Federal Register

7–21–06 Friday
Vol. 71 No. 140 July 21, 2006

United States Government Printing Office
SUPERINTENDENT OF DOCUMENTS
Washington, DC 20402

OFFICIAL BUSINESS
Penalty for Private Use, $300

PERIODICALS
Postage and Fees Paid
U.S. Government Printing Office
(ISSN 0097-6326)

Federal Register

7–21–06 Friday
Vol. 71 No. 140 July 21, 2006

Pages 41345–41722

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.archives.gov*.

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge as one of the databases on GPO Access, a service of the U.S. Government Printing Office.

The online edition of the **Federal Register** *www.gpoaccess.gov/nara*, available through GPO Access, is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, Number 1 (January 2, 1994) forward.

For more information about GPO Access, contact the GPO Access User Support Team, call toll free 1-888-293-6498; DC area 202-512-1530; fax at 202-512-1262; or via e-mail at *gpoaccess@gpo.gov*. The Support Team is available between 7:00 a.m. and 9:00 p.m. Eastern Time, Monday–Friday, except official holidays.

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: New Orders, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov*.

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 71 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Printing Office, Washington DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	202–512–1800
Assistance with public subscriptions	202–512–1806
General online information	**202–512–1530; 1–888–293–6498**

Single copies/back copies:

Paper or fiche	202–512–1800
Assistance with public single copies	1–866–512–1800 (Toll-Free)

FEDERAL AGENCIES

Subscriptions:

Paper or fiche	202–741–6005
Assistance with Federal agency subscriptions	202–741–6005

FEDERAL REGISTER WORKSHOP

THE FEDERAL REGISTER: WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: Sponsored by the Office of the Federal Register.

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

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

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

WHEN: Tuesday, August 8, 2006
9:00 a.m.–Noon

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

RESERVATIONS: (202) 741–6008

Contents

Federal Register
Vol. 71, No. 140
Friday, July 21, 2006

Separate Parts In This Issue

Reader Aids

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

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

CFR PARTS AFFECTED IN THIS ISSUE

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

5 CFR
Proposed Rules:
553.....41376

7 CFR
916.....41345
917.....41345

9 CFR
55.....41682
81.....41682

14 CFR
97 (2 documents).....41353, 41355

17 CFR
Proposed Rules:
242.....41710

26 CFR
1.....41357
Proposed Rules:
301.....41377

29 CFR
2520.....41359
Proposed Rules:
2201.....41384
2520.....41392

30 CFR
Proposed Rules:
202.....41516
206.....41516
210.....41516
217.....41516
218.....41516

33 CFR
Proposed Rules:
100.....41407

40 CFR
Proposed Rules:
50.....41409

41 CFR
101-48.....41369
102-41.....41369

43 CFR
Proposed Rules:
3200.....41542
3280.....41542

50 CFR
Proposed Rules:
17.....41410

Rules and Regulations

Federal Register
Vol. 71, No. 140
Friday, July 21, 2006

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916 and 917

[Docket No. AO–90–A7; FV05–916–1]

Nectarines and Peaches Grown in California; Order Amending Marketing Order Nos. 916 and 917

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule amends Marketing Orders Nos. 916 and 917 (orders), which regulate the handling of nectarines and peaches grown in California. The amendments are based on those proposed by the Nectarine Administrative Committee (NAC), the Peach Commodity Committee (PCC), and the Control Committee (part of M.O. No. 917) (Committees), which are responsible for local administration of orders 916 and 917. The amendments to order 917 only apply to peaches. The amendments would: update definitions for "handle", "grower", and add a definition for "pure grower" to both orders; increase committee membership of the NAC from eight to thirteen members and modify sections of order 916 to conform to the increased membership; eliminate the Shippers Advisory Committee in order 916; allow the Control Committee under order 917 to be suspended if the provisions of one commodity are suspended and transfer applicable duties and responsibilities to the remaining Commodity Committee; authorize interest and late payment charges on assessments paid late in both orders; and other related amendments. With the exception of the proposal to allow the Peach Commodity Committee to borrow funds, all of the proposals were favored by nectarine and peach growers in a mail referendum, held March 6 through 24, 2006. The amendments are intended to streamline and improve the administration, operation, and functioning of the orders.

DATES: Effective January 1, 2007, the suspension of the regulatory text for §§ 917.4, 917.18, and 917.25 that were suspended effective April 4, 1994, at 59 FR 10055, March 3 1994, is lifted.

This rule is effective August 21, 2006, for §§ 916.15 and 916.41 of Marketing Order 916 and §§ 917.29, 917.35, and 917.37 of Marketing Order 917. For §§ 916.5, 916.9, 916.11, 916.12, 916.16, 916.20, 916.22, 916.25 and 916.32 of Marketing Order 916, and §§ 917.4, 917.5, 917.6, 917.8, 917.14, 917.18, 917.22, 917.24 and 917.25 of Marketing Order 917, this rule is effective January 1, 2007.

Effective January 1, 2007, certain regulatory text of §§ 917.4, 917.18, and 917.25 are suspended.

FOR FURTHER INFORMATION CONTACT: Melissa Schmaedick, Marketing Order Administration Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, Post Office Box 1035, Moab, UT 84532, telephone: (435) 259–7988, fax: (435) 259–4945; or Kathleen M. Finn, 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.

Small businesses may request information on this proceeding 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.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on January 25, 2005 and published in the January 28, 2005 issue of the **Federal Register** (70 FR 4041); Recommended Decision and Opportunity to File Written Exceptions issued on November 18, 2005, and published in the November 29, 2005, issue of the **Federal Register** (70 FR 71734); and Secretary's Decision and Referendum Order issued on February 15, 2006, and published in the February 22, 2006 issue of the **Federal Register** (71 FR 8994).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

Preliminary Statement

This final rule was formulated on the record of a public hearing held on February 15 and 16, 2005, in Fresno, California. Notice of this hearing was issued January 25, 2005 and published in the **Federal Register** on January 28, 2005 (70 FR 4041). The hearing was held to consider the proposed amendment of Marketing Orders 916 and 917, hereinafter referred to the "orders."

The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the "Act," and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

The notice of hearing contained numerous order changes jointly proposed by the Nectarine Administrative Committee, the Peach Commodity Committee, and the Control Committee (order 917), which are responsible for local administration of orders 916 and 917. Marketing order 917 regulates both California pears and peaches. However, the amendments to order 917 only apply to peaches. The pear provisions of the order have been suspended since 1994. Because the Pear Commodity Committee and the pear provisions are suspended, the Pear Commodity Committee did not participate in any amendment discussions.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of AMS on November 18, 2005, filed with the Hearing Clerk, U.S. Department of Agriculture, a Recommended Decision and Opportunity to File Written Exceptions thereto by December 19, 2005.

One exception was filed on behalf of the proponents during the exception period. The exception expressed general support for the proposals, including modifications to those proposals recommended by USDA in its Recommended Decision.

A Secretary's Decision and Referendum Order was issued on February 15, 2006, directing that a referendum be conducted during the period March 6 through March 24, 2006, among peach and nectarine growers to

determine whether they favored the proposed amendments to the orders. To become effective, the amendments had to be approved by at least two-thirds of those producers voting or by voters representing at least two-thirds of the volume of peaches or nectarines represented by voters voting in the referendum. Voters voting in the referendum favored all but one of the amendments proposed by the Committees.

The amendments favored by voters and included in this order will:

1. Allow hybrid fruit that exhibits the characteristics of nectarines or peaches and is subject to cultural practices common to such fruit be subject to marketing order regulations under both orders.

2. Specify that the act of packing be considered a handling function under both orders.

3. Change the marketing season for nectarines from May 1 through November 30 to April 1 through November 30.

4. Allow the duties and responsibilities of the Control Committee under order 917 to be transferred to one Commodity Committee if the provisions for the other commodity are suspended.

5. Increase membership on the NAC from eight to thirteen members and revise the procedures that constitute quorum and voting requirements to conform to the increased committee size. The proposal would also add to both orders that the Committees may vote by facsimile and set forth voting requirements for video conferencing.

6. Eliminate the Shippers' Advisory Committee under the nectarine order.

7. Modify the definition of grower under both orders to clarify that officers of grower corporations are eligible to serve as committee grower members.

8. Add a definition of "pure grower" for purposes of eligibility for membership on the Committees. This proposal would also allow alternative methods to conduct nominations, change the date for holding nominations, authorize positions for pure growers and add tenure requirements for Committee members.

9. Authorize nominees to state their willingness to serve on the Committees prior to the selection.

10. Change the district boundaries under the nectarine order and redefine the peach districts.

11. Change the names and the composition of the districts of the Peach Commodity Committee.

12. Allow for interest and/or late payments for assessments not paid timely under both orders.

13. Clarify that subcommittees may be established by the Peach Commodity Committee.

The proposal to authorize the Peach Commodity Committee to borrow money failed to obtain the requisite number of votes needed, in number or in volume, to pass.

AMS also proposed to allow such changes as may be necessary to the orders so that all of the orders' provisions conform to the effectuated amendments. None were deemed necessary.

The amended marketing agreement was subsequently mailed to all peach and nectarine handlers in the production area for their approval. The marketing agreements were not approved by handlers representing at least 50 percent of the volume of peaches or nectarines handled by all handlers during the representative period of March 1, 2005, through February 28, 2006.

Small Business Consideration

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), 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 so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit. Thus, both the RFA and the Act are compatible with respect to small entities.

Small agricultural growers are defined by the Small Business Administration (SBA)(13 CFR 121.201) as those having annual receipts of less than $750,000. Small agricultural service firms, which include handlers regulated under the order, were defined at the time of the hearing as those with annual receipts of less than $5,000,000. The definition of small agricultural service firm has subsequently changed to one with annual receipts of $6,500,000.

According to the record, there are approximately 207 California nectarine and peach handlers (combined) and approximately 1,500 growers (combined nectarines and peaches) in the production area, the State of California. A majority of these handlers and growers may be classified as small entities.

Based on calculations made by the Peach and Nectarine Committees' staff, witnesses indicated that about 26 handlers (13 percent) would qualify as large business entities under the SBA definition of a large agricultural service firm ($5,000,000). For the 2004 season, it was estimated that the average handler price received was 8 dollars per container or container equivalent of nectarines or peaches. Thus, a handler would have to ship at least 625,000 containers to have annual receipts of 5 million dollars. Given data on shipments presented at the hearing and the estimated 8 dollar average handler price received during the 2004 season, small handlers represented approximately 87 percent of all the handlers within the industry. Under the 6.5 million dollar definition, more than 87 percent of handlers would qualify as small handler entities.

Record evidence also indicated that less than 20 percent of the combined number of California nectarine and peach growers could be defined as other than small entities. The Committees estimated that the average 2004 grower price received for nectarines and peaches was 5 dollars per container or a container equivalent. A grower would have to produce at least 150,000 containers of nectarines and peaches to have annual receipts of 750,000 dollars. Given data maintained by the Committees' staff and the 5 dollar estimated average grower price received during the 2004 season, the staff estimates that more than 80 percent of growers can be classified as small growers.

Evidence presented at the hearing indicates an average 2004 grower price of 5 dollars per container or container equivalent for both nectarines and peaches, and a combined pack-out of approximately 40,422,900 containers. Thus, the value of the 2004 pack-out is estimated to be $202,114,500. Dividing this total estimated grower revenue by the estimated number of combined nectarine and peach growers (1,500) yields an estimate of 2004 average revenue per grower of about $134,743. Because many growers produce both commodities, industry nectarine and peach production statistics were presented at the hearing as combined totals.

National Agricultural Statistical Service (NASS) data presented at the hearing provides the following production profile for California nectarines and peaches, respectively (all numbers are two-year averages for the 2003 crop year and preliminary data for 2004): bearing acres, 36,500 of nectarines and 37,000 of peaches; yield per acre of utilized production, 7.19 tons and 10.84 tons, respectively;

annual utilized production, 262,500 tons and 401,000 tons, respectively. Utilized production of both nectarines and peaches was less than total production in 2004; utilized production data was therefore used in the computation. Two-year (2003 and 2004) average grower prices per ton for nectarines and peaches were $391 and $309.50 respectively. However, $309.50 is the peach price per ton for both fresh and processed uses. Approximately one third of California freestone peaches are sold for processing at a price lower than growers receive for fresh market sales. Therefore, a better estimate of the price per ton for fresh peach sales is derived by using the U.S. estimated grower price for fresh peaches of 27 cents per pound ($540 per ton) for 2003, the most recent year for which a U.S. fresh peach price was available from the Economic Research Service of the USDA.

This NASS and ERS data is used to compute an additional estimate of average annual sales revenue per producer. By assuming that growers of nectarines are also growers of peaches, the 2004 average acreage for these crops (dividing the sum of nectarine and peach bearing acres by 2) is equal to 36,750 acres. Dividing this number by the number of combined peach and nectarine growers reported by CTFA (1,500) yields an estimate of 24.5 acres as the average size of a sample nectarine or peach farm in 2004. If the sample farm's acreage was split evenly between nectarines and peaches (12.5 acres of each fruit) and production yields equal to the statewide average (reported above), that farm would have produced and sold 89.88 tons of nectarines and 134.42 tons of peaches. The value of production for that sample farm would have been $35,143 for nectarines and $72,587 for peaches, or $107,730 total. This figure is lower than the $134,743 estimate using industry data. However, both computations confirm that the average nectarine or peach grower qualifies as a small grower under the SBA definition.

The amendments will: Update definitions and districts in both orders; increase membership of the Nectarine Administrative Committee from 8 to 13 members and modify sections of the order to conform to the increased membership; eliminate the Shippers Advisory Committee (M.O. No. 916); allow the Control Committee under M.O. No. 917 to be suspended if the provisions of one commodity are suspended and transfer applicable duties and responsibilities to the remaining Commodity Committee; and authorize interest and late payment charges on assessments that are paid late.

All of the amendments are intended to streamline and improve the administration, operation, and functioning of the programs. Many of the amendments will update the language of these two orders, thus better representing, and conforming with, current practices in these industries. The amendments are not expected to result in any significant cost increases for growers or handlers. More efficient administration of program activities may result in cost savings for the Peach and Nectarine Committees.

Proposal 1 will amend the order to allow hybrid fruit that exhibits the characteristics of nectarines or peaches and is subject to cultural practices common to nectarines and peaches to be subject to marketing order regulations. This amendment provides a procedure for the Committees to recommend to USDA the specific hybrids to be included under the definitions and subject to order provisions.

The cultivation of hybrid fruit has been a practice of the nectarine and peach industries. The improvement in breeding technology provides for the development of fruit and fruit trees with more favorable characteristics, such as disease resistance. As breeding technology becomes more sophisticated, it is anticipated that nectarines and peaches will be crossbred with other tree fruit, such as apricots and plums.

The proposal will require that all hybrids for which regulation is contemplated will need to be recommended to USDA by the Committees. The Committees will identify hybrids currently in production that have characteristics of nectarines or peaches. The characteristics of the fruit will help determine whether the hybrid should be regulated. The Committees will also consider the cultural practices used on that specific hybrid, as cultural practices differ among various fruit trees. USDA would then proceed with rulemaking, as appropriate, as to what hybrids would be included under the order.

The amendment will provide flexibility in including hybrids as they are developed and provides sufficient safeguards to ensure compliance of order provisions. Incorporating specific reference to hybrid fruit into the definitions of "nectarine" and "peach" is not expected to result in any significant increase in costs to growers or handlers. There may be slight increases in the administration costs of the nectarine and peach orders in terms of program oversight, but it is expected that any increases would be offset by the benefits of including hybrids under the orders' provisions.

Proposal 2 will specify that the act of "packing" nectarines and peaches is a handling function under the orders. Most packers already assume all of the responsibilities of a handler, except the selling of the fruit and thus, this amendment is not expected to result in any significant increases in costs and will likely result in efficiencies that will benefit the administration of marketing orders 916 and 917.

Proposal 3 will extend the marketing season for nectarines to more accurately reflect the nectarine industry's current production and marketing season and will conform to current handling regulations. The amendment will change the current marketing season from May 1 through November 30 to April 1 through November 30. According to record evidence, aligning the marketing year with current production will not result in any increases in costs.

Proposal 4 will allow for the temporary suspension of the Control Committee, the oversight committee for peaches and pears under marketing order 917, when one of the commodity programs is suspended. Since the pear program has been suspended, the duties of the Control Committee have been lessened, as there is only one Commodity Committee that is active under the marketing order program. In the Pear Commodity Committee's absence, the Peach Commodity Committee has continued to operate in conjunction with the Control Committee. The amendment will also allow the Control Committee to become active again if both commodity groups were to become active under the order. This amendment is not expected to result in any increases in costs to growers or handlers.

Proposal 5 will increase the membership on the NAC from eight to thirteen members and revise quorum requirements. Proposal 5 will also provide for voting by facsimile and holding meetings via video teleconference for both the Nectarine and Peach Commodity Committees. Record evidence indicated that these amendments were necessary in order to update the business practices of the Nectarine and Peach Committees to include current day technology. The increase in Committee members from 8 to 13 will allow for greater industry participation and will provide for a larger pool of committee members to attend meetings and meet quorum requirements. This amendment is not expected to result in any significant

increases in costs to growers or handlers.

Regarding the increase in committee membership, this proposal will benefit growers by allowing more growers to be appointed to the Committee, thereby increasing industry participation in the marketing order program functions.

Regarding the use of facsimile and video teleconference, this provision will allow both the Nectarine and Peach Committees to take advantage of technology that is available currently, but was not known when the orders were promulgated. Amendments under this material issue are not expected to result in any significant increases in costs to growers or handlers.

Proposal 6 will eliminate the Shipper's Advisory Committee under the nectarine marketing order and bring the language of the order into conformance with current day operations of the program. Record evidence indicates that the Shipper's Advisory Committee has not been active for over 30 years and, while it once served a function under the marketing order program, it is no longer necessary. This amendment is not expected to result in any increases in costs to growers or handlers.

Proposal 7 will modify the definition of grower to specify that both employees of growers and corporate officers of growers are eligible to serve on the Nectarine and Peach Committees in grower positions. This amendment will be a clarifying change and will bring the language of the order into conformance with current-day operations of the program. This amendment is not expected to result in any increases in costs to growers or handlers.

Proposal 8 will add a definition for pure grower to both the nectarine and peach orders. When implemented, pure growers will be defined as growers that grow their own product (and are not employees or officers of a packing business) or, that grow and pack primarily their own product. If they do pack for other growers, the total production packed from other growers cannot exceed 25 percent of the total production packed for that marketing season for that pure grower's packing facility. Pure growers, who only pack a limited amount of fruit for other growers, are still primarily dependent on their own production, which is the essential component of being a pure grower.

Proposal 8 will modify the current nomination procedures for the Committees, as well as modify the deadline for conducting the nominations, add a 50-percent pure grower membership requirement for the Committees and establish tenure requirements for members. According to the hearing record, nomination procedures will be modified to provide for mailings of ballots and will change the beginning date of the nomination period from February 15 to January 31. The change in the beginning date is necessary in order to provide extra time for the mailing of ballots.

While some increases in administration costs could arise as a result of the mailing of ballots, record evidence indicates that the benefit of increased industry participation would merit that expense.

Proposal 9 will modify the current acceptance procedure for persons nominated to serve on the Nectarine and Peach Committees. Currently, the acceptance procedure for persons nominated and selected to serve on the Committees involves a two-step process. When implemented, the two steps will be combined into one, thus resulting in less paperwork, a shorter acceptance procedure and improved efficiency in the acceptance process. This amendment is not expected to result in any increases in costs to growers or handlers.

Proposal 10 will modify the Fresno and Tulare districts under the peach marketing order by moving Kings County from the Fresno district to the Tulare district and by including all of Tulare County in the Tulare district, and will also modify district boundaries under the nectarine order. This change will also serve as the basis for modifying committee representation for the Tulare district under the peach order, as discussed under Proposal 11. These amendments are not expected to result in any significant increases in costs to growers or handlers.

Proposal 11 will modify the names of the peach producing districts under that marketing order and change district representation on the Peach Commodity Committee to reflect the modified districts discussed under Proposal 10. This amendment will provide for more accurate representation of current-day peach production. This amendment is not expected to result in any significant increases in costs to growers or handlers.

Proposal 12 will provide for interest and penalty provisions for late payment of assessments to be added to both the nectarine and peach orders. This amendment will strengthen the assessment collection functions of the orders. The implementation of interest and late payments will serve as an incentive for handlers to pay their assessments in a timely manner. While this amendment is expected to result in some costs under the marketing orders, the more timely assessment payments are expected to benefit the industries.

Lastly, Proposal 14 will clarify that "other committees" established by the Peach Committee would be referred to as "subcommittees." This amendment is not expected to result in any increases in costs to growers or handlers.

The proposals put forth at the hearing will streamline program operations, but are not expected to result in a significant change in industry production, handling or distribution activities. In discussing the impacts of the amendments on growers and handlers, record evidence indicates that the changes are expected to be positive because the administration of the programs will be more efficient, and therefore more effective, in executing Committee duties and responsibilities. There will be no significant cost impact on either small or large growers or handlers.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the amendments to the order on small entities. The record evidence is that the amendments are designed to increase efficiency in the functioning of the orders.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule. These amendments are designed to enhance the administration and functioning of marketing orders 916 and 917 to benefit the California nectarine and peach industries.

Committee meetings regarding these amendments as well as the hearing dates were widely publicized throughout the peach and nectarine industries, and all interested persons were invited to attend the meetings and the hearing and participate in Committee deliberations on all issues. All Committee meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues.

Paperwork Reduction Act

Current information collection requirements for Parts 916 and 917 have been previously approved by the Office of Management and Budget (OMB) under OMB number 0581–0189, "Generic Fruit Crops." The changes would have an insignificant impact on total burden hours currently approved under this information collection.

Specifically, the amendment to increase the Nectarine Administrative Committee (committee) from 8 to 13 members would require an additional 5 members and 5 alternates to complete

existing confidential background and acceptance statements every 2 years. Increasing committee members from 16 (8 members and 8 alternates) to 26 (13 members and 13 alternates) would result in an increase of .43 burden hours, or 26 minutes. In addition, because the Shipper's Advisory Committee is being recommended to be abolished, form FV–75, "Confidential California Tree Fruit Agreement Questionnaire", which is currently approved under OMB No. 0581–0189 for 1.99 burden hours, would no longer be needed. Removing this form would result in an overall decrease of 1.56 burden hours.

Also, the amendment will authorize nominees under the nectarine order to state their willingness to serve on the committee prior to their selection, which would result in the combining of Confidential Background statement and the acceptance statement, which are already approved by OMB. There would be no change in the burden hours by combining these forms.

The amendment to allow the duties and responsibilities of the Control Committee, under marketing order 917, to be transferred to one commodity committee if the provisions of the other commodity committee are suspended will also result in minimal changes to paperwork requirements under this program. If this authority is effectuated, and the Peach Commodity Committee was to assume the duties and responsibilities of the Control Committee, some forms used by the Control Committee would require a modification in the name of the committee using those forms. However, the functioning of the forms and the current burden would remain the same.

In addition, any changes to forms, or increased burden generated in nominating and selecting pure growers on the Committees would be submitted to OMB for approval prior to implementation.

AMS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

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. Witnesses stated that existing forms could be adequately modified to serve the needs of the Nectarine and Peach Commodity Committees.

Civil Justice Reform

The amendments to Marketing Orders 916 and 917 stated herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. The amendments will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

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. A 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.

Order Amending the Orders Regulating Peaches and Nectarines Grown in California

Findings and Determinations

The findings and determinations set forth hereinafter are supplementary and in addition to the findings and determination previously made in connection with the issuance of the order; and all of said previous findings and determinations are hereby ratified and affirmed, except as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) Findings and Determinations Upon the Basis of the Hearing Record. Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*) and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon the proposed amendments to Marketing Order Nos. 916 and 917 (7 CFR parts 916 and 917), regulating the handling of peaches and nectarines grown in California.

Upon the basis of the evidence introduced at such hearing and the record thereof it is found that:

(1) The marketing orders, as amended, and as hereby further amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The marketing orders, as amended, and as hereby further amended, regulate the handling of peaches and nectarines grown in the production area in the same manner as, and are applicable only to persons in the respective classes of commercial and industrial activity specified in the marketing order upon which hearings have been held;

(3) The marketing orders, as amended, and as hereby further amended, are limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivision of the production area would not effectively carry out the declared policy of the Act;

(4) The marketing orders, as amended, and as hereby further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of peaches and nectarines grown in the production area; and

(5) All handling of peaches and nectarines grown in the production area is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

(b) *Additional findings.* The effective date for amendments to sections 916.15, 916.32(b), 916.37 (removal of provision) and 916.41, of Marketing Order 916, and §§ 917.29, 917.35, and 917.37 of Marketing Order 917, shall be 30 days after publication in the **Federal Register**.

The amendments to §§ 916.5, 916.9, 916.11, 916.12, 916.16, 916.20, 916.22, 916.25 and 916.32(a) of Marketing Order 916, and §§ 917.4, 917.5, 917.6, 917.8, 917.14, 917.18, 917.22, 917.24 and 917.25 of Marketing Order 917, shall be effective on January 1, 2007. These sections contain provisions for incorporating hybrids into the definition of peach and nectarine, including the act of packing as part of handling functions, and nominating and seating committee members. The amendments to these sections should be implemented to coincide with the beginning of a new crop year.

(b) *Determinations.* It is hereby determined that:

(1) Handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping peaches or nectarines covered by the orders as hereby amended) who, during the period March 1, 2005, through February 28, 2006, handled 50 percent or more of the volume of such

peaches or nectarines covered by said orders, as hereby amended, have not signed an amended marketing agreement; and,

(2) The issuance of this amendatory order, further amending the aforesaid orders, is favored or approved by at least two-thirds of the producers who participated in a referendum on the question of approval and who, during the period of March 1, 2005, through February 28, 2006 (which has been deemed to be a representative period), have been engaged within the production area in the production of such peaches or nectarines, such producers having also produced for market at least two-thirds of the volume of such commodity represented in the referendum.

(3) In the absence of a signed marketing agreement, the issuance of this amendatory order is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers of peaches and nectarines in the production area.

Order Relative to Handling of Peaches and Nectarines Grown in California

It is therefore ordered, That on and after the effective dates hereof, all handling of peaches and nectarines grown in California shall be in conformity to, and in compliance with, the terms and conditions of the said orders as hereby amended as follows:

The provisions of the proposed order amending the order contained in the Recommended Decision issued by the Administrator on November 18, 2005, and published in the **Federal Register** on November 29, 2005, (70 FR 71733) shall be and are the terms and provisions of this order amending the order and set forth in full herein.

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.

■ For the reasons set forth in the preamble, Title 7 of Chapter XI of the Code of Federal Regulations is amended by revising parts 916 and 917 to read as follows:

■ 1. The authority citation for 7 CFR part 916 continues to read as follows:

Authority: 7 U.S.C. 601–674.

PART 916—NECTARINES GROWN IN CALIFORNIA

■ 2. Revise § 916.5 to read as follows:

§ 916.5 Nectarines.

Nectarines means: (a) All varieties of nectarines grown in the production area; and

(b) Hybrids grown in the production area that exhibit the characteristics of a nectarine and are subject to cultural practices common to nectarines, as recommended by the committee and approved by the Secretary.

■ 3. Revise § 916.9 to read as follows:

§ 916.9 Grower.

Grower is synonymous with producer and means any person who produces nectarines for market in fresh form, and who has a proprietary interest therein. Employees of growers and officers of corporations actively engaged in growing nectarines are eligible to serve in grower positions on the committee.

■ 4. Revise § 916.11 to read as follows:

§ 916.11 Handle.

Handle and ship are synonymous and mean to pack, sell, consign, deliver, or transport nectarines, or to cause nectarines to be packed, sold, consigned, delivered, or transported, between the production area and any point outside thereof, or within the production area: *Provided,* That the term handle shall not include the sale of nectarines on the tree, the transportation within the production area of nectarines from the orchard where grown to a packing facility located within such area for preparation for market, or the delivery of such nectarines to such packing facility for such preparation.

■ 5. Revise paragraphs (a) and (b) of § 916.12 to read as follows:

§ 916.12 District.

* * * * *

(a) *District 1* shall include the counties of Madera and Fresno.

(b) *District 2* shall include the counties of Kings and Tulare.

* * * * *

■ 6. Revise § 916.15 to read as follows:

§ 916.15 Marketing season.

Marketing season means the period beginning on April 1 and ending on November 30 of any year.

■ 7. Add a new § 916.16 to read as follows:

§ 916.16 Pure Grower or Pure Producer.

(a) *Pure grower* means any grower: (1) Who produces his or her own product (and is not an employee or officer of a packing business); or

(2) Who produces and handles his or her own product; *Provided,* That a pure grower can pack the production of other growers as long as the production packed does not exceed 25 percent of the total production packed for that marketing year for that pure grower's packing facility. Pure grower is synonymous with pure producer.

(b) The committee may establish, with the approval of the Secretary, rules and regulations for the implementation and operation of this section.

■ 8. Revise § 916.20 to read as follows:

§ 916.20 Establishment and membership.

There is hereby established a Nectarine Administrative Committee consisting of thirteen members, each of whom shall have an alternate who shall have the same qualifications as the member for whom he/she is an alternate. The members and their alternates shall be growers or authorized employees of growers. Six of the members and their respective alternates shall be growers of nectarines in District 1. Four members and their respective alternates shall be growers of nectarines in District 2; two of the members and their respective alternates shall be growers of nectarines in District 3; and one member and his/her alternate shall be growers of nectarines in District 4; *Provided,* That at least 50% of the nominees from each representation area shall be pure growers. Furthermore, no person shall serve more than three consecutive two-year terms of office or a total of six consecutive years; *Provided further,* That an appointment to fill less than a two year term of office, or serving one term as an alternate, shall not be included in determining the three consecutive terms of office; *Provided further,* That time served prior to the effective date of this section shall not be counted toward consecutive term limits.

■ 9. Revise paragraph (b) of § 916.22 to read as follows:

§ 916.22 Nomination.

* * * * *

(b) *Successor members.* (1) The committee shall appoint a nominating committee, which will hold or cause to be held, not later than January 31 of each odd numbered year, a nomination procedure or a meeting or meetings of growers in each district for the purpose of designating nominees for successor members and alternate members of the committee. Meetings may be supervised by the nominating committee that shall prescribe such procedure as shall be reasonable and fair to all persons concerned. After the nomination procedure or meetings have concluded, the nominating committee by February

15 will verify consent to place the nominee's name on the ballot and will cause a ballot listing all of the nominees for a given district to be mailed to all growers within the district. Members and their alternates will be chosen based on a descending ranking of votes received. Once ballots have been tabulated, the Nectarine Administrative Committee will announce to the growers the nominees that have been selected and recommended to the Secretary.

(2) Nominations may only be by growers, or by duly authorized employees. At meetings, only growers who are present at such nomination meetings may participate in the nomination of nominees for members and their alternates. All known growers will then receive a ballot for the nominees in the district in which they produce and are entitled to vote accordingly. A grower who produces in multiple districts is allowed to vote only in one district, and may exchange his/her ballot for that of the nominees in another district provided the grower is producing in the district for which he/she wants to participate. Employees of such grower shall be eligible for membership as principal or alternate to fill only one position on the committee.

(3) A particular grower, including authorized employees of such grower, shall be eligible for membership as principal or alternate to fill only one position on the committee.

■ 10. Revise § 916.25 to read as follows:

§ 916.25 Acceptance.

Each person to be selected by the Secretary as a member or as an alternate member of the committee shall, prior to such selection, qualify by advising the Secretary that he/she agrees to serve in the position for which nominated for selection.

■ 11. Revise § 916.32 to read as follows:

§ 916.32 Procedure.

(a) Nine members of the committee, or alternates acting for members, shall constitute a quorum and any action of the committee shall require the concurring vote of the majority of those present: *Provided,* That actions of the committee with respect to expenses and assessments, or recommendations for regulations pursuant to §§ 916.50 to 916.55, shall require at least nine concurring votes.

(b) The committee may vote by telephone, telegraph, or other means of communication, such as facsimile, and any votes so cast shall be confirmed promptly in writing: *Provided,* That if an assembled meeting is held, all votes shall be cast in person. A videoconference shall be considered an assembled meeting and all votes shall be considered as cast in person.

■ 12. Remove § 916.37.

■ 13. Add three new sentences at the end of paragraph (b) of § 916.41 to read as follows:

§ 916.41 Assessments.

* * * * *

(b) * * * Furthermore, any assessment not paid by a handler within a period of time prescribed by the committee may be subject to an interest or late payment charge, or both. The period of time, rate of interest and late payment charge shall be as recommended by the committee and approved by the Secretary. Subsequent to such approval, all assessments not paid within the prescribed period of time shall be subject to an interest or late payment charge or both.

PART 917—FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

■ 14. The authority citation for part 917 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 15. In § 917.4, the suspension of March 3, 1994 (59 FR 10055), is lifted effective January 1, 2007.

■ 16. Revise § 917.4 to read as follows:

§ 917.4 Fruit.

Fruit means the edible product of the following kinds of trees:

(a) All varieties of peaches grown in the production area;

(b) All hybrids grown in the production area exhibiting the characteristics of a peach and subject to cultural practices common to peaches as recommended by the committee and approved by the Secretary; and

(c) All varieties of pears except Beurre Hardy, Beurre D'Anjou, Bosc, Winter Nelis, Doyenne du Comice, Beurre Easter, and Beurre Clairgeau.

■ 17. In § 917.4, the words "and (c) All varieties of pears except Beurre Hardy, Beurre D'Anjou, Bosc, Winter Nelis, Doyenne du Comice, Beurre Easter, and Beurre Clairgeau" are suspended effective January 1, 2007.

■ 18. Revise § 917.5 to read as follows:

§ 917.5 Grower.

Grower is synonymous with producer and means any person who produces fruit for market in fresh form, and who has a proprietary interest therein. Employees of growers and officers of corporations actively engaged in growing peaches are eligible to serve in grower positions on the committee.

■ 19. Revise § 917.6 to read as follows:

§ 917.6 Handle.

Handle and ship are synonymous and mean to sell, consign, deliver or transport fruit or to cause fruit to be sold, consigned, delivered or transported between the production area and any point outside thereof, or within the production area: *Provided,* That for peaches, packing or causing the fruit to be packed also constitutes handling; *Provided further,* That the term handle shall not include the sale of fruit on the tree, the transportation within the production area of fruit from the orchard where grown to a packing facility located within such area for preparation for market, or the delivery of such fruit to such packing facility for such preparation.

■ 20. Add a new § 917.8 to read as follows:

§ 917.8 Pure Grower or Pure Producer.

(a) For peaches, *pure grower* means any grower:

(1) Who produces his or her own product (and is not an employee or officer of a packing business); or

(2) Who produces and handles his or her own product; *Provided,* That a pure producer can pack the production of other growers as long as the production packed does not exceed 25 percent of the total production packed for that marketing year by that pure grower's packing facility. *Pure grower* is synonymous with pure producer.

(b) The committee may establish, with the approval of the Secretary, rules and regulations for the implementation and operation of this section.

■ 21. In § 917.14, paragraphs (n) and (o) are revised to read as follows:

§ 917.14 District.

* * * * *

(n) *Fresno District* includes and consists of Madera County, Fresno County, and Mono County.

(o) *Tulare District* includes and consists of Tulare County and Kings County.

* * * * *

■ 22. In § 917.18, the suspension of March 3, 1994 (59 FR 10055), is lifted effective January 1, 2007.

■ 23. Section 917.18 is amended by revising the fourth and sixth sentences of paragraph (a), and revising paragraph (b) to read as follows:

§ 917.18 Nomination of commodity committee members of the Control Committee.

* * * * *

(a) * * * In the event provisions of this part are terminated or suspended as to any fruit, nominations of members to the Control Committee shall be

composed of representatives of any remaining fruit. * * * In the event provisions of this part are terminated or suspended as to any fruit, the members of the commodity committee of the remaining fruit shall have all the powers, duties, and functions given to the Control Committee under this part and sections of this part pertaining to the designation of the Control Committee shall be terminated or suspended.

(b) A person nominated by any commodity committee for membership on the Control Committee shall be an individual person who is a member or alternate member of the commodity committee that nominates him/her. Each member of each commodity committee shall have only one vote in the selection of nominees for membership on the Control Committee.

■ 24. In § 917.18, paragraph (a), the words "The number of remaining members which each respective commodity committee shall be entitled to nominate shall be based upon the proportion that the previous three fiscal periods' shipments of the respective fruit is of the total shipments of all fruit to which this part is applicable during such periods. In the event provisions of this part are terminated or suspended as to any fruit, nominations of members to the Control Committee shall be composed of representatives of any remaining fruit. The apportionment shall be determined as aforesaid. In the event provisions of this part are terminated or suspended as to any fruit, the members of the commodity committee of the remaining fruit shall have all the powers, duties, and functions given to the Control Committee under this part and sections of this part pertaining to the designation of the Control Committee shall be terminated or suspended." are suspended effective January 1, 2007.

■ 25. Revise § 917.22 to read as follows:

§ 917.22 Nomination of Peach Commodity Committee members.

Nominations for membership on the Peach Commodity Committee shall be made by growers of peaches in the respective representation areas, as follows:

(a) *District 1* composed of the Fresno District: seven nominees.

(b) *District 2* composed of the Tulare District: three nominees.

(c) *District 3* composed of the Tehachapi District and Kern District: one nominee.

(d) *District 5* composed of the South Coast District and Southern California District: one nominee.

(e) *District 4* composed of the Stanislaus District, Stockton District and all of the production area not included in paragraphs (a) through (d) of this section: one nominee.

■ 26. Section 917.24 is amended as follows:

■ a. Amend the first sentence of paragraph (a) by removing the phrase "February 15" and adding in its place the phrase "January 31 for peaches and not later than February 15 for pears";

■ b. Amend paragraph (b) by adding the phrase "and alternates" to the end of the first sentence after the phrase "commodity committee members" and adding three new sentences at the end of the paragraph to read as follows;

■ c. Amend paragraph (c) by adding a new sentence at the end of the paragraph to read as follows; and

■ d. Add a new paragraph (d) to read as follows:

§ 917.24 Procedure for nominating members of various commodity committees.

(a) * * *

(b) * * * All peach growers, or authorized employees, will receive a ballot for the nominees in the district in which they produce and are entitled to vote accordingly. A peach grower who produces in multiple districts is allowed to vote only in one district, and may exchange his/her ballot for that of nominees in another district provided the grower is producing in the district for which he/she wants to participate. For both commodity committees, each such grower, including employees of such grower, shall be entitled to cast but one vote for each position to be filled for the representation area in which he/she produces such fruit.

(c) * * * The members and alternates of the Peach Commodity Committee shall be growers, or shall be authorized employees of such growers and at least 50% of the nominees from each representation area shall be pure growers.

(d) For peaches, no person shall serve more than three (3) consecutive two-year terms of office or a total of six (6) consecutive years; *Provided*, That an appointment to fill less than a two-year term of office, or serving one (1) term as an alternate, shall not be included in determining the (3) consecutive terms of office; *Provided further*, That time served prior to the effective date of this section shall not be counted toward consecutive term limits. The members shall serve until their respective successors are selected and have qualified.

■ 27. In § 917.25, suspension of the words "§ 917.21 through" that were suspended at 59 FR 10055, March 3, 1994, is lifted effective January 1, 2007.

■ 28. Amend § 917.25 by redesignating the introductory text as paragraph (a) and adding a new paragraph (b) to read as follows:

§ 917.25 Acceptance.

* * * * *

(b) For the Peach Commodity Committee, each person to be selected by the Secretary as a member or as an alternate member of the committee shall, prior to such selection, qualify by advising the Secretary that he/she agrees to serve in the position for which nominated for selection.

■ 29. In § 917.25 paragraph (a), the words "§ 917.21 through" are suspended effective January 1, 2007.

■ 30. Revise paragraph (d) of § 917.29 to read as follows:

§ 917.29 Organization of committees.

* * * * *

(d) The Control Committee or any commodity committee may, upon due notice to all of the members of the respective committee, vote by letter, telegraph or telephone: *Provided*, That any member voting by telephone shall promptly thereafter confirm in writing his/her vote so cast. The Peach Commodity Committee may, upon due notice to all of the members of the respective committee, vote by letter, telegraph, telephone, facsimile, video teleconference, or any other means of communication recommended by the committee and approved by the Secretary; *Provided*, That any member voting by telephone shall promptly thereafter confirm in writing his/her vote so cast.

■ 31. Add a sentence at the end of paragraph (d) of § 917.35 to read as follows:

§ 917.35 Powers and duties of each commodity committee.

* * * * *

(d) * * * To establish subcommittees to aid the Peach Commodity Committee in the performance of its duties under this part as may be deemed advisable.

* * * * *

■ 32. Revise § 917.37 to read as follows:

§ 917.37 Assessments.

(a) As his/her pro rata share of the expenses which the Secretary finds are reasonable and are likely to be incurred by the commodity committees during a fiscal period, each handler shall pay to the Control Committee, upon demand, assessments on all fruit handled by him/her. The payment of assessments for the maintenance and functioning of the

committees may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) The Secretary shall fix the respective rate of assessment, which handlers shall pay with respect to each fruit during each fiscal period in an amount designed to secure sufficient funds to cover the respective expenses, which may be incurred during such period. At any time during or after the fiscal period, the Secretary may increase the rates of assessment in order to secure funds to cover any later findings by the Secretary relative to such expenses, and such increase shall apply to all fruit shipped during the fiscal period. Furthermore, any assessment not paid by a peach handler within a period of time prescribed by the Control Committee may be subject to an interest or late payment charge, or both. The period of time, rate of interest and late payment charge shall be as recommended by the committee and approved by the Secretary. Subsequent to such approval, all assessments for peaches not paid within the prescribed period of time shall be subject to an interest or late payment charge or both.

(c) In order to provide funds to carry out the functions of the commodity committee prior to commencement of shipments in any season, shippers may make advance payments of assessments, which advance payments shall be credited to such shippers and the assessments of such shippers shall be adjusted so that such assessments are based upon the quantity of fruit shipped by such shippers during such season. Any shipper who ships fruit for the account of a grower may deduct, from the account of sale covering such shipment or shipments, the amount of assessments levied on said fruit shipped for the account of such grower.

Dated: July 17, 2006.

Lloyd. C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E6–11600 Filed 7–20–06; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30504 Amdt. No. 3176]

Standard Instrument Approach Procedures, Weather Takeoff Minimums; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and/or Weather Takeoff Minimums for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective July 21, 2006. The compliance date for each SIAP and/or Weather Takeoff Minimums is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of July 21, 2006.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. 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-or-federal-regulations/ibr-locations.html.*

For Purchase—Individual SIAP and Weather Takeoff Minimums copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription—Copies of all SIAPs and Weather Takeoff Minimums mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Donald P. Pate, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd. Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to Title 14 of the Code of Federal Regulations, part 97 (14 CFR part 97), establishes, amends, suspends or revokes SIAPs and/or Weather Takeoff Minimums. The complete regulatory description of each SIAP and/or Weather Takeoff Minimums is contained in official FAA from documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA Forms are identified as FAA Forms 8260–3, 8260–4, 8260–5 and 8260–15A. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs and/or Weather Takeoff Minimums, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs and/or Weather Takeoff Minimums but refer to their depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP and/or Weather Takeoff Minimums contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR sections, with the types and effective dates of the SIAPs and/or Weather Takeoff Minimums. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and/or Weather Takeoff Minimums as contained in the transmittal. Some SIAP and/or Weather Takeoff Minimums amendments may have been previously issued by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP, and/or Weather Takeoff Minimums amendments may require making them effective in less than 30 days. For the remaining SIAPs and/or Weather Takeoff Minimums, an effective date at least 30 days after publication is provided.

