. (if assigned)
Legal Business Name
Doing Business As (DBA)/Common Name (if different from Legal Business Name)
Address (including Street, City, State, ZIP Code)

Trade-In Vehicle Information		
Make	Model	Model Year
Trade-In Vehicle VIN	Odometer Mileage	

Dealer or Salvage Auction Transferring Trade-In Vehicle Information		
Legal Business Name		
Doing Business As (DBA)/Common Name (if different from Legal Business Name)		
Address (including Street, City, State, ZIP Code)		
Check one: [ ] Dealer [ ] Salvage Auction	Contact Name and Title	Contact Phone and Email
Address (including Street, City, State, ZIP Code)	Date this Facility Received the Trade-In Vehicle from Dealer or Salvage Auction	

WARNING

This is a legal document that contains certifications under penalty of law. There are significant civil and criminal penalties for submitting false information. Please read each certification and ensure that the information that you are certifying by signing this document is, to the best of your knowledge and belief, true, accurate, and complete.

The person signing this document certifies under penalty of law that:

- This facility appears on the CARS program Disposal Facility List.
- This facility participates in the End of Life Vehicle Solutions (ELVS) program and the ELVS identification number listed above is true and correct. (Excluding facilities located in Maine or a U.S. territory).
- This facility is capable of crushing or shredding the trade-in vehicle, either with its own equipment or by use of a mobile crusher.
- This facility meets all applicable Federal and State laws.
- This facility has a currently active State license to operate as a disposal facility in the State where it is located.
- This facility received the trade-in vehicle bearing the above listed Vehicle Identification Number (VIN) on the date listed above from the dealer or salvage auction listed above.
- I, or an employee of this facility under my direction or supervision, will report to the National Motor Vehicle Title Information System (NMVTIS) the status of the trade-in vehicle as a scrap vehicle not more than seven (7) days after the above-listed date of receipt.
- The trade-in vehicle has not been, and will not be, sold, leased, exchanged or otherwise disposed of for use as an automobile in the United States or in any other country.
- This facility will not transfer the trade-in vehicle to another disposal facility prior to its crushing or shredding.
- This facility will not sell or transfer the trade-in vehicle's engine block and drive train (unless with respect to the drive train, the transmission, drive shaft, or rear end are sold as separate parts) at any time prior to its crushing or shredding.
- I, or an employee of this facility under my direction or supervision, will dispose of refrigerants, antifreeze, lead products, mercury switches, and such other toxic or hazardous vehicle components prior to the crushing or shredding of the trade-in vehicle, in accordance with all applicable Federal and State requirements.
- If this facility participates in ELVS, I, or an employee of this facility under my direction or supervision, will return all mercury switches in accordance with the procedures of the National Vehicle Mercury Switch Recovery Program (NVMSRP).
- I, or an employee of this facility under my direction or supervision, will crush or shred (or cause to be crushed or shredded on our premises), the trade-in vehicle within one-hundred eighty (180) days after the above-listed date of receipt.
- I, or an employee of this facility under my direction or supervision, will report to NMVTIS that this facility crushed or shredded the trade-in vehicle not more than seven (7) days after the date of crushing or shredding. (Note: The CARS program does not require that this facility, or any other entity which may subsequently receive the crushed trade-in vehicle, subsequently submit to NHTSA a CARS program Disposal Facility Certification Form, nor does it require that this facility, or any other entity which may subsequently receive the crushed trade-in vehicle, report to NMVTIS that the crushed trade-in vehicle has been shredded).