Further, the SIAPs and/or Weather Takeoff Minimums contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and/or Weather Takeoff Minimums, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between SIAPs and/or Weather Takeoff Minimums and safety in air commerce, I find that notice and public procedure before adopting these SIAPs and/or Weather Takeoff Minimums are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs and/or Weather Takeoff Minimums effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC, on July 14, 2006.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, under Title 14, Code of Federal Regulations, part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures and Weather Takeoff Minimums effective 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

** * * Effective 3 August 2006*

Alamosa, CO, San Luis Valley Regional/ Bergman Field, RNAV (GPS) RWY 20, Orig
Spokane, WA, Spokane Intl, RNAV (GPS) RWY 7, Orig
Spokane, WA, Spokane Intl, RNAV (GPS) RWY 25, Amdt 1

** * * Effective 31 August 2006*

Chicago, IL, Chicago Midway Intl, RNAV (RNP) Y RWY 13C, Orig-A
Newport News, VA, Newport News/ Williamsburg Intl, NDB RWY 7, Amdt 3D, CANCELLED
Newport News, VA, Newport News/ Williamsburg Intl, NDB RWY 25, Amdt 4D, CANCELLED
Evanston, WY, Evanston-Uinta County burns Field, Takeoff Minimums and Textual DP, Amdt 1

** * * Effective 28 September 2006*

Hooper Bay, AK, Hooper Bay, RNAV (GPS) RWY 13, Orig
Hooper Bay, AK, Hooper Bay, RNAV (GPS) RWY 31, Orig
Hooper Bay, AK, Hooper Bay, VOR/DME RWY 31, Orig
Hooper Bay, AK, Hooper Bay, VOR OR GPS RWY 31, Amdt 1A, CANCELLED
Hooper Bay, AK, Hooper Bay, Takeoff Minimums and Textual DP, Orig
Kenai, AK, Kenai, ILS OR LOC RWY 19R, Amdt 2
Kenai, AK, Kenai, VOR RWY 19R, Amdt 17
Andalusia-Opp, AL, Andalusia-Opp, RNAV (GPS) RWY 11, Amdt 1
Andalusia-Opp, AL, Andalusia-Opp, Takeoff Minimums and Textual DP, Amdt 1
Dalton, GA, Dalton Muni, RNAV (GPS) RWY 14, Orig
Dalton, GA, Dalton Muni, RNAV (GPS) RWY 32, Orig
Dalton, GA, Dalton Muni, Takeoff Minimums and Textual DP, Amdt 4
Dalton, GA, Dalton Muni, GPS RWY 14, Orig CANCELLED
Dalton, GA, Dalton Muni, GPS RWY 32, Orig CANCELLED
Boise, ID, Boise Air Terminal/Gowen Field, RNAV (GPS) RWY 10L, Amdt 1
Boise, ID, Boise Air Terminal/Gowen Field, RNAV (GPS) RWY 28L, Amdt 2
Pocatello, ID, Pocatello Regional, RNAV (GPS) RWY 3, Amdt 1
Auburn, IN, De Kalb, ILS OR LOC RWY 27, Orig-A
Muncie, IN, Delaware County-Johnson Field, RNAV (GPS) RWY 14, Orig
Muncie, IN, Delaware County-Johnson Field, RNAV (GPS) RWY 32, Orig
Muncie, IN, Delaware County-Johnson Field, VOR RWY 32, Amdt 15
Muncie, IN, Delaware County-Johnson Field, VOR RWY 14, Amdt 17
Muncie, IN, Delaware County-Johnson Field, Takeoff Minimums and Textual DP, Orig
Ann Arbor, MI, Ann Arbor Muni, RNAV (GPS) RWY 6, Amdt 1
Ann Arbor, MI, Ann Arbor Muni, RNAV (GPS) RWY 24, Amdt 1
Ann Arbor, MI, Ann Arbor Muni, Takeoff Minimums and Textual DP, Amdt 7
Columbus/Westpoint/Starkville, MS, Golden Triangle Regional, RNAV (GPS) RWY 36, Orig
Columbus/Westpoint/Starkville, MS, Golden Triangle Regional, Takeoff Minimums and Textual DP, Orig
Columbus/Westpoint/Starkville, MS, Golden Triangle Regional, GPS RWY 36, Orig. CANCELLED
Cincinnati, OH, Cincinnati Muni Arpt Lunken Field, RNAV (GPS) RWY 25, Orig
Cincinnati, OH, Cincinnati Muni Arpt Lunken Field, DNDB RWY 25, Amdt 10
Mitchell, SD, Mitchell Muni, RNAV (GPS) RWY 12, Orig
Mitchell, SD, Mitchell Muni, RNAV (GPS) RWY 30, Orig
Mitchell, SD, Mitchell Muni, VOR RWY 12, Amdt 11
Mitchell, SD, Mitchell Muni, VOR RWY 30, Amdt 5
Yankton, SD, Chan Gurney Muni, RNAV (GPS) RWY 13, Orig
Yankton, SD, Chan Gurney Muni, VOR RWY 13, Amdt 3
Nacogdoches, TX, A L Mangham Jr Regional, RNAV (GPS) RWY 15, Orig, CANCELLED
Nacogdoches, TX, A L Mangham Jr Regional, RNAV (GPS) RWY 33, Orig-A, CANCELLED
Tyler, TX 7 Pounds Rgnl, RNAV (GPS) RWY 13, Amdt 1
Tyler, TX 7 Pounds Rgnl, RNAV (GPS) RWY 31, Amdt 1
Tyler, TX 7 Pounds Rgnl, Takeoff Minimums and Textual DP, Orig
Hayward, WI, Sawyer County, RNAV (GPS) RWY 2, Orig
Hayward, WI, Sawyer County, RNAV (GPS) RWY 20, Orig
Hayward, WI, Sawyer County,LOC/DME RWY 20, Amdt 1Orig
Hayward, WI, Sawyer County, GPS RWY 2, Orig, CANCELLED

Hayward, WI, Sawyer County, GPS RWY 20, Orig, CANCELLED

[FR Doc. 06–6377 Filed 7–20–06; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30505; Amdt. No. 3177]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment amends Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective July 21, 2006. The compliance date for each SIAP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register of July 21, 2006.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Ave., SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which affected airport is located; or

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. 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.*

For Purchase—Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription—Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Donald P. Pate, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to Title 14, Code of Federal Regulations, part 97 (14 CFR part 97) amends Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in the appropriate FAA Form 8260, as modified by the National Flight Data Center (FDC)/Permanent Notice to Airmen (P–NOTAM), which is incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Code of Federal Regulations. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP as modified by FDC/P–NOTAMs.

The SIAPs, as modified by FDE P–NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedure (TERPS). In developing these chart changes to SIAPs, the TERPS criteria were applied to only these specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Further, the SIAPs contained in this amendment are based on the criteria contained in TERPS. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC on July 14, 2006.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal regulations, part 97, 14 CFR part 97, is amended by amending Standard Instrument Approach Procedures,

effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

** * * Effective Upon Publication*

FDC date	State	City	Airport	FDC No.	Subject
06/08/06	WV	HUNTINGTON	TRI-STATE/MILTON J. FERGUSON FIELD.	6/9122	ILS RWY 30, AMDT 4B.
06/08/06	WV	HUNTINGTON	TRI-STATE/MILTON J. FERGUSON FIELD.	6/9123	RADAR RWY 3, AMDT 5.
06/08/06	WV	HUNTINGTON	TRI-STATE/MILTON J. FERGUSON FIELD.	6/9124	ILS RWY 12, AMDT 12.
06/08/06	CO	DENVER	DENVER INTL	6/9237	RNAV (GPS) RWY 25, ORIG.
06/08/06	GA	ATLANTA	HARTSFIELD-JACKSON INTL	6/9278	RNAV (GPS) RWY 27R, AMDT 1.
06/08/06	GA	ATLANTA	HARTSFIELD-JACKSON INTL	6/9280	RNAV (GPS) RWY 27L, AMDT 1.
06/08/06	GA	ATLANTA	HARTSFIELD-JACKSON INTL	6/9281	RNAV (GPS) RWY 8R, AMDT 1.
06/08/06	GA	ATLANTA	HARTSFIELD-JACKSON INTL	6/9282	RNAV (GPS) RWY 8L, AMDT 1.
06/08/06	GA	ATLANTA	HARTSFIELD-JACKSON INTL	6/9283	RNAV (GPS) RWY 9R, AMDT 1.
06/08/06	GA	ATLANTA	HARTSFIELD-JACKSON INTL	6/9284	RNAV (GPS) RWY 9L, AMDT 1.
06/08/06	TX	ALICE	ALICE INTL	6/9286	RNAV (GPS) RWY 31 AMDT 1.
06/08/06	TX	ALICE	ALICE INTL	6/9287	RNAV (GPS) RWY 13 ORIG.
06/08/06	GA	ATLANTA	HARTSFIELD-JACKSON INTL	6/9289	ILS OR LOC RWY 26L, AMDT 19.
06/08/06	GA	ATLANTA	HARTSFIELD-JACKSON INTL	6/9290	ILS OR LOC RWY 27L, AMDT 15.
06/08/06	GA	ATLANTA	HARTSFIELD-JACKSON INTL	6/9291	ILS OR LOC RWY 27R, AMDT 4.
06/08/06	ID	SANDPOINT	SANDPOINT	6/9292	LOC/DME A, AMDT 1.
06/08/06	GA	ATLANTA	HARTSFIELD-JACKSON INTL	6/9294	ILS OR LOC RWY 9L, AMDT 8.
06/08/06	GA	ATLANTA	HARTSFIELD-JACKSON INTL	6/9295	ILS OR LOC RWY 26R, AMDT 4.
06/08/06	GA	ATLANTA	HARTSFIELD-JACKSON INL	6/9296	ILS OR LOC RWY 8R, AMDT 59.
06/08/06	AK	KING COVE	KING COVE	6/9310	RNAV (GPS)–A, ORIG.
06/08/06	FL	DESTIN-FORT WALTON BEACH.	DESTIN-WALTON BEACH	6/9322	RNAV (GPS) RWY 14, ORIG–A.
06/29/06	AK	KING SALMON	KING SALMON	6/2457	RNAV (GPS) Z RWY 29, ORIG–A.
06/29/06	AK	KING SALMON	KING SALMON	6/2460	RNAV (GPS) Y RWY 29, ORIG.
06/29/06	TX	FORT WORTH	FORT WORTH MEACHAM INTL	6/1325	GPS RWY 34, ORIG–C.
06/29/06	TX	FORT WORTH	FORT WORTH MEACHAM INTL	6/1326	RNAV (GPS) RWY 16, ORIG.
06/29/06	MO	FORT LEONARD WOOD	WAYNESVILLE RGNL AT FORNEY FLD.	6/1390	VOR RWY 32, ORIG–B.
06/29/06	MO	FORT LEONARD WOOD	WAYNESVILLE RGNL AT FORNEY FLD.	6/1391	NDB RWY 32, ORIG–A.
06/29/06	NY	PLATTSBURGH	PLATTSBURGH INTL	6/1395	RNAV (GPS) RWY 17, ORIG.
06/29/06	FL	MIAMI	KENDALL-TAMIAMI EXECUTIVE	6/1396	RNAV (GPS) RWY 9R, ORIG.
06/29/06	AK	KING SALMON	KING SALMON	6/1397	LOC/DME BC RWY 29, AMDT 2.
06/29/06	AK	KING SALMON	KING SALMON	6/1398	ILS OR LOC RWY 11, AMDT 15.
06/29/06	AK	KING SALMON	KING SALMON	6/1400	RNAV (GPS) RWY 11, ORIG–A.
06/29/06	AK	KING SALMON	KING SALMON	6/1402	VOR/DME OR TACAN RWY 29, AMDT 9.
06/29/06	FL	MIAMI	KENDALL-TAMIAMI EXECUTIVE	6/1403	RNAV (GPS) RWY 27L, ORIG.
06/29/06	AK	KING SALMON	KING SALMON	6/1405	VOR OR TACAN RWY 11, AMDT 12.
06/29/06	TX	ABILENE	ABILENE REGIONAL	6/1411	LOC BC RWY 17L, AMDT 3B.
06/29/06	TX	ABILENE	ABILENE REGIONAL	6/1412	RNAV (GPS) RWY 17L, ORIG.
07/03/06	MI	DETROIT	COLEMAN A. YOUNG MUNI	6/1646	ILS RWY 33, AMDT 14.
07/05/06	AZ	SEDONA	SEDONA	6/1805	GPS RWY 3 ORIG.
07/05/06	CA	ATWATER	CASTLE	6/1808	ILS/DME RWY 31, ORIG.
07/05/06	CA	ATWATER	CASTLE	6/1810	GPS RWY 31 ORIG.
07/05/06	CA	ATWATER	CASTLE	6/1811	VOR/DME RWY 13, ORIG.
07/05/06	CA	ATWATER	CASTLE	6/1813	GPS RWY 13 ORIG.
07/05/06	CA	ATWATER	CASTLE	6/1814	VOR/DME RWY 31, ORIG.
07/05/06	HI	LIHUE	LIHUE	6/1822	RNAV (GPS) RWY 35, ORIG–B.
07/06/06	NJ	NEWARK	NEWARK LIBERTY INTL	6/1966	RNAV (RNP) Y RWY 22L, ORIG.
07/06/06	AL	HALEYVILLE	POSEY FIELD	6/1977	VOR/DME OR GPS RWY 18, AMDT 4.

FDC date	State	City	Airport	FDC No.	Subject
07/07/06	ID	HAILEY	FRIEDMAN MEMORIAL	6/2036	RNAV (RNP) Y RWY 31, ORIG.
07/07/06	OR	EUGENE	MAHLON SWEET FIELD	6/2037	GPS RWY 16, ORIG–B.
07/07/06	AS	PAGO PAGO	PAGO PAGO INTL	6/2066	VOR–D, AMDT 5.
07/07/06	AS	PAGO PAGO	PAGO PAGO INTL	6/2067	ILS/DME RWY 5, AMDT 13.
07/07/06	AS	PAGO PAGO	PAGO PAGO INTL	6/2068	VOR/DME OR TACAN–B, AMDT 5.
07/10/06	IA	CLARINDA	SCHENCK FIELD	6/2244	GPS RWY 20, ORIG–A.
07/10/06	IA	CLARINDA	SCHENCK FIELD	6/2246	GPS RWY 2, ORIG.
07/11/06	PA	READING	READING REGIONAL/CARL A SPAATZ FIELD.	6/2297	ILS RWY 36, AMDT 29.
07/11/06	IL	CHICAGO	CHICAGO MIDWAY	6/2299	ILS OR LOC/DME RWY 13C.
07/11/06	AR	BRINKLEY	FRANK FEDERER MEMORIAL	6/2309	NDB A, AMDT 2.
07/11/06	WI	ASHLAND	JOHN F. KENNEDY	6/2320	NDB RWY 2, AMDT 9.
07/11/06	GA	MACON	MIDDLE GEORGIA REGIONAL	6/2323	RNAV (GPS) RWY 13, ORIG.
07/11/06	AK	UNALAKLEET	UNALAKLEET	6/2350	LOC RWY 14, AMDT 2.
07/11/06	WA	PORT ANGELES	WILLIAM R FAIRCHILD INTL	6/2357	ILS 1 RWY 8, AMDT 1C.
07/12/06	MH	MAJURO ATOLL	MARSHALL ISLANDS INTL	6/2437	RNAV (GPS) RWY 25, ORIG.
07/12/06	MH	MAJURO ATOLL	MARSHALL ISLANDS INTL	6/2438	RNAV (GPS) RWY 7, ORIG.
07/12/06	MH	MAJURO ATOLL	MARSHALL ISLANDS INTL	6/2439	NDB RWY 25, ORIG.
07/12/06	MH	MAJURO ATOLL	MARSHALL ISLANDS INTL	6/2440	NDB RWY 7, ORIG.
07/12/06	HI	HILO	HILO INTL	6/2453	VOR/DME OR TACAN RWY 26, AMDT 5A.

[FR Doc. 06–6376 Filed 7–20–06; 8:45 am]
BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9275]

RIN 1545–BC87

Exclusion of Employees of 501(c)(3) Organizations in 401(k) and 401(m) Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 410(b) of the Internal Revenue Code. The final regulations permit, in certain circumstances, employees of a tax-exempt organization described in section 501(c)(3) to be excluded for the purpose of testing whether a section 401(k) plan (or a section 401(m) plan that is provided under the same general arrangement as the section 401(k) plan of the employer) meets the requirements for minimum coverage specified in section 410(b). These regulations affect tax-exempt employers described in section 501(c)(3), retirement plans sponsored by these employers, and participants in these plans.

DATES: *Effective Date:* July 21, 2006.

Applicability Date: These regulations apply to plan years beginning after December 31, 1996.

FOR FURTHER INFORMATION CONTACT: Linda L. Conway, 202–622–6060, or Michael P. Brewer, 202–622–6090 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains final amendments to the Income Tax Regulations (26 CFR part 1) under section 410(b) of the Internal Revenue Code of 1986 (Code). On March 16, 2004, a notice of proposed rulemaking (REG–149752–03) was published in the **Federal Register** (69 FR 12291) under section 410(b). The regulations implement a directive by Congress, contained in section 664 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (Pub. L. 107–16, 115 Stat. 38) (EGTRRA), to amend § 1.410(b)–6(g) of the regulations.

Prior to the enactment of the Small Business Job Protection Act of 1996 (Pub. L. 104–188, 110 Stat. 1755) (SBJPA), both governmental and tax-exempt entities generally were subject to the section 410(b) coverage requirements and precluded from maintaining section 401(k) plans pursuant to section 401(k)(4)(B). To prevent the section 401(k)(4)(B) prohibition from causing a plan to fail section 410(b), the existing regulations provide that employees of either governmental or tax-exempt entities who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B) may be treated as excludable in applying the minimum coverage rules to a section 401(k) plan or a section 401(m) plan that is provided under the same general arrangement as the section 401(k) plan, if more than 95 percent of the employees of the employer who are not precluded from being eligible employees by section 401(k)(4)(B) benefit under the plan for the plan year. Although tax-exempt organizations described in section 501(c)(3) were precluded by section 401(k)(4)(B) from maintaining a section 401(k) plan, they were permitted to allow their employees to make salary reduction contributions to a plan or contract that satisfies section 403(b) (a section 403(b) plan).

Section 1426(a) of SBJPA amended section 401(k)(4)(B), effective for plan years beginning after December 31, 1996, to allow nongovernmental tax-exempt organizations (including organizations exempt under section 501(c)(3)) to maintain section 401(k) plans. Thus, a section 501(c)(3) tax-exempt organization can now maintain a section 401(k) plan, a section 403(b) plan, or both. Prior to the enactment of SBJPA, many eligible tax-exempt organizations maintained section 403(b) plans. In light of this provision of SBJPA, section 664 of EGTRRA directed the Secretary of the Treasury to modify the regulations under section 410(b) to provide that employees of an organization described in section 403(b)(1)(A)(i) (a section 501(c)(3) organization) who are eligible to make contributions under section 403(b) pursuant to a salary reduction agreement may be treated as excludable with respect to a plan under section 401(k) or a plan under section 401(m) that is provided under the same general arrangement as a plan under section 401(k), if (1) no employee of an organization described in section 403(b)(1)(A)(i) is eligible to participate in such section 401(k) plan or section 401(m) plan and (2) 95 percent of the

employees who are not employees of an organization described in section 403(b)(1)(A)(i) are eligible to participate in such plan under such section 401(k) or (m).

The amendment to § 1.410(b)–6(g) of the regulations pursuant to section 664 of EGTRRA allows the continued maintenance of section 403(b) plans by these organizations without requiring the same employees to be covered under a section 401(k) plan and the section 403(b) plan. In certain circumstances, the amendments will help an employer that maintains both a section 401(k) plan and a section 403(b) plan that provides for contributions under a salary reduction agreement (within the meaning of section 402(g)) to satisfy the section 410(b) coverage requirements with respect to the section 401(k) plan without the employer having to provide dual coverage for employees.

Only a few comments were received on the proposed regulations. No public hearing was requested or held. After consideration of the comments received, the final regulations adopt the provisions of the proposed regulations with certain modifications described below.

Explanation of Provisions

These final regulations retain the rule that provides that employees of governmental entities who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B)(ii) may be treated as excludable employees if more than 95 percent of the employees of the employer who are not precluded from being eligible employees by reason of section 401(k)(4)(B)(ii) benefit under the plan for the year.

As directed by section 664 of EGTRRA, these final regulations also provide that employees of a section 501(c)(3) organization who are eligible to make contributions under section 403(b) pursuant to a salary reduction agreement (within the meaning of section 402(g)) may be treated as excludable with respect to a section 401(k) plan, or a section 401(m) plan that is provided under the same general arrangement as a section 401(k) plan, if (1) no employee of a section 501(c)(3) organization is eligible to participate in such section 401(k) plan or section 401(m) plan; and (2) at least 95 percent of the employees who are neither employees of a section 501(c)(3) organization nor employees of a governmental entity who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B)(ii) are eligible to participate in such section 401(k) plan or section 401(m) plan.

The proposed regulations, in an attempt to simplify the language in section 664 of EGTRRA, would have provided that, for purposes of testing either a section 401(k) plan, or a section 401(m) plan that is provided under the same general arrangement, employees of a section 501(c)(3) organization who are eligible to make salary reduction contributions (within the meaning of section 402(g)) under a section 403(b) plan may be treated as excludible employees if no employee of the organization (rather than no employee of any organization described in section 403(b)(1)(A)(ii) (as in the language in section 664 of EGTRRA)) is eligible to participate in the section 401(k) plan or 401(m) plan, and 95% of the employees of the employer who are not employees of the organization (rather than an organization described in section 403(b)(1)(A)(ii) (as in the language in section 664 of EGTRRA)) are eligible to participate in the section 401(k) plan or section 401(m) plan. After further consideration, the IRS and Treasury Department have concluded that this simplification of the statutory language might not in all cases result in the same employees being excludible as would be excludible by applying the statutory language, which was not the intent. Thus, the final regulations more closely track the language in section 664 of EGTRRA than the proposed regulations.

The few comments received on the proposed regulations generally did not ask for changes to the basic rule but rather asked for further explanation as to the proper interpretation of the rule, including the scope of the exclusion and the interaction of the rule with other rules in the regulations under section 410(b). As explained further below, the IRS and Treasury Department believe that the answers to the questions raised in the comments is reasonably clear under the existing language, and have decided not to expand guidance in the regulation beyond the specific direction of Congress.

Commentators requested clarification as to when a section 401(m) plan is provided under the same general arrangement as a section 401(k) plan for purposes of these regulations. Generally, a section 401(m) plan is provided under the same general arrangement as a section 401(k) plan only to the extent that the matching contributions are contingent upon elective deferrals in the section 401(k) plan.

Commentators asked for clarification of the relationship between the proposed regulations and § 1.410(b)–7(f) and whether matching contributions made under a 401(a) tax-qualified plan may be taken into account when applying the coverage requirements of section 410(b) to matching contributions provided as part of a section 403(b) plan. Treasury regulation § 1.410(b)–7(f) permits a plan subject to section 403(b)(12)(A)(i), which requires the universal availability of the right to defer, to satisfy section 410(b) by taking into account plans that are not subject to section 403(b)(12)(A)(i). Accordingly, a section 403(b) plan is permitted to satisfy the section 410(b) coverage requirements for matching contributions by taking into account matching contributions that are provided under a plan that is not subject to section 403(b)(12)(A)(i) (*e.g.*, a section 401(a) tax-qualified plan). However, because Treasury regulation § 1.410(b)–7(f) does not permit a section 401(a) tax-qualified plan to satisfy the requirements of section 410(b) by taking into account a plan subject to section 403(b)(12)(A)(i), a section 401(a) tax-qualified plan must satisfy the section 410(b) coverage requirements by disregarding coverage under a section 403(b) plan. These regulations provide the rules for disregarding employees of a governmental or tax-exempt entity for purposes of applying the coverage requirements of section 410(b) to a section 401(k) plan or a section 401(m) plan that is provided under the same general arrangement as the section 401(k) plan.

Commentators asked whether employees of a tax-exempt organization described in section 501(c)(3) who would be eligible to make salary reduction contributions under a section 403(b) plan but for the exclusions permitted under section 403(b)(12), such as nonresident aliens and employees who normally work less than 20 hours per week, are taken into account as employees who are eligible to make salary reduction contributions for purposes of these regulations. These regulations provide that such employees are not taken into account unless they are actually eligible to make salary reduction contributions to the section 403(b) plan.

Effective Date

As directed by Congress in section 664 of EGTRRA, these final regulations apply to plan years beginning after December 31, 1996. However, the preamble to the proposed regulations provided that taxpayers were permitted to rely on the proposed regulations, and if and to the extent that the final regulations were more restrictive, the final regulations would be prospective. As described above, the final regulations

make certain modifications to the proposed regulations. These may be more restrictive than the proposed regulations under certain limited circumstances. Consequently, for plan years beginning after December 31, 1996, but before January 1, 2007, an employer is permitted to determine the excludible employees under a section 401(k) plan or section 401(m) plan using either § 1.410(b)–6(g) in the proposed regulations or these final regulations.

Special Analyses

It has been determined that this is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

Drafting Information

The principal authors of these regulations are Linda L. Conway and Michael P. Brewer of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by removing the entry for §§ 1.410(b)–2 through 1.410(b)–10 and adding entries in numerical order to read, in part, as follows:

Authority: 26 U.S.C. 7805. * * *

§ 1.410(b)–2 also issued under 26 U.S.C. 410(b)(6).

§ 1.410(b)–3 also issued under 26 U.S.C. 410(b)(6).

§ 1.410(b)–4 also issued under 26 U.S.C. 410(b)(6).

§ 1.410(b)–5 also issued under 26 U.S.C. 410(b)(6).

§ 1.410(b)–6 also issued under 26 U.S.C. 410(b)(6) and section 664 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (Public Law 107–16, 115 Stat. 38).

§ 1.410(b)–7 also issued under 26 U.S.C. 410(b)(6).

§ 1.410(b)–8 also issued under 26 U.S.C. 410(b)(6).

§ 1.410(b)–9 also issued under 26 U.S.C. 410(b)(6).

§ 1.410(b)–10 also issued under 26 U.S.C. 410(b)(6).* * *

■ **Par. 2.** Section 1.410(b)–0 is amended by:

■ 1. Revising the entry for 1.410(b)–6(g).

■ 2. Adding entries for 1.410(b)–6(g)(1), (g)(2), and (g)(3).

The revision and additions read as follows:

§ 1.410(b)–0 Table of contents.

* * * * *

§ 1.410(b)–6 Excludable employees.

* * * * *

(g) Employees of certain governmental or tax-exempt entities.

(1) Plans covered.

(2) Employees of governmental entities.

(3) Employees of tax-exempt entities.

* * * * *

■ **Par. 3.** In § 1.410(b)–6, paragraph (g) is revised to read as follows:

§ 1.410(b)–6 Excludable employees.

* * * * *

(g) *Employees of certain governmental or tax-exempt entities*—(1) *Plans covered.* For purposes of testing either a section 401(k) plan, or a section 401(m) plan that is provided under the same general arrangement as a section 401(k) plan, an employer may treat as excludable those employees described in paragraphs (g)(2) and (3) of this section.

(2) *Employees of governmental entities.* Employees of governmental entities who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B)(ii) may be treated as excludable employees if more than 95 percent of the employees of the employer who are not precluded from being eligible employees by reason of section 401(k)(4)(B)(ii) benefit under the plan for the year.

(3) *Employees of tax-exempt entities.* Employees of an organization described in section 403(b)(1)(A)(i) who are eligible to make salary reduction contributions under section 403(b) may be treated as excludable with respect to a section 401(k) plan, or a section 401(m) plan that is provided under the same general arrangement as a section 401(k) plan, if—

(i) No employee of an organization described in section 403(b)(1)(A)(i) is eligible to participate in such section 401(k) plan or section 401(m) plan; and

(ii) At least 95 percent of the employees who are neither employees of an organization described in section 403(b)(1)(A)(i) nor employees of a governmental entity who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B)(ii) are eligible to participate in such section 401(k) plan or section 401(m) plan.

* * * * *

■ **Par. 4.** In § 1.410(b)–10, paragraph (e) is added to read as follows:

§ 1.410(b)–10 Effective dates and transition rules.

* * * * *

(e) *Effective date for provisions relating to exclusion of employees of certain tax-exempt entities.* The provisions in § 1.410(b)–6(g) apply to plan years beginning after December 31, 1996. For plan years to which § 1.410(b)–6 applies that begin before January 1, 1997, § 1.410(b)–6(g) (as it appeared in the April 1, 2005 edition of 26 CFR part 1) applies.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: June 30, 2006.

Eric Solomon,

Acting Deputy Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. E6–11545 Filed 7–20–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2520

RIN 1210–AB04

Electronic Filing of Annual Reports

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Final rule.

SUMMARY: This document contains a final rule establishing an electronic filing requirement for certain annual reports required to be filed with the Department of Labor by plan administrators and other entities. The Employee Retirement Income Security Act of 1974, as amended (ERISA), the Internal Revenue Code of 1986, as amended (Code), and the regulations issued thereunder impose certain annual reporting obligations on pension and welfare benefit plans, as well as on certain other entities. These annual reporting obligations generally are satisfied by filing the Form 5500 "Annual Return/Report of Employee Benefit Plan," including any required schedules and attachments (Form 5500). Currently, the Department of Labor

(Department), the Pension Benefit Guaranty Corporation, and the Internal Revenue Service (Agencies) use an automated document processing system—the ERISA Filing Acceptance System (EFAST)—to process the Form 5500 filings. As part of the Department's efforts to update and streamline the current processing system, the regulation contained in this document requires electronic filing of all annual reports filed with the Secretary of Labor (Secretary) for plan years beginning on or after January 1, 2008, to satisfy annual reporting obligations under Part 1 of Title I of ERISA. This regulation affects employee pension and welfare benefit plans, plan sponsors, administrators, and service providers to plans subject to Title I of ERISA.

DATES: This rule is effective September 19, 2006.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Goodman or Yolanda R. Wartenberg, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8523. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

Sections 104(a) and 4065 of ERISA, and sections 6058(a) and 6059(a) of the Code, and the regulations issued under those sections impose certain annual reporting and filing obligations on pension and welfare benefit plans, as well as on certain other entities.[1] Plan administrators, employers, and others generally satisfy these annual reporting obligations by filing the Form 5500 Annual Return/Report of Employee Benefit Plan, together with any required attachments and schedules (Form 5500). On August 30, 2005, the Department of Labor (Department) published in the **Federal Register** (70 FR 51541) a proposed rule to implement the Department's announced intention to move to a wholly electronic filing system for receipt of Form 5500 filings (E-Filing Proposal).

The E-Filing Proposal described the current automated document processing system—the ERISA Filing Acceptance System (EFAST)—maintained by the Department to process annual reports. Using the EFAST system, the Department annually receives and processes approximately 1.4 million filings. For the 2002 plan year, these filings translated into approximately 25 million paper pages. The EFAST system, which was developed in 1998 and 1999, relies on a mixture of paper and electronic filing options and computerized processing methods to accept, compile, and monitor the Form 5500 filings. A private contractor performs the EFAST processing under a contract with the Department's Employee Benefits Security Administration (EBSA). The end of the time-limited contracting cycle and the beginning of another contracting cycle present a significant opportunity for EBSA to evaluate the system and to make changes to take advantage of technological advances. In connection with that process, the Department posted, in March 2004, a request for public comments (Request for Comment) on its Web site relating to updating the current EFAST processing system.[2]

The Department explained in the E-Filing Proposal that it believed that a wholly electronic system will result in, among other things, reduced filer errors and, therefore, reduced correspondence and potential for filer penalties; more timely data for public disclosure and enforcement, thereby enhancing the protections for participants and beneficiaries; and lower annual report processing costs, benefiting taxpayers generally. In order to ensure an orderly and cost-effective migration to an electronic filing system by both the Department and Form 5500 filers, the requirement to file electronically was proposed to be implemented for plan years beginning on or after January 1, 2007.

The Department received eighteen comment letters on the E-Filing Proposal from representatives of employers, plans, and plan service providers. The Department also received a comment letter from the Small Business Administration's Office of Advocacy (SBA). Copies of all the comments are posted on the Department's Web site at *http://www.dol.gov/ebsa/regs/cmt_mefr.html.*

Set forth below is a discussion of the comments received on the proposal, including changes made in response to the comments, and an overview of the final regulation.

B. Discussion of Public Comments

Virtually all of the comments received in response to the E-Filing Proposal recognized the value of electronic filing over paper filing, expressed support for increasing the use of electronic filing, and recognized that the Department's move to a wholly electronic system for receipt and processing of Form 5500 filings reflects a trend also seen in the business community to move toward paperless systems. The majority of comments endorsed the concept of a transition to 100 percent electronic filing and favored the development of a secure Internet Web site on which a filer could file the Form 5500 through direct input of data as an option to hiring a third party preparer or purchasing privately developed software to file the Form 5500. Several commenters, including the SBA, questioned the ability of employers, especially small employers, to make the necessary adjustments to comply with an electronic filing mandate for the 2007 plan year, especially in the absence of information about the technical specifications that will have to be met to use the new e-filing system. Most commenters suggested that the Department postpone the implementation to give filers and service providers enough time to prepare their own systems and staff to use the system. Some suggested that the Department grant a transition year exemption from annual reporting civil penalties for unintentional filing violations caused by lack of familiarity with the new filing process. One commenter asked whether electronic filing would apply for administrators of one-participant plans required to file the Form 5500–EZ to satisfy annual reporting requirements under the Code.[3]

The E-Filing Proposal specifically invited comments on the need for an exception to accommodate any unanticipated and potentially significant impediments to some filers' transition to electronic filing. Commenters were encouraged to provide specific examples of such impediments, as well as to address the specific conditions for, and necessary scope of, relief under a hardship exception. In response, several commenters suggested as alternatives that the Department phase in the e-file

[1] Other filing requirements beyond the scope of this rule may apply to employee benefit plans and to multiple employer welfare arrangements under ERISA or to other benefit arrangements under the Code. For example, Code sec. 6033(a) imposes an additional reporting and filing obligation on organizations exempt from tax under Code sec. 501(a), which may be related to retirement trusts that are qualified under sec. 401(a) of the Code. Code sec. 6047(e) also imposes an additional reporting and filing obligation on pension benefit plans that are employee stock ownership plans (ESOPs).

[2] A more detailed description of the EFAST processing system is included in the Request for Comment which may be reviewed at: *http://www.efast.dol.gov/efastrfc.html.*

[3] For purposes of the annual reporting requirements under the Code, certain pension benefit arrangements that cover only sole proprietors or partners (and their spouses), which are not employee benefit plans under Title I of ERISA, are permitted to file the Form 5500–EZ to satisfy filing requirements under the Code. See instructions to the Form 5500–EZ to determine who may currently file the Form 5500–EZ.

mandate over time and allow filers to test the system on a voluntary basis or through a pilot program. One commenter suggested the Department continue to offer paper filing along with electronic filing and, instead of mandating electronic filing, take steps to encourage electronic filing by making it easier and cheaper to use than paper.

1. Electronic Filing Mandate

In developing the proposed regulation, the Department sought to advance two main goals. One was to maximize the speed, efficiency, and accuracy with which annual reports are transmitted, accepted, and processed, thereby enhancing the protection of participants' rights. The other was to minimize the burden placed on filers. In pursuit of these goals, the Department considered and analyzed several alternatives, taking into account the costs and benefits attendant to each. These included the following: (1) Creating a new processing system that could continue to process both electronic and paper submissions without limitation; (2) continuing the present, primarily paper-based processing system on an interim basis alongside a new, solely electronic processing system; (3) developing a new, primarily electronic processing system with a temporary capacity to process a limited number of paper filings, which would be made available under criteria targeting those filers most likely to desire a longer transition period; and (4) transitioning to a new, solely electronic processing system under a uniformly applicable electronic filing requirement.

After having carefully considered the public comments, the Department continues to believe, consistent with the goals of E-government, as recognized by the Government Paperwork Elimination Act [4] and the E-Government Act of 2002,[5] that the new processing system designed to replace EFAST must have as its core component a requirement that Form 5500 filings be submitted through electronic means. A mandate of electronic filing of benefit plan information, among other program strategies, will facilitate EBSA's achievement of its Strategic Goal of "enhancing pension and health benefits of American workers." EBSA's strategic goal directly supports the Secretary of Labor's (Secretary) Strategic Goals of "protecting workers benefits" and of fostering "a competitive workforce," as well as promoting job flexibility and minimizing regulatory burden.[6] A cornerstone of EBSA's enforcement program is the collection, analysis, and disclosure of benefit plan information.

A comparison of the relative costs and benefits of the available alternatives supports the move to a wholly electronic filing system. The Department believes that a wholly electronic system will result in, among other things, a reduction in filer errors and a correlative reduction in correspondence and potential for filer penalties; more timely data for public disclosure and enforcement, thereby enhancing the protections for participants and beneficiaries; and lower annual report processing costs, benefiting taxpayers generally. The resulting improvement in the timeliness and accuracy of the information from electronic filing would assist EBSA in its enforcement, oversight, and disclosure roles and ultimately enhance the security of plan benefits.[7] Having a phase-in period, pilot program, and providing filers with a voluntary choice whether to file electronically, as suggested by some commenters, would require the Department to continue to maintain a paper filing system. The Department still believes that maintaining any paper filing system, even on a reduced scale and/or for a limited period of time, would be inherently inefficient and unduly costly. It is the Department's view that any economic benefit that might accrue to some limited class of filers under the alternatives considered would be outweighed by the benefits to participants and beneficiaries at large and to the Department and taxpayers generally of implementing a single, wholly electronic system. The Department accordingly is not prepared to adopt any alternative that would involve continuation of paper filing alternatives to electronic filing.

The Department's conclusions concerning the public comments and alternatives are grounded in the Regulatory Impact Analysis presented in the E-Filing Proposal and below.

2. Postponed Implementation of Electronic Filing Requirement

As noted above, commenters generally expressed concern about the time line in the proposal calling for the new electronic requirement to be implemented for plan years (or reporting years for non-plan filers) commencing on or after January 1, 2007. Several commenters, including the SBA, questioned the ability of employers, especially small employers, to make the necessary adjustments to comply with an electronic filing mandate for the 2007 plan year and urged that a delay of the implementation of the e-file mandate was needed to give all filers and service providers enough time to train staff, adopt new procedures, and install new software.

In light of the concerns raised regarding the timing of the implementation of the system, and in order to ensure an orderly and cost-effective migration to an electronic filing system by both the Department and Form 5500 filers, the Department has decided to delay the electronic filing requirement. Under the final regulation, the electronic filing requirement is to become effective for all annual report filings made under Part 1 of Title I of ERISA for plan years (or reporting years for non-plan filings) beginning on or after January 1, 2008. Accordingly, the vast majority of filers will have until at least July 2009 to make any necessary adjustments to accommodate the electronic filing of their annual report.[8] This delay also affords service providers, software developers, and the Department adequate time to work through electronic processing issues.[9]

In addition, the Department, in coordination with the Internal Revenue Service (IRS) and Pension Benefit Guaranty Corporation (PBGC), is taking

[4] Title XVII, Pub. L. 105–277, 112 Stat. 2681 (Oct. 21, 1998).

[5] Pub. L. 107–347, 116 Stat. 2899 (Dec. 17, 2002).

[6] For further information on the Department of Labor's Strategic Plan and EBSA's relationship to it, see *http://www.dol.gov/_sec/stratplan/main.htm.*

[7] The Government Accountability Office (GAO) noted in a June, 2005 report on the Form 5500 that the current necessity for handling paper filings under EFAST creates a long processing related delay between receipt of a filing and the availability of its information for any enforcement and oversight purposes even in cases where no filing errors are detected. Private Pensions: Government Actions Could Improve the Timeliness and Content of Form 5500 Pension Information (GAO–05–491) ("GAO Report") at 28 and fig. 9 at 32. GAO also noted that, where errors in a filing are detected, additional processing delays of up to 120 more days occur. Electronic filing would eliminate virtually all of that processing delay, improving outcomes for all of the users of the Form 5500 information.

[8] Annual reports generally are not required to be filed until the end of the 7th month following the end of the plan year.

[9] One comment noted that to create a wholly electronic filing environment, the filing system will have to be capable of accepting amended filings for prior years where paper filings were permitted as well as delinquent filings that currently can be filed under the Department's Delinquent Filer Voluntary Compliance Program by using either the form issued for the prior year or the most current form available at the time the administrator files the late report. As noted above, the Department believes that the new e-file system must be the exclusive means for filing all Form 5500s. Accordingly, delinquent or amended filings for prior plan years for which paper filing options were available will be subject to the electronic filing requirement. The Department will provide instructions prior to the inauguration of the system on how those filings are to be made under the electronic filing system.

steps to revise the Form 5500 that should further mitigate any burdens associated with transitioning to a new wholly electronic processing system. Concurrently with the publication of this final rule, the Agencies are separately publishing in today's **Federal Register** proposed revisions to the annual reporting forms and proposed amendments to the Department's implementing regulations that are to be applicable for the 2008 plan year, the reporting year for which the new e-filing system will be implemented. As discussed more fully in the separate **Federal Register** notices, the Agencies believe the proposed form changes in conjunction with the electronic filing system will substantially reduce plan administrators' reporting compliance burdens and also greatly enhance the utility and accessibility of reported information to the government, participants and beneficiaries, and others. For example, the Agencies are developing a simplified, two-page form (titled the Form 5500–SF with the "SF" standing for "Short Form") for plans that have fewer than 100 participants and that invest in secure, easily valued assets. The Department estimates that approximately 90 percent of all small plan filers would be able to use the new short form. Also, because of limits on what the IRS can require to be filed electronically,[10] the IRS is removing from the Form 5500 the schedules, attachments, and information currently required solely to comply with an IRS reporting obligation (e.g., Schedule E (ESOP Annual Information) and Schedule SSA (Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits)). The IRS has advised the Department that, although there are no mandatory electronic filing requirements for the Form 5500 under the Code or the regulations issued thereunder, to ease the burdens on plans the cover only sole proprietors or partners (and their spouses) that are not subject to Title I of ERISA but file the Form 5500–EZ to satisfy the annual reporting and filing obligations imposed by the Code, the IRS intends to permit certain Form 5500–EZ filers to satisfy the requirement to file the Form 5500–EZ with the IRS by filing the Form 5500–SF electronically through the EFAST processing system. Therefore, under the proposal certain Form 5500–EZ filers will be provided both electronic and paper filing options. The electronic option would allow 5500–EZ filers to complete and electronically file with EFAST selected information on the Short Form 5500. Form 5500–EZ filers would also be able to choose instead to file a Form 5500–EZ on paper with the IRS.

[10] See, e.g., 26 CFR 301.6033–4T (mandating electronic filing of certain corporate income tax returns and returns of organizations required to be filed under Code sec. 6033).

3. Waiver of Filing Penalties

Two commenters, including the SBA, suggested that the Department consider providing filers, especially small plan filers, with a one time exemption from annual reporting civil penalties for unintentional filing violations due to lack of familiarity with the new filing process. Commenters also expressed concern that design and operational issues may arise during the initial stages of implementing the new electronic filing system that may require filers to refile, revise software, or otherwise incur expenses and delay in adjusting their systems to address glitches in the electronic filing system. The comments expressed the view that a one time exemption from civil penalties would help plan sponsors transitioning to an unfamiliar filing process.

Section 502(c)(2) of ERISA provides that the Secretary may assess a civil penalty of up to $1,100 a day from the date of a plan administrator's failure or refusal to file the annual report required to be filed under ERISA.[11] Penalties under section 502(c)(2) are assessed only in those instances where there is a failure or refusal to file any annual report within the prescribed time frames or where, subsequent to notification that a filed report has been rejected and the reasons for which the filing has been rejected, the filer fails or refuses to file a corrected report within the 45-day period prescribed in section 104(a)(5) of ERISA. Section 104(a)(5) specifically contemplates that, where a filing is rejected under section 104(a)(4), the filer will be afforded 45 days from the date of the rejection to submit a revised filing satisfactory to the Secretary. Accordingly, in the case of a report rejected under section 104(a)(4), the administrator can avoid the assessment of any penalty under section 502(c)(2) by making the necessary corrections to the filing within the prescribed time frame. In addition, as reflected in the regulation at § 2560.502c–2, penalties may be waived, in whole or in part, upon the administrator's showing of mitigating circumstances regarding the degree or willfulness of the noncompliance.

[11] In accordance with the requirements of the Federal Civil Penalties Inflation Act of 1990, as amended, the Department's regulation at 29 CFR 2575.502c–2 increased the maximum civil penalty from $1,000 a day as stated in section 502(c)(2) of ERISA to $1,100 a day for violations occurring after July 29, 1997.

The Department recognizes that some plan administrators, plan sponsors, and service providers may encounter technical and logistical problems in taking the steps necessary to transition to a wholly electronic filing system for annually submitting Form 5500 reports. As noted above, the Department believes that further delay of the electronic mandate being adopted in this final rule will provide plans and service providers with adequate time to make necessary adjustments in advance of the implementation of the new filing system. The Agencies also will be conducting outreach activities to help filers successfully make the transition to the wholly electronic filing system. Nonetheless, in assessing civil penalties under section 502(c)(2) of ERISA, the Department will take into account technical and logistical obstacles experienced by plan administrators who acted prudently and in good faith in attempting to timely file a complete annual report during the first year of the wholly electronic filing system. In the Department's view it would be premature at this point to announce a general exemption from annual reporting civil penalties, but the Department will remain open to reconsidering the issue to the extent developments suggest that an exemption for unintentional filing violations caused by lack of familiarity with the new filing process would facilitate a smoother transition to the new electronic filing system.

Although not specifically raised by the commentators, annual reporting penalties assessed under section 502(c)(2) of ERISA are independent from those penalties that may be imposed by the IRS for noncompliance with the annual reporting requirements of the Code. Therefore, penalties under one or both statutes could be assessed or waived in a given situation. In this regard, the Department will be coordinating its annual reporting compliance efforts with those of the IRS.

4. Technical Comments on the E-Filing System

In connection with the proposal, the Department reviewed the Request for Comments on the technical design of the new electronic filing system and provided further information regarding the project to assist the public in evaluating the electronic filing proposal; however, the Department noted that the proposed regulation concerned only the mandate of electronic filing. A number of commenters included in their comments recommendations regarding

various technical and operational specifications that the commenters thought should be part of the new e-filing system.

The majority of commenters favored the development of a secure Internet Web site on which a filer could file the Form 5500 through direct input of data as an additional option to hiring a third party preparer or purchasing privately developed software to file the Form 5500. Four commenters requested that the system be structured to allow direct filing by plan administrators so that small plans would not have to hire a paid preparer to file nor have to use privately developed software at plan expense. Several commenters emphasized the need for an automated way to receive an electronic signature in the form of a Personal Identification Number (PIN) or other signer identification. Other commenters suggested that the Department establish both a transmitter-based and a Web-based filing process. Several commenters suggested that multiple parties be able to submit information electronically for single filing, that plan sponsors be allowed to authorize third party filers as well as accommodate multiple signers, and that the plan's auditor and actuary be able to access the forms and provide approval as needed, including use of a separate electronic signature. Other commenters suggested that the system allow for the ability to download and import into the electronic Form 5500 filing materials from multiple sites or entities and allow for the use of multiple, privately-developed software formats in a filing. One commenter wanted the system to include adequate safeguards against security vulnerabilities resulting from multiple-party access to information saved to a secured Internet Web site. Another commenter recommended developing a standard encryption method for the report of the independent qualified public accountant. One commenter recommended that the e-filing system be capable of processing extensions, and amended and late filings, as well as filings for different years.

The Department reiterates its intention to ensure that the new e-filing system will remedy the existing technical difficulties that underlie the perceived limitations of EFAST's current electronic filing design and will provide an electronic filing process that will be simpler, easier, and more attractive to filers. For example, as explained in the E-Filing Proposal, the Department anticipates that the new electronic filing system will incorporate the Internet as the sole medium for transmission of all filings, with this Internet-based transmission process superseding all of the other currently available methods of transmitting Form 5500 filings, including use of computer diskette, CD–ROM and magnetic tape. The system is to incorporate immediate validity and accuracy checks that will reduce both the error and rejection rate of filings and will eliminate much of the costly post-filing paper correspondence and related potential penalties. It is intended that the new electronic filing system will provide more than one vehicle for the electronic submission of annual return/reports. It is intended that the new filing system will offer users of approved, privately developed Form 5500 computer software (service providers to plans as well as plan administrators) a secure Internet-based method for transmission of Form 5500 filings created through the use of the software. In making a transition to 100 percent electronic filing, it is contemplated that the new system will continue to provide support to private sector software developers. Indeed, it is expected that third-party software will remain the primary means of producing Form 5500s. It is intended that service providers and software developers that provide value-added services for plan sponsors will be able to incorporate the new system's method of transmission into their services effectively and efficiently. Software file specifications will be based on improved data exchange technology based on widely-accepted standards, such as XML. It is also intended that software file specifications will be non-proprietary so that users of different software may freely share information across different platforms. The Department also intends to include in the new system, as a separate filing method, a dedicated, secure Internet Web site through which plan administrators (or other return/report preparers) will be able to input data and to complete and submit Form 5500 filings on an individual plan-by-plan basis. It is anticipated that the Internet Web site will provide the filer with the capability of entering and saving data for an individual filing through multiple sessions, uploading attachments, saving return/reports to a repository, and retrieving, updating, and editing stored filings, as well as creating and submitting amended filing data to EBSA.

The Department is aware that some filers may be concerned that the new electronic filing system could require changes in their current practices or their purchase of new software. The Department does not believe that filers are at significant risk of not having electronic access or that filers will be required to purchase new software or make significant changes to their current practices. As an initial matter, this filing is made on behalf of employee benefit plans, not individuals. Moreover, the Department's confidence that these filers should be able to have electronic access, with relatively little difficulty or additional cost, is based on the following considerations. First, the new system will have two options for electronic filing: (1) By entering data directly on screen (through a Web-based system) and (2) by entering data through third-party software that many preparers may choose to use with an XML data feed. Second, the new system will be platform neutral; in this regard, the Department's Chief Information Officer will confirm and ensure that the new system will support all major platforms (Windows, Mac, UNIX, Linux, etc.) and browsers (Mozilla, Firefox, Opera, IE, Netscape, etc.).

Although it is still not possible at this time to provide full technical details regarding the new electronic filing system as many of the technological aspects of the redesign are still in development, the Department has been and will continue to consider the filing community's concerns and recommendations regarding various technical and operational specifications in the development of the new electronic filing system. In that regard, the Department notes that many of the commenters' suggestions were previously submitted in response to the Request for Comment that the Department posted on its Web site relating to updating the current EFAST processing system.

C. Overview of the Final Rule

The rule adds a new § 2520.104a–2, Electronic Filing of Annual Reports, to subpart E of 29 CFR part 2520 and establishes a requirement for the electronic filing of the Form 5500 for purposes of the annual reporting provisions of Title I of ERISA. The final rule provides that any annual report (including any accompanying schedules or attachments) filed with the Secretary under Part 1 of Title I of ERISA for any plan year beginning on or after January 1, 2008, shall be filed electronically in accordance with the instructions applicable to the report and such other guidance as the Secretary may provide. Because the Form 5500 is also filed by certain non-plan entities, such as common or collective trusts, pooled separate accounts, and entities described in 29 CFR 2520.103–12, which file for the fiscal year ending

with or within the plan year for which a plan's annual report is filed, the final rule makes further reference to the first "reporting year" beginning on or after January 1, 2008, for such entities.

The rule is designed to ensure that all annual reports filed under Part 1 of Title I of ERISA, as well as any statements or schedules required to be attached to the report, including those filed by administrators (29 CFR 2520.103–1), group insurance arrangements (29 CFR 2520.103–2), common or collective trusts and pooled separate accounts (29 CFR 2520.103–3, 2520.103–4, and 2520.103–9), and entities described in 29 CFR 2520.103–12, are required to be filed electronically.

Following the development of a new electronic filing system, the Department intends to provide specific instructions and guidance concerning methods of electronic filing in the instructions for the Form 5500 and via its Web site. The requirement in the final rule to file the annual report electronically applies only to annual reports filed under Part 1 of Title I of ERISA.

For purposes of the annual reporting requirements under section 4065 of Title IV of ERISA, the PBGC has advised the Department that all administrators of plans required to file reports under ERISA section 4065 also are required to file reports for purposes of section 104(a) of ERISA and a plan administrator's electronic filing of the Form 5500 for purposes of ERISA section 104(a), together with the required attachments and schedules and otherwise in accordance with the instructions to the form, will be treated as satisfying the administrator's annual reporting obligation under section 4065 of Title IV of ERISA.

For purposes of the annual filing and reporting requirements of the Code, the IRS has advised the Department that, although there are no mandatory electronic filing requirements for a Form 5500 under the Code or the regulations issued thereunder, the electronic filing of a Form 5500 by plan administrators, employers, and certain other entities for purposes of ERISA section 104(a), together with the required attachments and schedules and otherwise in accordance with the instructions to the Form, will be treated as satisfying the annual filing and reporting requirements under Code sections 6058(a) and 6059(a). Furthermore, as noted above, the IRS has determined that administrators of certain one-participant plans may file the Short Form 5500 electronically through the EFAST processing system to satisfy the requirement to file the Form 5500–EZ with the IRS. Administrators of one-participant plans will continue to have the option of filing the Form 5500–EZ, but if they file the Form 5500–EZ, they must file with the IRS, rather than with EFAST.[12] The IRS intends that plan administrators, employers, and certain other entities that are subject to other filing and reporting requirements under Code sections 6033(a), 6047(e), and 6057(b) must continue to satisfy these requirements in accordance with IRS revenue procedures, publications, forms, and instructions. With respect to other annual reporting and filing obligations imposed by the Code but not required under section 104(a) of ERISA, such as are currently satisfied by the filing of the Schedule SSA, the IRS has advised the Department that it is currently exploring how best to make a transition from paper filing to electronic filing in a manner that minimizes the burdens on taxpayers and practitioners. For example, the IRS notes that it has promulgated regulations mandating or permitting electronic filing of certain returns filed by pension and welfare benefit plans. *See, e.g.,* 26 CFR 301.6033–4T (mandating electronic filing of certain corporate income tax returns and returns of organizations required to be filed under Code section 6033); 26 CFR 1.6033–4T (returns required to be filed on magnetic media under 26 CFR 301.6033–4T must be filed in accordance with IRS revenue procedures, publications, forms, or instructions).

The rule also makes it clear that the requirement to file annual reports electronically does not affect a person's record retention or disclosure obligations. In other words, the obligations of persons to retain records for purposes of sections 107 and 209 of ERISA would not be altered by the fact that the annual report would be required to be filed in electronic form. Similarly, a plan administrator's obligation to make the latest annual report available for examination and to furnish copies upon request, in accordance with sections 104(b)(2) and 104(b)(4) of ERISA, will not be affected by an electronic filing requirement.

Conforming changes are being made in order to reflect the electronic filing requirement in 29 CFR 2520.103–1(f) (contents of the annual report), 2520.103–2(c) (contents of the annual report for a group insurance arrangement), 2520.103–9(d) (direct filing for bank or insurance carrier trusts and accounts), and 2520.103–12(f) (limited exception and alternative method of compliance for annual reporting of investments in certain entities).

[12] Under the voluntary electronic filing option, one participant plan filers filing an amended return for a plan year must file the amended return electronically using the Form 5500–SF if they initially filed the Form 5500–SF electronically for the plan year and must file the amendment with the IRS using the paper Form 5500–EZ if they initially filed for plan year with the IRS on a paper Form 5500–EZ.

D. Regulatory Impact Analysis

Summary

The Department has considered the costs and benefits of this final regulation, taking into account the public comments submitted in response to the proposed regulation, the changes to the proposal incorporated into this final regulation, and the Department's process to transition from EFAST to a new electronic filing system. The Department believes that the benefits that will arise from mandatory electronic filing beginning with the 2008 plan year will justify its costs. Those costs, which will fall principally on plans, will consist mainly of a one-time, transition or start-up cost to make the change to electronic filing, generally to be incurred in 2009, which on aggregate is estimated to be $22 million. Benefits to plans, which will include ongoing savings on material and postage and efficiency gains from the early detection and elimination of potential filing errors in the course of electronic filing, are estimated to total $10 million annually beginning in 2009. Over time the ongoing savings attributable to this regulation are expected to outweigh its one-time transition cost. Aggregate savings are estimated to exceed aggregate costs by $24 million over the first five years (discounting future savings at a real rate of 3 percent).

As previously stated, additional, substantial, although not quantifiable, benefits are expected to accrue to the government and the public in the forms of substantially reduced processing costs and more timely availability of accurate filing data for use in enforcement and for other purposes of benefit to plans and participants.

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a "significant regulatory action" is an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the

economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OMB has determined that this action is significant under section 3(f)(4) because it raises novel legal or policy issues arising from the President's priorities. Accordingly, the Department has undertaken and describes below an analysis of the costs and benefits of this regulation.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and are likely to have a significant economic impact on a substantial number of small entities. For purposes of analysis under the RFA, EBSA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under section 104(a)(3) of ERISA, the Secretary may also provide for exemptions or simplified annual reporting and disclosure for welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46, and 2520.104b–10, certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans that cover fewer than 100 participants and satisfy certain other requirements. Further, while some large employers may have small plans, in general small employers maintain most small plans. Thus, EBSA believes that assessing the impact of these rules on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 *et seq.*).

The Department presented an initial regulatory flexibility analysis at the time this regulation was proposed because the Department believed that the proposed regulation might have a significant economic impact on a substantial number of small entities, as defined under section 603 of the RFA. After reviewing and considering the public comments submitted in response to the proposal and the changes that are incorporated into the final regulation, the Department has prepared a final regulatory flexibility analysis, which is presented in this document as part of a broader economic analysis.

Costs and Benefits

Under this final regulation, costs to plans will include a one-time transition or start-up cost to make the change to electronic filing, estimated at $22 million. Benefits will include ongoing savings on material and postage and efficiency gains from the early detection and elimination of potential filing errors in the course of electronic filing, estimated to total $10 million annually. Over time the ongoing savings attributable to this regulation are expected to outweigh its one-time transition cost. Aggregate savings are estimated to exceed aggregate costs by $24 million over the first five years (discounting future savings at a real rate of 3 percent). Additional benefits are expected to accrue to the government and the public in the forms of reduced processing costs and more timely availability of accurate filing data.

The costs and benefits of this regulation will accrue primarily to 815,000[13] plans that file Form 5500s.[14] Non-plan entities that file Form 5500s generally do so in their capacity as service providers to plans and therefore are expected to pass their own costs and benefits from the regulation on to the plans they serve.[15]

[13] The numbers used in this analysis for aggregate plans and for plan subcategories (such as large and small plans; hand-print, machine-print, and electronic filers; and correction correspondence) are derived from Form 5500 data for the 2002 plan year.

[14] The economic analysis of the regulation pertains only to those plans that file a Form 5500 to satisfy filing requirements under Title I of ERISA. Because the Form 5500–EZ is filed only to satisfy filing requirements under the Code, data related to Form 5500–EZ filers is not included in this analysis.

[15] Economic theory predicts that producers in competitive markets pass costs and savings on to buyers.

Transition Costs

This regulation will entail some one-time costs, incurred in making the transition to electronic filing. The magnitude of the transition costs will vary across filer groups. As described in the economic analysis for the proposed regulation, the Department believes that filers that previously relied on the hand-print method of filing will generally face higher transition costs than other filers. The Department has refined its analysis of filers' transition costs to take into account commenters' concerns about the increased risk of initial filing difficulties when the new electronic filing system first begins operations, which is associated with potential higher filing costs. For purposes of this analysis, therefore, the Department has assumed that filers who submit an electronic filing within the first six months of operations of the new processing system, from January 1, 2009, through June 30, 2009 (the early filing period), may experience a higher cost.[16]

Hand-print Filers. Hand-print filers as a group are likely to face larger transition costs than others.[17] These filers by and large currently file government printed forms, filled out by hand or by using a typewriter.[18] Like all other filers, they will have the option of preparing and submitting their filings via a government provided Web site. It is likely that many (but not all) of these hand-print filers already have an electronic infrastructure (mainly a personal computer and Internet service) sufficient to support electronic filing. Nonetheless, hand-print filers are likely to incur some expense to learn about the new requirement, and some will incur

[16] In order to estimate how many filers within each relevant category would be likely to file within the first six months of the new filing system's operation, the Department analyzed filing patterns of the relevant types of plans for each calendar year from 2000 to 2002 and averaged the resulting data to produce an estimate for each category.

[17] The comments focused on small plans in discussing the potential difficulties that hand-print filers may experience. The Department believes that all hand-print filers, regardless of plan size, may experience larger transition costs than machine-print filers, since the size and complexity of the reports filed by larger hand-print filers may create a burden equivalent to that of the small hand-print filers. Accordingly, these estimates treat all hand-print filers the same with regard to transition costs.

[18] A very small fraction of all hand-print filers, typically a few percent, file computer-generated forms that are similar to and processed in the same way as government printed forms. These filers might tend to incur smaller transition costs than other hand-print filers. Because of their small numbers and the difficulties in separately identifying them in the data used for this analysis, the Department did not attempt to adjust its estimates to reflect this possible difference. This omission may result in a small overstatement of the aggregate transition cost for hand-print filers.

additional costs, such as in locating and becoming familiar with Internet access, as well as in establishing a secured filing account.

For the 96,000 current hand-print filers, the Department estimates that 11,000 will file their 2008 Form 5500 filing during the early filing period (from January 1, 2009, through June 30, 2009). The filers in that group, whether large or small, are assumed to require on average three hours to transition to electronic filing. The hand-print filers who file their 2008 reports after June 30, 2009, are assumed to require on average one and one-half hours each. The resulting transition cost to electronic filing for all hand-print filers is estimated at a one-time, aggregate of $9 million. This assumes that a professional-level employee, who costs the plans on average $58.80 per hour in wages, benefits, and overhead,[19] would perform the work required to make the transition to electronic filing. As discussed in the preamble to the proposed regulation, the Department recognizes that transition costs may vary greatly among hand-print filers and may be larger or smaller than these estimates. For example, some hand-filers may decide to switch to use of a service provider for completing the Form 5500 filing, which might entail greater initial expense; others may experience lower costs because they are highly experienced Internet users already engaged in electronic business activities.

Machine-Print Filers. The Department has also revised its estimates for machine-print filers to take into account a potentially higher cost of making the transition during the early filing period. The Department believes that a large proportion of machine-print filers hire service providers to complete their filings. For purposes of these estimates, that proportion is conservatively assumed to be 50 percent.

With respect to filings on behalf of machine-print filers by service providers during the early filing period, it is likely that service providers will quickly encounter and resolve any early period filing difficulties, reducing the transition cost per plan. Accordingly, the Department has assumed that, for that class of filings, the transition to electronic will require an average of five minutes per filing; later filings are assumed to require no transition costs. These assumptions, applied to an estimated 58,000 of service-provider filings that are expected to be made during early filing period, add $300,000 to the aggregate transition costs.

For machine-print filers who prepare their own filings and file them during the early filing period, the Department has assumed that the transition to the electronic filing system will require on average one hour; for later filers, the Department has assumed a transition time averaging 30 minutes. The Department estimates that 355,000 machine-print filers will transition to electronic filing using their own resources, with 58,000 filing during the early filing period, incurring an estimated aggregate transition cost of $12 million.

Based on the above-described calculations, the Department estimates that the total aggregate transition costs for all machine-print filers will be $12 million.

Electronic Filers

The Department has also revised its estimates to include costs attributable to filers who have previously used the electronic methods of filing available under EFAST in order to account for the possibility that electronic filers who file during the early filing period might have larger transition costs than those who make that transition later. The Department estimates that 500 previous electronic filers will file during the early filing period and that their transition to the new electronic processing system will require five minutes per plan. The Department assumes that later filers in this category will have only negligible transition costs. This results in an estimate of $2,000 in aggregate transition costs attributable to electronic filers.

In summary, the total aggregate start-up, transition cost to electronic filing under this regulation is estimated at $22 million, incurred primarily in 2009.

Ongoing Costs and Benefits

Preparation Costs. This regulation pertains to the filing, and not to the preparation, of the Form 5500. It is possible, however, that for some filers mandatory electronic filing will prompt changes in preparation methods. For example, hand-print filers may currently prepare their filings using a government-printed form and a typewriter. Such filers may prepare future filings by entering information into a government Web site. The Department considered the cost of making such transitions in preparation methods to be part of the overall transition cost of the regulation, included in the estimates presented above.

With respect to ongoing preparation costs, it is possible that some filers will incur higher costs in connection with new preparation methods prompted by this regulation and enabled by the new electronic filing system than with their current methods, while others will incur lower costs. For example, it is not immediately determinable whether entering information into a Web site will take more or less time than typing it onto a paper form. The Department expects that commercial preparation software will incorporate features that ease preparation, such as integrated access to form instructions and automatic filling of data fields based on entries in other fields or in prior filings. The Department also intends that the new government filing Web site interface will be designed with attention to ease of preparation. As it did not have an immediate basis to quantify the magnitude or costs and savings from possible changes in preparation methods, the Department did not attribute any such costs or savings to the regulation.

Filing Cost Savings. Filing costs generally are expected to be reduced by the implementation of this regulation. Savings are foreseen from the elimination of materials and mailing costs and from a reduction in filing errors and subsequent corrections. Electronic transmission will eliminate certain costs otherwise attendant to paper filing, including materials and postage. The Department estimates that by changing to electronic filing, 815,000 plans will benefit from approximately $900,000 in such cost-savings annually, assuming savings of $0.0167 per sheet of paper and $0.57 for postage per filing.

In addition, automated checks for errors and omissions upon electronic transmission, together with automated error checks and integrated instructions common to filing preparation software, will ease compliance with reporting requirements. Importantly, these features will reduce the need for subsequent amendments to submitted filings, as well as helping to avoid reporting penalties that might otherwise be assessed for deficient filings.

Historically, filers that use a software-based system generally have fewer filing errors. In 2002, 6 percent and 16 percent of electronic and machine-print filings, respectively, had filing errors compared to 38 percent of hand-print filings. The filing errors include items such as missing signatures, attestations, schedules, or back-up documents that resulted in an incomplete filing. As a result of filer errors and the need for

[19] The total labor cost is derived from wage and compensation data from the Bureau of Labor Statistics' (BLS) 2004 National Occupational Employment and Wage Estimates from the Occupational Employment Survey and BLS 2004 Employment Cost for Compensation.

additional information or clarifications about Form 5500 filings for the 2002 plan year, the Department mailed 150,000 letters to filers requesting corrections or additions. This correction process ultimately delays the final submission and requires plans to incur additional costs to address deficiencies. The electronic filing system's intended error detection capability may largely eliminate the Department's need to forward correspondence to plans with deficient filings. This enhancement is likely to save time for filers. If the need for correspondence can be eliminated, the aggregate annual cost savings to affected filers could be as high as $9 million, assuming elimination of correspondence with the Department saves an average of one hour of a professional's time, at an average of $58.80 per hour, plus the value of associated postage and materials. A disproportionate share of this savings, estimated at $2.2 million, would accrue to current hand-print filers (reflecting their historically higher filing error rates), while $6.6 million would accrue to machine-print filers. The Department (and by extension taxpayers) would realize additional savings from this reduced need to correct filing errors.

Societal Benefits of E-Filing and E-Government

The Department believes, as previously stated in the preamble to the proposed regulation, that the implementation of a fully electronic processing system for Form 5500 filings will produce substantial additional benefits for both the government and the public through reduced processing costs and more timely availability of accurate filing data. The decrease in erroneous filings and corrective correspondence will produce immediate savings to the Federal Government and therefore to taxpayers, and improvements in the data accuracy and accelerated processing will improve the timeliness and reliability of national statistics on private employee benefit plans.

In addition, the Department continues to believe that this regulation will contribute to the Federal Government's progress in implementing E-government initiatives, taking advantage of the electronic information technologies that are becoming increasingly central to business success in the United States. The proliferation of such technologies, and of expertise and familiarity with using them, is expected to moderate the cost of compliance with this regulation and to increase the importance of its implementation. The Department reviewed current literature on this topic in depth in the preamble to the E-Filing Proposal and continues to rely on those studies and their conclusions in adopting this final regulation.

Alternatives Considered

As discussed in the preamble to the E-Filing Proposal, before electing to pursue a wholly electronic filing system, the Department considered alternative options for reconfiguring the filing methods for the Form 5500, focusing in particular on the gradual approach advocated generally in the public comments on the Request for Comment, which described technical aspects of the development of the new processing system. The preamble to the proposed regulation described these alternatives and the Department's reasons for rejecting them in favor of mandated electronic filing. The Department continues to believe that allowing filers to choose whether to file electronically or on paper is undesirable because it would perpetuate the inefficiencies inherent in paper filing, such as avoidable filing errors and associated correspondence and civil penalties, delays in processing filings, and inferior data quality, as well as higher costs for the Federal government (and by extension taxpayers).

The Department received several comments on the E-Filing Proposal requesting that the Department reconsider some of the rejected alternatives. Commenters also asked the Department to consider providing small plans a one-year deferral of the electronic filing mandate, a one-year period of relief for filing violations, or a voluntary pilot program during the new system's first year of operations. These commenters suggested that providing this sort of transition relief would ameliorate public concerns about the burden of transitioning to electronic filing. In response to these comments the Department considered delaying the applicability date of the electronic filing mandate an additional year, until the 2009 year. To evaluate this alternative, the Department assessed the relative costs and benefits of mandating electronic filing beginning with the 2008 or 2009 plan year. In each scenario, the Department assumed that the new processing system would be operational as of January 1, 2009.

The Department's economic analysis supports its decision to require electronic filing beginning with the 2008 plan year. As noted earlier, some commenters anticipate that filers who file during the new electronic filing system's initial months of operation may incur higher transition costs than those who file later. Delaying the applicability date until plan year 2009 would reduce the proportion of filers exposed to such potential higher costs from a substantial minority to a tiny one. The Department estimates that adopting this alternative might reduce aggregate transition costs by $3 million. However, delaying the applicability date would also prolong for an additional year the estimated $10 million combined annual cost arising from paper filing and associated error correction under EFAST, which electronic filing is expected to eliminate, and so on net would increase aggregate, long-term filer costs by $7 million. It would also delay for a year the anticipated societal benefits of electronic filing.

Small Plans

This regulation will have an impact on small plans. As for all other plans, costs and benefits for small plans are expected to vary with the plans' circumstances. Most will likely incur moderate transition costs and subsequently realize moderate ongoing savings. Some, however, may experience larger impacts, including greater transition costs and at least some period of ongoing net cost increases rather than ongoing net savings. For example, some small plans may lack experience with or easy access to the Internet. Such plans may incur larger than typical transition costs to gain access to the Internet (or to enlist a service provider with access) and may find it more time consuming, and therefore more costly, to prepare their filing on a government Web site (or to interact with a service provider) than to prepare their filing using a government printed form that is completed "by hand" and filed on paper through the mails.

The Department estimates that 667,000 small plans will incur one-time transition costs of $18 million; this includes $7 million for 72,000 current hand-print filers, $11 million for 587,000 current machine-print filers, and $2,000 for 9,000 current electronic filers. It is further estimated that small plans will realize on-going annual savings from the elimination of materials and postage costs (approximately $715,000) and from the elimination of the need to correct deficient filings ($1.8 million accruing to hand-print filers, $5.6 million to machine-print filers, and $36,000 to electronic filers) for a total of approximately $8 million in annual savings. As with all other plans, over time the aggregate ongoing savings realized by small plans are expected to outweigh their aggregate one-time transition costs. Over five years, savings

are estimated to exceed costs by $17 million (discounting future savings at a real rate of 3 percent). The Department believes that impacts may vary among small plans, depending for example on their (or their service providers') access to and familiarity with associated technologies, and possibly on their size. The Department, however, lacks a basis on which to estimate such variations.

Paperwork Reduction Act

This final regulation does not introduce, or materially modify, any information collection requirement, but furthers the Department's goal of automating the submission of the Form 5500. As such, this final rule is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) because it does not contain a "collection of information" as defined in 44 U.S.C. 3502(3).

Congressional Review Act

The notice of final rulemaking being issued here is subject to the provisions of the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to the Congress and the Comptroller General for review.

Unfunded Mandates Reform Act

Pursuant to provisions of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), this rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or the private sector, which may impose an annual burden of $100 million or more.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism, and requires Federal agencies to adhere to specific criteria in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. This final rule does not have federalism implications because it has no 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. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in this final rule do not alter the fundamental reporting and disclosure requirements of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects in 29 CFR Part 2520

Employee benefit plans, Pensions, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Department amends 29 CFR part 2520 as follows:

PART 2520—RULES AND REGULATIONS FOR REPORTING AND DISCLOSURE

■ 1. The authority section of part 2520 continues to read as follows:

Authority: 29 U.S.C. 1021–1025, 1027, 1029–31, 1059, 1134, and 1135; Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2520.101–2 also issued under 29 U.S.C. 1132, 1181–1183, 1181 note, 1185, 1185a–b, 1191, and 1191a–c. Secs. 2520.102–3, 2520.104b–1, and 2520.104b–3 also issued under 29 U.S.C. 1003, 1181–1183, 1181 note, 1185, 1185a–b, 1191, and 1191a–c. Secs. 2520.104b–1 and 2520.107 also issued under 26 U.S.C. 401 note, 111 Stat. 788.

■ 2. Add §.2520.104a–2 after § 2520.104a–1 to read as follows:

§ 2520.104a–2 Electronic filing of annual reports.

(a) Any annual report (including any accompanying statements or schedules) filed with the Secretary under part 1 of title I of the Act for any plan year (or reporting year, in the case of common or collective trusts, pooled separate accounts, and similar non-plan entities) beginning on or after January 1, 2008, shall be filed electronically in accordance with the instructions applicable to such report, and such other guidance as the Secretary may provide.

(b) Nothing in paragraph (a) of this section is intended to alter or affect the duties of any person to retain records or to disclose information to participants, beneficiaries, or the Secretary.

■ 3. Amend § 2520.103–1 by revising paragraph (f) as follows:

§ 2520.103–1 Contents of the annual report.

* * * * *

(f) *Electronic filing.* See § 2520.104a–2 and the instructions for the Form 5500 "Annual Return/Report of Employee Benefit Plan" for electronic filing requirements. The plan administrator must maintain an original copy, with all required signatures, as part of the plan's records.

■ 4. Amend § 2520.103–2 by revising paragraph (c) as follows:

§ 2520.103–2 Contents of the annual report for a group insurance arrangement.

* * * * *

(c) *Electronic filing.* See § 2520.104a–2 and the instructions for the Form 5500 "Annual Return/Report of Employee Benefit Plan" for electronic filing requirements. The trust or other entity described in § 2520.104–43(b) filing under this section must maintain an original copy, with all required signatures, as part of its records.

■ 5. Amend § 2520.103–9 by revising paragraph (d) as follows:

§ 2520.103–9 Direct filing for bank or insurance carrier trusts and accounts.

* * * * *

(d) *Electronic filing.* See § 2520.104a–2 and the instructions for the Form 5500 "Annual Return/Report of Employee Benefit Plan" for electronic filing requirements. The bank or insurance company which maintains the common or collective trust or pooled separate account must maintain an original copy, with all required signatures, as part of its records.

■ 6. Amend § 2520.103–12 by revising paragraph (f) as follows:

§ 2520.103–12 Limited exemption and alternative method of compliance for annual reporting of investments in certain entities.

* * * * *

(f) *Electronic filing.* See § 2520.104a–2 and the instructions for the Form 5500 "Annual Return/Report of Employee Benefit Plan" for electronic filing requirements. The entity described in paragraph (c) of this section must maintain an original copy, with all required signatures, as part of its records.

Signed at Washington, DC, this 13th day of July 2006.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 06–6331 Filed 7–20–06; 8:45 am]

BILLING CODE 4510–29–P

GENERAL SERVICES ADMINISTRATION

41 CFR Parts 101–48 and 102–41

[FPMR Amendment 2006-05; FPMR Case 2004–101–1; FMR Case 2004–102–2]

RIN 3090–AH11

Federal Property Management Regulations; Disposition of Seized, Forfeited, Voluntarily Abandoned, and Unclaimed Personal Property

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: The General Services Administration (GSA) is amending the Federal Property Management Regulations (FPMR) by revising coverage on utilization, donation, or disposal of abandoned and forfeited personal property and moving it into the Federal Management Regulation (FMR). A cross-reference is added to the FPMR to direct readers to the coverage in the FMR. The FMR is written in plain language to provide agencies with updated regulatory material that is easy to read and understand.

DATES: *Effective Date:* July 21, 2006.

FOR FURTHER INFORMATION CONTACT: The Regulatory Secretariat, Room 4035, GS Building, Washington, DC 20405, at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Robert A. Holcombe, Office of Governmentwide Policy, Office of Travel, Transportation, and Asset Management (MT), at (202) 501–3828, or Internet e-mail at *robert.holcombe@gsa.gov*. Please cite FPMR Amendment 2006-05, FPMR case 2004–101–1, FMR case 2004–102–2.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule updates, streamlines, and clarifies FPMR part 101–48 and moves the part into the Federal Management Regulation (FMR). The final rule is written in a plain language question and answer format. This style uses an active voice, shorter sentences, and pronouns. A question and its answer combine to establish a rule. The employee and the agency must follow the language contained in both the question and its answer.

A proposed rule was published in the **Federal Register** (70 FR 15792, March 29, 2005). The only activity providing comments was the General Services Administration's Federal Supply Service (FSS). The FSS had 15 comments that are summarized, along with our responses, below:

1. *Title of part 102–41.* Comment to confirm that the title correctly uses the term "disposition," as the title to FPMR part 101–48 uses the word "disposal".

Response: Agreed. The term "disposition" includes disposal and more accurately portrays the scope of the discussion of this part.

2. *Section 102–41.5.* Comment that "disposition" should be used instead of "disposal" to be consistent with the title of this part.

Response: Agreed. This change was made.

3. *Section 102–41.5.* Comment that the text should make clear that GSA does not normally accept responsibility for the disposal of overseas excess property.

Response: Agreed. Clarifying text has been added.

4. *Section 102–41.20.* Comment that the term "beer" is defined in this part, whereas "malted beverage" was defined in FPMR part 101–48.

Response: No change. The term "malted beverage" does not appear in this part, and does not need to be defined.

5. *Section 102–41.20.* Comment that the definition for "unclaimed property" should include the provision that the owner may file a claim for up to three years.

Response: No change. The definition for "unclaimed property" does not need to include this provision. This aspect of the property is discussed in section 102–41.180.

6. *Section 102–41.20.* Comment that the definition for "voluntarily abandoned property" should specify that evidence of voluntary abandonment can be either in writing or circumstantial.

Response: Agreed. This change has been made.

7. *Section 102–41.30(a).* Comment that the reference to "GSA regional office" be changed to "GSA Region3/NCR" as Region 3/NCR has primary responsibility to file appropriate applications with the Federal district court.

Response: Agreed. This change has been made.

8. *Section 102–41.30(b)(4).* Comment that this provision should specify the possibility of abandoning or destroying the property, not just destruction.

Response: Agreed. This change has been made.

9. *Section 102–41.35.* Comment that individual agencies may have their own legislative authorities that may not require these agencies to report personal property to GSA as excess.

Response: Agreed. A general statement was added that allowed for special authorities outside 40 U.S.C.

10. *Section 102–41.75.* Comment about GSA's ability to retain sales proceeds.

Response: No change. If an agency has specific legislative authority to retain proceeds from the sale of forfeited property, the agency may retain sales proceeds. This is addressed in the provision.

11. *Section 102–41.80.* Comment regarding "voluntarily abandoned property" and that evidence relating to the abandonment of this property may not always be formally documented.

Response: Agreed. The definition of "voluntarily abandoned property" has been changed to take into account that evidence of voluntary abandonment can be circumstantial.

12. *Section 102–41.105.* Comment regarding the inclusion of a provision for "abandonment or destruction."

Response: Agreed. This provision has been added.

13. *Section 102–41.115.* Comment regarding GSA's ability to retain sales proceeds upon the sale of "voluntarily abandoned property."

Response: No change. Similar to the comment and response to comment number 10, an agency that has specific statutory authority to retain proceeds may retain proceeds.

14. *Section 102–41.130(b).* Comment regarding the disposition of unclaimed property and how the owner filing a claim would obtain a reimbursement.

Response: No change. The provisions of these subparts relating to the disposition of unclaimed property provide for the finding agency to obtain reimbursement for the transfer of this property or set aside sales proceeds to reimburse the owner filing a claim within 3 years. The finding agency is responsible to pay the reimbursement to the owner filing a claim.

15. *Section 102–41.180.* Comment regarding GSA's ability to retain sales proceeds from the sale of unclaimed property on behalf of the finding agency.

Response: No change. The finding agency must deposit proceeds from the sale of unclaimed personal property in a special account for three years pending a possible claim by the owner. After three years, the ability of an agency to retain the proceeds depends on whether an agency has specific legislative authority to do so. Otherwise, if an agency does not have specific legislative authority, the proceeds are deposited as miscellaneous receipts in the U.S. Treasury.

During the final review process with the Office of Management and Budget, additional clarifications were made regarding the use or disposal of voluntarily abandoned personal property and unclaimed personal property. Provisions are added to allow the agency to abandon or destroy property of low value if there is no anticipated use for the property in order to save storage and handling costs.

B. Executive Order 12866

GSA has determined that this proposed rule is not a significant regulatory action for the purposes of Executive Order 12866 dated September 30, 1993.

C. Regulatory Flexibility Act

This final rule is not required to be published in the **Federal Register** for notice and comment; therefore the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, does not apply.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this final rule does not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.*

E. Small Business Regulatory Enforcement Fairness Act

This final rule is exempt from Congressional review prescribed under 5 U.S.C. 801 since it relates solely to agency management and personnel.

List of Subjects in 41 CFR Parts 101–48 and 102–41

Government property management.

Dated: February 23, 2006.

David L. Bibb,

Acting Administrator of General Services.

■ For the reasons set forth in the preamble, GSA amends 41 CFR chapters 101 and 102 as set forth below:

CHAPTER 101—FEDERAL PROPERTY MANAGEMENT REGULATIONS

■ 1. Part 101–48 is revised to read as follows:

PART 101–48—UTILIZATION, DONATION, OR DISPOSAL OF ABANDONED AND FORFEITED PERSONAL PROPERTY

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

§ 101–48.000 Cross-reference to the Federal Management Regulation (FMR) (41 CFR chapter 102, part 102–41).

For information on the disposition of seized, forfeited, voluntarily abandoned, and unclaimed personal property, see FMR part 102–41 (41 CFR part 102–41).

CHAPTER 102—FEDERAL MANAGEMENT REGULATION

■ 2. Part 102–41 is added to subchapter B of chapter 102 to read as follows:

PART 102–41—DISPOSITION OF SEIZED, FORFEITED, VOLUNTARILY ABANDONED, AND UNCLAIMED PERSONAL PROPERTY

Subpart A—General Provisions

Sec.

Subpart B—Seized or Forfeited Personal Property

Subpart C—Voluntarily Abandoned Personal Property

Subpart D—Unclaimed Personal Property

Subpart E—Personal Property Requiring Special Handling

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

Subpart A—General Provisions

§ 102–41.5 What does this part cover?

(a) This part covers the disposition of seized, forfeited, voluntarily abandoned, and unclaimed personal property under the custody of any Federal agency located in the United States, the U.S. Virgin Islands, American Samoa, Guam, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, and Palau. Disposition of such personal property located elsewhere must be in accordance with holding agency regulations. Please see § 102–36.380 of this subchapter B regarding the disposal of foreign excess. The General Services Administration (GSA) does not normally accept responsibility for disposal of property located outside the United States and its territories. Additional guidance on disposition of seized, forfeited, voluntarily abandoned, and unclaimed personal property that requires special handling (e.g., firearms, hazardous materials) is contained in part 101–42 of this title. Additional guidance on the disposition of firearms (as scrap only), distilled spirits, wine, beer, and drug paraphernalia is provided in subpart E of this part.

(b) These regulations do not include disposal of seized, forfeited, voluntarily abandoned, and unclaimed personal property covered under authorities outside of the following statutes:

(1) 40 U.S.C. 552, Abandoned or Unclaimed Property on Government Premises.

(2) 40 U.S.C. 1306, Disposition of Abandoned or Forfeited Property.

(3) 26 U.S.C. 5688, Forfeited Distilled Spirits, Wines, and Beer.

(4) 26 U.S.C. 5872, Forfeited Firearms.

(5) 21 U.S.C. 863, Drug Paraphernalia.

§ 102–41.10 To whom do "we", "you", and their variants refer?

Use of pronouns "we", "you", and their variants throughout this part refer to the agency having custody of the personal property.

§ 102–41.15 How do we request a deviation from these requirements and who can approve it?

See §§ 102–2.60 through 102–2.110 of this chapter to request a deviation from the requirements of this part.

Definitions

§ 102–41.20 What definitions apply to this part?

The following definitions apply to this part:

Beer means an alcoholic beverage made from malted cereal grain, flavored with hops, and brewed by slow fermentation.

Distilled spirits, as defined in the Federal Alcohol Administration Act (27 U.S.C. 211), means ethyl alcohol; hydrated oxide of ethyl; or spirits of wine, whiskey, rum, brandy, gin, and other distilled spirits, including all dilutions and mixtures thereof, for non-industrial use.

Drug paraphernalia means any equipment, product, or material primarily intended or designed for use in manufacturing, compounding, converting, concealing, processing, preparing, or introducing into the human body a controlled substance in violation of the Controlled Substances Act (see 21 U.S.C. 863). It includes items primarily for use in injecting, ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body.

Eleemosynary institution means any nonprofit health or medical institution that is organized and operated for charitable purposes.

Firearms means any weapon, silencer, or destructive device designed to, or readily convertible to, expel a projectile by the action of an explosive, as defined in the Internal Revenue Code (26 U.S.C. 5845). Excludes antique firearms as defined in 26 U.S.C. 5845(g).

Forfeited property means personal property that the Government has acquired ownership of through a summary process or court order pursuant to any law of the United States.

Seized property means personal property that has been confiscated by a Federal agency, and whose care and handling will be the responsibility of the agency until final ownership is determined by the judicial process.

Unclaimed property means personal property unknowingly abandoned and found on premises owned or leased by the Government, i.e., lost and found property.

Voluntarily abandoned property means personal property abandoned to any Federal agency in a way that immediately vests title to the property in the Government. There must be written or circumstantial evidence that the property was intentionally and voluntarily abandoned. This evidence should be clear that the property was not simply lost by the owner.

Wine means the fermented juice of a plant product, as defined in 27 U.S.C. 211.

Responsibility

§ 102–41.25 Who retains custody and is responsible for the reporting, care, and handling of property covered by this part?

You, the holding agency, normally retain physical custody of the property and are responsible for its care and handling pending final disposition. With the exception of property listed in § 102–41.35, you must report promptly to the GSA forfeited, voluntarily abandoned, or unclaimed personal property not being retained for official use and seized property on which proceedings for forfeiture by court decree are being started or have begun. In general, the procedures for reporting such property parallel those for reporting excess personal property under part 102–36 of this subchapter B.

§ 102–41.30 What is GSA's role in the disposition of property covered by this part?

(a) *Seized property subject to court proceedings for forfeiture.* (1) If the seizing agency files a request for the property for its official use, the GSA Region 3/National Capital Region will apply to the court for an order to turn the property over to the agency should forfeiture be decreed. If no such request has been filed, GSA will determine whether retention of the property for Federal official use is in the Government's best interest, and, if so, will apply to the court to order delivery of the property to—

(i) Any other Federal agency that requests it; or

(ii) The seizing agency to be retained for a reasonable time in case the

property may later become necessary to any agency for official use.

(2) In the event that the property is not ordered by competent authority to be forfeited to the United States, it may be returned to the claimant.

(b) *Forfeited, voluntarily abandoned, or unclaimed property.* When forfeited, voluntarily abandoned, or unclaimed property is reported to GSA for disposal, GSA will direct its disposition by—

(1) Transfer to another Federal agency;

(2) Donation to an eligible recipient, if the property is not needed by a Federal agency and there are no requirements for reimbursement to satisfy the claims of owners, lien holders, or other lawful claimants;

(3) Sale; or

(4) Abandonment and destruction in accordance with § 102–36.305 of this subchapter B.

§ 102–41.35 Do we report to GSA all seized personal property subject to judicial forfeiture as well as forfeited, voluntarily abandoned, or unclaimed personal property not retained for official use?

Yes, send GSA reports of excess (see § 102–36.125 of this subchapter B) for all seized personal property subject to judicial forfeiture as well as forfeited, voluntarily abandoned, or unclaimed personal property not required for official use, except the following, whose disposition is covered under other statutes and authorities:

(a) Forfeited firearms or munitions of war seized by the Department of Commerce and transferred to the Department of Defense (DOD) pursuant to 22 U.S.C. 401.

(b) Forfeited firearms directly transferable to DOD by law.

(c) Seeds, plants, or misbranded packages seized by the Department of Agriculture.

(d) Game animals and equipment (other than vessels, including cargo) seized by the Department of the Interior.

(e) Files of papers and undeliverable mail in the custody of the United States Postal Service.

(f) Articles in the custody of the Department of Commerce Patent and Trademark Office that are in violation of laws governing trademarks or patents.

(g) Unclaimed and voluntarily abandoned personal property subject to laws and regulations of the U.S. Customs and Border Protection, Department of Homeland Security.

(h) Property seized in payment of or as security for debts arising under the internal revenue laws.

(i) Lost, abandoned, or unclaimed personal property the Coast Guard or the military services are authorized to dispose of under 10 U.S.C. 2575.

(j) Property of deceased veterans left on a Government facility subject to 38 U.S.C. 8501.

(k) Controlled substances reportable to the Drug Enforcement Administration, Department of Justice, Washington, DC 20537.

(l) Forfeited, condemned, or voluntarily abandoned tobacco, snuff, cigars, or cigarettes which, if offered for sale, will not bring a price equal to the internal revenue tax due and payable thereon; and which is subject to destruction or delivery without payment of any tax to any hospital maintained by the Federal Government for the use of present or former members of the military.

(m) Property determined appropriate for abandonment/destruction (see § 102–36.305 of this subchapter B).

(n) Personal property where handling and disposal is governed by specific legislative authority notwithstanding Title 40 of the United States Code.

Subpart B—Seized or Forfeited Personal Property

§ 102–41.40 How is personal property forfeited?

Personal property that has been seized by a Federal agency may be forfeited through court decree (judicial forfeiture) or administratively forfeited if the agency has specific authority without going through the courts.

§ 102–41.45 May we place seized personal property into official use before the forfeiture process is completed?

No, property under seizure and pending forfeiture cannot be placed into official use until a final determination is made to vest title in the Government.

§ 102–41.50 May we retain forfeited personal property for official use?

Yes, you may retain for official use personal property forfeited to your agency, except for property you are required by law to sell. Retention of large sedans and limousines for official use is only authorized under the provisions of part 102–34 of this subchapter B. Except for the items noted in § 102–41.35, report to GSA all forfeited personal property not being retained for official use.