I certify under penalty of law that:

- ***I have authority to execute this document,***
- ***I have read each of the foregoing certifications,***
- ***This document, and any attachments, were either prepared by me or prepared under my direction or supervision,***
- ***The information set forth in this document, and any attachments, is, to the best of my knowledge and belief, true, accurate, and complete,***
- ***I am aware that there are significant penalties for submitting false information, including the possibility of civil penalties under the CARS program, suspension or revocation of continued participation in the CARS program, as well as fines and/or imprisonment.***

DATE: _____, 2009

DISPOSAL FACILITY

_____

(signature)

_____

(print name)

_____

(title)

_____

(contact phone and e-mail)

Privacy Act Statement

This notice is provided pursuant to the Privacy Act of 1974, 5 USC § 552a: This information is solicited under the authority of Public Law 111-32, 123 Stat. 1859. Furnishing the information is voluntary, but failure to provide all or part of the information may result in disapproval of a request for a credit on this purchase or lease transaction under the Cars Program. The principal purposes for collecting the information are to ensure proper disposal of trade-in vehicles, to prevent, identify and penalize fraud in connection with the Program, and to update an existing government database of Vehicle Identification Numbers. Other routine uses are published in the Federal Register at 65 F.R. 19476 (April 11, 2000), available at: www.dot.gov/privacy.

Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2127-0658. Public reporting for this collection of information is estimated to be approximately XX minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, National Highway Traffic Safety Administration, 1200 New Jersey Ave, S.E., Washington, DC, 0590.

Appendix F to Part 599 – Salvage Auction Certification Form

NHTSA www.nhtsa.gov

Salvage Auction Certification Form

OMB 2127-0658 Exp. 1/31/2009

CARS car allowance rebate system

Salvage Auction Information		
CARS Invoice No. (if available)		
Legal Business Name		
Doing Business As (DBA)/Common Name (if different from Legal Business Name)		
Address (including Street, City, State, ZIP Code)		
Trade-In Vehicle Information		
Make	Model	Model Year
Trade-In Vehicle VIN	Odometer Mileage	
Dealer Transferring Trade-In Vehicle Information		
Legal Business Name		
Doing Business As (DBA)/Common Name (if different from Legal Business Name)		
Address (including Street, City, State, ZIP Code)		
Contact Name and Title	Contact Phone and Email	
Address (including Street, City, State, ZIP Code)	Date this Salvage Auction Received the Trade-In Vehicle from Dealer	

WARNING

This is a legal document that contains certifications under penalty of law. There are significant civil and criminal penalties for submitting false information. Please read each certification and ensure that the information that you are certifying by signing this document is, to the best of your knowledge and belief, true, accurate, and complete.

The person signing this document certifies under penalty of law that:

- This facility meets all applicable Federal and State laws.
- This facility has a currently active State license to conduct business as a salvage auction in the State where it is located.
- This facility received the trade-in vehicle bearing the above listed Vehicle Identification Number (VIN) on the date listed above from the dealer listed above.
- I, or an employee of this facility under my direction or supervision, will report to the National Motor Vehicle Title Information System (NMVTIS) the status of the trade-in vehicle within three (3) days after the date the dealer consigns the trade-in vehicle, or prior to auction (whichever is earlier).
- This facility will limit any auction sale of the trade-in vehicle solely to disposal facilities that appear on the CARS program Disposal Facility List.
- The trade-in vehicle has not been, and will not be, sold, leased, exchanged or otherwise disposed of for use as an automobile in the United States or in any other country.
- This facility will not remove any parts from the trade-in vehicle.
- This facility will not transfer the trade-in vehicle at any time prior to its sale at auction, and then only to a disposal facility that appears on the CARS program Disposal Facility List.

I certify under penalty of law that:

- ***I have authority to execute this document,***
- ***I have read each of the foregoing certifications,***
- ***This document, and any attachments, were either prepared by me or prepared under my direction or supervision,***
- ***The information set forth in this document, and any attachments, is, to the best of my knowledge and belief, true, accurate, and complete,***
- ***I am aware that there are significant penalties for submitting false information, including the possibility of civil penalties under the CARS program, suspension or revocation of continued participation in the CARS program, as well as fines and/or imprisonment.***

DATE: _____, 2009

SALVAGE AUCTION

_____
(signature)

_____
(print name)

_____
(title)

_____
(contact phone and e-mail)

Privacy Act Statement

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Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2127-0658. Public reporting for this collection of information is estimated to be approximately XX minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, National Highway Traffic Safety Administration, 1200 New Jersey Ave, S.E., Washington, DC, 20590.

Issued on: July 23, 2009.

Ronald L. Medford,

Acting Deputy Administrator.