§ 102–41.55 Where do we send the reports for seized or forfeited personal property?

(a) Except for the items noted in paragraph (b) of this section, report seized or forfeited personal property not retained for official use to the General Services Administration, Property Management Branch (3FPD), Washington, DC 20407.

(b) Report aircraft, firearms, and vessels to the regional GSA Property Management Branch office specified in § 102–36.125 of this subchapter B.

§ 102–41.60 Are there special requirements in reporting seized or forfeited personal property to GSA?

Yes, in addition to the information required in § 102–36.235 of this subchapter B for reporting excess, you must indicate—

(a) Whether the property—

(1) Was forfeited in a judicial proceeding or administratively (without going through a court);

(2) Is subject to pending court proceedings for forfeiture, and, if so, the name of the defendant, the place and judicial district of the court from which the decree will be issued, and whether you wish to retain the property for official use;

(b) The report or case number under which the property is listed; and

(c) The existence or probability of a lien, or other accrued or accruing charges, and the amount involved.

§ 102–41.65 What happens to forfeited personal property that is transferred or retained for official use?

Except for drug paraphernalia (see §§ 102–41.210 through 102–41.235), forfeited personal property retained for official use or transferred to another Federal agency under this subpart loses its identity as forfeited property. When no longer required for official use, you must report it to GSA as excess for disposal in accordance with part 102–36 of this subchapter B. You must follow the additional provisions of subpart E of this part and part 101–42 of Chapter 101, Federal Property Management Regulations in this title when disposing of firearms, distilled spirits, wine, beer, and drug paraphernalia.

§ 102–41.70 Are transfers of forfeited personal property reimbursable?

Recipient agencies do not pay for the property. However, you may charge the recipient agency all costs you incurred in storing, packing, loading, preparing for shipment, and transporting the property. If there are commercial charges incident to forfeiture prior to the transfer, the recipient agency must pay these charges when billed by the commercial organization. Any payment due to lien holders or other lawful claimants under a judicial forfeiture must be made in accordance with provisions of the court decree.

§ 102–41.75 May we retain the proceeds from the sale of forfeited personal property?

No, you must deposit the sales proceeds in the U.S. Treasury as miscellaneous receipts, unless otherwise directed by court decree or specifically authorized by statute.

Subpart C—Voluntarily Abandoned Personal Property

§ 102–41.80 When is personal property voluntarily abandoned?

Personal property is voluntarily abandoned when the owner of the property intentionally and voluntarily gives up title to such property and title vests in the Government. The receiving agency ordinarily documents receipt of the property to evidence its voluntary relinquishment. Evidence of the voluntary abandonment may be circumstantial.

§ 102–41.85 What choices do I have for retaining or disposing of voluntarily abandoned personal property?

You may either retain or dispose of voluntarily abandoned personal property based on the following circumstances:

(a) If your agency has a need for the property, you may retain it for official use, except for large sedans and limousines which may only be retained for official use as authorized under part 102–34 of this subchapter B. See § 102–41.90 for how retained property must be handled.

(b) If your agency doesn't need the property, you should determine whether it may be abandoned or destroyed in accordance with the provisions at FMR 102–36.305 through 102–36.330. Furthermore, in addition to the circumstances when property may be abandoned or destroyed without public notice at FMR 102–36.330, voluntarily abandoned property may also be abandoned or destroyed without public notice when the estimated resale value of the property is less than $500.

(c) If the property is not retained for official use or abandoned or destroyed, you must report it to GSA as excess in accordance with § 102–41.95.

§ 102–41.90 What happens to voluntarily abandoned personal property retained for official use?

Voluntarily abandoned personal property retained for official use or transferred to another Federal agency under this subpart loses its identity as voluntarily abandoned property. When no longer required for official use, you must report it to GSA as excess, or abandon/destroy the property, in accordance with part 102–36 of this subchapter B.

§ 102–41.95 Where do we send the reports for voluntarily abandoned personal property?

Except for aircraft, firearms, and vessels, report voluntarily abandoned personal property to the regional GSA Property Management Branch office for the region in which the property is located. Report aircraft, firearms, and vessels to the regional GSA Property Management Branch office specified in § 102–36.125 of this subchapter B.

§ 102–41.100 What information do we provide when reporting voluntarily abandoned personal property to GSA?

When reporting voluntarily abandoned personal property to GSA, you must provide a description and location of the property, and annotate that the property was voluntarily abandoned.

§ 102–41.105 What happens to voluntarily abandoned personal property when reported to GSA?

Voluntarily abandoned personal property reported to GSA will be made available for transfer, donation, sale, or abandonment/destruction in accordance with parts 102–36, 102–37, 102–38, and §§ 102–36.305 through 102–36.330 of this subchapter B, respectively. You must follow the additional provisions of §§ 102–41.190 through 102–41.235 and part 101–42 of Chapter 101, Federal Property Management Regulations in this title when disposing of firearms and other property requiring special handling.

§ 102–41.110 Are transfers of voluntarily abandoned personal property reimbursable?

No, all transfers of voluntarily abandoned personal property will be without reimbursement. However, you may charge the recipient agency all costs you incurred in storing, packing, loading, preparing for shipment, and transporting the property.

§ 102–41.115 May we retain the proceeds received from the sale of voluntarily abandoned personal property?

No, you must deposit the sales proceeds in the U.S. Treasury as miscellaneous receipts unless your agency has specific statutory authority to do otherwise.

Subpart D—Unclaimed Personal Property

§ 102–41.120 How long must we hold unclaimed personal property before disposition?

You must generally hold unclaimed personal property for 30 calendar days from the date it was found. Unless the previous owner files a claim, title to the property vests in the Government after 30 days, and you may retain or dispose of the property in accordance with this part. However, see the following sections for handling of unclaimed personal property under specific circumstances.

§ 102–41.125 What choices do I have for retaining or disposing of unclaimed personal property?

You may either retain or dispose of unclaimed abandoned personal property based on the following circumstances:

(a) If your agency has a need for the property, you may retain it for official use if you have held the unclaimed property for 30 calendar days and the former owner has not filed a claim. After 30 days, title vests in the Government and you may retain the unclaimed property for official use. Large sedans and limousines which may only be retained for official use as authorized under part 102–34 of this subchapter B. See § 102–41.130 for how retained property must be handled.

(b) If your agency doesn't need the property, you should determine whether it may be immediately abandoned or destroyed in accordance with the provisions at FMR 102–36.305 through 102–36.330. You are not required to hold unclaimed property for 30 days, if you decide to abandon or destroy it. Title to the property immediately vests in the Government in these circumstances. In addition to the circumstances when property may be abandoned or destroyed without public notice at FMR 102–36.330, unclaimed personal property may also be abandoned or destroyed without public notice when the estimated resale value of the property is less than $500. See § 102–41.135 for procedures to be followed if a claim is filed.

(c) If the property is not retained for official use or abandoned or destroyed, you must report it to GSA as excess in accordance with § 102–41.140.

§ 102–41.130 What must we do when we retain unclaimed personal property for official use?

(a) You must maintain records of unclaimed personal property retained for official use for 3 years after title vests in the Government to permit identification of the property should the

former owner file a claim for the property. You must also deposit funds received from disposal of such property in a special account to cover any valid claim filed within this 3-year period.

(b) When you no longer need the unclaimed property which you have placed in official use, report it as excess in the same manner as other excess property under part 102–36 of this subchapter B.

§ 102–41.135 How much reimbursement do we pay the former owner when he or she files a claim for unclaimed personal property that we no longer have?

If the property was sold, reimbursement of the property to the former owner must not exceed any proceeds from the disposal of such property, less the costs of the Government's care and handling of the property. If the property was abandoned or destroyed in accordance with § 102–41.125, or otherwise used or transferred, reimbursement of the property to the former owner must not exceed the estimated resale value of the property at the time of the vesting of the property with the Government, less costs incident to the care and handling of the property, as determined by the General Services Administration, Office of Travel, Transportation, and Asset Management (MT), Washington DC, 20405.

§ 102–41.140 When do we report to GSA unclaimed personal property not retained for official use?

After you have held the property for 30 calendar days and no one has filed a claim for it, the title to the property vests in the Government. If you decide not to retain the property for official use, report it as excess to GSA in accordance with part 102–36 of this subchapter B.

§ 102–41.145 Where do we send the reports for unclaimed personal property?

Except for the items noted in § 102–36.125 of this subchapter B, report unclaimed personal property to the regional GSA Property Management Branch office for the region in which the property is located.

§ 102–41.150 What special information do we provide on reports of unclaimed personal property?

On reports of unclaimed personal property, you must provide the report or case number assigned by your agency, property description and location, and indicate the property as unclaimed and the estimated fair market value.

§ 102–41.155 Is unclaimed personal property available for transfer to another Federal agency?

Yes, unclaimed personal property is available for transfer to another Federal agency, but only after 30 calendar days from the date of finding such property and no claim has been filed by the former owner, and with fair market value reimbursement from the recipient agency. The transferred property then loses its identity as unclaimed property and becomes property of the Government, and when no longer needed it must be reported excess in accordance with part 102–36 of this subchapter B.

§ 102–41.160 May we retain the reimbursement from transfers of unclaimed personal property?

No, you must deposit the reimbursement from transfers of unclaimed personal property in a special account for a period of 3 years pending a claim from the former owner. After 3 years, you must deposit these funds into miscellaneous receipts of the U.S. Treasury unless your agency has statutory authority to do otherwise.

§ 102–41.165 May we require reimbursement for the costs incurred in the transfer of unclaimed personal property?

Yes, you may require reimbursement from the recipient agency of any direct costs you incur in the transfer of the unclaimed property (e.g., storage, packing, preparation for shipping, loading, and transportation).

§ 102–41.170 Is unclaimed personal property available for donation?

No, unclaimed personal property is not available for donation because reimbursement at fair market value is required.

§ 102–41.175 May we sell unclaimed personal property?

Yes, you may sell unclaimed personal property after title vests in the Government (as provided for in § 102–41.120) and when there is no Federal interest. You may sell unclaimed personal property subject to the same terms and conditions as applicable to surplus personal property and in accordance with part 102–38 of this subchapter B.

§ 102–41.180 May we retain the proceeds from the sale of unclaimed personal property?

No, you must deposit proceeds from the sale of unclaimed personal property in a special account to be maintained for a period of 3 years pending a possible claim by the former owner. After the 3-year period, you must deposit the funds in the U.S. Treasury as miscellaneous receipts or in such other agency accounts when specifically authorized by statute.

Subpart E—Personal Property Requiring Special Handling

§ 102–41.185 Are there certain types of forfeited, voluntarily abandoned, or unclaimed property that must be handled differently than other property addressed in this part?

Yes, you must comply with the additional provisions in this subpart when disposing of the types of property listed here.

Firearms

§ 102–41.190 May we retain forfeited, voluntarily abandoned, or unclaimed firearms for official use?

Generally, no; you may retain forfeited, voluntarily abandoned, or unclaimed firearms only when you are statutorily authorized to use firearms for official purposes.

§ 102–41.195 How do we dispose of forfeited, voluntarily abandoned, or unclaimed firearms not retained for official use?

Report forfeited, voluntarily abandoned, or unclaimed firearms not retained for official use to the General Services Administration, Property Management Branch (7FP–8), Denver, CO 80225–0506 for disposal in accordance with § 101–42.1102–10 of the Federal Property Management Regulations in this title.

§ 102–41.200 Are there special disposal provisions for firearms that are seized and forfeited for a violation of the National Firearms Act?

Yes, firearms seized and forfeited for a violation of the National Firearms Act (26 U.S.C. 5801—5872) are subject to the disposal provisions of 26 U.S.C. 5872(b). When there is no contrary judgment or action under such forfeiture, GSA will direct the disposition of the firearms. GSA may—

(a) Authorize retention for official use by the Treasury Department;

(b) Transfer to an executive agency for use by it; or

(c) Order the firearms destroyed.

Forfeited Distilled Spirits, Wine, and Beer

§ 102–41.205 Do we report all forfeited distilled spirits, wine, and beer to GSA for disposal?

(a) Yes, except do not report distilled spirits, wine, and beer not fit for human consumption or for medicinal, scientific, or mechanical purposes. When reporting, indicate quantities and kinds, proof rating, and condition for

shipping. GSA (3FPD) may transfer such property to another Federal agency for official purposes, or donate it to eligible eleemosynary institutions for medicinal purposes only.

(b) Forfeited distilled spirits, wine, and beer that are not retained for official use by the seizing agency or transferred or donated to eligible recipients by GSA must be destroyed. You must document the destruction with a record of the time and location, property description, and quantities destroyed.

Drug Paraphernalia

§ 102–41.210 What are some examples of drug paraphernalia?

Some examples of drug paraphernalia are—

(a) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;
(c) Carburetion tubes and devices;
(d) Smoking and carburetion masks;
(e) Roach clips (objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand);
(f) Miniature spoons with level capacities of one-tenth cubic centimeter or less;
(g) Chamber pipes;
(h) Carburetor pipes;
(i) Electric pipes;
(j) Air-driven pipes;
(k) Chillums;
(l) Bongs;
(m) Ice pipes or chillers;
(n) Wired cigarette papers; or
(o) Cocaine freebase kits.

§ 102–41.215 Do we report to GSA all forfeited, voluntarily abandoned, or unclaimed drug paraphernalia not required for official use?

No, only report drug paraphernalia that has been seized and forfeited for a violation of 21 U.S.C. 863. Unless statutorily authorized to do otherwise, destroy all other forfeited, voluntarily abandoned, or unclaimed drug paraphernalia. You must ensure the destruction is performed in the presence of two witnesses (employees of your agency), and retain in your records a signed certification of destruction.

§ 102–41.220 Is drug paraphernalia forfeited under 21 U.S.C. 863 available for transfer to other Federal agencies or donation through a State Agency for Surplus Property (SASP)?

Yes, but GSA will only transfer or donate forfeited drug paraphernalia for law enforcement or educational purposes and only for use by Federal, State, or local authorities. Federal or State Agencies for Surplus Property (SASP) requests for such items must be processed through the General Services Administration, Property Management Branch (3FPD), Washington, DC 20407. The recipient must certify on the transfer document that the drug paraphernalia will be used for law enforcement or educational purposes only.

§ 102–41.225 Are there special provisions to reporting and transferring drug paraphernalia forfeited under 21 U.S.C. 863?

Yes, you must ensure that such drug paraphernalia does not lose its identity as forfeited property. Reports of excess and transfer documents for such drug paraphernalia must include the annotation that the property was seized and forfeited under 21 U.S.C. 863.

§ 102–41.230 May SASPs pick up or store donated drug paraphernalia in their distribution centers?

No, you must release donated drug paraphernalia directly to the donee as designated on the transfer document.

§ 102–41.235 May we sell forfeited drug paraphernalia?

No, you must destroy any forfeited drug paraphernalia not needed for transfer or donation and document the destruction as specified in § 102–41.215.

[FR Doc. E6–11584 Filed 7–20–06; 8:45 am]
BILLING CODE 6820–14–S

Proposed Rules

Federal Register
Vol. 71, No. 140
Friday, July 21, 2006

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 553

RIN 3206–AI32

Reemployment of Civilian Retirees To Meet Exceptional Employment Needs

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing proposed regulations to amend the criteria under which OPM may grant dual compensation (salary off-set) waivers on a case-by-case basis, or delegate waiver authority to agencies. This amendment clarifies that OPM may grant or delegate to agencies the authority to grant such waivers in situations resulting from emergencies posing an immediate and direct threat to life or property or situations resulting from unusual circumstances that do not involve an emergency. The proposed changes will make it easier for agencies to reemploy needed individuals when faced with unusual circumstances. In addition, we are proposing to amend the section headings to avoid redundancy. This amendment is also removing information concerning military employees.

DATES: We will consider comments received on or before September 19, 2006.

ADDRESSES: You may submit comments, which are identified by RIN 3206–AI32, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- E-mail: *employ@opm.gov*. Include "RIN 3206–AI32, Reemployment of Military and Civilian Retirees to Meet Exceptional Employment Needs" in the subject line of the message.
- Fax: (202) 606–2329.
- Mail: Nancy H. Kichak, Associate Director for Strategic Human Resources Policy, U.S. Office of Personnel Management, Room 6551. 1900 E Street, NW., Washington, DC 20415–9700.
- Hand Delivery/Courier: U.S. Office of Personnel Management, Room 6551. 1900 E Street, NW., Washington, DC 20415–9700.

FOR FURTHER INFORMATION CONTACT: Janice Warren, 202–606–2367, FAX: 202–606–2329, by TDD: 202–418–3134, or e-mail: *janice.warren@opm.gov*.

SUPPLEMENTARY INFORMATION: The current regulations provide OPM the authority to grant dual compensation (salary off-set) waivers on a case-by-case basis or delegate waiver authority to agencies in order to meet emergencies posing immediate and direct threat to life or property or emergencies resulting from other unusual circumstances. Under this proposed rule, OPM may grant a waiver or delegate waiver authority for unusual circumstances, which do not cause or create an emergency. Unusual circumstances may include, but are not limited to, the need to conform to a congressional or other mandate to meet new or expanded mission requirements by a particular date, as well as other unforeseen developments that will adversely impact an agency's ability to carry out its mission. To effectuate this change for individual waivers, we are removing the reference to "other unusual circumstances" in § 553.201(c) and adding a new paragraph, "Requests based on other unusual circumstances," at § 553.201(f). Similarly, for agency requests for delegated authority, we are modifying section 553.202(b)(1) to separate unusual circumstances from emergency situations. These changes will more closely align the regulations to the authorizing statutes at 5 U.S.C. 8344(i)(1)(B) and 8468(f)(1)(B), which distinguish between emergencies and other unusual circumstances. We are amending the titles of § 553.201 and 202 to make clear these provisions include termination of annuity. Consequently, we are removing § 553.201(b)(4) because this subsection is no longer needed with the change in the section titles. In addition, we are removing any references to "military employees" in the title of this regulation and eliminating § 553.203(b), because it is no longer needed. The Federal Employees Pay Comparability Act of 1990 (FEPCA) permitted OPM to authorize exceptions to the reduction in pay and retirement benefits normally required for either civilian or military retirees reemployed in the Federal Government. On October 5, 1999, President Clinton signed the National Defense Authorization Act for Fiscal Year 2000 (Pub. L. 106–65). Section 651 of this law repeals section 5532 of title 5, United States Code. This action ended the reductions in retired or retainer pay previously required of retired members of a uniformed service who are employed in a civilian office or position of the U.S. Government. As a result, we are deleting all information concerning military employees from this subpart.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only certain potential applicants and Federal employees.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 553

Administrative practice and procedure, Government employees, Military personnel, Retirement, and Wages.

Office of Personnel Management.

Linda M. Springer,

Director.

Accordingly, OPM is proposing to amend 5 CFR part 553 subpart B, as follows:

PART 553—REEMPLOYMENT OF CIVILIAN RETIREES TO MEET EXCEPTIONAL EMPLOYMENT NEEDS

1. The authority for part 553 continues to read as follows:

Authority: 5 U.S.C. 8344, 8468, Sec. 651, Pub. L. 106–65 (113 Stat. 664).

2. The heading for part 553 is revised as set forth above.

Subpart B—Special Provisions for Reemployment Without Penalty To Meet Exceptional Recruiting or Retention Needs

3. Section 553.201 is amended by revising the section heading; paragraphs (a), (b)(2) and (c) introductory text; removing paragraph (b)(4); redesignating

paragraph (f) as paragraph (g); and adding a new paragraph (f) to read as follows:

§ 553.201 Requesting OPM approval for reemployment without reduction or termination of annuity in individual cases.

(a) *Request by agency head.* The head of an agency may request OPM to approve individual exceptions on a case-by-case basis to meet temporary hiring needs based on an emergency or other unusual circumstances or when the agency has encountered exceptional difficulty in recruiting or retaining a qualified candidate for a particular position. Authority to submit such a request may not be redelegated to an official below the agency's headquarters level.

(b) * * *

(2) The request must be submitted in accordance with the criteria set out in paragraphs (c), (d), (e), or (f) of this section.

* * * * *

(c) *Requests based on an emergency hiring need.* An agency may request reemployment without penalty for an individual whose services are needed on a temporary basis to respond to an emergency involving a direct threat to life or property. Requests submitted on that basis must meet the following criteria:

* * * * *

(f) *Requests based on other unusual circumstances.* An agency may request reemployment without penalty for an individual whose services are needed on a temporary basis due to unusual circumstances. Agencies must provide justification describing the unusual circumstances.

* * * * *

4. Section 553.202 is amended by revising the section heading, and paragraph (b)(1) to read as follows:

§ 553.202 Request for delegation of authority to approve reemployment without reduction or termination of annuity in emergencies or other unusual circumstances.

* * * * *

(b) * * *

(1) Description of the situations for which authority is requested. The situation must result from emergencies posing immediate and direct threat to life or property or from other unusual circumstances.

* * * * *

5. Section 553.203 is revised to read as follows:

§ 553.203 Status of individuals serving without reduction.

Reemployed civilian annuitants. Annuitants reemployed with full salary and annuity under an exception granted in accordance with this part are not considered employees for purposes of subchapter III of chapter 83 or chapter 84 of title 5, United States Code. They may not elect to have retirement contributions withheld from their pay; they may not use any employment for which an exception is granted as a basis for a supplemental or recomputed annuity; and they may not participate in the Thrift Savings Plan.

[FR Doc. E6–11618 Filed 7–20–06; 8:45 am]
BILLING CODE 6325–39–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG–153037–01]

RIN 1545–BA31

Suspension of Statutes of Limitations in Third-Party and John Doe Summons Disputes and Expansion of Taxpayers' Rights To Receive Notice and Seek Judicial Review of Third-Party Summonses

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to the regulations relating to third-party and John Doe summonses. These proposed regulations reflect amendments to sections 7603 and 7609 of the Internal Revenue Code of 1986 made by the Internal Revenue Service Restructuring and Reform Act of 1998, the Omnibus Budget Reconciliation Act of 1990, the Technical and Miscellaneous Revenue Act of 1988, and the Tax Reform Act of 1986, which were enacted subsequent to adoption of the current regulations. These proposed regulations provide guidance relating to the manner in which summonses may be served on third-party recordkeepers, the expanded class of third-party summonses subject to notice requirements and other procedures, and the suspension of periods of limitations if a court proceeding is brought involving a challenge to a third-party summons, or if a third party's response to a summons is not finally resolved within six months after service. These proposed regulations affect third parties who are served with a summons, taxpayers identified in a third-party summons, and other persons entitled to notice of a third-party summons.

DATES: Written comments and requests for a public hearing must be received by October 19, 2006.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–153037–01), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Alternatively, submissions may be hand delivered between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–153037–01), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Comments may also be submitted electronically to *http://www.irs.gov/regs* or the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS–REG–153037–01).

FOR FURTHER INFORMATION CONTACT: Elizabeth Rawlins at (202) 622–3630 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed regulations amending the Procedure and Administration Regulations (26 CFR part 301) under sections 7603 and 7609 of the Internal Revenue Code of 1986 (Code). The proposed regulations reflect amendments to sections 7603 and 7609 enacted in the Internal Revenue Service Restructuring and Reform Act of 1998 (Pub. L. 105–206, 112 Stat. 685) (RRA 1998), the Technical and Miscellaneous Revenue Act of 1988 (Pub. L. 100–647, 102 Stat. 3343) (TAMRA 1988), and the Tax Reform Act of 1986 (Pub. L. 99–514, 100 Stat. 2085) (TRA 1986). The proposed regulations also reflect changes made to section 6503(j) in the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508, 104 Stat. 1388) (OBRA 1990).

Explanation of Provisions

In general, section 7609 provides that if a summons is served on a third party requiring the third party to give testimony or produce records relating to a taxpayer or other person identified in the summons, the Internal Revenue Service (IRS) must provide notice of the summons to the taxpayer and to any other person identified in the description of summoned records and testimony within three days of the date on which the summons was served, but no later than 23 days prior to the date fixed in the summons as the day on which the examination of the summoned person or materials is scheduled. Persons entitled to notice of a third-party summons are entitled to bring a proceeding to quash the summons by filing a petition in district court within 20 days after notice is

given. Persons entitled to notice also may intervene in any proceeding to enforce the summons. During the pendency of a proceeding to quash a summons brought by the taxpayer, or during the pendency of a proceeding to enforce a summons in which the taxpayer has intervened, the periods of limitations on assessment and criminal prosecution are suspended. These periods of limitations are also suspended if the third-party's response to the summons remains unresolved six months after the summons is served, regardless of whether a proceeding has been brought with respect to the summons. These proposed regulations amend prior regulations relating to third-party summonses to reflect the statutory changes to sections 7603 and 7609 described below.

Notice of Third-Party Summonses

Section 7609(a) requires the IRS to provide notice of a third-party summons to the taxpayer being investigated and every person identified in the description of summoned records and testimony unless the summons is excepted from the notice requirements under section 7609(c)(2). Prior to RRA 1998, the IRS was required to provide notice of a third-party summons only if the summons was served on a third-party recordkeeper and the summons required the production of records made or kept of another person's business transactions or affairs (or testimony about such records). RRA 1998 expanded the types of third-party summonses to which the notice, intervention, and proceeding to quash procedures apply by removing the prior specifically-defined third-party recordkeeper limitation. The proposed regulations reflect the expansion of the notice procedures to all third-party summonses not excepted by section 7609(c)(2).

Exceptions To Notice, Intervention, and Proceeding To Quash Procedures

Section 7609(c)(2) provides that certain summonses, including summonses served on the person with respect to whose liability the summons was issued, third-party summonses issued to confirm or deny the existence of records, and summonses that require court approval before service, are excepted from the notice, intervention, and proceeding to quash provisions of subsections 7609(a) and (b). Two additional exceptions, relating to third-party summonses issued in aid of collection under section 7609(c)(2)(D) and summonses issued by a criminal investigator under section 7602(c)(2)(E), were the subject of recent statutory changes.

Prior to RRA 1998, former section 7609(c)(2)(B) broadly excepted from the notice requirements and other procedural rules a summons issued in aid of the collection of any person's liability. RRA 1998 narrowed the collection exception, now found in section 7609(c)(2)(D), to except only summonses issued in aid of the collection of either: (i) An assessment or judgment against the person with respect to whose liability the summons is issued, or (ii) the liability of a transferee or fiduciary of the liable person. Under section 7609(c)(2)(D), as amended, the IRS now must give notice of a third-party summons issued in aid of the collection of a person's potential liability for an unassessed tax. For example, the IRS must provide notice of a third-party summons to a potentially responsible person if the purpose of the third-party summons is to determine whether the person is liable for the trust fund recovery penalty under section 6672.

The exception from notice, intervention, and proceeding to quash procedures for summonses issued by a criminal investigator under section 7609(c)(2)(E) was added by RRA 1998. Section 7609(c)(2)(E) excepts third-party summonses issued by criminal investigators if the summoned third party is not a third-party recordkeeper, as that term is defined under new section 7603(b).

Third-Party Recordkeepers

Section 7603(b)(1) provides that third-party recordkeeper summonses may be served by certified or registered mail to the last known address of the third-party recordkeeper. Section 7603(b)(2) enumerates classes of persons that are third-party recordkeepers, including banks, credit card issuers, attorneys, accountants, and enrolled agents.

1. When Third-Party Recordkeeper Status Arises

Prior to RRA 1998, third-party recordkeeper summonses were defined under former section 7609(a)(1) as summonses that were served on a third-party recordkeeper, *i.e.*, a person belonging to one of several enumerated classes of business occupations, for the production of records made or kept of another person's business transactions or affairs. Based on these requirements, existing § 301.7609–2(b) provides that "[a] person is a 'third-party recordkeeper' with respect to a given set of records only if the person made or kept the records in the person's capacity as a third-party recordkeeper."

RRA 1998 amended section 7603, relating to service of summonses, by adding to new subsection (b) the enumerated classes of third-party recordkeepers, but did not incorporate the requirement of former section 7609(a)(1)(B) that the records of the business transactions or affairs be made or kept by the third-party recordkeeper in its capacity as such. There is no indication in the legislative history to RRA 1998 that Congress intended to alter the requirement under § 301.7609–2(b) that the records of a third-party recordkeeper be made or kept in the third-party recordkeeper's capacity as such. Accordingly, the proposed regulations maintain the requirement under existing § 301.7609–2(b).

2. Owners or Developers of Computer Software Source Code

RRA 1998 added owners or developers of computer software source code to the enumerated classes of third-party recordkeepers under section 7603(b)(2). The proposed regulations define owners or developers of computer software source code as third-party recordkeepers if they are summoned to produce the source code or the programs and data to which the source code relates, whether or not they make or keep records of another person's business transactions or affairs.

Suspension of Periods of Limitations

1. Suspension Under Section 7609(e)(1)

Section 7609(e)(1) provides that the periods of limitations under section 6501 (relating to assessment and collection) and section 6531 (relating to criminal prosecution) are suspended if any person with respect to whose liability a third-party summons was issued (or the agent, nominee, or other person acting under the direction and control of such person), pursuant to section 7609(b), intervenes in a judicial proceeding to enforce a third-party summons or brings a proceeding to quash a third-party summons. The suspension continues for the period during which the proceeding, including appeals, is pending.

2. Suspension Under Section 7609(e)(2)

Section 7609(e)(2) provides that the periods of limitations under section 6501 and section 6531, are suspended if there is no final resolution of the third party's response to the summons within six months after service of such summons, regardless of whether the person with respect to whose liability the summons was issued has intervened in an enforcement proceeding or brought a proceeding to quash.

Suspension of the periods of limitations under section 7609(e)(2) begins six months after the summons is served and ends upon the final resolution of the summoned party's response. The proposed regulations describe the types of summonses to which the suspension of periods of limitations under section 7609(e)(2) apply and define final resolution.

a. Summonses to Which Suspension Under Section 7609(e)(2) May Apply

Prior to RRA 1998, former section 7609(e)(2) suspended a taxpayer's periods of limitations if either a third-party recordkeeper's response to a summons, for which the taxpayer was entitled to receive notice under section 7609(a), or if a summoned person's response to a John Doe summons was not finally resolved within six months after the summons was served. Nothing in the legislative history to RRA 1998 suggests that Congress intended to expand the basic statutory structure of section 7609(e)(2) to encompass any summonses other than John Doe summonses and third-party summonses subject to the notice requirement of section 7609(a). Therefore, the proposed regulations provide that the periods of limitations are suspended under section 7609(e)(2) only with respect to third-party summonses to which the notice requirements of section 7609(a) apply, or to John Doe summonses for which taxpayers are entitled to notice of any statute suspension pursuant to section 7609(i)(4).

b. Final Resolution of a Third Party's Response to a Summons

Section 7609(e)(2) provides that suspension of the periods of limitations ends on the date of final resolution of the third party's response to the summons. The purpose of section 7609(e)(2) is to suspend the periods of limitations if an investigation is delayed by a summoned person's failure to produce all of the summoned information within six months. Although final resolution is not defined in section 7609, nor is it elaborated on in the legislative history of that statute, the same term is found in section 6503(j), which suspends the period of limitations on assessment during a judicial enforcement period relating to designated and related summonses. Like section 7609(e)(2), section 6503(j) provides that the suspension period will not end until there is final resolution of the summoned person's response to the summons. The legislative history of section 6503(j) indicated that the term *final resolution* means, in cases in which a court proceeding is brought, that no court proceeding remains pending and the summoned party has complied with the summons to the extent the court required. Therefore, the proposed regulations define final resolution as occurring when the summoned person fully complies with the production required by the summons. If the summons is the subject of litigation, full compliance occurs when any order enforcing any part of the summons is fully complied with and all appeals are either disposed of or the period in which an appeal may be taken or a request for further review may be made has expired. The IRS will administratively create procedures by which taxpayers can inquire about the suspension of their periods of limitations under section 7609(e)(2).

Protections for and Duties of Summoned Third Parties

Section 7609(i)(3) provides that any summoned party who produces records or gives testimony in good faith reliance on an IRS certificate or court order is not liable to a customer or other person for disclosure of records or testimony in response to a third-party summons. RRA 1998 modified these provisions by extending protection to all recipients of third-party summonses subject to the notice requirements of section 7609(a) and by expanding the protection from liability to include the giving of testimony by a third party, in addition to the production of records. The proposed regulations reflect these statutory changes.

Notification Requirement for John Doe Summonses Under Section 7609(i)(4)

Section 7609(i)(4) requires the recipient of a John Doe summons to notify the unnamed taxpayers to which the summons applies if those taxpayers' periods of limitations are suspended by operation of section 7609(e)(2), relating to the absence of a resolution to the summoned party's response six months after service of the summons.

The proposed regulations specify the time and the manner for providing the notice required under section 7609(i)(4). Notice must be given as soon as possible after the suspension of the periods of limitations and must be made in writing. The written notification may be hand delivered, sent to the address of the taxpayer last known by the summoned person to be valid, or transmitted by any electronic means. Failure by the summoned party to comply with the notice requirements of section 7609(i)(4) will not preclude the suspension of the periods of limitations pursuant to section 7609(e)(2).

Use of Informal Procedures Not Precluded by Section 7609

Section 7609(j) provides that nothing in section 7609 shall be construed to limit the IRS's ability to obtain information through formal or informal procedures authorized by sections 7601 and 7602. The proposed regulations provide that section 7609 does not require the IRS to issue a third-party summons before conducting an informal inquiry of a third party or examining a third party's books, papers, records, or other data during an investigation.

Proposed Effective Dates

These amendments are proposed to be applicable on the date the final regulations are filed with the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501), the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply to these regulations. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (preferably a signed original and eight (8) copies) that are submitted timely to the IRS. The IRS and the Treasury Department specifically request comments on the clarity of the proposed rule and how it may be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Elizabeth Rawlins of the Office of the Associate Chief Counsel, Procedure and Administration

(Collection, Bankruptcy and Summonses Division), Internal Revenue Service.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendment to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.7603–1 is revised to read as follows:

§ 301.7603–1 Service of summons.

(a) *In general*—(1) *Hand delivery or delivery to place of abode.* Except as otherwise provided in paragraph (a)(2) of this section, a summons issued under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 shall be served by an attested copy delivered in hand to the person to whom it is directed, or left at such person's last and usual place of abode.

(2) *Summonses issued to third-party recordkeepers.* A summons issued under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 for the production of records (or testimony about such records) by a third-party recordkeeper, as described in section 7603(b)(2) and § 301.7603–2, may also be served by certified or registered mail to the third-party recordkeeper's last known address, as defined in § 301.6212–2. If service to a third-party recordkeeper is made by certified or registered mail, the date of service is the date on which the summons is mailed.

(b) *Persons who may serve a summons.* The officers and employees of the Internal Revenue Service whom the Commissioner has designated to carry out the authority described in § 301.7602–1(b) to issue a summons are authorized to serve a summons issued under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602.

(c) *Effect of certificate of service.* The certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons.

(d) *Sufficiency of description of summoned records.* When a summons requires the production of records, it shall be sufficient if such records are described with reasonable certainty.

(e) *Records.* For purposes of this section and § 301.7603–2, the term *records* includes books, papers, or other data.

(f) *Effective date.* This section is applicable on the date final regulations are published in the **Federal Register**.

Par. 3. Section 301.7603–2 is added to read as follows:

§ 301.7603–2 Third-party recordkeepers.

(a) *Definitions*—(1) *Accountant.* A person is an accountant under section 7603(b)(2)(F) for purposes of determining whether that person is a third-party recordkeeper if, on the date the records described in the summons were created, the person was registered, licensed, or certified as an accountant under the authority of any state, commonwealth, territory, or possession of the United States, or of the District of Columbia.

(2) *Attorney.* A person is an attorney under section 7603(b)(2)(E) for purposes of determining whether that person is a third-party recordkeeper if, on the date the records described in the summons were created, the person was registered, licensed, or certified as an attorney under the authority of any state, commonwealth, territory, or possession of the United States, or of the District of Columbia.

(3) *Credit cards*—(i) *Person extending credit through credit cards.* The term *person extending credit through the use of credit cards or similar devices* under section 7603(b)(2)(C) generally includes any person who issues a credit card. The term does not include a seller of goods or services who honors credit cards issued by other parties but who does not extend credit through the use of credit cards or similar devices.

(ii) *Devices similar to credit cards.* An object is a device similar to a credit card under section 7603(b)(2)(C) only if it is physical in nature, such as a charge plate or similar device that may be tendered to obtain an extension of credit. Thus, a person who extends credit by requiring customers to sign sales slips without requiring the use of, or reference to, a physical object issued by that person is not a third-party recordkeeper under section 7603(b)(2)(C).

(iii) *Debit cards.* A debit card is not a credit card or similar device because a debit card is not tendered to obtain an extension of credit.

(4) *Enrolled agent.* A person is an enrolled agent under section 7603(b)(2)(I) for purposes of determining whether that person is a third-party recordkeeper if the person is enrolled as an agent authorized to practice before the Internal Revenue Service pursuant to Circular 230, 31 CFR part 10.

(5) *Owner or developer of certain computer code and data.* An owner or developer of computer software source code under section 7603(b)(2)(J) is a third-party recordkeeper when summoned to produce a computer software source code (as defined in section 7612(d)(2)), or an executable code and associated data described in section 7612(b)(1)(A)(ii), even if that person did not make or keep records of another person's business transactions or affairs.

(b) *When third-party recordkeeper status arises*—(1) *In general.* Except as provided in paragraph (a)(5) of this section, a person listed in section 7603(b)(2) is a third-party recordkeeper for purposes of section 7609(c)(2)(E) and § 301.7603–1 only if the summons served on that person seeks records (or testimony regarding such records) of a third party's business transactions or affairs and such recordkeeper made or kept the records in the capacity of a third-party recordkeeper. For instance, an accountant is not a third-party recordkeeper (by reason of being an accountant) with respect to the accountant's records of a sale of property by the accountant to another person. Similarly, a credit card issuer is not a third-party recordkeeper (by reason of being a person extending credit through the use of credit cards or similar devices) with respect to—

(i) Records relating to non-credit card transactions, such as a cash sale by the issuer to a holder of the issuer's credit card; or

(ii) Records relating to transactions involving the use of another issuer's credit card.

(2) *Examples.* The rules of paragraph (b)(1) of this section are illustrated by the following examples:

Example 1. V issues a credit card (the V card) that is honored by R, a retailer. When using the V card, C, a customer, signs a sales slip in triplicate. C, R, and V each retain one copy. Only the copy held by V is held by a third-party recordkeeper under section 7603(b)(2), even though R may issue its own credit card.

Example 2. R, a retailer, issues its own credit card (the R card) to C, a customer. When C makes a credit purchase from R using the R card, C signs a sales slip in duplicate. C and R each retain one copy. Because R keeps the copy in its capacity as credit card issuer, as well as in its capacity as a retailer, it is a third-party recordkeeper under section 7603(b)(2) with respect to its copy of the sales slip.

(c) *Effective date.* This section is applicable on the date the final

regulations are published in the **Federal Register**.

Par. 4. Sections 301.7609–1 through 301.7609–5 are revised to read as follows:

§ 301.7609–1 Special procedures for third-party summonses.

(a) *In general*—(1) Section 7609 requires the Internal Revenue Service (IRS) to follow special procedures when summoning a third party's testimony, records, or computer software source code. Except as provided in § 301.7609–2(b), the IRS must provide notice of a third-party summons to any person identified in the summons, other than the person summoned. A person entitled to notice of a third-party summons may intervene in any proceeding brought to enforce the summons or may bring a proceeding to quash the summons, regardless of whether they receive notice of the summons from the IRS pursuant to section 7609(a) and § 301.7609–2.

(2) Neither section 7609 nor § 301.7603–1, § 301.7603–2, or §§ 301.7609–1 through 301.7609–5 limit the IRS's ability to obtain information, other than by summons, through formal or informal procedures authorized by sections 7601 and 7602.

(b) *Cross references.* See § 301.7609–2 for rules relating to persons who must be notified of a third-party summons and exceptions to the notification requirements. See § 301.7609–3 for rules relating to the rights and duties of summoned parties. See § 301.7609–4 for rules relating to actions to quash a summons or to intervene in a summons enforcement proceeding. See § 301.7609–5 for rules relating to the suspension of periods of limitations.

(c) *Records.* For purposes of §§ 301.7609–1 through 301.7609–5, the term "records" includes books, papers, or other data.

(d) *Effective date.* This section is applicable on the date the final regulations are published in the **Federal Register**.

§ 301.7609–2 Notification of persons identified in third-party summonses.

(a) *In general*—(1) *Persons entitled to notice.* Except as provided in § 301.7609–2(b), the Internal Revenue Service (IRS) shall give notice of a third-party summons to any person, other than the person summoned, who is identified in the summons. The only persons so identified are the person with respect to whose liability the summons is issued and any other person identified in the description of summoned records or testimony. For example, if the IRS issues a summons to a bank with respect to the liability of C that requires the production of account records of A and B, both of whom are named in the summons, the IRS must notify A, B and C of the summons.

(2) *Time for providing notice.* If notice is required by paragraph (a)(2) of this section, such notice must be given within three days of the date on which the summons is served on the third party, but no later than 23 days prior to the date fixed in the summons as the date on which the examination of the summoned person or records is scheduled.

(3) *Methods for serving notice.* Notice may be served by hand delivery to any person entitled to notice or by leaving notice at such person's last and usual place of abode. Notice also may be served by certified or registered mail to the person's last known address, as defined in § 301.6212–2. If service to a person entitled to notice is made by certified or registered mail, the date of service is the date on which the notice is mailed.

(4) *Content of the notice.* Notice required to be given to any person entitled to notice must be accompanied by a copy of the summons that has been served and must include an explanation of the right to bring a proceeding to quash the summons. The copy of the summons accompanying the notice is not required to contain the attestation that appears pursuant to section 7603 on the copy of the summons served on the summoned person.

(b) *Exceptions.* The IRS is not required to provide notice to persons identified in the following third-party summonses:

(1) *Summons served on the taxpayer.* The IRS is not required to provide notice of a summons served on the person with respect to whose liability the summons was issued, or any officer or employee of such person.

(2) *Existence of records.* The IRS is not required to provide notice in the case of a summons issued to determine whether or not records of the business transactions or affairs of a person identified in the summons have been made or kept.

(3) *Numbered account or similar arrangement.* The IRS is not required to provide notice in the case of a summons issued solely to determine the identity of a person having a numbered account or similar arrangement with a bank or other institution. An account is a numbered account or similar arrangement within the meaning of this paragraph (b)(3) if it is an account through which a person may authorize transactions solely through the use of a number, symbol, code name, or other device not involving the disclosure of the person's identity. The term *person having a numbered account or similar arrangement* includes the person who opened the account and any person authorized to access the account or to receive records or statements concerning it.

(4) *Summonses in aid of the collection of liabilities*—(i) *In general.* The IRS is not required to provide notice in the case of a summons issued in aid of the collection of liabilities. A summons is in aid of the collection of liabilities within the meaning of this paragraph if it is issued in connection with the collection of—

(A) An assessment or judgment against the person with respect to whose liability the summons is issued; or

(B) The liability determined at law or in equity of any transferee or fiduciary of a person described in paragraph (b)(4)(i)(A) of this section.

(ii) *Examples.* The rules of paragraph (b)(4) of this section are illustrated by the following examples:

Example 1. A third-party summons is issued to a bank to determine the amount held in an account in the name of A, against whom unpaid income taxes have been assessed. Notice of the summons is not required to be given to A or any other persons identified in the summons because the summons is issued in connection with the collection of taxes that have been assessed.

Example 2. A third-party summons is issued to determine whether assessments should be made against A, who is potentially liable for a trust fund recovery penalty under section 6672 with respect to the assessed but unpaid withholding tax liability of employer E. The summons is captioned: In the matter of A. Notice of the summons must be provided to A and to any other persons identified in the summons because the summons was issued with respect to A's potential, unassessed liability under section 6672.

(5) *Summonses issued by a criminal investigator.* The IRS is not required to provide notice in the case of a summons issued by a criminal investigator to a person other than a third-party recordkeeper, as defined in section 7603(b). For purposes of section 7609(c)(2)(E), a summons issued by a criminal investigator is any summons issued as part of a criminal investigation by an IRS officer or employee having authority to conduct a criminal investigation and to issue a summons.

(6) *John Doe summons.* The IRS is not required to provide notice in the case of a John Doe summons issued under section 7609(f).

(7) *Summons issued pursuant to a court order to prevent spoliation of evidence.* The IRS is not required to

provide notice in the case of a summons for which a court determines there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.

(c) *Effective date.* This section is applicable on date the final regulations are published in the **Federal Register.**

§ 301.7609–3 Duty of and protection for the summoned party.

(a) *Duty of the summoned party.* Upon receipt of a summons, the summoned party must begin to assemble the summoned records. The summoned party must be prepared to produce the summoned records on the date on which the summons states that they are to be examined, regardless of the institution or anticipated institution of a proceeding to quash or the summoned party's intervention in a proceeding to quash, as allowed under section 7609(b)(2)(C).