[FR Doc. E9–17994 Filed 7–24–09; 4:15 pm]

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Federal Register

Wednesday,
July 29, 2009

Part V

The President

Federal Register
Vol. 74, No. 144
Wednesday, July 29, 2009

Presidential Documents

Title 3—

The President

Proclamation 8398 of July 24, 2009

Anniversary of the Americans with Disabilities Act, 2009

By the President of the United States of America

A Proclamation

Today we celebrate the 19th anniversary of the enactment of the historic Americans with Disabilities Act (ADA). Signed into law on July 26, 1990, this landmark legislation established a clear mandate against discrimination on the basis of disability so that people with disabilities would have an equal opportunity to achieve the American Dream.

Our Nation is once again poised to make history for people with disabilities. I am proud to announce that the United States will sign the United Nations Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly in New York on December 13, 2006. The Convention is the first new human rights convention of the 21st century adopted by the United Nations, and it represents a paradigm shift in protecting the human rights of 650 million people with disabilities worldwide. We proudly join the international community in further advancing the rights of people with disabilities.

As we reflect upon the past and look toward a brighter future, we recognize that our country has made great progress. More than ever before, Americans with disabilities enjoy greater access to technology and economic self-sufficiency. More communities are accessible, more children with disabilities learn alongside their peers, and more employers recognize the capabilities of people with disabilities.

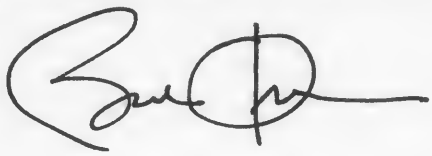
Despite these achievements, much work remains to be done. People with disabilities far too often lack the choice to live in communities of their choosing; their unemployment rate is much higher than those without disabilities; they are much likelier to live in poverty; health care is out of reach for too many; and too many children with disabilities are denied a world-class education.

My Administration has met these challenges head-on. We have launched the "Year of Community Living" to help people with disabilities live wherever they choose. We have nearly doubled the funding for the Individuals with Disabilities Education Act. I was proud to sign the groundbreaking Christopher and Dana Reeve Paralysis Act and the Children's Health Insurance Reauthorization Act, which provides health insurance to millions of additional children. I also lifted the ban on stem cell research. These measures demonstrate our commitment to leveling the playing field for every person with a disability. My Administration will not rest on these accomplishments, and we will continue to focus on improving the lives of people with disabilities. I encourage States, localities, and communities across the country to cultivate an environment in which the 54 million Americans living with a disability are valued and respected.

Americans have repeatedly affirmed the importance of protecting the human rights and dignity of every member of this great country. Through the steps we have taken, we will continue to build on the ADA and demonstrate our ongoing commitment to promoting, protecting, and ensuring the full enjoyment of all human rights and fundamental freedoms by people with disabilities.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim July 26, 2009, as the Anniversary of the Americans with Disabilities Act. I call on Americans across our country to celebrate the progress we have made in protecting the civil rights of people with disabilities and to recognize the step forward we make with the signing of the United Nations Convention on the Rights of Persons with Disabilities. Inspired by the advances of the last 19 years, let us commit to greater achievements in the years ahead.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of July, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-fourth.



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Federal Register
Vol. 74, No. 144
Wednesday, July 29, 2009

Presidential Documents

Title 3—

The President

Proclamation 8399 of July 24, 2009

National Korean War Veterans Armistice Day, 2009

By the President of the United States of America

A Proclamation

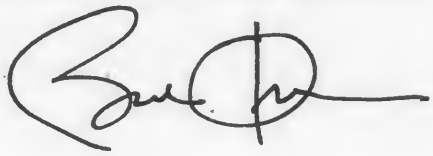
Fifty-six years after the signing of the Military Armistice Agreement at Panmunjom, Americans remain grateful for the courage and sacrifice of our Korean War veterans. More than 600,000 United States and allied combatants lost their lives in Korea during the 3 years of bitter warfare that ended on July 27, 1953. Many were also injured, taken as prisoners of war, and missing in action. These dedicated servicemen and women, under the banner of the United Nations, fought to secure the blessings of freedom and democracy on the Korean Peninsula, and they deserve our unending respect and gratitude.