(b) *Disclosing summoned party not liable*—(1) *In general.* A summoned party, or an agent or employee thereof, who makes a disclosure of records or gives testimony as required by a summons in good faith reliance on the certificate of the Secretary (as defined in paragraph (b)(2) of this section) or an order of a court requiring production of records or giving of testimony, will not be liable for any claim arising from such disclosure brought by any customer, any party with respect to whose tax liability the summons was issued, or any other person.

(2) *Certificate of the Secretary.* The Secretary may issue to the summoned party a certificate if the person with respect to whose liability the summons was issued expressly consents to the examination of the records summoned and the taking of testimony. The Secretary also may issue to the summoned party a certificate stating that—

(i) The 20-day period within which a person entitled to notice of the summons may institute a proceeding to quash the summons has expired; and

(ii) No proceeding has been instituted within that period.

(c) *Reimbursement of costs.* Summoned third parties may be entitled to reimbursement of their costs of assembling and preparing to produce summoned records, to the extent allowed by section 7610 and § 301.7610–1.

(d) *Notification of suspension of periods of limitations in connection with a John Doe summons*—(1) *Requirement of notification.* If any periods of limitations are suspended under section 7609(e)(2) and § 301.7609–5(d) with respect to a John Doe summons described in section 7609(f), the summoned party is required under section 7609(i)(4) to provide notice of such suspension to all persons with respect to whose liability the summons was issued.

(2) *Content of notification.* A summoned party required to notify a person of the suspension of the periods of limitations shall provide the following information to such person—

(i) A John Doe summons was served on the summoned party seeking records that may be relevant to the person's tax liability;

(ii) The date on which the summons was served;

(iii) The tax period(s) to which the summons relates;

(iv) Six months has passed since service of the summons and the summoned party's response to the summons has not been finally resolved;

(v) The periods of limitations under section 6501 (relating to assessment and collection) and section 6531 (relating to criminal prosecution), have been suspended; and

(vi) The date on which suspension of the periods of limitations under sections 6501 and 6531 began.

(3) *Time and manner of notification.* The notification must be made in writing and may be delivered in person, by mail sent to the address last known by the summoned party, or by use of any electronic means of transmission. Notification should be made as soon as possible after the suspension of the periods of limitations begins. Failure by a summoned party to give notice of the suspension of periods of limitations as required by section 7609(i)(4) does not prevent the suspension of the periods of limitations under section 7609(e)(2).

(e) *Effective date.* This section is applicable on the date the final regulations are published in the **Federal Register**.

§ 301.7609–4 Right to intervene; right to institute a proceeding to quash.

(a) *Intervention in proceeding with respect to enforcement of a summons.* Under section 7609(b)(1), a person entitled to notice of a summons under section 7609(a) and § 301.7609–2 is entitled to intervene in any proceeding brought under section 7604 with respect to the enforcement of that summons.

(b) *Right to institute a proceeding to quash*—(1) *In general.* Under section 7609(b), a person entitled to notice of a summons under section 7609(a) and § 301.7609–2 may institute a proceeding to quash the summons in the United States district court for the district in which the summoned person resides or is found.

(2) *Requirements for a proceeding to quash.* To institute a proceeding to quash a summons, a person entitled to notice of the summons must, not later than the 20th day following the day the notice of the summons was served on or mailed to such person—

(i) File a petition to quash a summons in the name of the person entitled to notice of the summons in the proper district court;

(ii) Notify the Internal Revenue Service (IRS) by sending a copy of that petition to quash by registered or certified mail to the IRS employee and office designated in the notice of summons to receive the copy; and

(iii) Notify the summoned person by sending by registered or certified mail a copy of the petition to quash to the summoned person.

(3) *Failure to give timely notice.* If a person entitled to notice of the summons fails to give proper and timely notice to either the summoned person or the IRS in the manner described in paragraph (b)(2) of this section, that person has failed to institute a proceeding to quash and the district court lacks jurisdiction to hear the proceeding. For example, if the person entitled to notice mails a copy of the petition to the summoned person, but fails to mail a copy of the petition to the designated IRS employee and office, the person entitled to notice has failed to institute a proceeding to quash. Similarly, if the person entitled to notice mails a copy of such petition to the summoned person but, instead of sending a copy of the petition by registered or certified mail to the designated IRS employee and office, the person entitled to notice provides the designated IRS employee and office the petition by some other means, the person entitled to notice has failed to institute a proceeding to quash.

(4) *Failure to institute a proceeding to quash.* If a person entitled to notice fails to institute a proceeding to quash within 20 days following the day the notice of the summons was served on or mailed to such person, the IRS may examine the summoned records and take summoned testimony following the 23rd day after notice of the summons was served on or mailed to the person entitled to notice.

(c) *Presumption no notice has been mailed.* Section 7609(b)(2)(B) permits a person entitled to notice to institute a

proceeding to quash by filing a petition in district court and notifying both the IRS and the summoned person. Unless the person entitled to notice has notified both the IRS and the summoned person in the appropriate manner, the person entitled to notice has failed to institute a proceeding to quash. For the purpose of permitting the IRS to examine the summoned witnesses and records, it is presumed that the notification was not timely mailed if the copy of the petition was not delivered to the summoned person or to the person and office designated to receive the notice on behalf of the IRS within three days after the close of the 20-day period allowed for instituting a proceeding to quash.

(d) *Effective date.* This section is applicable on the date the final regulations are published in the **Federal Register**.

§ 301.7609–5 Suspension of periods of limitations.

(a) *In general.* Except in the case of a summons that is a designated or related summons described in section 6503(j), the following rules relating to the suspension of certain periods of limitations apply to all third-party summonses subject to the notice requirements of section 7609(a) and to all John Doe summonses subject to the requirements of section 7609(f).

(b) *Intervention in an action to enforce the summons*—(1) *In general.* If a person entitled to notice of a summons under section 7609(a) and § 301.7609–2 with respect to whose liability the summons was issued, or such person's agent, nominee, or other person acting under the direction or control of the person entitled to notice, takes any action to intervene in a proceeding with respect to enforcement of such summons brought pursuant to section 7604, that person's periods of limitations under sections 6501 (relating to assessment and collection) and 6531 (relating to criminal prosecutions) for the tax period or periods that are the subject of the summons are suspended for the period during which such proceeding is pending.

(2) *Action to intervene.* A person entitled to notice takes any action to intervene in a proceeding to enforce a summons within the meaning of § 301.7609–4(a) on the date when a motion to intervene is filed with the court.

(c) *Institution of a proceeding to quash a summons*—(1) *In general.* If a person entitled to notice of a summons under section 7609(a) and § 301.7609–2 with respect to whose liability the summons was issued, or such person's agent, nominee, or other person acting under the direction or control of such person, takes any action described in § 301.7609–4(b) to institute a proceeding to quash such summons, that person's periods of limitations under sections 6501 and 6531 for the tax period or periods that are the subject of the summons are suspended for the period during which such proceeding is pending.

(2) *Action to institute a proceeding to quash a summons.* A person entitled to notice takes any action to institute a proceeding to quash if he or she files a petition to quash the summons in any district court, regardless of whether the timely filing requirements of section 7609(b)(2)(A) or the notice requirements of section 7609(b)(2)(B) are satisfied. For example, a person entitled to notice takes an action to institute a proceeding to quash a summons for purposes of this section if that person files a petition to quash the summons in district court and notifies the summoned person by sending a copy of the petition by registered or certified mail, but fails to mail a copy of that notice to the appropriate Internal Revenue Service (IRS) person and office.

(d) *Summoned party's failure to finally resolve the response to a summons after six months from service*—(1) *In general.* If a third party's response to a summons for which the IRS was required to provide notice to persons identified in the summons, or to a John Doe summons described in section 7609(f), is not finally resolved within six months after the date of service of the summons, the periods of limitations are suspended under sections 6501 and 6531, for the person with respect to whose liability the summons was issued and for any person whose identity is sought to be obtained by a John Doe summons, for the tax period or periods that are the subject of the summons. The suspension shall begin on the date which is six months after the service of the summons and shall end on the date on which there is a final resolution of the summoned party's response to the summons.

(2) *Example.* The rules of paragraph (d)(1) of this section are illustrated by the following example:

Example. A John Doe summons is issued on April 1, 2000, to the promoter of a tax shelter and seeks the names of all participants in the shelter in order to investigate the participants' income tax liabilities for 1997 and 1998. The district court approves service of the summons on April 30, 2000, and the summons is served on the promoter on May 1, 2000. The promoter does not provide the names of the participants. The periods of limitations for the participants' income tax liabilities and criminal prosecution for 1997 and 1998 are suspended under section 7609(e)(2) beginning on November 1, 2000, the date which is six months after the date the John Doe summons was served until the date on which the promoter's response to the summons is finally resolved.

(e) *Definitions*—(1) *Agent, nominee, etc.* A person is the agent, nominee, or other person of a person entitled to notice under section 7609(a) and § 301.7609–2, and is acting under the direction or control of the person entitled to notice for purposes of section 7609(e)(1), if the person entitled to notice has the ability in fact or at law to cause the agent, nominee or other person, to take the actions permitted under section 7609(b).

(2) *Period during which a proceeding is pending*—(i) *Intervention in an enforcement proceeding.* The period during which the periods of limitations under sections 6501 and 6531 are suspended under section 7609(e)(1) begins on the date any person described in paragraph (b) of this section intervenes in an action to enforce the summons. The periods of limitations remain suspended until all appeals are disposed of, or until the expiration of the period during which an appeal may be taken or a request for further review may be made. The periods of limitations remain suspended for the period during which a proceeding is pending, regardless of compliance (or partial compliance) with the summons during that period. If, following issuance of an order to enforce a third-party summons, a collateral proceeding is brought challenging whether production made by the summoned party fully satisfied the court order and whether sanctions should be imposed against the summoned party for a failure to satisfy that order, the periods of limitations remain suspended until all appeals of the collateral proceeding are disposed of, or until the expiration of the period during which an appeal may be taken or a request for further review of the collateral proceeding may be made. Any collateral proceeding to the original proceeding shall be considered to be a continuation of the original proceeding.

(ii) *Proceeding to quash a summons.* The period during which the periods of limitations under sections 6501 and 6531 are suspended under section 7609(e)(1) begins on the date any person described in paragraph (c) of this section files a petition to quash the summons in district court. The periods of limitations remain suspended until all appeals are disposed of, or until expiration of the period in which an appeal may be taken or a request for further review may be made. The

periods of limitations remain suspended for the period during which a proceeding is pending, regardless of compliance (or partial compliance) with the summons during that period.

(iii) *Examples.* The rules of paragraph (e)(2) are illustrated by the following examples:

Example 1. A revenue agent issues a summons to A, an accountant for B, requiring production of records relating to B's income tax liabilities for 1998. The summons is served on A on March 1, 2000. B files a petition to quash the summons in district court on March 15, 2000. The district court dismisses B's petition on July 1, 2000. B fails to appeal this decision by filing a notice of appeal within 60 days from the date of the district court's order of dismissal. The revenue agent notifies A that B did not appeal the district court's order. A turns over all of the records requested in the summons. The periods of limitations applicable to B for 1998 under sections 6501 and 6531 are suspended under section 7609(e)(1) from March 15, 2000, the date B filed a petition to quash, until August 30, 2000, the last day on which B could have filed a notice of appeal.

Example 2. A revenue agent issues a summons to A, an accountant for B, requiring production of records relating to B's income tax liabilities for 1999. The summons is served on A on June 1, 2001. B files an untimely petition to quash the summons in district court on June 30, 2001. The district court dismisses B's petition on July 31, 2001. B does not file an appeal of the district court's order. The periods of limitations applicable to B for 1999 under sections 6501 and 6531 are suspended under section 7609(e)(1) from June 30, 2001, the date B filed an untimely petition to quash, until September 29, 2001, the last day on which B could have filed a notice of appeal.

(3) *Final resolution of the summoned third party's response to a summons.* For purposes of section 7609(e)(2)(B), final resolution with respect to a summoned party's response to a third-party summons occurs when the summons or any order enforcing any part of the summons is fully complied with and all appeals are disposed of or the period in which an appeal may be taken or a request for further review may be made has expired. The determination of whether there has been full compliance will be made within a reasonable time, given the volume and complexity of the records produced, after the later of the giving of all testimony or the production of all records requested by the summons. If, following an enforcement order, collateral proceedings are brought challenging whether the production made by the summoned party fully satisfied the court order and whether sanctions should be imposed against the summoned party for a failing to do so, the suspension of the periods of limitations shall continue until the summons or any order enforcing any part of the summons is fully complied with and the decision in the collateral proceeding becomes final. A decision in a collateral proceeding becomes final when all appeals are disposed of or when the period in which an appeal may be taken or a request for further review may be made has expired.

(f) *Effective date.* This section is applicable on the date the final regulations are published in the **Federal Register**.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. E6–11543 Filed 7–20–06; 8:45 am]

BILLING CODE 4830–01–P

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2201

Regulations Implementing the Freedom of Information Act

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Occupational Safety and Health Review Commission (OSHRC) is proposing to revise its regulations implementing the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended. The proposed regulations contain new provisions to comply with Executive Order 13392. In addition, the proposed regulations have been updated to reflect changes in OSHRC's policies and procedures. As a result of these proposed amendments, the public will have a clearer understanding of OSHRC's policies and procedures implementing the FOIA.

DATES: Submit comments on or before August 21, 2006.

ADDRESSES: You may submit comments by any of the following methods:

- E-mail: *regsdocket@oshrc.gov.* Include "FOIA PROPOSED RULEMAKING" in the subject line of the message.
- Fax: (202) 606–5417.
- Mail: 1120 20th Street, NW., Ninth Floor, Washington, DC 20036–3457.
- Hand Delivery/Courier: Same as mailing address.

Instructions: All submissions must include your name, return address and e-mail address, if applicable. Please clearly label submissions as "FOIA PROPOSED RULEMAKING." If you submit comments by e-mail, you will receive an automatic confirmation e-mail from the system indicating that we have received your submission. If, in response to your comments submitted via e-mail, you do not receive a confirmation e-mail within five working days, please contact us directly at (202) 606–5410.

FOR FURTHER INFORMATION CONTACT: Jin H. Kim, Attorney-Advisor, Office of the General Counsel, via telephone: (202) 606–5410, or via e-mail: *jkim@oshrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Occupational Safety and Health Review Commission (OSHRC) proposes several substantive and technical revisions governing its regulations implementing the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended. OSHRC proposes revising its FOIA regulations, including the addition of new provisions and the modification of existing provisions, to comply with Executive Order 13392 (E.O. 13392), 70 FR 75373, December 19, 2005. In E.O. 13392, the President directs each agency to ensure that its FOIA operations treat FOIA requesters courteously and appropriately and to provide requesters with prompt information regarding the status of their FOIA requests, as well as appropriate information regarding the agency's response. In addition, each agency is to provide FOIA requesters and the public in general with "citizen-centered" ways to learn about the agency's FOIA process and how to receive agency records that are publicly available. By ensuring that its FOIA operations are "citizen-centered" and "results-oriented," each agency will improve service and performance, thereby strengthening compliance with the FOIA.

In order to achieve these goals, E.O. 13392 requires each agency head to designate a Chief FOIA Officer, who has agency-wide responsibility for the efficient and appropriate compliance with the FOIA. As part of his or her duties under E.O. 13392, the Chief FOIA Officer must review the agency's FOIA operations and identify any areas for improvement. In addition, E.O. 13392 requires agencies to establish FOIA Requester Service Centers to enable any FOIA requester to seek information concerning the status of his or her FOIA request as well as appropriate information about the agency's FOIA response. As part of the FOIA Requester Service Center, E.O. 13392 further requires an agency to designate its own FOIA Public Liaison(s) to serve as the supervisory official(s) to whom a FOIA

requester can raise concerns about the service the FOIA requester has received from the FOIA Requester Service Center, following an initial response to the FOIA request. Based upon these new requirements, OSHRC therefore proposes to revise its regulations implementing the FOIA to comply fully with E.O. 13392.

Further, as a result of the Chief FOIA Officer's review of OSHRC's FOIA operations, OSHRC proposes to amend its rules to reflect recent changes in OSHRC's policies and procedures as they relate to the processing of FOIA requests. At the beginning of this fiscal year, OSHRC moved all FOIA processing from its Office of Administration to the Office of the General Counsel, where paralegals and attorneys have received training in the handling of FOIA requests. Moreover, OSHRC has identified several areas for improvement in its processing of FOIA requests that are addressed by these proposed rules, such as establishing a recordkeeping log, standardizing forms for processing FOIA requests, adding definitions to clarify the use of terms, and establishing a streamlined appeals process that covers fee waiver denials. These changes in OSHRC's policies and procedures will make the processing of FOIA requests more efficient and responsive. Lastly, OSHRC proposes several minor revisions that are purely technical or clarifying in nature which relate to changes in phrasing and nomenclature.

Accordingly, OSHRC proposes to revise its regulations implementing the FOIA and put them out for public comment pursuant to 5 U.S.C. 552(a)(4)(A)(i), (a)(6)(B)(iv), (a)(6)(D)(i), and (a)(6)(E)(i). For the convenience of the reader, OSHRC reproduces proposed 29 CFR part 2201 in its entirety. The specific amendments that OSHRC proposes to each section of 29 CFR part 2201 are discussed hereafter in regulatory sequence.

II. Proposed Regulatory Revisions

The President's issuance of E.O. 13392 on December 14, 2005 created new requirements and duties for improving agency disclosure of information under the FOIA which are implemented in these proposed rules. Consequently, OSHRC proposes to amend the authority citation in 29 CFR part 2201 to add a reference to E.O. 13392.

In 29 CFR 2201.1, OSHRC would make changes to correct a grammatical error in the section heading and to add abbreviations for "Occupational Safety and Health Review Commission" and "Freedom of Information Act" to the regulatory text. Accordingly, the proposed rules in part 2201 are revised throughout to refer to the "Occupational Safety and Health Review Commission" as "OSHRC" or "Commission," and the "Freedom of Information Act" as "FOIA."

In § 2201.2, OSHRC proposes adding a sentence to the end of the section that provides additional details about the designation of one of the Commissioners as the Chairman and his responsibilities for the administrative operations of the Commission, consistent with section 12(e) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 661(e). Also, to conform to the abbreviations noted above in § 2201.1, OSHRC would substitute "OSHRC" in place of "The Occupational Safety and Health Review Commission (OSHRC or Commission)" in new § 2201.2.

In § 2201.3, OSHRC proposes revising the delegation of FOIA-related duties to reflect the changes required by E.O. 13392 and break them out into new paragraphs (a) through (d). In order to comport with E.O. 13392, OSHRC would eliminate the current language regarding the Chairman's delegation of authority to the Freedom of Information Act Officer. In its place, OSHRC proposes adding a delegation of authority to the Chief FOIA Officer under new paragraph (a). In addition, OSHRC would eliminate the alternate designation of another OSHRC officer or employee, such as the General Counsel or the Executive Secretary, by the Chairman or the Executive Director in the absence of the Freedom of Information Act Officer. Instead, under new paragraph (b) of proposed § 2201.3, the Chief FOIA Officer would designate the agency's FOIA Disclosure Officer(s) to process all FOIA requests. Under paragraph (c), the Chief FOIA Officer would designate the FOIA Public Liaison(s) to address any concerns about the service a FOIA requester has received following an initial response by the agency. Under new paragraph (d), OSHRC's proposal identifies the FOIA Disclosure Officer(s) and FOIA Public Liaison(s) as serving in the agency's FOIA Requester Service Center and provides the address and telephone number to contact the FOIA Requester Service Center. This new language reflects changes in the delegation of authority and designation of personnel in compliance with E.O. 13392.

Indeed, in order to ensure appropriate communication with FOIA requesters, E.O. 13392 requires agencies to "establish one or more FOIA Requester Service Centers" to receive and respond to inquiries from FOIA requesters. To comply with this requirement, OSHRC proposes to establish a FOIA Requester Service Center at its national office in Washington, DC OSHRC's FOIA Requester Service Center, which will handle all FOIA requests and inquiries about FOIA requests, will consist of FOIA Disclosure Officer(s) and FOIA Public Liaison(s). Under OSHRC's new procedures, the FOIA Disclosure Officer(s) will handle all initial responses to FOIA requests. The FOIA Public Liaison(s) will ensure appropriate communication between FOIA requesters and FOIA Disclosure Officer(s) and will be supervisory employee(s). This change will help ensure that OSHRC's FOIA operations are "citizen-centered" and "results-oriented" as directed in E.O. 13392. OSHRC also would update references to the FOIA Officer and Information Office throughout 29 CFR part 2201 to reflect this change.

OSHRC proposes to eliminate the second to last sentence of current § 2201.3 that refers to the handling of requests for copies of individual decisions because copies of Commission decisions have been placed on OSHRC's Web site for the public's convenience, pursuant to the Electronic Freedom of Information Act Amendments of 1996, Public Law 104–231, 110 Stat. 3048 (codified as amended in 5 U.S.C. 552) (e-FOIA). OSHRC would further eliminate the last sentence of current § 2201.3 which refers to the handling of "all other information requests" because this information will be covered under new § 2201.5(a) of the regulations; thus, its inclusion in § 2201.3 is redundant.

In § 2201.4, OSHRC first proposes to change the heading to include the phrase "and definitions." Second, OSHRC would update regulatory cross-references and make minor nomenclature changes throughout the section, such as deleting "Review" from "Review Commission" and replacing "Freedom of Information Act Officer" with "FOIA Disclosure Officer." Third, OSHRC would make other minor changes in phrasing to paragraph (a) by combining the last two sentences of the existing regulations for clarity without changing the meaning of the provision. Fourth, in paragraph (c), OSHRC would edit the paragraph heading to update the nomenclature, as well as the introductory text to describe more precisely the location of the reading room. Fifth, OSHRC would also add new paragraphs (c)(3) and (c)(4) to reflect the language of the FOIA, and renumber current paragraphs (c)(3) and (c)(4) as new paragraphs (c)(5) and (c)(6). Sixth, in paragraph (d), OSHRC would add a new paragraph heading noting record availability at the OSHRC

e-FOIA reading room, as well as language clarifying the availability of electronic records. Finally, OSHRC would add a new paragraph (e) to § 2201.4 to provide definitions relevant to 29 CFR part 2201 that are consistent with other agencies' FOIA regulations. These nine definitions clarify certain FOIA terminology but in no way change how OSHRC processes FOIA requests. The terms include: "commercial use request," "direct costs," "duplication," "education institution," "noncommercial scientific institution," "representative of the news media, or media requester," "review," "search," and "working day." The terms have been defined using standard language consistent with the statute, including the incorporation of minor technical modifications from the FOIA regulations of several other government agencies, including the Department of Justice (28 CFR part 16) and the Office of Management and Budget (OMB) (5 CFR part 1303). OSHRC proposes to define "working day," which is not defined in other government agencies" FOIA regulations, in order to clarify the FOIA's calculation of time.

OSHRC would remove current § 2201.5 altogether because it is no longer necessary. OSHRC had a policy of providing a hard copy of a single decision before the advent of the Internet and e-FOIA. Pursuant to e-FOIA, OSHRC has placed Commission decisions on OSHRC's Web site, *http://www.oshrc.gov*, for the public's convenience. Therefore, OSHRC proposes to remove § 2201.5 in its entirety and renumber subsequent sections accordingly.

OSHRC then proposes to redesignate current § 2201.6 as new § 2201.5. In new § 2201.5 (old § 2201.6), OSHRC would eliminate paragraph (a) of the current regulations in its entirety. Pursuant to e-FOIA, OSHRC has placed most of this information on its Web site for the public's convenience. OSHRC also proposes to make minor technical changes throughout this section to update cross-references and to reflect changes made to other sections in part 2201, as well as to clarify language which would not change the meaning of the provision. For example, OSHRC would remove "Review" from "Review Commission," replace "Freedom of Information Act Officer" with "FOIA Disclosure Officer" and change references to other provisions. Further, OSHRC would redesignate the old paragraph (b) as paragraph (a) with a new paragraph heading, "Requests for information" and modify the language within new paragraph (a) to clearly delineate the procedures for making FOIA requests. The new paragraph (a) provides that requests for information must be made in writing with "Freedom of Information Act Request" printed on the request's envelope or cover as well as the request itself, and addressed to the FOIA Disclosure Officer. In addition, FOIA requests must describe the record requested to the fullest extent possible and specify the preferred form or format of the response. The new language states that OSHRC shall try to accommodate requesters as to form or format when possible, and if no form or format is specified, OSHRC shall respond in the form or format that is most accessible to OSHRC. This new language is easier to understand and clarifies the procedures for requesting records. Further, OSHRC would redesignate current paragraph (c) as new paragraph (b), and would rephrase new paragraph (b) for clarity regarding the date of receipt of a FOIA request. OSHRC would also delete paragraph (d) (Specificity required) (old § 2201.6) because the information requested in paragraph (d) is now incorporated in new paragraph (a) of proposed § 2201.5.

OSHRC proposes to redesignate current § 2201.7 as new § 2201.6. In new § 2201.6 (old § 2201.7), OSHRC would first update cross-references to other sections changed in part 2201 and then make minor technical and grammatical changes throughout this section. For example, OSHRC would remove "Review" from "Review Commission" and replace "Freedom of Information Act Officer" with "FOIA Disclosure Officer" throughout this section. OSHRC also proposes to rephrase paragraph (b) for clarity without changing the meaning of the provision by directly stating that the FOIA Disclosure Officer(s) shall notify the requester in writing about extensions of time. Also in the introductory text to paragraph (b), OSHRC would delete the phrase "telephonic notice" when discussing "extensions of response time in usual circumstances" beyond the allowable time, because the FOIA requires written notice under 5 U.S.C. 552(a)(6)(B). Further, OSHRC would modify the language of paragraph (b)(1) to reflect in a more precise manner the location of OSHRC records. OSHRC records are currently located in OSHRC's national office, regional offices and an off-site storage location. In paragraph (b)(3), OSHRC would delete the phrase "or among two or more components within the Commission having substantial subject-matter interest in the request" because this phrase is unnecessary to OSHRC's FOIA operations. For consistency purposes, OSHRC proposes requiring written notice in paragraph (c) for additional extensions of time, as well as in paragraph (d)(3) for when the estimated time to process a FOIA request substantially changes. By providing written notice to requesters for these circumstances, OSHRC believes that it would improve OSHRC's communication with requesters.

In paragraph (d) of § 2201.6 (old § 2201.7), OSHRC would rename the heading from "multitrack processing" to "two-track processing" to describe more accurately OSHRC's processing of FOIA requests. Further, in order to streamline the FOIA rules and make them more user friendly, OSHRC proposes deleting paragraph (e)(4), as well as paragraph (g) of current § 2201.7 and incorporate that information in new § 2201.9 (Appeal of denials). New § 2201.9 will apply to all appeals of denials related to FOIA requests (*i.e.*, requests for records, requests for expedited processing, and/or requests for fee waiver).

In paragraph (f), OSHRC proposes to consolidate all denials related to FOIA requests (*i.e.*, requests for records, requests for expedited processing, and/or requests for fee waiver) to streamline the rules and make them more user friendly. Finally, OSHRC would further revise the language in paragraph (f) to closely track the language of the FOIA, 5 U.S.C. 552(a)(6)(C)(i) and (F), by requiring the FOIA Disclosure Officer(s) to provide the reason for a denial, a reasonable estimate of the volume of matter denied (unless doing so would harm an interest protected by the exemption(s) under which the request was denied), the name and title or position of the person responsible for the denial of the request, and also notify the requester of the right to appeal the determination in the written notice of denial.

Due to the movement of paragraph (g) to new § 2201.9 (Appeal of denials), OSHRC proposes redesignating paragraph (h) as new paragraph (g). OSHRC would edit the language in new paragraph (g) to require written justification for deletions within a record, because the FOIA states that "the justification for the deletion shall be explained fully in writing" as required under 5 U.S.C. 552(a).

OSHRC proposes to redesignate current § 2201.8 as new § 2201.7. In new § 2201.7 (old § 2201.8), OSHRC would revise this section to reflect changes in OSHRC's calculation of fees, and create an appendix that reflects OSHRC's fee schedule. In paragraph (a), OSHRC proposes to make several nomenclature changes and update a cross-reference to the section on fee waivers. In addition,

OSHRC proposes eliminating the specified dollar amount ($10) and changing it to "the threshold amount as provided in OSHRC's schedule of fees." Further, in new § 2201.7 (old § 2201.8), OSHRC proposes deleting paragraphs (a)(2) and (a)(3) and incorporating that definitional information in paragraph § 2201.4(e). In addition, the procedural information in paragraph (a)(3) is duplicated in new § 2201.8(a) discussed below. In paragraph (b), OSHRC proposes revising the copying, searching and reviewing fees so they are based on the direct costs of these services as provided in the FOIA under 5 U.S.C. 552(a)(4)(A)(iv). The FOIA provides that the Director of OMB shall promulgate guidelines for a uniform schedule of fees for all agencies under 5 U.S.C. 552(a)(4)(A)(i). OSHRC calculates its fees in accordance with OMB's "Uniform Freedom of Information Act Fee Schedule and Guidelines," 52 FR 10012, March 27, 1987. Under OMB's guidelines, these fees are to be based on the average hourly salary (base plus DC locality payment) of employees performing the services plus 16 percent for benefits. In addition, the fees for clerical employees are to be based on an average of all employees at the GS–9 level and below; the fees for professional employees are to be based on all employees at the GS–10 through GS–14 level; and the fees for managerial employees are to be based on an average of all employees at the GS–15 level and above. OSHRC's Office of Administration has calculated and updated the fees, which appear in the attached Appendix A. The FOIA Requester Service Center also will provide a hard copy of the schedule of fees upon request. OSHRC proposes to revise the language in paragraphs (b)(1), (b)(2) and (b)(3) of new § 2201.7 (old § 2201.8) to reflect the new calculation of fees.

OSHRC proposes to add a new paragraph (c) in new § 2201.7 (old § 2201.8) requiring the FOIA Disclosure Officer to provide requesters an itemized invoice for fees related to FOIA requests. Although the FOIA does not require an itemized invoice, OSHRC would provide an itemized invoice for the convenience of the requester as part of OSHRC's effort to be citizen-centered pursuant to E.O. 13392. OSHRC would also redesignate old paragraph (c) as new paragraph (d) to reflect the addition of the new paragraph (c). New paragraph (d) will be updated to include changes in nomenclature. OSHRC also would delete the current paragraph (d) (Certification or authentication), and include such certification or authentication service in a new paragraph (g) (Fees for services not required by the Freedom of Information Act), which is more inclusive of other services, such as express mail.

Paragraph (e) will remain essentially the same, except that OSHRC would make changes in wording that are technical in nature, such as replacing "Freedom of Information Act Officer" with "FOIA Disclosure Officer" and using gender neutral language. OSHRC would also change "copying or search" to "the total fee" to reflect the true cost of satisfying the request. OSHRC in this proposal has left in place the $25 total fee threshold, above which the agency is required to contact the requester about cost. OSHRC is considering, however, whether to raise that threshold amount. OSHRC requests comments specifically on whether, and by how much, this threshold should be raised.

In paragraph (f) of new § 2201.7 (old § 2201.8), OSHRC would make some changes in nomenclature to insert the term."FOIA Disclosure Officer" and insert gender neutral language. OSHRC would also modify the language in the third sentence to require full payment when a requester has previously failed to pay within 30 days. This revision is more consistent with the other sentences in the paragraph addressing advance payment. As noted above, OSHRC proposes to create a new paragraph (g) on fees for services not required by the FOIA. This new paragraph is more inclusive of the types of services, such as express mail, that is not in OSHRC's current regulation. OSHRC also would revise the language in paragraph (h), as well as paragraph (i), to reflect changes in OSHRC's procedures for transferring the bill collection responsibilities related to FOIA requests to OSHRC's Office of Administration. OSHRC believes that this change in bill collection procedures will improve efficiency because the FOIA Requester Service Center will not have to devote resources to bill collection and can focus on responding to FOIA requests. In paragraph (i), OSHRC would further revise the language to more precisely reflect the statutory provisions relating to the Federal government's collection of debts under the Debt Collection Act of 1982 and its administrative procedures.

OSHRC proposes to redesignate current § 2201.9 as new § 2201.8. In new § 2201.8 (old § 2201.9), OSHRC would make several minor changes that are technical in nature, such as replacing references to the "Freedom of Information Act Officer" with "FOIA Disclosure Officer" and using gender neutral language. As mentioned in the discussion of new § 2201.7 (old § 2201.8), OSHRC would include some of the procedural language from paragraph (a)(3) of old § 2201.8 in paragraph (a) of new § 2201.8 (old § 2201.9).

As previously mentioned, OSHRC proposes adding a new section, § 2201.9 (Appeal of denials), to consolidate all appeals in one section. This change is intended to make the FOIA rules more user friendly. OSHRC would also change the time the requester may appeal a denial from 30 working days after the requester receives notice of the appeal to 20 working days. This change is based on a survey of various smaller agencies, including the Federal Mine Safety and Health Review Commission (20 working days). In addition, OSHRC would add appeals of denial of fee waivers in this section because OSHRC's current rule does not specifically provide for appeals of denial of fee waivers.

In § 2201.10, OSHRC would make minor technical changes, such as replacing "Freedom of Information Act Officer" with "FOIA Disclosure Officer."

Finally, OSHRC would update the cross-references to the various sections and paragraphs throughout the rules in 29 CFR part 2201 to reflect changes in section numbers and paragraphs due to the reorganization of these proposed regulations.

Executive Order 12866

The Commission is an independent regulatory agency, and as such, is not subject to the requirements of E.O. 12866.

Paperwork Reduction Act

The Commission has determined that the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, does not apply because these rules do not contain any information collection requirements that require the approval of OMB.

Executive Order 13132

The Commission is an independent regulatory agency, and as such, is not subject to the requirements of E.O. 13132.

Regulatory Flexibility Act

The Commission has determined under the Regulatory Flexibility Act, 5 U.S.C. 606(b), that these rules, if adopted, would not have a significant economic impact on a substantial number of small entities. Therefore, a Regulatory Flexibility Statement and Analysis has not been prepared.

Unfunded Mandates Reform Act of 1995

The Commission is an independent regulatory agency, and, as such, is not subject to the Unfunded Mandates Reform Act, 2 U.S.C. 1501 *et seq.*

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. 804(2). The proposed rule will not result in an annual effect on the economy of more than $100 million per year; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based companies in domestic and export markets.

List of Subjects in 29 CFR Part 2201

Freedom of Information.

Signed at Washington, DC, on July 17, 2006.

W. Scott Railton,

Chairman.

For the reasons set forth in the preamble, the Commission proposes that Chapter XX, part 2201 of Title 29, Code of Federal Regulations, be revised as follows:

PART 2201—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT

Sec.

Authority: 29 U.S.C. 661(g); 5 U.S.C. 552; E.O. 13392, 70 FR 75373, 3 CFR, 2005 Comp., p. 216.

§ 2201.1 Purpose and scope.

This part prescribes procedures to obtain information and records of the Occupational Safety and Health Review Commission (OSHRC or Commission) under the Freedom of Information Act (FOIA), 5 U.S.C. 552. It applies only to records or information of the Commission or in the Commission's custody. This part does not affect discovery in adversary proceedings before the Commission. Discovery is governed by the Commission's Rules of Procedure in 29 CFR part 2200, subpart D.

§ 2201.2 Description of agency.

OSHRC adjudicates contested enforcement actions under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651–678. The Commission decides cases after the parties are given an opportunity for a hearing. All hearings are open to the public and are conducted at a place convenient to the parties by an Administrative Law Judge. Any Commissioner may direct that a decision of a Judge be reviewed by the full Commission. The President designates one of the Commissioners as Chairman, who is responsible on behalf of the Commission for the administrative operations of the Commission.

§ 2201.3 Delegation of authority and responsibilities.

(a) The Chairman delegates to the Chief FOIA Officer the authority to act upon all requests for agency records.

(b) The Chief FOIA Officer shall designate the FOIA Disclosure Officer(s), who shall be responsible for processing FOIA requests.

(c) The Chief FOIA Officer shall designate the FOIA Public Liaison(s), who shall serve as the supervisory official(s) to whom a FOIA requester can raise concerns about the service the FOIA requester has received following an initial response.

(d) OSHRC establishes a FOIA Requester Service Center that shall be staffed by the FOIA Disclosure Officer(s) and FOIA Public Liaison(s). The address and telephone number of the FOIA Requester Service Center is 1120 20th Street, NW., Washington, DC 20036–3457. (202) 606–5410.

§ 2201.4 General policy and definitions.

(a) *Non-exempt records available to public.* Except for records and information exempted from disclosure by 5 U.S.C. 552(b) or published in the **Federal Register** under 5 U.S.C. 552(a)(1), all records of the Commission or in its custody are available to any person who requests them in accordance with § 2201.5(a). Records include any information that would be a record subject to the requirements of 5 U.S.C. 552 when maintained by the Commission in any format, including electronic format. In response to FOIA requests, the Commission will search for records manually or by automated means, except when an automated search would significantly interfere with the operation of the Commission's automated information system.

(b) *Examination of records in cases appealed to courts.* A final order of the Commission may be appealed to a United States Court of Appeals. When this occurs, the Commission may send part or all of the official case file to the court and may retain other parts of the file. Thus, a document in a case may not be available from the Commission but only from the court of appeals. In such a case, the FOIA Disclosure Officer may inform the requester that the request for a particular document should be directed to the court.

(c) *Record availability at the OSHRC on-site FOIA Reading Room.* The records of Commission activities are publicly available for inspection and copying at the OSHRC on-site FOIA Reading Room, 1120 20th St., NW., Ninth Floor, Washington, DC 20036–3457. These records include:

(1) Final decisions including concurring and dissenting opinions as well as orders issued as a result of adjudication of cases;

(2) OSHRC Rules of Procedure and Guides to those procedures;

(3) Specific agency policy statements adopted by OSHRC and not published in the **Federal Register**;

(4) Administrative staff manuals that affect a member of the public;

(5) Copies of records that have been released to a person under the FOIA that, because of the subject matter, the Commission determines that the records have become or are likely to become the subject of subsequent requests for substantially the same records; and

(6) A general index of records referred to under paragraph (c)(3) of this section.

(d) *Record availability at the OSHRC e-FOIA Reading Room.* Materials created on or after November 1, 1996 under paragraphs (c)(1), (2), (3) and (4) of this section may also be accessed electronically through the Commission's Web site at *http://www.oshrc.gov.*

(e) *Definitions.* For purposes of this part:

Commercial use request means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. The FOIA Disclosure Officer shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because the FOIA Disclosure Officer has

reasonable cause to doubt a requester's stated use, the FOIA Disclosure Officer shall provide the requester a reasonable opportunity to submit further clarification.

Direct costs means those expenses that the Commission actually incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating duplication machinery. Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept.

Duplication means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (for example, magnetic tape or disk), among others. The FOIA Disclosure Officer shall honor a requester's specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format.

Educational institution means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

Noncommercial scientific institution means an institution that is not operated on a "commercial" basis, as that term is defined in this paragraph, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

Representative of the news media, or news media requester is any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. For purposes of this definition, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. For "freelance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but the FOIA Disclosure Officer shall also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. However, a request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use.

Review means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. It also includes processing any record for disclosure—for example, doing all that is necessary to redact it and prepare it for disclosure. Review costs are recoverable even if a record ultimately is not disclosed. Review time does not include time spent resolving general legal or policy issues regarding the application of exemptions.

Search means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. The FOIA Disclosure Officer shall ensure that searches are done in the most efficient and least expensive manner reasonably possible. For example, the FOIA Disclosure Officer shall not search line-by-line where duplicating an entire document would be quicker and less expensive.

Working day means a regular Federal working day. It does not include Saturdays, Sundays, or Federal legal public holidays.

§ 2201.5 Procedure for requesting records.

(a) *Requests for information.* All requests for information must be made in writing and must be mailed or delivered to the FOIA Disclosure Officer at the address in § 2201.3(d). The words "Freedom of Information Act Request" must be printed on the face of the request's envelope or covering as well as the request itself. Requests for information must describe the particular record requested to the fullest extent possible and specify the preferred form or format (including electronic formats) of the response. The Commission shall accommodate requesters as to form or format if the record is readily reproducible in the requested form or format. When requesters do not specify the preferred form or format of the response, the Commission shall respond in the form or format in which the record is most accessible to the Commission.

(b) *Date of receipt.* A request that complies with paragraph (a) of this section is deemed received on the actual date it is received by the Commission. A request that does not comply with paragraph (a) of this section is deemed received when it is actually received by the FOIA Disclosure Officer. For requests that are expected to result in fees exceeding $250, the request shall not be deemed to have been received until the requester is advised of the anticipated costs and the Commission has received full payment or satisfactory assurance of full payment as provided under § 2201.7(f).

§ 2201.6 Responses to requests.

(a) *Responses within 20 working days.* The FOIA Disclosure Officer will either grant or deny a request for records within 20 working days after receiving the request.

(b) *Extensions of response time in unusual circumstances.* In unusual circumstances, the Commission may extend the time limit prescribed in paragraph (a) of this section by not more than 10 working days. The FOIA Disclosure Officer shall notify the requester in writing of the extension, the reasons for the extension and the date on which a determination is expected. "Unusual circumstances" exists, but only to the extent reasonably necessary to the proper processing of the particular request, when there is a need to:

(1) Search for and collect the requested records from one of OSHRC's regional offices or off-site storage facilities;

(2) Search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request; or

(3) Consult, with all practicable speed, with another agency having a substantial interest in the determination of the request.

(c) *Additional extension.* The FOIA Disclosure Officer shall notify the

requester in writing when it appears that a request cannot be completed within the allowable time (20 working days plus a 10 working day extension). In such instances, the requester will be provided an opportunity to limit the scope of the request so that it may be processed in the time limit, or to agree to a reasonable alternative time frame for processing.

(d) *Two-track processing.* To ensure the most equitable treatment possible for all requesters, the Commission will process requests on a first-in, first-out basis using a two-track processing system based upon the estimated time it will take to process the request.

(1) The first track is for requests of simple to moderate complexity that are expected to be completed within 20 working days.

(2) The second track is for requests involving "unusual circumstances" that are expected to take between 21 to 30 working days to complete and those that, because of their unusual volume or other complexity, are expected to take more than 30 working days to complete.

(3) Requesters should assume, unless otherwise notified by the Commission, that their request is in the first track. The Commission will notify requesters when their request is placed in the second track for processing and that notification will include the estimated time for completion. Should subsequent information substantially change the estimated time to process a request, the requester will be notified in writing. In the case of a request expected to take more than 30 working days for action, a requester may modify the request to allow it to be processed faster or to reduce the cost of processing. Partial responses may be sent to requesters as documents are obtained by the FOIA Disclosure Officer from the supplying offices.

(e) *Expedited processing.* (1) The Commission may place a person's request at the front of the queue for the appropriate track for that request upon receipt of a written request that clearly demonstrates a compelling need for expedited processing. Requesters must provide detailed explanations to support their expedited requests. For purposes of determining expedited processing, the term *compelling need* means:

(i) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of any individual; or

(ii) That a request is made by a person primarily engaged in disseminating information, and that person establishes that there is an urgency to inform the public concerning actual or alleged Federal Government activity.

(2) A person requesting expedited processing must include a statement certifying the compelling need given to be true and correct to the best of his or her knowledge and belief. The certification requirement may be waived by the Commission as a matter of agency discretion.

(3) The FOIA Disclosure Officer will make the initial determination whether to grant or deny a request for expedited processing and will notify a requester within 10 calendar days after receiving the request whether processing will be expedited.

(f) *Content of denial.* When the FOIA Disclosure Officer denies a request for records, either in whole or in part, a request for expedited processing, and/or a request for fee waivers (see § 2201.8), the written notice of the denial shall state the reason for denial, give a reasonable estimate of the volume of matter denied (unless doing so would harm an interest protected by the exemption(s) under which the request was denied), set forth the name and title or position of the person responsible for the denial of the request, and notify the requester of the right to appeal the determination as specified in § 2201.9. A refusal by the FOIA Disclosure Officer to process the request because the requester has not made advance payment or given a satisfactory assurance of full payment required under § 2201.7(f) may be treated as a denial of the request and appealed under § 2201.9.

(g) *Deletions.* The FOIA Disclosure Officer shall provide to the requester in writing a justification for deletions within records. The amount of information deleted from records shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption under which the deletion is made. If technically feasible, the place in the record where the deletion is made shall be marked.

§ 2201.7 Fees for copying, searching, and review.

(a) *Fees required unless waived.* The FOIA Disclosure Officer shall charge the fees in paragraph (b) of this section unless the fees for a request are less than the threshold amount as provided in OSHRC's fee schedule, in which case no fees shall be charged. The FOIA Disclosure Officer shall, however, waive the fees in the circumstances stated in § 2201.8.

(b) *Calculation of fees.* Fees for copying, searching and reviewing will be based on the direct costs of these services, including the average hourly salary (base plus DC locality payment), plus 16 percent for benefits, of the following three categories of employees involved in responding to FOIA requests: clerical—based on an average of all employees at GS–9 and below; professional—based on an average of all employees at GS–10 through GS–14; and managerial—based on an average of all employees at GS–15 and above. OSHRC will calculate a schedule of fees based on these direct costs. The schedule of fees under this section appears in Appendix A to this Part 2201. A copy of the schedule of fees may also be obtained at no charge from the FOIA Disclosure Officer. See § 2201.3(d).