Every day we are reminded of the selfless service of these veterans. The Korean War Veterans Memorial stands in our Nation's Capital as an enduring tribute to them. Marching among juniper bushes and rows of granite, Soldiers, Marines, Sailors, Airmen, and Coast Guardsmen silently remind all who glimpse their faces of the great challenges that so many Americans overcame. The strong partnership between the United States and the Republic of Korea is also a proud testament to our men and women in uniform.

Today we remember and honor the valor of Korean War veterans and the extraordinary sacrifices that they and their families made in the cause of peace.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim July 27, 2009, as National Korean War Veterans Armistice Day. I call upon all Americans to observe this day with appropriate ceremonies and activities that honor and give thanks to our distinguished Korean War veterans. I also ask Federal departments and agencies and interested groups, organizations, and individuals to fly the flag of the United States at half-staff on July 27, 2009, in memory of the Americans who died as a result of their service in Korea.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of July, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-fourth.



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Federal Register

Vol. 74, No. 144

Wednesday, July 29, 2009

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FEDERAL REGISTER PAGES AND DATE, JULY

CFR PARTS AFFECTED DURING JULY

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

1054.....32479
1060.....32479
1065.....32479
1068.....32479
1200.....36430

41 CFR

Ch. 301.....35807

42 CFR

Proposed Rules:
34.....31798
73.....33401
410.....33403, 33520, 35232
411.....33403, 33520
414.....33403, 33520
415.....33403, 33520
416.....35232
419.....35232
431.....34468
447.....34468
457.....34468
485.....33403, 33520

44 CFR

17.....34495
62.....36611
64.....31857, 35809
65.....33365
67.....33368, 34697

Proposed Rules:
67.....31649, 31656, 32480

45 CFR

612.....31622

46 CFR

8.....32088
401.....35812

Proposed Rules:
404.....35838
535.....31666

47 CFR

1.....36948
9.....31860
52.....31630
64.....37624
73.....32466, 34262
300.....31638

Proposed Rules:
Ch. 1.....32093, 36446
52.....31667
73.....32102, 32489, 32490, 32856, 34291
101.....36134

48 CFR

Ch. 1.....31556, 31565, 34206
2.....31557
4.....31561
8.....31557
9.....31557, 31561, 31564
13.....31557
17.....31557, 34206
22.....34206
36.....31557, 34206
42.....31557
52.....31561
53.....31557
201.....37625
202.....34263, 37626, 37642
204.....34264, 37642, 37644, 37645
207.....34265, 37625, 37648
209.....34266
212.....34263, 34269, 35825, 37626
215.....37625
217.....34270, 37642, 37649
219.....34264, 37644
225.....34264, 37626, 37650
234.....34263
235.....37648
236.....37645
237.....34266, 37625, 37645
239.....34269, 37645
245.....37645
247.....37652
252.....34264, 34266, 37626, 37642, 37645, 37648, 37649, 37650, 37652
253.....37644
Ch. 9.....36358
1537.....37173
1552.....37173

Proposed Rules:
2.....33953
17.....33953
22.....33953
36.....33953
52.....33953
215.....37669
216.....34292
217.....37669
243.....37669
704.....32857
713.....32857
714.....32857
715.....32857
744.....32857
752.....32857

49 CFR

209.....35131
211.....35131
265.....33923
356.....36614
365.....36614
374.....36614
390.....37653
512.....37878
571.....35131, 37122, 37176
599.....37878
1503.....36030

Proposed Rules:
191.....31675
192.....31675, 34707, 36139
193.....31675, 36139
195.....31675, 36139
229.....35950, 36152
234.....35950, 36152
235.....35950, 36152
236.....35950, 36152
Ch. V.....31812
571.....31387

50 CFR

17.....32857
100.....34696
217.....35136
622.....33170
648.....32466, 35826
660.....31874, 33372, 34700, 37176, 37177
679.....32469, 33923, 34701, 35827, 36950, 37654, 37655, 37656
697.....37530