(1) *Copying fee.* The fee per copy of each page shall be calculated in accordance with the per-page amount established in OSHRC's fee schedule. For other forms of duplication, direct costs of producing the copy, including operator time, shall be calculated and assessed. Copying fees shall not be charged for the first 100 pages of copies unless the copies are requested for a commercial use.

(2) *Search fee.* Search fees shall be calculated in accordance with the amounts established in OSHRC's fee schedule. Commercial requesters shall be charged for all search time. Search fees shall be charged even if the responsive documents are not located or if they are located but withheld on the basis of an exemption. However, search fees shall be limited or not charged as follows:

(i) *Easily identifiable decisions.* Search fees shall not be charged for searching for decisions that the requester identifies by name and date, or by docket number, or that are otherwise easily identifiable.

(ii) *Educational, scientific or news media requests.* No fee shall be charged if the request is not for a commercial use and is by an educational or scientific institution, whose purpose is scholarly or scientific research, or by a representative of the news media.

(iii) *Other non-commercial requests.* No fee shall be charged for the first two hours of searching if the request is not for a commercial use and is not by an educational or scientific institution, or a representative of the news media.

(iv) *Requests for records about self.* No fee shall be charged to search for records filed in the Commission's systems of records if the requester is the subject of the requested records. See the Privacy Act of 1974, 5 U.S.C. 552a(f)(5) (fees to be charged only for copying).

(3) *Review fee.* A review fee shall be charged only for commercial requests. Review fees shall be calculated in accordance with the amounts established in OSHRC's schedule of fees. A review fee shall be charged for the initial examination of documents located in response to a request to determine if it may be withheld from disclosure, and for the excision of withholdable portions. However, a review fee shall not be charged for review by the Chairman under § 2201.9 (Appeal of denials).

(c) *Invoices.* The FOIA Disclosure Officer shall provide the requester with an invoice containing an itemization of assessed fees.

(d) *Aggregation of requests.* When the FOIA Disclosure Officer reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request into a series of requests for the purpose of evading the assessment of fees, the FOIA Disclosure Officer may aggregate any such requests and charge accordingly.

(e) *Fees likely to exceed $25.* If the total fee charges are likely to exceed $25, the FOIA Disclosure Officer shall notify the requester of the estimated amount of the charges. The notification shall offer the requester an opportunity to confer with the FOIA Disclosure Officer to reformulate the request to meet the requester's needs at a lower cost.

(f) *Advance payments.* Advance payment of fees will generally not be required. If, however, charges are likely to exceed $250, the FOIA Disclosure Officer shall notify the requester of the likely cost and: If the requester has a history of prompt payment of FOIA charges, obtain satisfactory assurance of full payment; or if the requester has no history of payment, require an advance payment of an amount up to the full estimated charge. If the requester has previously failed to pay a fee within 30 days of the date of billing, the FOIA Disclosure Officer shall require the requester to pay the full amount owed plus any interest owed as provided in paragraph (h) of this section or demonstrate that he or she has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated charges before the FOIA Disclosure Officer begins to process the new request or a pending request from that requester.

(g) *Fees for services not required by the Freedom of Information Act.* The Commission has discretion regarding its response to requests for services not required by the FOIA. For example, the FOIA does not require agencies to certify or authenticate responsive documents, nor does it require responsive documents to be sent by express mail. If these services are requested, the FOIA Disclosure Officer shall assess the direct costs of such services.

(h) *Interest on unpaid bills.* The Commission's Office of Administration shall begin assessing interest charges on unpaid bills starting on the thirty-first day after the date the bill was sent. Interest will accrue from the date of billing until the Commission receives full payment. Interest will be at the rate described in 31 U.S.C. 3717.

(i) *Debt collection procedures.* If bills are unpaid 60 days after the mailing of a written notice to the requester, the Commission's Office of Administration may resort to the debt collection procedures set out in the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

§ 2201.8 Waiver of fees.

(a) *General.* The FOIA Disclosure Officer shall waive part or all of the fees assessed under § 2201.7(b) if two conditions are satisfied: Disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and disclosure is not primarily in the commercial interest of the requester. Where the FOIA Disclosure Officer has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the FOIA Disclosure Officer may seek clarification from the requester before assigning the request to a specific category for fee assessment purposes. The FOIA Disclosure Officer shall afford the requester the opportunity to show that the requester comes within these two conditions. The following factors may be considered in determining whether the two conditions are satisfied:

(1) Whether the subject of the requested records concerns the operations or activities of the government;

(2) Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities;

(3) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so, whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(b) *Partial waiver of fees.* If the two conditions stated in paragraph (a) of this section are met, the FOIA Disclosure Officer will ordinarily waive all fees. In exceptional cases, however, only a partial waiver may be granted if the request for records would impose an exceptional burden or require an exceptional expenditure of Commission resources, and the request for a waiver minimally satisfies the "public interest" requirement in paragraph (a) of this section.

§ 2201.9 Appeal of denials.

A denial of a request for records, either in whole or in part, a request for expedited processing, or a request for fee waivers, may be appealed in writing to the Chairman of the Commission within 20 working days of the date of the letter denying an initial request. The Chairman shall act on the appeal under 5 U.S.C. 552(a)(6)(A)(ii) within 20 working days after the receipt of the appeal. If the Chairman wholly or partially upholds the denial of the request, the Chairman shall notify the requesting person that the requester may obtain judicial review of the Chairman's action under 5 U.S.C. 552(a)(4)(B)–(G).

§ 2201.10 Maintenance of statistics.

(a) The FOIA Disclosure Officer shall maintain records of:

(1) The number of determinations made by the agency not to comply with the requests for records made to the agency and the reasons for those determinations;

(2) The number of appeals made by persons, the results of those appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) A complete list of all statutes that the agency used to authorize the withholding of information under 5 U.S.C. 552(b)(3), which exempts information that is specifically exempted from disclosure by other statutes;

(4) A description of whether a court has upheld the decision of the agency to withhold information under each of those statutes cited, and a concise description of the scope of any information upheld;

(5) The number of requests for records pending before the agency as of September 30 of the preceding year and the median number of days that these requests had been pending before the agency as of that date;

(6) The number of requests for records received by the agency and the number of requests the agency processed;

(7) The median number of days taken by the agency to process different types of requests;

(8) The total amount of fees collected by the agency for processing requests;

(9) The average amount of time that the agency estimates as necessary, based on the past experience of the agency, to comply with different types of requests;

(10) The number of full-time staff of the agency devoted to the processing of requests for records under this section; and

(11) The total amount expended by the agency for processing these requests.

(b) The FOIA Disclosure Officer shall annually, on or before February 1 of each year, prepare and submit to the Attorney General an annual report covering each of the categories of records to be maintained in accordance with paragraph (a) of this section, for the previous fiscal year. A copy of the report will be available for public inspection and copying at the OSHRC FOIA Reading Room, and a copy will be accessible through OSHRC's Web site at *http://www.oshrc.gov.*

APPENDIX A TO PART 2201.—SCHEDULE OF FEES

Type of fee	Amount of fee
Threshold Amount (Amount below which fees will not be assessed)	$10.
Search and Review Hourly Fees:	
Clerical (GS–9 and below)	$23.
Professional (GS–10 through GS 14)	$46.
Managerial (GS–15 and above)	$76.
Duplication cost per page	$0.25.
Computer printout copying fee	$0.40.
Searches of computerized records	Actual cost to the Commission, but shall not exceed $300 per hour, including machine time and the cost of the operator and clerical personnel.
Certification Fee	$35 per authenticating affidavit or declaration. (Note: Search and review charges may be assessed in accordance with the rates listed above.)

[FR Doc. E6–11574 Filed 7–20–06; 8:45 am]
BILLING CODE 7600–01–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2520

RIN 1210–AB06

Annual Reporting and Disclosure

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Proposed rule.

SUMMARY: This document contains proposed amendments to Department of Labor (Department) regulations relating to annual reporting and disclosure requirements under Part 1 of Subtitle B of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA or Act). The proposed amendments contained in this document are necessary to conform the annual reporting and disclosure regulations to proposed revisions to the Form 5500 Annual Return/Report of Employee Benefit Plan forms and instructions. The proposed changes to the Form 5500 and implementing regulatory amendments are intended to facilitate the transition to an electronic filing system, separately proposed at 70 FR 51542 (August 30, 2005), reduce and streamline annual reporting burdens, especially for small businesses, and update the annual reporting forms to reflect current issues and agency priorities. The regulatory amendments thus would, upon adoption, apply for the reporting year for which the electronic filing requirement is implemented. The proposed regulatory amendments will affect the financial and other information required to be reported and disclosed by employee benefit plans filing the Form 5500 Annual Return/Report of Employee Benefit Plan under Part 1 of Subtitle B of Title I of ERISA.

DATES: Written comments must be received by the Department of Labor on or before September 19, 2006.

ADDRESSES: Comments should be addressed to the Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA), Room N–5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attn: Form 5500 Regulation Revisions (RIN 1210–AB06). Comments also may be submitted electronically to *e-ori@dol.gov* or by using the Federal eRulingmaking Portal *http://www.regulations.gov* (follow instructions for submission of comments). EBSA will make all comments available to the public on its Web site at *http://www.dol.gov/ebsa.* The comments also will be available for public inspection at the Public Disclosure Room, N–1513, EBSA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Goodman or Michael Baird, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693–8523 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

A. Background

Under Titles I and IV of ERISA, and the Internal Revenue Code (Code), as amended, pension and other employee benefit plans are generally required to file annual returns/reports concerning, among other things, the financial condition and operations of the plan. Filing the Form 5500 "Annual Return/Report of Employee Benefit Plan," together with any required attachments and schedules (Form 5500 Annual Return/Report) generally satisfies these annual reporting requirements. The Form 5500 Annual Return/Report is the primary source of information concerning the operation, funding, assets, and investments of pension and other employee benefit plans. In addition to being an important disclosure document for plan participants and beneficiaries, the Form 5500 Annual Return/Report is a compliance and research tool for the Department and a source of information and data for use by other federal agencies, Congress, and the private sector in assessing employee benefit, tax, and economic trends and policies.

B. Discussion of the Proposed Revisions to Part 2520

1. Section 2520.103–1

The Department of Labor (Department) annual reporting regulations, including § 2520.103–1, are promulgated under the provisions of ERISA that authorize the creation of limited exemptions and simplified reporting and disclosure for welfare plans under ERISA section 104(a)(3), simplified annual reports under ERISA section 104(a)(2)(A) for pension plans that cover fewer than 100 participants, and alternative methods of compliance for all pension plans under ERISA section 110(a). Various changes are being proposed to the Form 5500 Annual Return/Report and its instructions in a Notice of Proposed Form Revisions published today in the **Federal Register**. To accommodate those form and instruction changes, the regulatory amendments to 29 CFR 2520.103–1 are being proposed to update the references to the annual report to reflect the new structure and components of the Form 5500 Annual Return/Report.

The following subsections outline major changes to the Form 5500. A more comprehensive discussion of the form and instructions changes is in the above-referenced Notice of Proposed Forms Revisions. Facsimiles of the proposed form revisions and proposed form instructions can be viewed on the EBSA's Web site at *http://www.dol.gov/ebsa.*[1] To avoid unnecessary duplication, only a general summary of the form and instruction changes is included in this notice as background for the required cost/benefit and regulatory analysis discussions. For a comprehensive discussion of form and instruction changes, see the Notice of Proposed Forms Revisions published concurrently in today's **Federal Register**.

(a) Short Form 5500 (Eligible Small Plan Filers)

A new two-page Form 5500 Annual Return/Report of Employee Benefit Plan—the Form 5500–SF (Short Form 5500)—is being proposed in an effort to streamline the reporting requirements for certain small pension and welfare plans (generally, plans with fewer than 100 participants) that have investment portfolios in which their assets are held by regulated financial institutions and the investments have a readily determinable fair market value as described in the proposed regulation at § 2520.103–1(c)(2)(iii). A detailed description of the proposed Form 5500–SF and a facsimile of the form is in the Notice of Proposed Forms Revisions being published concurrently in today's **Federal Register**. Substantially all of the information required to be reported by employee benefit plans on the proposed Short Form 5500 currently is included in that information required to be reported as part of the Form 5500 Annual Return/Report under the simplified reporting options presently available to small plans. The proposal would not eliminate the existing simplified reporting options for small plans but, rather, would add the Short Form 5500 as another simplified reporting option for eligible small plans.

The Internal Revenue Service (IRS) has advised the Department that, although there are no mandatory electronic filing requirements for the Form 5500 under the Code or the regulations issued thereunder, to ease the burdens on plans that are not subject to Title I of ERISA but that file the Form 5500–EZ to satisfy the annual reporting and filing obligations imposed by the Code, the IRS is proposing to permit certain Form 5500–EZ filers to satisfy the requirement to file the Form 5500–EZ with the IRS by filing the proposed Short Form 5500 electronically through the EFAST processing system. Therefore, under the IRS' proposal, certain Form 5500–EZ filers will be provided both electronic and paper filing options. The electronic option will allow 5500–EZ filers to complete and electronically file with EFAST selected information on the Short Form 5500. 5500–EZ filers will also be able to choose instead to file a Form 5500–EZ on paper with the IRS.[2]

(b) Removal of Internal Revenue Service-Only Schedules From the Form 5500 Annual Return/Report

Under the proposal the Form 5500 Annual Return/Report will no longer include any of the schedules from the current Form 5500 Annual Return/Report that are required only for the IRS. This will effectuate the adoption of a wholly electronic filing requirement for the Form 5500 Annual Return/Report given the current limitations on the IRS's authority to mandate electronic filing of certain tax returns. Accordingly, under the proposal, the following schedules will no longer be required to be filed as part of the Form 5500 Annual Return/Report: Schedule E (ESOP Annual Information), Schedule P (Annual Return of Fiduciary of Employee Benefit Trust), and Schedule SSA (Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits). The IRS, however, has advised the Department that it intends that plan administrators, employers, and certain other entities that are subject to filing and reporting requirements under the Code will have to continue to satisfy any applicable requirements in accordance with IRS revenue procedures, regulations, publications, forms, and instructions. In that regard, the IRS has independently eliminated the Schedule P from the 2006 Form 5500 in anticipation of the transition to a wholly electronic filing environment. Further, as described elsewhere in this document, the Department is proposing to move to the Schedule R three questions on ESOP information formerly reported on the Schedule E, and the IRS has advised the Department that it does not anticipate requiring separate filings by ESOPs on the remaining questions from the Schedule E. The IRS is evaluating the information collected on Schedule SSA, and considering whether other existing information collections could be used in place of the Form 5500 Annual Return/Report.

(c) Schedule A (Insurance Information)

Schedule A must be attached to the Form 5500 Annual Return/Report for an ERISA-covered plan if any pension or welfare benefits under the plan are provided by, or if the plan holds any investment contracts with, an insurance company or other similar organization. Although the proposal would retain most of the Schedule A data substantially unchanged, the Department is proposing to add a line item to give administrators a specific space on the Schedule A to report the failure by an insurance carrier to provide necessary information. Certain other technical changes are being proposed to the Schedule A form and instructions to improve Schedule A as a tool for disclosure of insurance fees and commissions.

(d) Schedule B (Actuarial Information)

Schedule B is required for defined benefit pension plans subject to the minimum funding standards (see Code section 412 and Part 3 of Title I of ERISA). The Pension Benefit Guaranty Corporation (PBGC) proposes adding questions to the Schedule B designed to

[1] Paper copies of the proposed form revisions and proposed instructions may be obtained by telephoning 1–866–444–EBSA (3272) (this is a toll-free number).

[2] Under the voluntary electronic filing option, 5500–EZ filers filing an amended return for a plan year must file the amended return electronically using the Form 5500–SF if they initially filed electronically for the plan year and must file with the IRS using the paper Form 5500–EZ if they filed for plan year with the IRS on a paper Form 5500–EZ.

obtain a "look-through" allocation of plan investments in certain pooled investment funds for certain very large defined benefit plans. Under the proposal, defined benefits plans with more than 1,000 participants would be required to breakout the percentage of total plan assets held as "stock," "debt," "real estate," and "other." The underlying investments in master trusts, common or collective trusts, pooled separate accounts, and other pooled investment vehicles, would be required to be broken out and could not be treated merely as "other," regardless of how they are listed on Schedule H. For investments in "debt," plans would be required to provide the "Macaulay duration" and break out the percentages held as government debt, investment-grade corporate debt, and high-yield corporate debt.

(e) Schedule C (Service Provider Information)

Schedule C must be attached to the Form 5500 Annual Return/Report filed by large plan filers to report any person who rendered services to the plan that received directly or indirectly $5,000 or more in compensation from the plan during the plan year, and to report terminated accountants or actuaries. Consistent with recommendations of the ERISA Advisory Council Working Groups and the Government Accountability Office (GAO), EBSA has concluded that more information should be disclosed on the Form 5500 Annual Return/Report regarding plan fees and expenses. *See ERISA Advisory Council Report of the Working Group on Plan Fees and Reporting on Form 5500* (November 10, 2004) (available on the Internet at: *http://www.dol.gov/ebsa/publications*) and the Government Accountability Office (*See Private Pensions: Government Actions Could Improve the Timeliness and Content of Form 5500 Pension Information*, GAO–05–491) (available on the Internet at: *http://www.gao.gov*). EBSA's proposal would continue to limit Schedule C reporting to large plan filers and would retain the $5,000 reporting threshold, but would revise the Schedule C and accompanying instructions to clarify the requirements regarding reporting of direct and indirect compensation (*i.e.*, money or anything else of value) received during the plan year in connection with services rendered to the plan or the person's position with the plan. Also, a new section would be added requiring that the source and nature of compensation in excess of $1,000 received from parties other than the plan or the plan sponsor be disclosed for certain key service providers, including, among others, investment managers, consultants, brokers, and trustees, as well as all other fiduciaries.

(f) Schedule R (Retirement Plan Information)

In light of the proposed removal of the Schedule E (ESOP Annual Information), certain questions from the Schedule E are being incorporated into the Schedule R in order to continue to collect certain information regarding ESOPs as part of the Form 5500 Annual Return/Report. In addition, multiemployer defined benefit pension plans would have to provide a list identifying each employer contributing an annual amount equal to or greater than five percent of all annual contributions to the plan (measured in dollars) and setting forth (1) the name of the contributing employer; (2) employer's employer identification number (EIN); (3) dollar amount contributed; (4) contribution rate; (5) whether the contribution base unit measure was hourly, weekly, unit of product, or other; and (6) expiration date for the collective bargaining agreement pursuant to which contributions are required to be made to the plan.

(g) Technical and Conforming Changes for Forms and Instructions

Various other technical and conforming changes are being proposed as part of the restructuring of the Form 5500 Annual Return/Report. Several of the more significant changes include: (1) Revision of the instructions for the Form 5500 Annual Return/Report and development of instructions for the Short Form 5500 to reflect the new structure of the reports and electronic filing requirements; (2) addition of questions regarding compliance with the Department's blackout notice regulation in 29 CFR 2510.101–3; (3) addition of a compliance question on whether the plan failed to pay benefits when due under the plan; (4) expansion of the use of codes to report plan feature information on pension and welfare benefit plans; (5) elimination of the optional entry of the name and the EIN of the preparer; (6) requiring administrative expenses to be reported separately from other expenses on the Schedule I; (7) addition of a question on whether any minimum funding amount reported for a pension plan will be met by the funding deadline; and (8) adoption of a standard format for use in connection with an independent qualified public accountant (IQPA) rendering an opinion on the supplemental schedule information on Line 4a of Schedule H and I relating to delinquent participant contributions.

2. Section 2520.104–44

Section 2520.104–44 and the current Form 5500 Annual Return/Report instructions provide for limited reporting for pension plans exclusively using a tax deferred annuity arrangement under Code section 403(b)(1), custodial accounts for regulated investment company stock under Code section 403(b)(7), or a combination of both. Under the proposal, the exemption in § 2520.104–44(b)(3) would be eliminated, with the result that Code section 403(b) pension plans subject to Title I would be treated the same as any other Title I pension plan for purposes of the annual reporting requirements under Title I of ERISA. With the growth in the size and number of Code section 403(b) arrangements, and the advent of Code section 401(k) plans, the Code 403(b) arrangements have become more like Code section 401(k) plans. In this regard, the IRS has undertaken to update certain of its regulations. *See* 69 FR 67075, 67076 (November 16, 2004). For those section 403(b) plans that are subject to Title I of ERISA, the Department has detected violations in a high percentage of its investigations of Code section 403(b) plans. The predominant issue has been improper handling of employee contributions. The Department believes that these developments warrant amending the annual reporting requirements to put Code section 403(b) plans on par with other ERISA-covered pension plans. Small Code section 403(b) plans generally would be 100 percent invested in eligible assets for purposes of filing the proposed Short Form 5500.

3. Section 2520.104–46

In accordance with the Department's authority under section 104(a)(2)(A) and 104(a)(3) of ERISA, the Department has adopted, at 29 CFR 2520.104–41, simplified annual reporting requirements for pension and welfare benefit plans with fewer than 100 participants. In addition, the Department, at 29 CFR 2520.104–46, has prescribed for such small plans a waiver from the requirements of section 103(a)(3)(A) to engage an IQPA and to include the opinion of the accountant as part of the plan's annual report. The waiver of the IQPA requirements for pension plans was conditioned, among other requirements, on enhanced disclosure in the Summary Annual Report (SAR) provided to participants and beneficiaries. In that regard, the Department prepared a model notice

that plans could use to satisfy the enhanced SAR disclosure conditions. That model notice has been available at the EBSA's Web site at *http://www.dol.gov/ebsa*. In order to provide plan administrators with additional access to the model notice and facilitate compliance with the audit waiver and Short Form 5500 eligibility conditions, the Department is proposing to add the model notice as an appendix to § 2520.104–46.

4. Section 2520.104b–10

Section 104(b)(3) of ERISA provides in part that, each year, administrators must furnish to participants and beneficiaries receiving benefits under a plan materials that fairly summarize the plan's annual report. Section 2520.104b-10 sets forth the requirements for the SAR and prescribes formats for such reports. The amendments being proposed do not include any change to the SAR requirements. However, in order to facilitate compliance with the SAR requirement for Short Form 5500 filers, the Department is updating its cross-reference guide to correspond to the line items of the SAR to the relevant line items on the Short Form 5500. The cross-reference guide, as before, would continue to be an appendix to § 2520.104b–10.

C. Findings on the Revised Form 5500 Annual Return/Report (including Short Form 5500) as a Limited Exemption and Alternative Method of Compliance

Section 104(a)(2)(A) of the Act authorizes the Secretary of Labor (Secretary) to prescribe by regulation simplified reporting for pension plans that cover fewer than 100 participants. Section 104(a)(3) authorizes the Secretary to exempt any welfare plan from all or part of the reporting and disclosure requirements of Title I of ERISA or to provide simplified reporting and disclosure if the Secretary finds that such requirements are inappropriate as applied to such plans. Section 110 permits the Secretary to prescribe for pension plans alternative methods of complying with any of the reporting and disclosure requirements if the Secretary finds that: (1) The use of the alternative method is consistent with the purposes of Title I of ERISA, provides adequate disclosure to plan participants and beneficiaries, and provides adequate reporting to the Secretary; (2) application of the statutory reporting and disclosure requirements would increase costs to the plan or impose unreasonable administrative burdens with respect to the operation of the plan; and (3) the application of the statutory reporting and disclosure requirements would be adverse to the interests of plan participants in the aggregate.

For purposes of Title I of ERISA, the filing of a completed Form 5500 Return/Report, including the filing of the proposed Short Form 5500, in accordance with the instructions and related regulations, generally would constitute compliance with the limited exemption and alternative method of compliance in 29 CFR 2520.103–1(b). The findings required under ERISA sections 104(a)(3) and 110 relating to the use of the proposed revised Form 5500 Annual Return/Report, including the proposed Short Form 5500, as alternative methods of compliance, simplified report, and limited exemption from the reporting and disclosure requirements of part 1 of Title I of ERISA are set forth below.

In proposing revisions to the Form 5500 Annual Return/Report and the amendments in this proposed rulemaking, the Department has attempted to balance the needs of participants, beneficiaries, and of the Department to obtain information necessary to protect ERISA rights and interests with the needs of administrators to minimize costs attendant with the reporting of information to the federal government. The Department makes the following findings under sections 104(a)(3) and 110 of the Act with regard to the use of the revised Form 5500 Annual Return/Report as a simplified report, alternative method of compliance, and limited exemption pursuant to 29 CFR 2520.103–1(b).

The use of the proposed revised Form 5500 Annual Return/Report, including the proposed Short Form 5500, is consistent with the purposes of Title I of ERISA and provides adequate disclosure to participants and beneficiaries and adequate reporting to the Secretary. While the information that would be required to be reported on or in connection with the revised Form 5500 Annual Return/Report and the proposed Short Form 5500 deviates, as before, in some respects, from that delineated in section 103 of the Act, the information essential to ensuring adequate disclosure and reporting under Title I is required to be included on or as part of the Form 5500 Annual Return/Report, as proposed to be revised, and the proposed Short Form 5500.

The use of Form 5500 Annual Return/Report, as revised, or the proposed Short Form 5500 will relieve plans subject to the annual reporting requirements from increased costs and unreasonable administrative burdens by providing a standardized format that facilitates reporting, eliminates duplicative reporting requirements, and simplifies the content of the annual report in general. The Form 5500 Annual Return/Report, under the proposed revision, including the proposed Short Form, is intended to further reduce the administrative burdens and costs attributable to compliance with the annual reporting requirements.

Taking into account the above, the Department has determined that application of the statutory annual reporting and disclosure requirements without the availability of the Form 5500 Annual Return/Report, including the proposed Short Form 5500, would be adverse to the interests of participants in the aggregate. The proposed revised Form 5500 Annual Return/Report provides for the reporting and disclosure of basic financial and other plan information described in section 103 of ERISA in a uniform, efficient, and understandable manner, thereby facilitating the disclosure of such information to plan participants and beneficiaries.

Finally, the Department has determined under section 104(a)(3) of ERISA that a strict application of the statutory reporting requirements, without taking into account the proposed revisions to the Form 5500 Annual Return/Report and the proposed Short Form 5500, would be inappropriate in the context of welfare plans for the same reasons discussed above (i.e., the streamlined form reduces filing burdens without impairing enforcement, research, and policy needs, while at the same time providing adequate disclosure to participants and beneficiaries).

D. Regulatory Impact Analysis

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether the regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f) of Executive Order 12866, the order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering

with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising 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 terms of the Executive Order, it has been determined that this regulatory action will have an annual effect on the economy of more than $100 million. Therefore, this action is "economically significant" and subject to OMB review under section 3(f)(4) of Executive Order 12866. The Department accordingly has undertaken to assess the costs and benefits of this regulatory action in satisfaction of the applicable requirements of the Executive Order.

In accordance with OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), Table 1 below depicts an accounting statement showing the net annual cost reduction associated with the provisions of this proposed rule. The Department believes that some employee benefit plans will see a decrease in costs and others might see an increase in costs due to this proposed rule. Further information about the amount of increase and decrease in costs for particular plan types is displayed in the cost section later on in this document. On aggregate, the Department estimates a cost reduction of up to $174 million in the first year.

TABLE 1.—ACCOUNTING STATEMENT: ESTIMATED COST REDUCTION FROM THE CURRENT REPORTING REQUIREMENTS TO THE PROPOSED 2008 REPORTING REQUIREMENTS

[In millions]

Category	Net cost reduction
Annualized Monetized Benefit ..	$174

Need for Regulatory Action

The annual reporting regulations for which amendments are being proposed provide specific limited exceptions, for certain types of welfare benefit plans, from the statutory reporting requirements; simplified reporting and disclosure requirements for other types of small plans; and an alternative method of compliance in general for all pension plans. In providing these special rules, the Department and the other Agencies intend to reduce the overall burden of the statutory reporting requirements without sacrificing the quality of the information collected.

As described in the preamble to the Department's proposal to require electronic filing of the Form 5500 (70 FR 51542) (E-Filing Proposal), the Department is in the process of creating a fully electronic filing system to receive the annual reports filed by employee benefit plans. In addition, as noted above, the Department has received reports from the GAO and the ERISA Advisory Council that suggest the need for some substantive changes to the annual reporting forms and the reporting regulations. The Department, in coordination with the IRS, and the PBGC (Agencies), also conducted a thorough review of the content requirements for the Form 5500. The Agencies believe the proposed regulatory and form changes, in conjunction with adoption of the electronic filing system, will substantially reduce plan administrators' reporting compliance burdens and also enhance the utility and accessibility of reported information to the government, participants and beneficiaries, and others.

The Form 5500 Annual Return/Report serves as the primary source of information concerning the operation, funding, assets, and investments of pension and other employee benefit plans. The Form 5500 Annual Return/Report is an important disclosure document for participants and beneficiaries, an enforcement and research tool for the Department, and a source of information and data for use by other federal agencies, Congress, and the private sector in assessing employee benefit, tax, and economic trends and policies. The Department in this proposal has attempted to balance the interests of participants, beneficiaries, and the Department in the protection of ERISA rights, as well as the public's interest in the availability of information on benefit plans, with plan administrators' and sponsors' interest in minimizing costs attendant with the reporting of information to the federal government. The Department believes that the proposed regulations' benefits justify the costs. The basis for this conclusion is explained below.

As stated in this preamble, the Department has determined that the use of the revised Form 5500 Annual Return/Report, including the proposed new Short Form 5500, would relieve plans subject to the annual reporting requirements from increased costs and administrative burdens by providing a standardized format that facilitates reporting, eliminates duplicative reporting requirements, and simplifies the content of the annual report in general.

Moreover, the Department believes that the revisions to the Form 5500 Annual Return/Report implemented by these proposed regulations, as compared to the existing form and schedules, will both reduce the cost of reporting, on aggregate and for a large majority of affected plans, and enhance the protection of ERISA rights.

Regulatory Alternatives

Executive Order 12866 directs Federal Agencies promulgating regulations to evaluate regulatory alternatives. The Department has concluded that, in connection with its proposal to move to a wholly electronic filing environment for employee benefit plan annual reports, form revisions and implementing regulatory changes should be made to facilitate the transition to an electronic filing system, reduce and streamline annual reporting burdens, especially for small businesses, and update the annual reporting forms to reflect current issues and agency priorities.

In developing the forms revisions and implementing regulatory changes, the Department was informed by recommendations made by GAO and the ERISA Advisory Council and conducted a thorough-going review of the current regulations and the scope of information collected, which included consideration of alternative methods of reaching its goals. The Department's consideration included, for example, different approaches to eligibility for the Short Form 5500, (*see* discussion in preamble to the Notice of Proposed Forms Revisions under the heading "Short Form 5500 as New Simplified Report for Certain Small Plans"), different approaches to reporting for welfare plans (*see id.* under the heading "F. Other Welfare Plan Issues"), and different approaches to improving the reporting of direct and indirect compensation paid to service providers (*see id.* under the heading "Schedule C: Compensation received by plan service providers"). Similarly, the Notice of Proposed Forms Revision discusses the assessments on how to balance the need for information to help the PBGC evaluate the financial solvency of multiemployer plans and the potential burden on administrators of multiemployer plans (*see id.* under the heading "Schedule R: Contributors to Multiemployer Pension Plans"). Inasmuch as the regulatory amendments contained in this Notice are intended to implement the forms revisions contained in the Notice of Proposed

Forms Revisions, the discussions in the Notice of Proposed Forms Revisions are directly relevant to the Department's analysis under Executive Order 12866 and should be read as part of the Department's compliance with the requirements of the Executive Order. The Department therefore incorporates those discussions by this reference.

The public is invited to comment specifically on the decision points for the several categories of proposed revisions, and on the adequacy of the models, assumptions, and data developed in order to evaluate regulatory burden. In considering these alternatives, the Department weighted the objective of reduced regulatory burden against the need for adequate reporting and disclosure to insure the protection of plan participants, quantifying impacts where possible. For example:

• *Establishment of a Short Form 5500 for certain small plans:* In considering criteria of eligibility for filing the Short Form 5500 the Department evaluated both less stringent and more stringent criteria. If, for example, the Department had relied solely on the conditions for a waiver of the audit requirements for small plans, the Department believes that as many as 95 percent of small plans (612,000 plans) would meet the Short Form 5500 requirements. Because of concern about the need to limit eligibility to small plans with easy to value investment portfolios, however, the Department added the requirements of small plans that invest in secure assets that are held or issued by regulated financial institutions and that have a fair market value that is easily determined. In so doing, the Department estimates that approximately 90 percent of small plans (571,000 plans) that formerly were able to file under the simplified requirements would qualify as eligible to file the Short Form 5500. An additional 9,000 small Code section 403(b) plans would also qualify.

• *Addition of certain asset allocation and duration information to Schedule B:* Schedule B is filed by defined benefit pension plans subject to the minimum funding standards. As noted below, this revision will increase reporting costs for affected plans. The Agencies, however, believe that these costs are justified by the need to better monitor plan funding. In developing this proposed revision, the PBGC considered the approach that could balance the need for better monitoring of plan funding and the increased burden that would be incurred to provide additional information on the breakdown of assets and duration of debt instruments held by defined benefit plans. While the PBGC initially considered the application of the additional requirements to all large defined benefit plans (15,000 plans), it subsequently determined that additional information for the largest plans, i.e., those with more than 1,000 participants (5,000 plans), on the level and types of assets in the plan and the sensitivity of these assets to changes in market conditions would suffice for the desired improvement in the monitoring of plan funding.

Benefits and Costs

Benefits—These regulations and the Form 5500 Annual Return/Report and Short Form 5500 that the regulations implement will provide a standardized, streamlined alternative means of compliance with applicable statutory reporting requirements. In so doing, they will both ease plan administrators' compliance with reporting requirements and greatly enhance the utility and accessibility of information reported to the government, participants and beneficiaries, and others. In particular, the regulations and forms, together with the Department's planned program for assisting filers in the preparation and electronic submission of filings, will give plan administrators clear guidance and a supportive, routine mechanism for satisfying their reporting obligations. They also will make it possible to efficiently capture and assemble the information into an electronic data system. The data can then be processed and analyzed in the service of many beneficial activities. These include monitoring compliance with ERISA's reporting and other requirements, targeting, and carrying out prompt and effective enforcement actions; informing participants and beneficiaries of the characteristics, operations, and financial status of their benefit plans; producing statistics on the employee benefit system and monitoring trends therein and informing the public; and assembling information and conducting research that advances knowledge and fosters the formulation of sound public policies toward employee benefits. The Department believes that the benefits of the proposed regulations justify the costs.

The Department further believes that the revisions to the existing reporting requirements contained in the proposed regulations will both reduce aggregate reporting costs and enhance protection of ERISA rights. The former anticipated effect is quantified in the discussion of costs below. With respect to the latter, the Department developed each of the revisions contained in the proposed regulations either to enhance protections, or to reduce costs in ways that do not compromise protections. The revisions are considered separately below.

Removal of the IRS-only schedules: As explained in the Notice of Proposed Forms Revisions published simultaneously with these proposed regulations, this change is intended partly to facilitate a change to mandatory electronic filing—a change which is expected to yield substantial benefits. As also explained therein, to the extent that some Title I information may have been collected in these schedules, these proposed regulations provide for the ongoing collection of that information in other parts of the Annual Return/Report. In addition, it is the Department's understanding that some of the IRS-only information that will no longer be collected as part of the annual return/report may be collected in the future via other Treasury or IRS vehicles. The Department expects this revision to preserve protections of ERISA rights, while reducing Form 5500 Return/Report filing reporting costs as estimated below. From a broader societal perspective, the reduction in reporting costs may be less than what has been assumed here if IRS elects to collect some of this information through other channels.

Establishment of a Short Form 5500 for certain small plans: The Short Form 5500 is being developed with the specific intent of reducing reporting costs (as estimated below) while continuing to collect sufficient information to preserve ERISA protections, satisfying the enforcement, research, and regulatory needs of the Department and the other Agencies, and the disclosure needs of participants and beneficiaries. The Agencies determined that less information is needed in the case of small plans that invest in secure assets that are held or issued by regulated financial institutions and that have a fair market value that is easily determined. The Agencies believe that the eligibility conditions for Short Form 5500 filers, including the requirements relating to security and valuation of the plan's investments, ensure that the Short Form 5500 will provide adequate disclosure to the participants and beneficiaries in the plan and adequate annual reporting to the Agencies. The Notice of Proposed Forms Revisions published simultaneously with these proposed regulations details the content of the Short Form 5500 and elaborates on its adequacy for its intended purpose. Small plans that are not eligible to file the Short Form 5500 would continue to be able to file

simplified reports as under the current system.

Elimination of the special reporting rules for Code section 403(b) plans: As noted below, this revision is expected to increase reporting costs for affected plans. However, the Department believes these added costs are justified by the need to enhance ERISA protections in connection with these plans the Department believes that developments with respect to Code section 403(b) plans, described above in connection with the proposed amendment to 2520.104–44, warrant amending the annual reporting requirements to put Code section 403(b) plans on par with other ERISA-covered pension plans. Small Code section 403(b) plans generally would be 100 percent invested in eligible assets for purposes of filing the proposed Short Form 5500. This would result in only a modest increase in the annual reporting burden on small Code section 403(b) plan filers.

Addition of certain asset allocation and duration information to Schedule B: As noted below, this revision will increase reporting costs for affected plans. The Agencies, however, believe that these costs are justified by the need to better monitor plan funding. The PBGC has found that it needs more information on the breakdown of assets and duration of debt instruments held by defined benefit plans. A plan's funded status is highly dependent on the level and types of assets in the plan and the sensitivity of these assets to changes in market conditions. Thus, the additional information required by this revision will improve the PBGC's ability to estimate the impact of economic changes on the financial status of the plans it insures, and by extension, on the future financial status of the PBGC. Much of the information newly required by this revision is typically in the immediate possession of the committee or authority that oversees the investments of plans sponsored by privately held companies, and generally is already required to be provided to the United States Securities and Exchange Commission by public company sponsors of defined benefit plans.

Adding Multiemployer Plan Contributing Employer Information: The Form 5500 Annual Return/Report currently does not require plans to state the number or identities of employers participating in a multiemployer plan. Multiemployer plans are, however, currently required to keep a list of participating employers on file and to make such information available to participants on request. Accordingly, requiring multiemployer plans to provide the number of participating employers will not create any new recordkeeping requirements. This information will be useful to various governmental and private firms that use the Form 5500 Annual Return/Report data for policy and research purposes. The Form 5500 Annual Return/Report also currently lacks information that shows a multiemployer plan's basis for employer contributions. This information is particularly important with respect to multiemployer defined benefit pension plans, as this information is needed by the PBGC in order for it to assess the financial risk posed to the plan by the financial collapse or withdrawal of one or more contributing employers. Over the past several years, the financial condition of many multiemployer plans has been deteriorating. The PBGC believes it is prudent to begin monitoring those companies that are major contributors to the multiemployer plans. To do so, the PBGC must be able to identify these companies. Because multiemployer plans are most at risk when a major contributing sponsor encounters financial difficulties, this proposed revision would require identification only of major contributors.

Other Improvements and Clarifications of Existing Form 5500 Reporting Requirements: Some of the revisions that come under this heading are technical clarifications or conforming changes to more substantive proposed revisions. These entail no material benefits or costs. Other revisions make small adjustments to the instructions or reporting requirements to reflect changing market or compliance trends. Some of these entail small increases in reporting costs that are justified by the need to stay current. These include, for example, the addition of feature codes to identify plans with certain default features, compliance questions directed at the provision of blackout notices, and fuller instruction on the reporting of certain indirect plan expenses. Others, such as the elimination of the requirement for self-insured health benefit plans to separately report certain payments to individual health care providers, may reduce reporting costs without compromising protections. These revisions and their respective intents are detailed in the Notice of Proposed Forms Revisions published simultaneously with these proposed regulations.

Costs

Although the costs to plans of satisfying their annual reporting obligations will be lower under these proposed regulations than they would be under existing regulations, they will still be substantial.[3] As shown in Table 2 below, the aggregate cost of such reporting under the existing regulations is estimated to be $1,062 million annually, shared across the 833,000 filers subject to the filing requirement. The Department estimates that the proposed regulations, however, impose an annual cost burden on the 833,000 filers of only $888 million.[4]

TABLE 2.—SUMMARY OF COSTS: CURRENT REQUIREMENTS VS. PROPOSED REQUIREMENTS

	Total costs (in millions)	Total burden hours (in millions)
Current Reporting Requirements	$1,062	13.51
Change due to Revisions for 2008	174	2.26
Proposed Reporting Requirement, 2008	888	11.25

Note: Number of affected plans: 833,000.

[3] The Department believes, however, that the annual cost burden on filers would be higher still in the absence of the existing regulations, because the filers would then be required to comply with the statutory filing requirements without the benefit of any regulatory exceptions, simplified reporting, or alternative methods of compliance.

[4] More detail about the cost estimates can be found in the section "Assumptions, Methodology, and Uncertainty".

Because these proposed regulations make substantial revisions to the existing reporting requirements, they will entail some one-time transition costs. The Department examined such transition costs in connection with the last major revision to the Form 5500 Annual Return/Report, which revised the Annual Return/Report for plan years beginning in 1999. *See* 65 FR 5026 (Feb. 2, 2000). Based on information provided by plan service providers and Form 5500 Annual Return/Report software developers at that time, the Department concluded that such costs are generally loaded into the prices paid by plans for affected services and products, spread both across plans and across the expected life of the service and product changes. The Department's estimates provided here are therefore intended to reflect such spreading and loading of these transition costs. That is, the gradual defrayal of the transition costs is included in the annual cost estimates here.

In addition to estimating the total impact of the proposed revisions on aggregate costs, the Department has broken down the change in cost by individual revisions. This apportioning of costs to individual revisions could be potentially done in several ways, as some types of plans are affected by more than one revision and therefore sequencing of the changes becomes important for the calculations. For example, large and small Code section 403(b) plans are affected by the elimination of the special reporting rules, but small Code section 403(b) plans are affected also by the introduction of the Short Form 5500. For the purpose of quantifying the impact of the individual law changes, the Department carried out the calculations in the following way:

1. Removal of the IRS-only schedules: Under the proposed regulations some of the information formerly collected in these schedules will be collected by the Department elsewhere in the Form 5500 Annual Return/Report filing. On net, however, this revision will substantially reduce the amount of information collected. Relative to the current filing requirement, this revision will reduce the total annual burden hours for 740,000 affected filers by 1.2 million hours. Applying an hourly labor rate of $84 for service providers and $59 for plan sponsors, the Department estimates that this will lower the aggregate annual reporting cost by an estimated $90 million.[5]

2. Establishment of a Short Form 5500 for certain small plans: A large majority of small plans, or 580,000 of the 640,000 total small plan filers, are estimated to be eligible to use the Short Form 5500, thereby saving an estimated $154 million (1.9 million hours) annually. This estimate includes about 9,000 small Code section 403(b) plans that under the proposed rule would be subjected to increased filing requirements.

3. Addition of certain asset allocation and duration information to Schedule B: The provision of this information, and its certification by an actuary, will entail estimated additional annual costs of $1.5 million (19,000 hours) for 5,000 affected defined benefit pension plans with more than 1,000 participants.

4. Revision of Schedule C (Service Provider Information): This revision intends to clarify the reporting requirements and improve the information plan officials receive regarding amounts being received by plan service providers. This is anticipated to add an estimated $3 million (41,000 hours) for 79,000 affected plans to annual reporting costs.

5. Addition of requirements for certain multi-employer plans to report certain information about contributing employers: This is anticipated to add an estimated $300,000 (3,500 hours) to annual reporting costs for 10,000 multiemployer plans.

6. Adoption of various technical revisions and other miscellaneous revisions to the Form 5500 Annual Return/Report to improve and clarify existing reporting requirements: Together these are estimated to add an estimated $12 million (154,000 hours) to annual reporting costs and affect approximately 250,000 plans.

7. Elimination of the special reporting rules for Code section 403(b) plans: Approximately eighteen thousand Code section 403(b) plans are subject to the annual reporting requirements. It is anticipated that all 9,000 small Code section 403(b) plans will be eligible to use the new Short Form and will be eligible for waiver of the audit requirement. The impact of the proposed changes on the small Code section 403(b) plans is quantified above. Nine thousand large Code section 403(b) plans will be newly subject to the audit requirement and required to file a Form 5500 Annual Return/Report similar to those filed by similar Code section 401(k) plans. This revision will increase annual reporting costs for large Code section 403(b) plans by an estimated $54 million (or 690,000 hours).

A summary of the changes in costs and burden hours that were allocated to the groups of proposed changes as outlined above, as well as the number of affected employee benefit plans, can be found in Table 3 below.