Proposed Rules:
17.....31389, 32308, 32352, 32490, 32510, 32514, 33957, 34539, 36152, 37314
20.....36870
21.....36158
22.....36158
100.....36131
218.....32264, 33828, 33960
223.....37671
224.....37671, 37674
226.....36995
229.....36058, 36892
300.....32521
600.....36892
622.....31906, 32528
635.....36892
648.....33986
665.....34707

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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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H.R. 2632/P.L. 111–41
Korean War Veterans Recognition Act (July 27, 2009; 123 Stat. 1962)
Last List July 7, 2009

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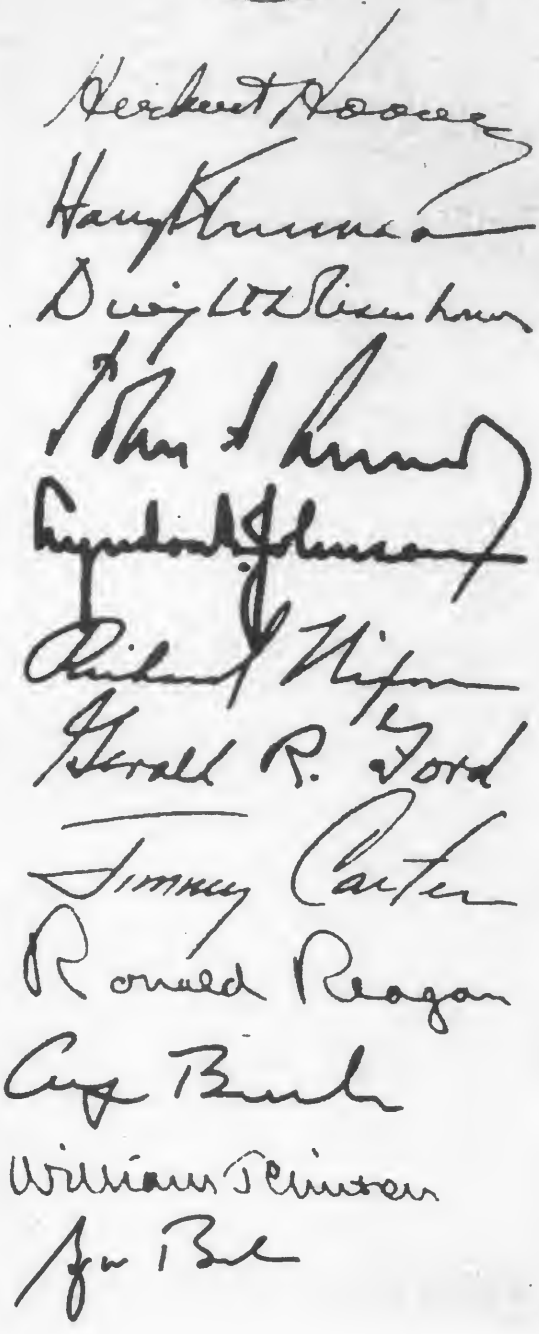

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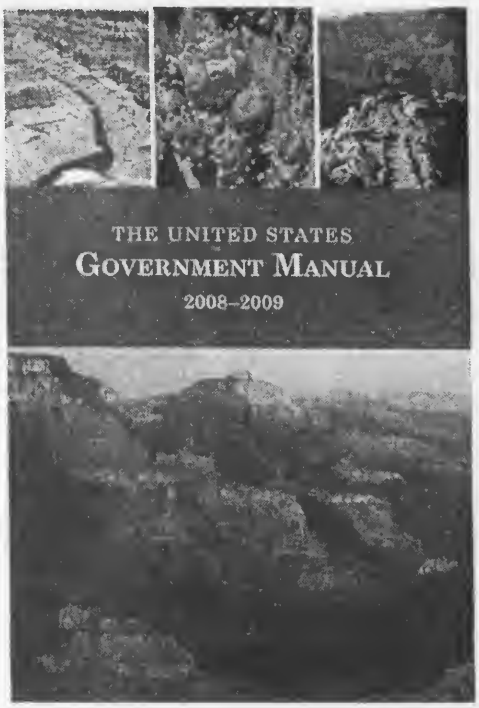

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