TABLE 3.—SUMMARY OF PROPOSED CHANGES TO THE REPORTING REQUIREMENTS: COST, BURDEN, AND AFFECTED PLANS

Revisions for 2008	Change in costs (in millions)	Change in burden hours	Number of affected plans
IRS-only Schedules, Short Form and small	−$90.1	−1,226,000	739,000
Code Section 403(b) plans	−154.3	−1,938,000	580,000
Schedule B	1.5	19,000	5,000
Schedule C	3.2	41,000	79,000
Multi-employer plans	0.3	3,500	10,000
Technical and Miscellaneous Revisions	11.9	154,000	253,000
Large Code Section 403(b) plans	53.9	689,000	9,000
Total	−173.6	(2,258.30)	833,000

Note: The displayed numbers might not sum up to the totals due to rounding.

[5] A discussion on the appropriateness of the labor rates used in the calculations as well as on other assumptions can be found in the Technical Appendix.

The proposed regulation otherwise generally does not alter reporting costs. Plans currently exempt from annual reporting requirements (such as certain small unfunded or fully insured welfare plans and certain Simplified Employer Pensions) will remain exempt. Also, except for Code section 403(b) plans, plans eligible for limited reporting options (such as certain IRA-based pension plans) will continue to be eligible for that annual reporting relief. The revisions continue the Form 5500 Annual Return/Report structure that is familiar to individual and corporate taxpayers—a simple two-page main form with basic information necessary to identify the plan for which the report is filed, along with a checklist of the schedules being filed that are applicable to the filer's plan type. The structure is designed to aid filers by allowing them to assemble and file a return customized to their plan.

Assumptions, Methodology, and Uncertainty

The cost and burden associated with the annual reporting requirement for any given plan will vary according to a variety of factors, including the plan's characteristics, practices, and operations, which in turn determine what information must be provided. A small, single-employer defined contribution pension plan filing a new Short Form 5500 generally will incur far lower costs than a large, multiemployer defined benefit pension plan that holds multiple insurance contracts, engages in numerous reportable transactions, and pays large fees to a number of service providers. Therefore, in arriving at its aggregate cost estimates, the Department separately considered the cost to different types of plans of providing different types of information. The basis for the Department's estimates is elaborated below.

Assumptions Underlying this Analysis—The Department's analysis of the costs and benefits of these proposed amendments assumes that all benefits and costs will be realized in the first year of the reporting cycle to which the amendments apply and within each year thereafter. This assumption is based on the nature of the statutory reporting provisions, which require that each plan complete a filing within a yearly period. The Department has used a "status quo" baseline for this analysis, assuming that the world absent the regulations will resemble the present.[6]

Methodology—The underlying cost data was developed by Mathematica Policy Research, Inc. (MPR), and has been used by the Agencies in various burden estimates related to the Form 5500 Annual Return/Report during recent years. *See,* 65 FR 21068, 21077–78 (April 19, 2000); Borden, William S., "Estimates of the Burden for Filing Form 5500: The Change in Burden from the 1997 to the 1999 Forms," Mathematica Policy Research, submitted to U.S. Dept. of Labor May 25, 1999.[7] It is grounded in surveys of filers and their service providers, which measured the unit cost burden of providing various types of information. Aggregate estimates were produced by interacting these unit cost measures with historical counts of Form 5500 Annual Return/Report filers.

A new burden estimating model, based on the Form 5500 Burden Model that MPR most recently used for estimating burdens in October 2004, was assembled by Actuarial Research Corporation (ARC). ARC assembled a simplified model, drawing on implied burdens associated with subsets of filer groups represented in the MPR model. The model used the level of detail consistent with reflecting burden differences associated with the various proposed forms revisions. In the following, the ARC model is described in broad terms. Further details about the model are explained in the Technical Appendix that can be accessed at the Department's Web site at *http://www.dol.gov/ebsa.*

To estimate aggregate burdens, the types of plans that have similar reporting requirements were grouped together. Thus, calculations were prepared for different subsets of types of plans as appropriate based on the specifics of the revisions to the reporting requirements. Table 4 below shows the particular types of plans considered, the number of plans affected by the proposed revisions, as well as the aggregate costs under current and proposed requirements. As can be seen from the Total line in Table 4, aggregate cost under current and proposed regulations add up to $1,062 million and $888 million, respectively. The universe of filers was divided into three basic plan types: Defined benefit pension plans, defined contribution pension plans, and welfare plans, and each of these major plan types was further subdivided into multiemployer and single-employer plans. Defined contribution Code section 403(b) plans were treated separately from other defined contribution plans. Since the filing requirements differ substantially for small and large plans, the plan types were also divided by plan size. For large plans (100 or more participants), the defined benefit plans were further divided between very large (1000 or more participants) and other large plans (at least 100 participants, but less than 1000 participants). For each of these sets of respondents, burden hours per respondent were estimated for the Form 5500 Annual Return/Report itself and for up to eight schedules.

TABLE 4.—NUMBER OF AFFECTED FILERS AND COST UNDER CURRENT VS. PROPOSED REQUIREMENTS

Type of plan	Number affected	Aggregate cost under current requirements (in millions)	Aggregate cost under proposed requirements (in millions)
5500 Large Plans (> = 100 participants)—189,000:			
DB, ME, 100–1,000 participants	800	7.6	7.2
DB, ME, > 1,000 participants	1,100	13.3	13.2
DB, SE, 100–1,000 participants	8,900	80.2	74.2
DB, SE, > 1,000 participants	4,200	38.8	39.2
DC, ME, non-403(b)	2,300	14.4	13.7
DC, ME, 403(b)	400	0.016	2.4
DC, SE, non-403(b)	70,000	437.1	401.3
DC, SE, 403(b)	8,600	0.350	51.9
Welfare, ME	5,700	14.3	14.8
Welfare, SE	86,600	124.3	127.9

[6] Further detail can be found in the Technical Appendix.

[7] The Mathematica report can be accessed at the Department's Web site at *http://www.dol.gov/ebsa.*

TABLE 4.—NUMBER OF AFFECTED FILERS AND COST UNDER CURRENT VS. PROPOSED REQUIREMENTS—Continued

Type of plan	Number affected	Aggregate cost under current requirements (in millions)	Aggregate cost under proposed requirements (in millions)
5500 Small Short Form Eligible—580,000:			
DB	30,800	30.3	21.2
DC, non-403(b)	533,000	263.9	87.8
DC, 403(b)	8,800	0.36	1.4
Welfare	7,000	3.4	1.2
5500 Small Short Form Ineligible—64,000:			
DB	4,000	3.8	3.7
DC, non-403(b)	60,200	29.3	26.9
DC, 403(b)	.....	.....	.....
Welfare	100	0.079	0.080
Total	832,500	1,061.5	888.08

Note: The displayed numbers might not sum up to the totals due to rounding.
DB—defined benefit plans.
SE—single-employer plans.
Large plans—100 participants or more.
DC—defined contribution plans
ME—multi employer plans.
Small plans—less than 100 participants.

In addition to separating plans by type and size, costs were estimated separately for the form and for each schedule. When items on a Form 5500 Annual Return/Report schedule are required by more than one Agency, the estimated burden associated with that schedule is allocated among the Agencies. This allocation is based on whether only a single item on a schedule is required by more than one agency or whether several or all of the items are required by more than one agency. Filers must read not only the instructions for particular items but also instructions pertaining to the general filing requirements, and the burden associated with reading the instructions is tallied and allocated accordingly.

A plan's reporting burden is estimated in light of the specific items and schedules it must complete as well as its size, funding method, and investment structures. For example, the annual report for a large fully insured welfare plan generally would consist of only a few questions on the Form 5500 and the Schedule A (Insurance Information). The requirement that this plan provide very limited information on the Form 5500 Annual Return/Report is reflected in the estimates of reporting burden time. By contrast, a large defined benefit pension plan that is intended to be tax-qualified and that uses a trust fund and invests in insurance contracts would be required to submit an annual report completing almost all the line items of the Form 5500, plus Schedule A (Insurance Information), Schedule B (Actuarial Information), Schedule C (Service Provider Information), Schedule D (DFE/Participating Plan Information), Schedule H (Financial Information), and Schedule R (Retirement Plan Information), and would be required to submit an IQPA's report and opinion. The Agencies' methodology attempts to capture, through its categorization, these different reporting burdens, thereby providing meaningful estimates of significant differences in the burdens placed on different categories of filers.

Burden estimates for each schedule were adjusted for the proposed revisions, reflecting the numbers of items added or deleted in each schedule or moved from one schedule to another, and the average burden currently attributable to items on each of the corresponding current schedules. The burden for the proposed Short Form 5500 was built from the estimated current burden associated with the various line items included in it.

The Department has not attributed a recordkeeping burden to the Form 5500 Annual Return/Report either here or in its Paperwork Reduction Act analysis because it believes that plan administrators' practice of keeping financial records necessary to complete the Form 5500 Annual Return/Report arises from usual and customary management practices that would be used by any financial entity, and does not result from ERISA or Code annual reporting and filing requirements.

The aggregate baseline burden is the sum of the burden per form and schedule filed multiplied by the estimated aggregate number of forms and schedules. The simplified model draws on Form 5500 Annual Return/Report data representing each plan's filing for plan year 2002 (the most recent year for which complete data is available), both for estimating the impact of changes in the numbers of filings associated with the introduction of the Short Form 5500 for most small filers as well as for estimating the impact of changes in filing obligations associated with other schedules. In summary, the model estimates that due to $174 million in cost reductions the proposed revisions would lead to aggregate costs of $888 million. While there is a net reduction in costs, the Department estimates that some large plans might experience cost increases, while small plans will experience cost reductions. The total burden estimates, as well as the burden broken out by type of plan can be found in Table 4 above.

Uncertainty within Estimates—The Department acknowledges that there are several areas of uncertainty that might affect the estimates, in particular the unit cost estimates. While the Department has a good sense for the filing universe and for the number of filers that file the different schedules of the Form 5500, the unit costs under the current requirements as well as the way they would change due to the proposed revisions are more uncertain. The Department has no direct measure for the unit costs, but rather uses a proxy adapted from the existing MPR model, which was developed in the late 1990s. Additional uncertainty is added due to the proposed revisions. Some of the revisions delete items or move them from certain schedules to others. The impact of these changes can be estimated more accurately than the impact of the revisions that require the

reporting of new items like fees. Consequently, the unit cost estimates would benefit from updated information and the Department welcomes comments that would provide information on this matter.

Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review, 70 FR 2664 (January 14, 2005) (Peer Review Bulletin), establishing that important scientific information shall be peer reviewed before it is disseminated by the Federal government. The Peer Review Bulletin applies to original data and formal analytic models used by agencies in Regulatory Impact Analyses. The Department determined that the data and methods employed in its regulatory analysis of this proposal constitutes "influential scientific information" as defined in the Peer Review Bulletin. Accordingly, a peer review was conducted under Section II of the Bulletin. The peer review report concluded that the methodology and data generally were sound and produced plausible estimates, which supports the Department's conclusion that the proposed form changes should reduce the aggregate burden relative to the previous forms. The Peer Review Report can be accessed at the Department's Web site at *http://www.dol.gov/ebsa.*

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions.

For purposes of analysis under the RFA, EBSA proposes to continue to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under ERISA section 104(a)(3), the Secretary may also provide for exemptions or for simplified reporting and disclosure for welfare benefit plans. Pursuant to the authority of ERISA section 104(a)(3), the Department has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46, and 2520.104b–10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans, that cover fewer than 100 participants and satisfy certain other requirements.

Further, while some large employers may have small plans, in general small employers maintain most small plans. Thus, EBSA believes that assessing the impact of these proposed rules on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 et seq.). EBSA therefore requests comments on the appropriateness of the size standard used in evaluating the impact of these proposed rules on small entities. EBSA has consulted with the SBA Office of Advocacy concerning use of this participant count standard for RFA purposes. *See* 13 CFR 121.902(b)(4). The following seven subsections address specific requirements of the RFA.

(1) The Department is proposing to amend the regulations relating to the annual reporting and disclosure requirements of section 103 of ERISA to conform existing regulations to proposed revisions to the Form 5500 Annual Return/Report forms that are included in the Notice of Proposed Forms Revisions published simultaneously with these regulations.

The Department continually strives to tailor reporting requirements to minimize reporting costs while ensuring that the information necessary to secure ERISA rights is adequately available. The optimal design for reporting requirements to satisfy these objectives changes over time. Benefit plan designs and practices evolve over time in response to market trends, including trends in labor markets, financial markets, health care and insurance markets, and markets for various services used by plans. Partly as a result, the nature and mix of compliance issues and risks to ERISA rights change over time. Frequent amendments to ERISA, the Code, and to associated regulations also change the parameters of ERISA rights and the methods needed to protect those rights. In addition, the technologies available to manage and transmit information continually advance. It is incumbent on the Department to revise its reporting requirements from time to time to keep pace with such changes. The Department is proposing these regulations and associated forms revisions to readjust its reporting requirements to take into account certain recent changes in markets, the law, and technology, many of which are referenced above in this preamble and/or in the Notice of Proposed Forms Revision published simultaneously with these regulations.

(2) Section 103 of ERISA requires every employee benefit plan covered under part 1 of Subtitle B of Title I of ERISA to publish and file an annual report concerning, among other things, the financial conditions and operations of the plan. Section 109 of ERISA authorizes the Secretary to prescribe forms for the reporting of information that is required to be included in the annual report. Section 104(a)(2)(A) of ERISA authorizes the Secretary to prescribe by regulation simplified annual reporting for pension plans that cover fewer than 100 participants. Section 104(a)(3) of ERISA authorizes the Secretary to exempt any welfare plan from all or part of the reporting and disclosure requirements of Title I of ERISA or to provide simplified reporting and disclosure if the Secretary finds that such requirements are inappropriate as applied to such plans. Section 110 of ERISA permits the Secretary to prescribe for pension plans alternative methods of complying with any of the reporting and disclosure requirements if the Secretary finds that: (1) The use of the alternative method is consistent with the purposes of Title I of ERISA, and it provides adequate disclosure to plan participants and beneficiaries and adequate reporting to the Secretary; (2) application of the statutory reporting and disclosure requirements would increase costs to the plan or impose unreasonable administrative burdens with respect to the operation of the plan; and (3) the application of the statutory reporting and disclosure requirements would be adverse to the interests of plan participants in the aggregate.

The Department proposes to find that use of the Form 5500 Annual Return/Report, as revised, along with the

proposed Short Form 5500, constitutes an alternative method of compliance, an exemption, and/or a simplified report, as applicable, consistent with these conditions. Generally, the Department believes that use of the revised Form 5500 Annual Return/Report and the proposed Short Form 5500 would relieve plans of all sizes of increased costs and burdens by providing a standard format that facilitates reporting required by the statute, eliminating duplicative reporting requirements, and streamlining the content of the annual return/report.

The objectives of these proposed, amended regulations and the associated proposed forms revisions are to streamline reporting and reduce aggregate reporting costs, particularly for small plans, while preserving and enhancing protection of ERISA rights. These purposes are detailed above in this preamble and in the Notice of Proposed Forms Revisions published simultaneously with these regulations.

(3) These proposed regulatory amendments do not alter the number of small plans required to comply with the annual reporting requirements, but do implement a new Short Form 5500, which is designed specifically to further streamline the limited reporting requirements presently applicable to small plans. The Department estimates that more than six million small, private-sector employee pension and welfare benefit plans are covered under Title I of ERISA. However, a large majority of these are fully insured or unfunded welfare benefit plans, which currently are exempt from annual reporting requirements and will continue to be exempt under these proposed regulations and the associated forms revisions. Approximately 644,000 small plans, including small pension plans and small funded welfare plans, currently are required to file annual reports and will continue to be so required under these proposed regulations and the associated forms revisions. Of these, an estimated 580,000 will be eligible to use the proposed new Short Form 5500. Use of the Short Form 5500 is expected to reduce these plans' reporting costs while preserving or enhancing the protection of their participants' ERISA rights.

Among small plans, perhaps the most acutely affected will be the approximately 9,000 small Code section 403(b) plans. As explained above, such plans are currently subject only to limited annual reporting requirements. These proposed regulations and associated forms revisions, which will subject these plans to the same requirements as other covered small plans, will increase these plans' reporting costs. As discussed above, the Department believes these added costs are justified by the need to strengthen protections for affected participants' ERISA rights. The numbers and types of small plans affected by these proposed regulations and the magnitude and nature of the proposed regulations' effects are further elaborated below.

(4) The proposed regulations' reporting requirements applicable to small plans are detailed above and in the associated Notice of Proposed Forms Revisions. For a large majority of the 644,000 small plans subject to annual reporting requirements, or an estimated 549,000 plans, submission of the Short Form 5500 alone will fully satisfy their annual reporting requirements. All of these plans are eligible for the waiver of audit requirements, and none are defined benefit pension plans. Therefore, for such plans satisfaction of their applicable annual reporting requirements is not expected to require the services of an IQPA or auditor, but will require the use of a mix of clerical and professional administrative skills. For an additional 31,000 small defined benefit pension plans that would be eligible to use the streamlined Short Form 5500, satisfaction of the reporting requirements also will require services of an actuary and submission of Schedule B. The remaining 64,000 small plans will not be eligible to use the Short Form 5500 and will continue to be required to file the Form 5500 Annual Return/Report. Of these, 4,000 are defined benefit plans that must use an actuary and file Schedule B, and 32,000 are ineligible for waiver of the audit requirement and are required to employ an IQPA and submit an IQPA's report. All will require a mix of clerical and professional administrative skills to satisfy their reporting requirements.

Satisfaction of annual reporting requirements under these proposed regulations is not expected to require any additional recordkeeping that would not otherwise be part of normal business practices.

Table 5 below compares the Department's estimates of small plans' reporting costs under the current requirements with those under the proposed requirements for various classes of affected plans. As shown, costs under the proposed requirements will be lower on aggregate and for most classes of plans. These estimates take account of the quantity and mix of clerical and professional skills required to satisfy the reporting requirements for various classes of plans.

TABLE 5.—SMALL PLAN REPORTING COSTS UNDER CURRENT VS. PROPOSED REQUIREMENTS

Class of plan	Number affected	Aggregate cost under current requirements (In millions)	Aggregate cost under proposed requirements (In millions)
Defined Benefit Pension, Short Form eligible	31,000	$30.34	$21.24
Defined Benefit Pension, Short Form ineligible	4,000	3.77	3.67
Code Section 403(b)	All of 9,000	0.36	1.45
Other Defined Contribution, Short Form eligible	533,000	263.94	87.84
Other Defined Contribution Pension, Short Form ineligible.	60,000	29.32	26.92
Funded Welfare	All of 7,000	3.52	1.24
Other Welfare	None of approximately 6 million	.....	.....
Total for All Affected Small Plans	644,000	331.26	142.35

The Department notes that the estimated reporting costs amount to $221 on average for each of the 644,000 small plans subject to annual reporting requirements, or just $22 if averaged across all of the approximately 6.6 million small plans covered by Title I of ERISA. This compares with roughly $4,000 on average for each of the 189,000 affected large filers.

(5) The Department is unaware of any relevant federal rules for small plans

that duplicate, overlap, or conflict with these proposed regulations.

(6) In developing these proposed regulations and the associated forms revisions, the Department considered a number of alternative provisions directed at small plans. For example, as discussed in the Notice of Proposed Forms Revisions published simultaneously with these regulations, the ERISA Advisory Council suggested that the Department consider exempting welfare plans from reporting requirements, or, alternatively, subjecting all welfare plans to new, separately designed reporting requirements. The Department opted instead to retain both the requirement that small funded welfare plans submit annual reports and the exception from annual reporting requirements for other small welfare plans. Annual reporting by the relatively small number of small funded welfare plans is necessary, in the Department's view, to protect ERISA rights in connection with the assets that they hold. A requirement that the remaining approximately six million small welfare plans report annually is not justified insofar as these plans have no assets to protect and insofar as the vast majority of these plans are fully insured and therefore separately protected by State oversight of the insurance contracts they hold and the insurers that issue them. The Department also considered both narrower and broader eligibility criteria for use of the Short Form 5500, settling on criteria that limit eligibility to plans holding relatively safe and protected assets, which nonetheless includes a large majority of small plans. The Department also considered the inclusion of more or fewer of the items of information formerly collected from small plans in the Form 5500 Annual Return/Report, retaining only those items it believes to be necessary and adequate to the protection of small plan participants' ERISA rights.

(7) The Department invites interested persons to submit comments regarding the impact on small plans of these proposed regulations and the associated forms revisions, and on the Department's assessment thereof. The Department also requests comments on the alternatives it considered and its conclusions regarding those alternatives; on any additional alternatives it should have considered; on what, if any, special problems small plans might encounter if the proposal were to be adopted; and what changes, if any, could be made to minimize those problems. To avoid duplication of comments, comments submitted in response to the Notice of Proposed Form Revisions published simultaneously with these proposed regulations will be treated as comments on this proposed rulemaking.

Paperwork Reduction Act Statement

The Department, as part of its continuing efforts to reduce paperwork and respondent burden, invites the general public and Federal agencies to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data are 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 is properly assessed. The Department solicits comments on the information collection request (ICR) included in this proposed regulatory action, as well as the Notice of Proposed Forms Revisions published simultaneously with this Notice. In order to avoid unnecessary duplication of public comments, the PRA information published in the associated Notice of Proposed Forms Revisions is incorporated herein by this reference in its entirety, and comments submitted in response to these **Federal Register** publications will be treated as comments on these proposed rules. A copy of the ICR may be obtained by contacting the office listed under the heading "PRA Addressee."

The Department has submitted a copy of the proposed information collection to OMB, in accordance with 44 U.S.C. 3507(d), for its review of the information collection. The Department is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agencies, including whether the information will have practical utility;
- Evaluate the accuracy of the Agencies' estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- 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.

Comments should be sent to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration, Department of Labor. Although comments may be submitted through September 19, 2006, OMB requests that comments be received within 30 days of publication of these proposed regulations to ensure their consideration.

PRA Addressee: Written comments regarding only PRA and the ICR should be sent to Gerald B. Lindrew, U.S. Department of Labor, EBSA/OPR, Room N–5718, 200 Constitution Avenue, NW., Washington, DC 20210, Telephone: (202) 693–8410; Fax: (202) 219–4745. These are not toll-free numbers. Written comments must be submitted on or before September 19, 2006 to be assured of consideration.

Congressional Review Act

The notice of proposed rulemaking being issued here is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and, if finalized, will be transmitted to the Congress and the Comptroller General for review.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, the proposed rules do not include any Federal mandate that may result in expenditures by state, local, or tribal governments in the aggregate of more than $100 million, or increased expenditures by the private sector of more than $100 million.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. These proposed rules do not have federalism implications because they would have no 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. Section 514 of ERISA provides, with certain exceptions

specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in these proposed rules do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects in 29 CFR Part 2520

Accountants, Disclosure requirements, Employee benefit plans, Employee Retirement Income Security Act, Pension plans, Pension and welfare plans, Reporting and recordkeeping requirements, and Welfare benefit plans.

In view of the foregoing, the Department of Labor proposes to amend 29 CFR part 2520 as set forth below:

PART 2520—RULES AND REGULATIONS FOR REPORTING AND DISCLOSURE

1. The authority citation for part 2520 continues to read as follows:

Authority: 29 U.S.C. 1021–1025, 1027, 1029–31, 1059, 1134, and 1135; Secretary of Labor's Order 1–2003, 68 FR 5374 (February 3, 2003). Sec. 2520.101–2 also issued under 29 U.S.C. 1132, 1181–1183, 1181 note, 1185, 1185a–b, 1191, and 1191a–c.

Secs. 2520.102–3, 2520.104b–1, and 2520.104b–3 also issued under 29 U.S.C. 1003, 1181–1183, 1181 note, 1185, 1185a–b, 1191, and 1191a–c. Secs. 2520.104b–1 and 2520.107 also issued under 26 U.S.C. 401 note, 111 Stat. 788.

2. In § 2520.103–1, revise paragraphs (a)(2) and (c) to read as follows:

§ 2520.103–1 Contents of the annual report.

(a) * * *

(2) Under the authority of subsections 104(a)(2), 104(a)(3) and 110 of the Act, a simplified report, limited exemption or alternative method of compliance is prescribed for employee welfare and pension benefit plans, as applicable. A plan filing a simplified report or electing the limited exemption or alternative method of compliance shall file an annual report containing the information prescribed in paragraph (b) or paragraph (c) of this section, as applicable, and shall furnish a summary annual report as prescribed in § 2520.104b–10.

* * * * *

(c) *Contents of the annual report for plans with fewer than 100 participants.* (1) Except as provided in paragraph (c)(2) of this section and in paragraph (d) of this section, and in §§ 2520.104–43 and 2520.104a–6, the annual report of an employee benefit plan that covers fewer than 100 participants at the beginning of the plan year shall include a Form 5500 "Annual Return/Report of Employee Benefit Plan" and any statements or schedules required to be attached to the form, completed in accordance with the instructions for the form, including Schedule A (Insurance Information), Schedule B (Actuarial Information), Schedule D (DFE/Participating Plan Information), Schedule I (Financial Information—Small Plan), and Schedule R (Retirement Plan Information). See the instructions for this form.

(2)(i) The annual report of an employee benefit plan that covers fewer than 100 participants at the beginning of the plan year and that meets the conditions in paragraph (c)(2)(ii) of this section with respect to a plan year may, as an alternative to the requirements of paragraph (c)(1) of this section, meet its annual reporting requirements by filing the Form 5500–SF "Short Form 5500 Annual Return/Report of Employee Benefit Plan" and any statements or schedules required to be attached to the form, including Schedule B (Actuarial Information), completed in accordance with the instructions for the form. See the instructions for this form.

(ii) A plan meets the conditions in this paragraph (c)(2)(ii) with respect to the year if the plan:

(A) Does not hold any employer securities at any time during the year;

(B) Satisfies the audit waiver conditions in §§ 2520.104–46(b)(1)(i)(A)(*1*) and 2520.104–46(b)(1)(i)(B) and (b)(1)(i)(C); and

(iii) Had at all times during the plan year 100 percent of the plan's assets held for investment purposes invested in assets that have a readily ascertainable fair market value. For purposes of this section, the following shall be treated as assets that have a readily ascertainable fair market value: Shares issued by an investment company registered under the Investment Company Act of 1940; investment and annuity contracts issued by any insurance company, qualified to do business under the laws of a State, that provides valuation information at least annually to the plan administrator; bank investment contracts issued by a bank or similar financial institution, as defined in § 2550.408b–4(c) of this chapter, that provides valuation information at least annually to the plan administrator; securities (except employer securities) traded on a public exchange; government securities issued by the United States or by a State; cash or cash equivalents held by a bank or similar financial institution, as defined in § 2550.408b–4(c) of this chapter; by an insurance company, qualified to do business under the law of a State; by an organization registered as a broker-dealer under the Securities Exchange Act of 1934; or by any other organization authorized to act as a trustee for individual retirement accounts under section 408 of the Internal Revenue Code; and any loan meeting the requirements of section 408(b)(1) of the Act and the regulations issued thereunder.

* * * * *

3. In § 2520.104–44, remove paragraph (b)(3).

4. In § 2520.104–46, add a new paragraph (e) and a new appendix to the section to read as follows:

§ 2520.104–46 Waiver of examination and report of an independent qualified public accountant for employee benefits plans with fewer than 100 participants.

* * * * *

(e) *Model notice.* The appendix to this section contains model language for inclusion in the summary annual report to assist plan administrators in complying with the requirements of paragraph (b)(1)(i)(B) of this section to avail themselves of the waiver of examination and report of the independent qualified public accountant for employee benefit plans with fewer than 100 participants. Use of the model language is not mandatory. In order to use the model language in the plan's summary annual report, administrators must, in addition to any other information required to be in the summary annual report, select among alternative language and add relevant information where appropriate in the model language. Items of information that are not applicable to a particular plan may be deleted. Use of the model language, appropriately modified and supplemented, will be deemed to satisfy the notice content requirements of paragraph (b)(1)(i)(B) of this section.

Appendix to § 2520.104–46—Model Summary Annual Report Notice (Plan Administrators Will Need To Modify the Model To Omit Information That Is Not Applicable to the Plan)

The U.S. Department of Labor's regulations require that an independent qualified public accountant audit the plan's financial statements unless certain conditions are met for the audit requirement to be waived. This plan met the audit waiver conditions for the plan year beginning (insert year) and therefore has not had an audit performed. Instead, the following information is provided to assist you in verifying that the assets reported on the (Form 5500 or Form

5500–SF—select as applicable) were actually held by the plan.

At the end of the (insert year) plan year, the plan had (include separate entries for each regulated financial institution holding or issuing qualifying plan assets):

[Set forth amounts and names of institutions as applicable where indicated]

[(insert $ amount) in assets held by (insert name of bank)],

[(insert $ amount) in securities held by (insert name of registered broker-dealer)],

[(insert $ amount) in shares issued by (insert name of registered investment company)],

[(insert $ amount) in investment or annuity contract issued by (insert name of insurance company)].

The plan receives year-end statements from these regulated financial institutions that confirm the above information. [Insert as applicable—The remainder of the plan's assets were (1) qualifying employer securities, (2) loans to participants, (3) held in individual participant accounts with investments directed by participants and beneficiaries and with account statements from regulated financial institutions furnished to the participant or beneficiary at least annually, or (4) other assets covered by a fidelity bond at least equal to the value of the assets and issued by an approved surety company.]

Plan participants and beneficiaries have a right, on request and free of charge, to get copies of the financial institution year-end statements and evidence of the fidelity bond. If you want to examine or get copies of the financial institution year-end statements or evidence of the fidelity bond, please contact [insert mailing address and any other available way to request copies such as e-mail and phone number].

If you are unable to obtain or examine copies of the regulated financial institution statements or evidence of the fidelity bond, you may contact the regional office of the U.S. Department of Labor's Employee Benefits Security Administration (EBSA) for assistance by calling toll-free 1.866.444.EBSA (3272). A listing of EBSA regional offices can be found at *http://www.dol.gov/ebsa*. General information regarding the audit waiver conditions applicable to the plan can be found on the U.S. Department of Labor Web site at *http://www.dol.gov/ebsa* under the heading "Frequently Asked Questions."

5. Revise the Appendix to § 2520.104b–10 to read as follows:

§ 2520.104b–10 Summary Annual Report.

* * * * *

APPENDIX TO § 2520.104b–10.—THE SUMMARY ANNUAL REPORT (SAR) UNDER ERISA: A CROSS-REFERENCE TO THE ANNUAL REPORT

SAR item	Form 5500—large plan filer line items	Form 5500—small plan filer line items	Form 5500–SF—filer line items
A. Pension Plan:			
1. Funding arrangement	Form 5500–9a	Same	Not applicable.
2. Total plan expenses	Sch. H—2j	Sch. I—2j	Line 8h.
3. Administrative expenses	Sch. H—2i(5)	Sch. I—2h	Line 8f.
4. Benefits paid	Sch. H—2e(4)	Sch. I—2e	Line 8d.
5. Other expenses	Sch. H—Subtract the sum of 2e(4) & 2i(5) from 2j.	Sch. I—2i	Line 8g.
6. Total participants	Form 5500—6f	Same	Line 5b.
7. Value of plan assets (net):			
a. End of plan year	Sch. H—1l [Col. (b)]	Sch. I—1c [Col. (b)]	Line 7a [Col. (b)].
b. Beginning of plan year	Sch. H—1l [Col. (a)]	Sch. I—1c [Col. (a)]	Line 7a [Col. (a)].
8. Change in net assets	Sch. H—Subtract 1l [Col. (a)] from 1l [Col. (b)].	Sch. I—Subtract 1c [Col. (a)] from 1c [Col. (b)].	Line 7c—Subtract Col. (a) from Col. (b).
9. Total income	Sch. H—2d	Sch. I—2d	Line 8c.
a. Employer contributions	Sch. H—2a(1)(A) & 2a(2)—if applicable.	Sch. I—2a(1) & 2b if applicable	Line 8a(1) if applicable.
b. Employee contributions	Sch. H—2a(1)(B) & 2a(2) if applicable.	Sch. I—2a(2) & 2b if applicable	Line 8a(2) if applicable.
c. Gains (losses) from sale of assets.	Sch. H—2b(4)(C)	Not applicable	Not applicable.
d. Earnings from investments.	Sch. H—Subtract the sum of 2a(3), 2b(4)(C) and 2c from 2d.	Sch. I—2c	Line 8b.
10. Total insurance premiums	Total of all Schs.A—5b	Total of all Schs.A—5b	Not applicable.
11. Funding deficiency:			
a. Defined benefit plans	Sch. B—10	Same	Same.
b. Defined contribution plans.	Sch. R—6c, if more than zero	Same	Line 12c.
B. Welfare Plan:			
1. Name of insurance carrier	All Schs. A—1(a)	Same	Not applicable.
2. Total (experience rated and non-experienced rated) insurance premiums.	All Schs. A—Sum of 8a(4) and 9(a).	Same	Not applicable.
3. Experience rated premiums	All Schs. A—8a(4)	Same	Not applicable.
4. Experience rated claims	All Schs. A—8b(4)	Same	Not applicable.
5. Value of plan assets (net):			
a. End of plan year	Sch. H—1l [Col. (b)]	Sch. I—1c [Col. (b)]	Line 7c—[Col. (b)].
b. Beginning of plan year	Sch. H—1l [Col. (a)]	Sch. I—1c [Col. (a)]	Line 7c—[Col. (a)].
6. Change in net assets	Sch. H—Subtract 1l [Col. (a)] from 1l [Col. (b)].	Sch. I—Subtract 1c [Col. (a)] from 1c [Col. (b)].	Line 7c—Subtract [Col. (a)] from [Col. (b)].
7. Total income	Sch. H—2d	Sch. I—2d	Line 8c.
a. Employer contributions	Sch. H—2a(1)(A) & 2a(2) if applicable.	Sch. I—2a(1) & 2b if applicable	Line 8a(1) if applicable.
b. Employee contributions	Sch. H—2a(1)(B) & 2a(2) if applicable.	Sch. I—2a(2) & 2b if applicable	Line 8a(2) if applicable.
c. Gains (losses) from sale of assets.	Sch. H—2b(4)(C)	Not applicable	Not applicable.
d. Earnings from investments.	Sch. H—Subtract the sum of 2a(3), 2b(4)(C) and 2c from 2d.	Sch. I—2c	Line 8b.

APPENDIX TO § 2520.104b–10.—THE SUMMARY ANNUAL REPORT (SAR) UNDER ERISA: A CROSS-REFERENCE TO THE ANNUAL REPORT—Continued

SAR item	Form 5500—large plan filer line items	Form 5500—small plan filer line items	Form 5500–SF—filer line items
8. Total plan expenses	Sch. H—2j	Sch. I—2j	Line 8h.
9. Administrative expenses	Sch. H—2i(5)	Sch. I, line 2h	Line 8f.
10. Benefits paid	Sch. H—2e(4)	Sch. I—2e	Line 8d.
11. Other expenses	Sch. H—Subtract the sum of 2e(4) & 2i(5) from 2j.	Sch. I—2i	Line 8g.

Signed at Washington, DC, this 13th day of July 2006.

Ann C. Combs,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 06–6330 Filed 7–20–06; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[CGD05–06–068]

RIN 1625–AA08

Special Local Regulations for Marine Events; John H. Kerr Reservoir, Clarksville, VA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish temporary special local regulations for the "Clarksville Hydroplane Challenge", a power boat race to be held on the waters of the John H. Kerr Reservoir adjacent to Clarksville, Virginia. These special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic in portions of the John H. Kerr Reservoir adjacent to Clarksville, Virginia during the power boat race.

DATES: Comments and related material must reach the Coast Guard on or before August 21, 2006.

ADDRESSES: You may mail comments and related material to Commander (dpi), Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004, hand-deliver them to Room 415 at the same address between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays, fax them to (757) 391–8149, or e-mail them to *Dennis.M.Sens@uscg.mil*. The Inspections and Investigations Branch, Fifth Coast Guard District, maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the above address between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Dennis Sens, Project Manager, Inspections and Investigations Branch, at (757) 398–6204.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD05–06–068), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the address listed under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

On October 7 and 8, 2006, the Virginia Boat Racing Association will sponsor the "Clarksville Hydroplane Challenge", on the waters of the John H. Kerr Reservoir. The event will consist of approximately 70 inboard hydroplanes racing in heats counter-clockwise around an oval racecourse. A fleet of spectator vessels is anticipated to gather nearby to view the competition. Due to the need for vessel control during the event, vessel traffic will be temporarily restricted to provide for the safety of participants, spectators and transiting vessels.

Discussion of Proposed Rule

The Coast Guard proposes to establish temporary special local regulations on specified waters of the John H. Kerr Reservoir adjacent to Occoneechee State Park, Clarksville, Virginia and State Route 15 Highway Bridge. The regulated area includes a section of the John H. Kerr Reservoir approximately one half mile long, and bounded in width by each shoreline. This rule will be enforced from 7:30 a.m. to 6:30 p.m. on October 7 and 8, 2006, and will restrict general navigation in the regulated area during the power boat race. The Coast Guard, at its discretion, when practical will allow the passage of vessels when races are not taking place. Except for participants and vessels authorized by the Coast Guard Patrol Commander, no person or vessel will be allowed to enter or remain in the regulated area during the enforcement period. These regulations are needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting vessels.

Regulatory Evaluation

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

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

Although this proposed regulation will prevent traffic from transiting a portion of the John H. Kerr Reservoir adjacent to Clarksville, Virginia during the event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect. Extensive advance notifications will be made to the maritime community via Local Notice to Mariners, marine information broadcasts, area newspapers and local radio stations, so mariners can adjust their plans accordingly. Vessel traffic will be able to transit the regulated area between heats, when the Coast Guard Patrol Commander deems it is safe to do so.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit this section of the John H. Kerr Reservoir during the event.

This proposed rule would not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will be enforced for only a short period, from 7:30 a.m. to 6:30 p.m. on October 7 and 8, 2006. The regulated area will apply to a segment of the reservoir adjacent to State Route 15 Highway Bridge and Occoneechee State Park. Marine traffic may be allowed to pass through the regulated area with the permission of the Coast Guard Patrol Commander. In the case where the Patrol Commander authorizes passage through the regulated area during the event, vessels will be required to proceed at the minimum speed necessary to maintain a safe course that minimizes wake near the race course. Before the enforcement period, we would issue maritime advisories so mariners can adjust their plans accordingly.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the address listed under **ADDRESSES**. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD and Department of Homeland Security Management Directive 5100.1, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction, from further environmental documentation. Special local regulations issued in conjunction with a regatta or marine parade permit are specifically excluded from further analysis and documentation under that section.

Under figure 2–1, paragraph (34)(h), of the Instruction, an "Environmental Analysis Check List" and a "Categorical Exclusion Determination" are not required for this rule. Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule from further environmental review.

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233; Department of Homeland Security Delegation No. 0170.1.

2. Add temporary § 100.35–T05–068 to read as follows:

§ 100.35–T05–068 John H. Kerr Reservoir, Clarksville, VA.

(a) *Regulated area.* The regulated area is established for the waters of the John H. Kerr Reservoir, adjacent to the State Route 15 Highway Bridge and Occoneechee State Park, Clarksville, Virginia, from shoreline to shoreline, bounded on the south by a line running northeasterly from a point along the shoreline at latitude 36°37′14″ N, longitude 078°32′46.5″ W, thence to latitude 36°37′39.2″ N, longitude 078°32′08.8″ W, and bounded on the north by the State Route 15 Highway Bridge. All coordinates reference Datum NAD 1983.

(b) *Definitions.* The following definitions apply to this section: (1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Coast Guard Sector Hampton Roads.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Sector Hampton Roads with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(3) *Participant* includes all vessels participating in the Clarksville Hydroplane Challenge under the auspices of the Marine Event Permit issued to the event sponsor and approved by Commander, Coast Guard Sector Hampton Roads.

(c) *Special local regulations.* (1) Except for event participants and persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the regulated area must: (i) Stop the vessel immediately when directed to do so by any Official Patrol and then proceed only as directed.

(ii) All persons and vessels shall comply with the instructions of the Official Patrol.

(iii) When authorized to transit the regulated area, all vessels shall proceed at the minimum speed necessary to maintain a safe course that minimizes wake near the race course.

(d) *Enforcement period.* This section will be enforced from 7:30 a.m. on October 7 to 6:30 p.m. on October 8, 2006.

Dated: July 12, 2006.

Steven Ratti,

Captain, U.S. Coast Guard, Commander, Fifth Coast Guard District, Acting.

[FR Doc. E6–11630 Filed 7–20–06; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 50

[FRL–8199–7; Docket ID No. EPA–HQ–OAR–2001–0017]

Availability of Additional Information Related to the Review of the National Ambient Air Quality Standards for Particulate Matter

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of data availability.

SUMMARY: The EPA is providing notice that it has placed in the docket for the review of the national ambient air quality standards (NAAQS) for particulate matter (PM) (Docket No. EPA–HQ–OAR–2001–0017) additional information relevant to the rulemaking. See 71 FR 2620 (Jan. 17, 2006) (proposing revisions to those standards). Specifically, this notice announces the availability of an EPA report, "Provisional Assessment of Recent Studies on Health Effects of Particulate Matter Exposure" (provisional assessment) (EPA/600/R–06/063), which presents EPA's survey and provisional assessment of studies relevant to assessing the health effects of PM that were published too recently to be included in the 2004 PM Air Quality Criteria Document.

DATES: The provisional assessment document will be placed in the PM NAAQS docket on or about July 21, 2006.

FOR FURTHER INFORMATION CONTACT: Dr. Mary Ross, National Center for Environmental Assessment (B243–01), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone: 919–541–5170; e-mail: *ross.mary@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

On January 17, 2006, EPA published a proposed rule to make revisions to the primary and secondary NAAQS for PM to provide requisite protection of public health and welfare (71 FR 2620). The proposed decisions separately addressed fine and coarse particles. These proposed decisions were based on: a thorough review of the scientific information on known and potential human health and welfare effects associated with exposure to these subclasses of PM at levels typically found in the ambient air as presented in the Air Quality Criteria Document (henceforth, the "Criteria Document") (two volumes, EPA/600/P–99/002aF and

EPA/600/P–99/002bF, October 2004); staff assessments presented in the Review of the National Ambient Air Quality Standards for Particulate Matter: Assessment of Scientific and Technical Information (henceforth, the "Staff Paper") (EPA–452/R–05–005a, December 2005); Clean Air Scientific Advisory Committee (CASAC) advice and recommendations, as reflected in the CASAC's letters to the Administrator, discussions of the drafts of the Criteria Document and Staff Paper at public meetings, and separate written comments prepared by individual members of the CASAC PM Review Panel; and public comments received during the development of these documents, either in connection with CASAC meetings or separately.

In the preamble to the proposed rule, EPA acknowledged that a number of new scientific studies on the health effects on PM had been published recently that were not included in the Criteria Document. See 71 FR at 2625. In order to ensure that the Administrator is fully aware of the new science that has developed since the cutoff date before making a final decision on whether to revise the current PM NAAQS, EPA conducted a provisional assessment of relevant new studies. EPA screened and surveyed the recent literature, including studies submitted during the public comment period on the proposed rule, and conducted a provisional assessment that places the results of those studies of potentially greatest policy relevance in the context of the findings of the 2004 Criteria Document. The focus of the provisional assessment was on: (a) epidemiological studies conducted in the U.S. or Canada that assessed exposures to $PM_{2.5}$ and/or $PM_{10-2.5}$ and (b) toxicology or epidemiology studies that compared the effects of PM from different sources, PM components, or size fractions.

The provisional assessment of the new PM science is presented in a document prepared by the National Center for Environmental Assessment (NCEA) within EPA's Office of Research and Development, entitled "Provisional Assessment of Recent Studies on Health Effects of Particulate Matter Exposure" (EPA/600/R–06/063, June 2006). The following section of this notice describes how to obtain copies of this document.

B. How Can I Get a Copy of This Document?

1. *Docket.* EPA has established a docket for the current review of the PM NAAQS under Docket ID No. EPA–HQ–OAR–2001–0017. The document entitled "Provisional Assessment of Recent Studies on Health Effects of Particulate Matter Exposure" (EPA/600/R–06/063) will be placed in this docket. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, Room B102 EPA West, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m. Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202–566–1744 and the telephone number for the Air and Radiation docket and Information Center is 202–566–1742.

2. *Electronic Access.* You may access this document at *http://www.epa.gov/air/particlepollution/actions.html* or on the NCEA home page under the "Recent Additions" and "Data and Publications" menus at *http://www.epa.gov/ncea.*

List of Subjects in 40 CFR Part 50

Environmental protection, Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

Dated: July 7, 2006.

Peter W. Preuss,

Director, National Center for Environmental Assessment.

[FR Doc. E6–11621 Filed 7–20–06; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AU51

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Astragalus brauntonii and Pentachaeta lyonii

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period and notice of availability of draft economic analyses.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the reopening of the comment period on the proposed designation of critical habitat for *Astragalus brauntonii* (Braunton's milk-vetch) and *Pentachaeta lyonii* (Lyon's pentachaeta) and the availability of the draft economic analyses of the proposed designation of critical habitat. The draft economic analysis for *Astragalus brauntonii* identifies a total surplus (sum of producer and consumer surplus) of approximately $91.87 million over a 20-year period (approximately $8.11 million annually at a 7 percent discount rate, or approximately $5.99 million annually at a 3 percent discount rate) from housing development forecasted to be built within the area of *Astragalus brauntonii* proposed critical habitat. The draft economic analysis for *Pentachaeta lyonii* identifies a total surplus (sum of producer and consumer surplus) of approximately $121.21 million over a 20-year period (approximately $10.69 million annually at a 7 percent discount rate, or $7.91 million annually at a 3 percent discount rate) from housing development forecasted to be built within the area of *Pentachaeta lyonii* proposed critical habitat. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed rule and the associated draft economic analyses. Comments previously submitted need not be resubmitted as they will be incorporated into the public record as part of this comment period, and will be fully considered in preparation of the final rule.

DATES: We will accept public comments until August 21, 2006.

ADDRESSES: Written comments and materials may be submitted to us by any one of the following methods:

1. You may submit written comments and information to the Field Supervisor, U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, CA 93003.

2. You may hand-deliver written comments and information to our Ventura Fish and Wildlife Office, at the above address.

3. You may fax your comments to 805/644–3958.

4. You may send comments by electronic mail (e-mail) to: *fw82plantsch@fws.gov*, or to the Federal eRulemaking Portal at *http://www.regulations.gov*. For directions on how to file comments electronically, see the "Public Comments Solicited" section. In the event that our Internet connection is not functional, please submit your comments by one of the alternate methods mentioned above.

Copies of the draft economic analyses and the proposed rule for critical habitat designation are available on the Internet at *http://www.fws.gov/ventura* or from the Ventura Fish and Wildlife Office at the address and contact numbers above.

FOR FURTHER INFORMATION CONTACT: Diane Noda, Ventura Fish and Wildlife Office, at the address listed in

ADDRESSES (telephone 805/644–1766; facsimile 805/644–3958).

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

We will accept written comments and information during this reopened comment period. We solicit comments on the original proposed critical habitat designation (70 FR 68982; November 10, 2005) and on our draft economic analyses of the proposed designation. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why any habitat should or should not be determined to be critical habitat, as provided by section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), including whether it is prudent to designate critical habitat;

(2) Specific information on the amount and distribution of *Astralagus brauntonii* and *Pentachaeta lyonii* habitat, and what areas that were occupied at the time of listing and that contain the features that are essential to the conservation of the species, should be included in the designations and why and what areas that were not occupied at the time of listing are essential to the conservation of the species and why;

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat;

(4) Additional information on areas which could be excluded from the final designation, specifically in Orange County;

(5) Information on whether the following should be included as a primary constituent element (PCE) for *Astragalus brauntonii*: Plant communities in areas that are ≥600 meters (m) in diameter, which is the minimum size needed to support associated insect pollinators (*e.g.*, bees and wasps), and seed dispersers (*e.g.*, insects and small mammals);

(6) Information on whether the following should be included as a PCE for *Pentachaeta lyonii*: Plant communities in areas that are ≥600 m in diameter, which is the minimum size needed to support associated insect pollinators, specifically bees, wasps, and flies;

(7) Information on whether, and, if so, how many of, the State and local environmental protection measures referenced in the draft economic analysis were adopted largely as a result of the listing of *Astragalus brauntonii* and *Pentachaeta lyonii*, and how many were either already in place or enacted for other reasons;

(8) Information on whether the draft economic analyses identify all State and local costs attributable to the proposed critical habitat designation, and information on any costs that have been inadvertently overlooked;

(9) Information on whether the draft economic analyses make appropriate assumptions regarding current practices and likely regulatory changes imposed as a result of the designation of critical habitat;

(10) Information on whether the draft economic analyses correctly assess the effect on regional costs associated with any land use controls that may derive from the designation of critical habitat;

(11) Information on areas that could potentially be disproportionately impacted by the *Astragalus brauntonii* and *Pentachaeta lyonii* critical habitat designation. The draft economic analyses indicate the potential economic value of areas within Ventura, Los Angeles, and Orange counties. Based on this information, we may consider excluding portions of these areas from the final designation per our discretion under section 4(b)(2) of the Act;

(12) Any foreseeable economic or other impacts resulting from the proposed designation of critical habitat, and in particular, any impacts on small entities or families; the reasons why our conclusion that the proposed designation of critical habitat will not result in a disproportionate effect on small businesses should or should not warrant further consideration; and other information that would indicate that the designation of critical habitat would or would not have any impacts on small entities or families;

(13) Information on whether the draft economic analyses appropriately identify all costs that could result from the designation;

(14) Information on whether our approach to critical habitat designation could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concern and comments; and

(15) Whether the benefit of excluding any particular area from the critical habitat designation under section 4(b)(2) of the Act outweighs the benefit of including those particular areas in the designation.

The Secretary shall designate critical habitat on the basis of 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. An area may be excluded from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of including a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species.

All previous comments and information submitted during the initial comment period on the November 10, 2005, proposed rule (70 FR 68982) need not be resubmitted. If you wish to comment, you may submit your comments and materials concerning the draft economic analyses and the proposed rule by any one of several methods (see **ADDRESSES** section). Our final designation of critical habitat will take into consideration all comments and any additional information we receive during both comment periods. On the basis of public comment on the draft economic analyses, the critical habitat proposal, and the final economic analyses, we may during the development of our final determination find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or not appropriate for exclusion.

Please submit electronic comments in an ASCII file format and avoid the use of special characters and encryption. Please also include "Attn: RIN 1018–AU51" and your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. We will not consider anonymous comments, and we will make all comments available for public inspection in their entirety. Comments and materials received, as well as supporting documentation used in preparation of the proposal to designate critical habitat, will be available for public inspection, by appointment during normal business hours at the Ventura Fish and Wildlife Office at the address listed under **ADDRESSES**.

Copies of the proposed rule and draft economic analyses are available on the Internet at: *http://www.fws.gov/ventura/*. You may also obtain copies of the proposed rule and draft economic analyses from the Ventura Fish and Wildlife Office (see **ADDRESSES**), or by calling 805/644–1766.

Background

We published a proposed rule to designate critical habitat for *Astragalus brauntonii* and *Pentachaeta lyonii* on November 10, 2005 (70 FR 68982). The proposed critical habitat totaled approximately 3,638 acres (ac) (1,471 hectares (ha)) for *Astragalus brauntonii* in Ventura, Los Angeles, and Orange counties, California; and 4,212 ac (1,703 ha) for *Pentachaeta lyonii* in Ventura and Los Angeles counties, California. Pursuant to the terms of a July 28, 2003, settlement agreement, we will submit for publication in the **Federal Register** a final critical habitat designation for *Astragalus brauntonii* and *Pentachaeta lyonii* on or before November 1, 2006.

Critical habitat is defined in section 3 of the Act as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. Based on the November 10, 2005, proposed rule to designate critical habitat for *Astragalus brauntonii* and *Pentachaeta lyonii* (70 FR 68982), we have prepared an individual draft economic analysis of the proposed critical habitat designation for *Astragalus brauntonii* and another for *Pentachaeta lyonii*.

The current draft economic analyses estimate the foreseeable economic impacts of the proposed critical habitat designation on government agencies and private businesses and individuals. The draft economic analysis provides a measure of the total surplus (sum of producer and consumer surplus) that will accrue from housing development forecasted to be built within the area of proposed critical habitat. The amount of surplus generated per housing unit is calculated as the market price of the new housing minus the variable costs of development and construction: Total expected surplus within the critical habitat unit is calculated by multiplying this expression by the expected number of housing units. For a further description of the methodology of these analyses, see section 3 (methodology) of draft economic analyses.

The draft economic analysis for *Astragalus brauntonii* identifies a total surplus (sum of producer and consumer surplus) of approximately $91.87 million over a 20-year period (approximately $8.11 million annually at a 7 percent discount rate, or approximately $5.99 million annually at a 3 percent discount rate) from housing development forecasted to be built within the area of *Astragalus brauntonii* proposed critical habitat. The draft economic analysis for *Pentachaeta lyonii* identifies a total surplus (sum of producer and consumer surplus) of approximately $121.21 million over a 20-year period (approximately $10.69 million annually at a 7 percent discount rate, or $7.91 million annually at a 3 percent discount rate) from housing development forecasted to be built within the area of *Pentachaeta lyonii* proposed critical habitat. The draft economic analyses measure lost economic efficiency associated with residential and commercial development, and public projects and activities, such as economic impacts on transportation projects, the energy industry, and Federal lands. The residential development industry is anticipated to experience the highest estimated costs as described in the draft economic analyses.

The draft economic analyses consider the potential economic effects of actions relating to the conservation of *Astragalus brauntonii* and *Pentachaeta lyonii*, including costs associated with sections 4, 7, and 10 of the Act, and including those attributable to designating critical habitat. They further consider the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for *Astragalus brauntonii* and *Pentachaeta lyonii* in essential habitat areas. The draft analyses consider both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the "opportunity costs" associated with the commitment of resources to comply with habitat protection measures (e.g., lost economic opportunities associated with restrictions on land use).

These draft analyses also address how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on small entities and the energy industry. This information can be used by decision-makers to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, these draft analyses look retrospectively at costs that have been incurred since the date these two species were listed as endangered (January 29, 1997; 62 FR 4172) and considers those costs that may occur in the 20 years following a designation of critical habitat.

As stated earlier, we solicit data and comments from the public on these draft economic analyses, as well as on all aspects of the proposal. We may revise the proposal, or its supporting documents, to incorporate or address new information received during the comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

Required Determinations—Amended

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule because it may raise novel legal and policy issues. However, it is not anticipated to have an annual effect on the economy of $100 million or more or affect the economy in a material way. The draft economic analysis for *Astragalus brauntonii* identifies a total surplus (sum of producer and consumer surplus) of approximately $8.11 million annually at a 7 percent discount rate, or approximately $5.99 million annually at a 3 percent discount rate from housing development forecasted to be built within the area of *Astragalus brauntonii* proposed critical habitat. The draft economic analysis for *Pentachaeta lyonii* identifies a total surplus (sum of producer and consumer surplus) of approximately $10.69 million annually at a 7 percent discount rate, or $7.91 million annually at a 3 percent discount rate from housing development forecasted to be built within the area of *Pentachaeta lyonii* proposed critical habitat. The residential development industry is anticipated to experience the highest estimated costs as described in the draft economic analyses. Due to the

timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) did not formally review the proposed rule.

Further, Executive Order 12866 directs Federal Agencies promulgating regulations to evaluate regulatory alternatives (Office of Management and Budget, Circular A–4, September 17, 2003). Pursuant to Circular A–4, once it has been determined that the Federal regulatory action is appropriate, the agency will then need to consider alternative regulatory approaches. Since the determination of critical habitat is a statutory requirement pursuant to the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), we must then evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts pursuant to section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the designation of critical habitat providing that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. As such, we believe that the evaluation of the inclusion or exclusion of particular areas, or combination thereof, in a designation constitutes our regulatory alternative analysis.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (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 publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. In our proposed rule, we withheld our determination of whether this designation would result in a significant effect as defined under SBREFA until we completed our draft economic analyses of the proposed designation so that we would have the factual basis for our determination.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed designation of critical habitat for *Astragalus brauntonii* and *Pentachaeta lyonii* would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (*e.g.*, residential and commercial development). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies; non-Federal activities are not affected by the designation.

If this proposed critical habitat designation is made final, Federal agencies must consult with us under section 7 of the Act if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our draft economic analyses of the proposed critical habitat designation, we evaluate the potential economic effects on small business entities resulting from conservation actions related to the listing of *Astragalus brauntonii* and *Pentachaeta lyonii* and proposed designation of critical habitat. We determined from our draft analyses that the small business entities that may be affected are firms in the new home construction sector. Small business effects have been calculated on the total surplus generated from new housing construction within critical habitat. This assumption is conservative because it is the worst-case scenario of how critical habitat will affect small businesses. In the event that conservation is achieved without requiring developers to completely avoid critical habitat, impacts on small businesses will be lower.

To estimate the number of firms potentially affected, these analyses use the following steps. First, they calculate the number of homes built by small businesses annually. Average revenues for a small construction firm are $694,000 annually. The mean new home price for the study area of these analyses is approximately $970,000 for *Astragalus brauntonii* and $920,000 for *Pentachaeta lyonii*. Small construction firms are assumed to build one new home per year. Second, they calculate the proportion of new home construction that would be undertaken by small businesses. Prior analyses of permitting data in Sacramento County found that 22 percent of building permits for single family dwellings were issued to builders classified as small businesses. A total of 156 new homes are projected to be built within *Astragalus brauntonii* proposed critical habitat over the next 20 years. Accordingly, 34 are projected to be built by small businesses. Since each firm builds one home per year, 34 small firms are potentially affected within *Astragalus brauntonii* proposed critical habitat over the 20-year time frame of this analysis. A total of 222 new homes are projected to be built within *Pentachaeta lyonii* proposed critical habitat over the next 20 years. Accordingly, 49 are projected to be built by small businesses. Since each firm builds one home per year, 49 small firms are potentially affected within *Pentachaeta lyonii* proposed critical habitat over the 20-year time frame of this analysis. These firms may be affected by activities associated with the conservation of *Astragalus brauntonii* and *Pentachaeta lyonii*, inclusive of activities associated with listing, recovery, and critical habitat. Critical habitat is not expected to result in significant small business impacts. In the development of our final designation, we will explore potential alternatives to minimize impacts to any

affected small business entities. These alternatives may include the exclusion of all or portions of the critical habitat units in Ventura, Los Angeles, and Orange counties, California.

We do not believe that the designation of critical habitat for *Astragalus brauntonii* and *Pentachaeta lyonii* will result in a disproportionate effect to small business entities. However, we are seeking comment on potentially excluding areas from the final critical habitat designation if it is determined that there will be a substantial and significant impact to small real estate development businesses in the affected areas.

The economic impacts of the proposed critical habitat designation vary widely even within a county. That is, the impacts of designation are frequently localized, which is sensible from an economic point of view and is consistent with the principles of urban economics. Housing prices vary over urban areas, typically declining as the location of the house becomes more remote. Large impacts may result from critical habitat if a particular area has a large fraction of developable land in critical habitat. Some areas have few alternate sites for development, or have highly rationed housing resulting in high prices. Any of these factors may cause the cost of critical habitat designation to increase. Please refer to our draft economic analyses of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

Executive Order 13211

On May 18, 2001, the President issued Executive Order (E.O.) 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule is considered a significant regulatory action under E.O. 12866 because it raises novel legal and policy issues, but it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments," with two exceptions. It excludes "a condition of federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or tribal governments "lack authority" to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. Non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) As discussed in the draft economic analyses of the proposed designation of critical habitat for the *Astragalus brauntonii* and *Pentachaeta lyonii*, the impacts on nonprofits and small governments are expected to be small. There is no record of consultations between the Service and any of these governments since the *Astragalus brauntonii* and *Pentachaeta lyonii* were listed as endangered on January 29, 1997 (62 FR 4172). It is likely that small governments involved with developments and infrastructure projects will be interested parties or involved with projects involving section 7 consultations for the *Astragalus brauntonii* and *Pentachaeta lyonii* within their jurisdictional areas. Any costs associated with this activity are likely to represent a small portion of a local government's budget. Consequently, we do not believe that the designation of critical habitat for the *Astragalus brauntonii* and *Pentachaeta lyonii* will significantly or uniquely affect these small governmental entities. As such, a Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of proposing critical habitat for the *Astragalus brauntonii* and *Pentachaeta lyonii*. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. In conclusion, the proposed designation of critical habitat for the *Astragalus brauntonii* and *Pentachaeta lyonii* does not pose significant takings implications.

Author

The primary author of this notice is the staff of the Ventura Fish and Wildlife Office.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 7, 2006.

Matt Hogan,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E6–11599 Filed 7–20–06; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register
Vol. 71, No. 140
Friday, July 21, 2006

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to Gorge Delights, Inc. of North Bonneville, Washington, an exclusive license to U.S. Patent No. 6,027,758, "Restructured Fruit and Vegetable Products and Processing Methods", issued on February 22, 2000.

DATES: Comments must be received by August 21, 2006.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Room 4–1174, Beltsville, Maryland 20705–5131.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5989.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights to this invention are assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license this invention as Gorge Delights, Inc. of North Bonneville, Washington, has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within thirty (30) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Richard J. Brenner,
Assistant Administrator.
[FR Doc. E6–11580 Filed 7–20–06; 8:45 am]
BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Forest Service

Glenn/Colusa County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Glenn/Colusa County Resource Advisory Committee (RAC) will meet in Willows, California. Agenda items to be covered include: (1) Introductions, (2) Approval of Minutes, (3) Public Comment, (4) Project Proposals/Possible Action, (5) General Discussion, (6) Next Agenda.

DATES: The meeting will be held on July 24, 2006, from 1:30 p.m. and end at approximately 4:30 p.m.

ADDRESSES: The meeting will be held at the Mendocino National Forest Supervisor's Office, 825 N. Humboldt Ave., Willows, CA 95988. Individuals wishing to speak or propose agenda items send their names and proposals to Tricia Christofferson, Acting DFO, 825 N. Humboldt Ave., Willows, CA 95988.

FOR FURTHER INFORMATION CONTACT: Bobbin Gaddini, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, 825 N. Humboldt Ave., Willows, CA 95939. (530) 934–1268; e-mail *ggaddini@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, persons who wish to bring matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. Public input sessions will be provided and individuals who made written requests by July 21, 2006 will have the opportunity to address the committee at those sessions.

Dated: July 14, 2006.
Tricia Christofferson,
Acting Designated Federal Official.
[FR Doc. 06–6387 Filed 7–20–06; 8:45 am]
BILLING CODE 3410–11–M

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to Procurement List.

SUMMARY: This action adds to the Procurement List products and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Effective Date:* August 20, 2006.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *SKennerly@jwod.gov.*

SUPPLEMENTARY INFORMATION: On May 19 and May 26, 2006, the Committee for Purchase From People Who Are Blind or Severely Disabled published notices (71 FR 29121; 30377) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and services and impact of the additions on the current or most recent contractors, the Committee has determined that the products and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the

products and services to the Government.

2. The action will result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following products and services are added to the Procurement List:

Products

Product/NSN: Cup, Water Canteen.
8465–00–165–6838.
NPA: The Lighthouse for the Blind, Inc. (Seattle Lighthouse), Seattle, Washington.
Contracting Activity: Defense Supply Center Philadelphia, Philadelphia, Pennsylvania.
Product/NSN: Kit, First Aid, Evasion & Escape.
6545–01–534–0925—Medical Module.
6545–01–534–0935—Survival Module.
6545–01–534–0894—Kit, First Aid, Evasion & Escape.
NPA: Friendship Industries, Inc., Harrisonburg, VA.
Contracting Activity: U.S. Air Force—AFMLO/USAF, Frederick, MD.
Product/NSN: Target, Silhouette.
6920–00–071–4589 (50 Plastic).
6920–00–071–4780 (25 Green Plastic).
NPA: North Central Sight Services, Inc., Williamsport, Pennsylvania.
Contracting Activity: Defense Supply Center Philadelphia, Philadelphia, Pennsylvania.

Services

Service Type/Location: Custodial Services, Grand Prairie Reserve Center Complex, Buildings 303, 308, 370, 397, 310 Army Drive, Grand Prairie, Texas.
NPA: Goodwill Industries of Fort Worth, Inc., Fort Worth, Texas.
Contracting Activity: 90th Regional Readiness Command, North Little Rock, Arkansas.
Service Type/Location: Custodial Services, Stewart Air National Guard Base, 105th Airlift Wing/LGC, One Militia Way, Building 204, Newburgh, New York.
NPA: New Dynamics Corporation, Middletown, New York.
Contracting Activity: 105th Airlift Wing/LGC, Newburgh, New York.
Service Type/Location: Grounds Maintenance, Athletic Fields—Basewide, Patrick Air Force Base, Florida.
NPA: Brevard Achievement Center, Inc., Rockledge, Florida.
Contracting Activity: 45th Contracting Squadron/LGCAA, Patrick AFB, Florida.
Service Type/Location: Laundry Service, Armed Forces Retirement Home—Washington (AFRH–W), 3700 North Capitol Street, NW., Washington, DC.
NPA: Rappahannock Goodwill Industries, Inc., Fredericksburg, Virginia.
Contracting Activity: Bureau of Public Debt, Parkersburg, West Virginia.

This action does not affect current contracts awarded prior to the effective date of this addition or options that may be exercised under those contracts.

G. John Heyer,
General Counsel.
[FR Doc. E6–11616 Filed 7–20–06; 8:45 am]
BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to and deletions from Procurement List.

SUMMARY: The Committee is proposing to add to the Procurement List products and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and to delete products and services previously furnished by such agencies.

Comments Must be Received on or Before: August 20, 2006.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

For Further Information or to Submit Comments Contact: Sheryl D. Kennerly, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *SKennerly@jwod.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice for each product or service will be required to procure the products and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and services to the Government.

2. If approved, the action will result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following products and services are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Products

Product/NSN: SKILCRAFT Toothpicks—200 ct. 8415–B51–0425 .
NPA: Winston-Salem Industries for the Blind, Winston-Salem, North Carolina.
Contracting Activity: AAFES, Dallas, Texas.
Product/NSN: Spice Blend, All Purpose Seasoning w/o Salt.
8950–01–E60–9456—Spice Blend, All Purpose w/o Salt, 2.5 oz.
8950–01–E60–9457—Spice Blend, All Purpose w/o Salt 6.75 oz.
8950–01–E60–9458—Spice Blend, All Purpose w/o Salt 10 oz.
8950–01–E60–9459—Spice Blend, All Purpose w/o Salt 20 oz.
8950–01–E60–9460—Spice Blend, All Purpose w/o Salt 28 oz.
Product/NSN: Spice Blend, Chili Powder.
8950–01–E60–9461—Spice Blend, Chili Powder 16 oz.
8950–01–E60–9462—Spice Blend, Chili Powder 17 oz.
8950–01–E60–9463—Spice Blend, Chili Powder 18 oz.
8950–01–E60–9464—Spice Blend, Chili Powder 20 oz.
8950–01–E60–9465—Spice Blend, Chili Powder 5 lbs.
Product/NSN: Spice Blend, Lemon Pepper.
8950–01–E60–9147—Lemon Pepper 6–28 oz poly.
8950–01–E60–9466—Spice Blend, Lemon Pepper 26 oz.
8950–01–E60–9467—Spice Blend, Lemon Pepper 27 oz.

Product/NSN: Spice, Cinnamon.
8950–01–E60–9150—Cinnamon, Ground 6–16 oz poly.
8950–01–E60–9468—Spice Blend, Cinnamon, Maple Sprinkle, 30 oz.
8950–01–E60–9469—Spice, Cinnamon, Ground 15 oz.
8950–01–E60–9470—Spice, Cinnamon, Ground 18 oz.
8950–01–E60–9471—Spice, Cinnamon, Ground 5 lbs.
8950–01–E60–9472—Spice, Cinnamon, Stick, whole 8 oz.
NPA: Continuing Developmental Services, Inc., Fairport, New York.
Contracting Activity: Defense Supply Center Philadelphia, Philadelphia, Pennsylvania.

Services

Service Type/Location: Facilities Management, Air Force Space Command, Los Angeles Air Force Base, El Segundo, California.
NPA: PRIDE Industries, Inc., Roseville, California.
Contracting Activity: 61st Contracting Squadron/LGCC, El Segundo, California.
Service Type/Location: Grounds Maintenance, Port Isabel Detention Center, 27991 Buena Vista Road, Los Fresnos, Texas.
NPA: Mavagi Enterprises, Inc., San Antonio, Texas.
Contracting Activity: DHS Immigration and Customs Enforcement, Dallas, Texas.

Deletions

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action may result in additional reporting, recordkeeping or other compliance requirements for small entities.
2. If approved, the action may result in authorizing small entities to furnish the products and services to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and services proposed for deletion from the Procurement List.

End of Certification

The following products and services are proposed for deletion from the Procurement List:

Products

Product/NSN: Binder, Note Pad.
7510–00–NIB–0195.
NPA: New York City Industries for the Blind, Inc., Brooklyn, New York.
NPA: ForSight Vision, York, Pennsylvania.
Contracting Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.
Product/NSN: Card Set, Guide, File.
7530–01–175–1553.
NPA: Georgia Industries for the Blind, Bainbridge, GA.
Contracting Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.
Product/NSN: Case, Carrying.
1220–00–765–5870.
1220–00–937–8286.
NPA: Arizona Industries for the Blind, Phoenix, Arizona.
Contracting Activity: U.S. Army Field Artillery Center & Fort Sill, Fort Sill, Oklahoma.
Product/NSN: Chock Wheel.
1730–00–NIB–001A (2″ x 4″ x 8″).
1730–00–NIB–001B (6″ x 8″ x 18″).
1730–00–NIB–001C (6″ x 8″ x 76″).
1730–00–NIB–001D (8″ x 12″).
1730–00–NIB–001E (10″ x 20″).
NPA: The Oklahoma League for the Blind, Oklahoma City, Oklahoma.
Contracting Activity: Defense Supply Center Richmond, Richmond, Virginia.
Product/NSN: Detergent, General Purpose.
7930–01–055–6122.
NPA: Lighthouse for the Blind of Houston, Houston, Texas.
Contracting Activity: GSA, Southwest Supply Center, Fort Worth, Texas.
Product/NSN: Inking Pad, Rubber Stamp.
7510–01–431–6515.
NPA: Cattaraugus County Chapter, NYSARC, Olean, New York.
Contracting Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.
Product/NSN: Insert, Foam, Laminated.
8135–00–NSH–0004.
NPA: Goodwill Industries of the Columbia Willamette, Portland, Oregon.
Contracting Activity: Bureau of the Mint, Department of the Treasury, Washington, DC.
Product/NSN: Splint, Pneumatic.
6515–00–935–6592.
6515–00–935–6593.
NPA: The Lighthouse for the Blind, Inc. (Seattle Lighthouse), Seattle, Washington.
Contracting Activity: Defense Supply Center Philadelphia, Philadelphia, Pennsylvania.

Services

Service Type/Location: Custodial Services, U.S. Border Patrol Station, U.S. Customs House, I–29 at Canadian Border, Pembina, North Dakota.
NPA: The Home Place Corporation, Grand Forks, North Dakota.
Contracting Activity: GSA, PBS Region 8, Denver, Colorado.
Service Type/Location: Parts Sorting, McClellan, California.
NPA: PRIDE Industries, Inc., Roseville, California.
Contracting Activity: Department of the Air Force.

G. John Heyer,
General Counsel.
[FR Doc. E6–11617 Filed 7–20–06; 8:45 am]
BILLING CODE 6353–01–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Notice

DATE AND TIME: Friday, July 28, 2006. 9:30 a.m.

PLACE: U.S. Commission on Civil Rights, 624 9th Street, NW., Room 540, Washington, DC 20425.

STATUS:

Briefing Agenda

Commission Briefing: The Benefits of Diversity in Elementary and Secondary Education.
- Introductory Remarks by Chairman.
- Speaker's Presentations.
- Questions by Commissioners and Staff Director.

Agenda

I. Approval of Agenda.
II. Approval of Minutes of July 5, 2006 Meeting.
III. Announcements.
IV. Staff Director's Report.
V. Program Planning.
- Motion to Keep the Record Open on the Briefing on the Benefits of Diversity in Elementary and Secondary Education.
- Proposed Briefing on the United States Naval Academy's Use of Religious and Racial Preferences in Placement of Cadets with Local Sponsors.
- Briefing Report on Campus Anti-Semitism.
- Proposal Poster for Campus Anti-Semitism Public Education Campaign.

VI. Management and Operations
- Fiscal Year 2008 Budget.
- Strategic Planning.
- Proposed Policy for Commissioner Evaluation of Draft Report.
- Proposed Policy of Peer Review for Draft Reports.
- Proposed Regulation on Outside Employment.

VII. State Advisory Committee Issues.
- Recharter Package for the Connecticut State Advisory Committee.
- Recharter Package for the California State Advisory Committee.

VIII. Future Agenda Items.

FOR FURTHER INFORMATION CONTACT: Audrey Wright, Office of the Staff Director, (202) 376–7700.

David P. Blackwood,

General Counsel.

[FR Doc. 06–6407 Filed 7–19–06; 9:12 am]

BILLING CODE 6335–01–M

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 060505121–6121–01]

Establishment of Advisory Committee and Clarification of Deemed Export-Related Regulatory Requirements

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Notice; extension.

SUMMARY: The Bureau of Industry and Security publishes this notice to extend the recruitment period on the Deemed Export Advisory Committee (DEAC). The original solicitation for this Federal Advisory Committee was published in the **Federal Register** on May 22, 2006. The DEAC will review and provide recommendations to the Department of Commerce on deemed export policy. The new deadline to respond to this recruitment notice is July 28, 2006.

DATES: Resumes must be received by July 28, 2006.

ADDRESSES: You may submit resumes to Ms. Yvette Springer by any of the following methods:

- E-mail to *Yspringer@bis.doc.gov.* Include "DEAC application" in the subject line of the message.
- *Fax:* 202–482–2927. Include "DEAC application" in the subject line of the message.
- *Mail or Hand Delivery/Courier:* U.S. Department of Commerce, Bureau of Industry and Security, Outreach and Education Services Division, 14th & Pennsylvania Avenue, NW., Room 1099D, Washington, DC 20230, ATTN: Ms. Yvette Springer—DEAC application.

FOR FURTHER INFORMATION CONTACT: Alex Lopes, Director, Deemed Exports and Electronics Division, Bureau of Industry and Security, Telephone: (202) 482–4875, or e-mail: *alopes@bis.doc.gov.*

SUPPLEMENTARY INFORMATION: The Bureau of Industry and Security publishes this notice to extend the recruitment period on the Deemed Export Advisory Committee (DEAC) from July 21, 2006 to July 28, 2006. The original solicitation for this Federal Advisory Committee was published in the **Federal Register** on May 22, 2006 (71 FR 29301). The purpose of the DEAC will be to review and provide recommendations to the Department of Commerce on deemed export policy.

The DEAC, which will not exceed 12 members, will be structured to ensure a balanced membership that will offer a comprehensive point of view on the complex technical and policy questions at issue. The advisory committee will consist of representatives from industry, academia, and other experts in the field to ensure a full discussion of all aspects of deemed exports and knowledge transfer from the corporate, academic, and national security perspectives. Members will be called upon to advise BIS on highly technical issues surrounding technology transfer and to help ensure that BIS effectively carries out its critical national security function. To that end, the DEAC shall have a diverse membership with expertise in national security affairs, scientific research and development (R&D) policy, and the various forms of technology subject to the EAR, such as nuclear, chemical, missile, electronics, computer, telecommunications, and avionic technology.

DEAC members will be appointed by the Secretary of Commerce and serve a term of not more than one year. DEAC members must obtain a secret security clearance prior to appointment. These clearances are necessary so that members may be permitted access to the classified information needed to formulate recommendations to the Department of Commerce. The DEAC will convene as appropriate, but in no case less than quarterly.

Dated: July 18, 2006.

Matthew Borman,

Deputy Assistant Secretary of Commerce for Export Administration.

[FR Doc. E6–11625 Filed 7–20–06; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Technical Advisory Committees; Notice of Recruitment of Private-Sector Members

Summary: Six Technical Advisory committees (TACs) advise the Department of Commerce on the technical parameters for export controls applicable to dual-use commodities and technology and on the administration of those controls. The TACs are composed of representatives from industry and Government representing diverse points of view on the concerns of the exporting community. Industry representatives are selected from firms producing a broad range of goods, technologies, and software presently controlled for national security, non-proliferation, foreign policy, and short supply reasons or that are proposed for such controls, balanced to the extent possible among large and small firms.

TAC members are appointed by the Secretary of Commerce and serve terms of not more than four consecutive years. The membership reflects the Department's commitment to attaining balance and diversity. TAC members must obtain secret-level clearances prior to appointment. These clearances are necessary so that members may be permitted access to the classified information needed to formulate recommendations to the Department of Commerce. Each TAC meets approximately 4 times per year. Members of the Committees will not be compensated for their services.

The six TACs are responsible for advising the Department of Commerce on the technical parameters for export controls and the administration of those controls within the following areas: Information Systems TAC: Control List Categories 3 (electronics), 4 (computers), and 5 (telecommunications and information security); Materials TAC: Control List Category 1 (materials, chemicals, microorganisms, and toxins); Materials Processing Equipment TAC: Control List Category 2 (materials processing); Regulations (EAR) and procedures for implementing the EAR; Sensors and Instrumentation TAC: Control List Category 6 (sensors and lasers); Transportation and Related Equipment TAC: Control List Categories 7 (navigation and avionics), 8 (marine), and 9 (propulsion systems, space vehicles, and related equipment). To respond to this recruitment notice, please send a copy of your resume to Ms. Yvette Springer at *Yspringer@bis.doc.gov.*

Deadline: This Notice of Recruitment will be open for one year from its date of publication in the **Federal Register.**

For Further Information Contact: Ms. Yvette Springer on (202) 482–4814.

Dated: July 18, 2006.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 06–6399 Filed 7–20–06; 8:45 am]

BILLING CODE 3510–JT–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–840]

Certain Frozen Warmwater Shrimp From India; Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* July 21, 2006.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood or Nichole Zink, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3874 or (202) 482–0049, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 1, 2006, the Department of Commerce (the Department) published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on certain frozen warmwater shrimp from India for the period August 4, 2004, through January 31, 2006. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 71 FR 5239 (Feb. 1, 2006). Between February 23, 2006, and February 28, 2006, in accordance with 19 CFR 351.213(b)(2), certain respondents requested a review of the antidumping duty order on certain frozen warmwater shrimp from India. In addition, on February 28, 2006, the petitioner[1] also requested an administrative review for numerous Indian exporters of subject merchandise in accordance with 19 CFR 351.213(b)(1).

In April 2006, the Department initiated an administrative review for 347 companies and we requested that each provide data on the quantity and value of its exports of subject merchandise to the United States during the period of review (POR). These companies are listed in the Department's notice of initiation. *See Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders on Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India and Thailand,* 71 FR 17819 (Apr. 7, 2006) (*Notice of Initiation*).

[1] The petitioner in this proceeding is the Ad Hoc Shrimp Trade Action Committee.

Between March 29, 2006, and July 6, 2006, the requests for administrative review were withdrawn for 268 companies, in accordance with 19 CFR 351.213(d)(1). These companies are: (1) Abad Fisheries (Abad); (2) Accelerated Freeze Drying Co., Ltd. (Accelerated I); (3) Accelerated Freeze-drying Co. (Accelerated II); (4) Adani Exportse (Adani); (5) Aditya Udyog (Aditya); (6) Agri Marine Exports Ltd. (Agri Marine); (7) AL Mustafa Exp & Imp (AL Mustafa); (8) Alapatt Marine Exports (Alapatt); (9) Alfuzz Frozen Foods Pvt. Ltd. (Alfuzz); (10) Allana Frozen Foods Pvt. Ltd. (Allana); (11) All Seas Marine P. Ltd. (All Seas); (12) Alsa Marine & Harvests Ltd. (Alsa); (13) Ameena Enterprises (Ameena); (14) AMI Enterprises (AMI); (15) Ananda Aqua Exports Private Limited (Ananda I); (16) Ananda Foods (Ananda II); (17) Andaman Seafoods Pvt. Ltd. (Andaman); (18) Anjaneya Seafoods (Anjaneya); (19) Anjani Marine Traders (Anjani); (20) Apex Exports (Apex); (21) Aqua Star Marine Foods (Aqua); (22) Arsha Seafood Exports Pvt. Ltd (Arsha); (23) A.S Marine Industries Pvt Ltd. (A.S Marine); (24) ASF Seafoods (ASF); (25) Ashwini Frozen Foods (Ashwini); (26) Asvini Exports (Asvini I); (27) Asvini Fisheries (Asvini II); (28) Asvini Fisheries Limited (Asvini III); (29) Asvrm Fisheries Ltd. (Asvrm); (30) Aswin Associates (Aswin); (31) Atta Export (Atta); (32) Avanti Feeds Limited (Avanti); (33) Baby Marine Sarass; (34) Bell Foods (Marine Division) (Bell); (35) Bengal Marine Pvt. Ltd. (Bengal); (36) Bharat Seafoods (Bharat); (37) Bhavani Seafoods (Bhavani); (38) Bhisti Exports (Bhisti); (39) Bijaya Marine Products (Bijaya); (40) Bilal Fish Suppliers (Bilal); (41) Bluefin Enterprises (Bluefin); (42) Bluepark Seafoods P. Ltd. (Bluepark); (43) Blue Water Foods & Exports P. Ltd. (Blue Water); (44) BMR Exports (BMR); (45) Brilliant Exports (Brilliant); (46) Britto Exports (Britto); (47) Capital Freezing Complex (Capital); (48) Capithan Exporting Co. (Capithan); (49) Castlecrock Seafoods Ltd. (Castlecrock); (50) Central Calcutta Cold Storage (Central Calcutta); (51) Cham Exports Ltd. (Cham I); (52) Cham Ocean Treasures Co., Ltd. (Cham II); (53) Cham Trading Organization (Cham III); (54) Chand International (Chand); (55) Chemmeens (Regd) (Chemmeens); (56) Choice Trading Corporation Pvt. Ltd. (Choice I); (57) Choice Canning Company (Choice II); (58) Corlim Marine Exports Pvt. Ltd (Corlim); (59) C P Aquaculture (India) Ltd. (C P Aquaculture); (60) Danda Fisheries (Danda); (61) Dariapur Aquatic Pvt. Ltd (Dariapur); (62) Deepmala Marine Exports (Deepmala); (63) Devi Fisheries Limited (Devi I); (64) Devi Seafoods Limited (Devi II); (65) Devi Seafoods Pvt. Ltd. (Devi III); (66) Dhanamjaya Irnpex P. Ltd (Dhanamjaya); (67) Diamond Seafoods Exports (Diamond); (68) Digha Seafood Exports (Digha); (69) Dorothy Foods (Dorothy); (70) Edhayam Frozen Foods Pvt. Ltd. (Edhayam); (71) EI-Te Marine Products (EI-Te); (72) Esmorio Export Enterprises (Esmorio); (73) Excel Ice Services/Chirag Int'l (Excel); (74) Exporter Coreline Exports; (75) Fernando Intrcontinental (Fernando); (76) Firoz & Company (Firoz); (77) Five Star Marine Exports (Five Star I); (78) Five Star Marine Exports Private Limited (Five Star II); (79) Forstar Frozen Foods Pvt. Ltd. (Forstar); (80) Freeze Engineering Industries (Pvt. Ltd.) (Freeze); (81) Frigerio Conserva Allana Limited (Frigerio); (82) Frontline Exports Pvt. Ltd. (Frontline); (83) G A Randerian Ltd (G A); (84) Gadre Marine Exports (Gadre); (85) Galaxy Maritech Exports P. Ltd. (Galaxy); (86) Gausia Cold Stoiage P. Ltd (Gausia); (87) Gayathri Seafoods (Gayathri); (88) Geo Aquatic Products (P) Ltd. (Geo Aquatic); (89) Geo Seafoods; (90) G.K S Business Associates Pvt. Ltd. (G.K S); (91) Goan Bounty; (92) Gold Farm Foods (P) Ltd (Gold); (93) Golden Star Cold Stoiage (Golden); (94) Gopal Seafoods; (95) Grandtrust Overseas (P) Ltd. (Grandtrust); (96) Gtc Global Ltd (Gtc); (97) GVR Exports (GVR I); (98) GVR Exports Pvt. Ltd. (GVR II); (99) Hanjar Ice and Cold Storage (Hanjar); (100) Hanswati Exports P. Ltd (Hanswati); (101) HIC ABF Special Foods Pvt. Ltd. (HIC ABF); (102) Hiravata Ice & Cold Storage (Hiravata); (103) Hiravati Exports Pvt. Ltd. (Hiravati I); (104) Hiravati International P. Ltd (Hiravati II); (105) HMG Industries Ltd (HMG); (106) Honest Frozen Food Company (Honest); (107) I Ahamed & Company (I Ahamed); (108) India Seafoods (India); (109) Indian Aquatic Products (Indian I); (110) Indian Seafood Corporation (Indian II); (111) Indo Aquatics; (112) Interfish; (113) International Freezefish Exports (International Freezefish); (114) Interseas; (115) Jagadeesh Marine Exports (Jagadeesh); (116) Jaya Lakshmi Sea Foods Pvt. Ltd. (Jaya Lakshmi I); (117) Jaya Saya Marine Exports (Jaya Satya); (118) Jayalakshmi Seafoods (P) Ltd. (Jaya Lakshmi II); (119) Jinny Marine Traders (Jinny Marine); (120) J R K Seafoods Pvt. Ltd. (J R K); (121) Kaushalya Aqua Marine Product Exports Pvt. Ltd. (Kaushalya); (122) Kay Kay Exports (Kay Kay); (123) Keshodwala Foods (Keshodwala); (124) Key Foods (Key); (125) King Fish Industries (King Fish); (126) KNR

Marine Exports (KNR); (127) Koluthara Exports Ltd. (Koluthara); (128) Konkan Fisheries Pvt. Ltd. (Konkan); (129) KR.M. Marine Exports (K.R.M.); (130) K. V Marine Exports (K. V Marine); (131) Lakshmi Marine Products (Lakshmi); (132) Lansea Foods Pvt. Ltd. (Lansea); (133) Laxmi Narayan Exports (Laxmi); (134) Lewis Natural Foods Ltd. (Lewis Natural); (135) Libran Cold Storages (P) Ltd (Libran); (136) L.G Seafoods; (137) Lourde Exports (Lourde); (138) Malabar Marine Exports (Malabar); (139) Malnad Exports Pvt. Ltd. (Malnad); (140) Mamta Cold Storage (Mamta); (141) Marina Marine Exports (Marina); (142) Marine Food Packers (Marine); (143) Markoorlose Sea Foods (Markoorlose); (144) Meenaxi Fisheries Pvt. Ltd. (Meenaxi); (145) Miki Exports International (Miki); (146) M K Exports (M K); (147) M.R.H. Trading Company (M.R.H.); (148) Msngr Aqua Intl (Msngr); (149) Mumbai Kamgar MGSM Ltd (Mumbai); (150) Naga Hanuman Fish Packers (Naga Hanuman); (151) Naik Ice & Cold Storage (Naik I); (152) Naik Seafoods Ltd (Naik II); (153) Nas Fisheries Pvt Ltd (Nas); (154) National Seafoods Company (National); (155) N.C Das & Company (N.C); (156) Nekkanti Sea Foods Limited (Nekkanti); (157) New Royal Frozen Foods (New Royal); (158) Noble Aqua Pvt. Ltd (Noble); (159) Noorani Exports Pvt. Ltd. (Noorani); (160) Omsons Marines Ltd. (Omsons); (161) Overseas Marine Export (Overseas); (162) Padmaja Exports (Padmaja); (163) Partytime Ice Pvt Ltd (Partytime); (164) Philips Foods India Pvt Ltd (Philips); (165) Pijikay International Exports P Ltd (Pijikay); (166) Pisces Seafood International (Pisces); (167) Premier Exports International (Premier I); (168) Premier Seafoods Exim (P) Ltd. (Premier II); (169) Pronto Foods Pvt. Ltd. (Pronto); (170) Rahul Foods (GOA) (Rahul I); (171) Rahul International (Rahul II); (172) Raj International (Raj); (173) Ramalmgeswara Proteins & Foods Ltd (Ramalmgeswara); (174) Rameshwar Cold Storage (Rameshwar); (175) Raunaq Ice & Cold Storage (Raunaq); (176) Ravi Frozen Foods Ltd (Ravi); (177) Raysons Aquatics Pvt. Ltd. (Raysons); (178) Razban Seafoods Ltd. (Razban); (179) RBT Exports (RBT); (180) Reddy & Reddy Importers & Exports (Reddy & Reddy); (181) Regent Marine Industries (Regent); (182) Relish Foods (Relish); (183) Riviera Exports Pvt. Ltd. (Riviera); (184) R K Ice & Cold Storage (R K); (185) Rohi Marine Private Ltd. (Rohi); (186) Royal Cold Storage India P Ltd. (Royal I); (187) Royal Link Exports (Royal II); (188) Rubian Exports (Rubian); (189) Ruby Marine Foods (Ruby); (190) Ruchi Worldwide (Ruchi); (191) RVR Marine Products (RVR); (192) S A Exports (S A); (193) S&S Seafoods (S&S); (194) Sabri Food Products (Sabri); (195) Safa Enterprises (Safa); (196) Sagar Foods; (197) Sagar Grandhi Exports Pvt. Ltd. (Sagar Grandhi); (198) Sagar Samrat Foods (Sagar Samrat); (199) Sagrvihar Fisheries Pvt. Ltd., 9 (Sagrvihar); (200) Sai Marine Exports Pvt. Ltd. (Sai); (201) Salet Seafoods Pvt Ltd (Salet); (202) Samrat Middle East Exports (P) Ltd (Samrat); (203) Sanchita Marine Products P Ltd. (Sanchita); (204) Sandhya Marines Limited (Sandhya); (205) Santhi Fisheries & Exports Ltd. (Santhi); (206) Sarveshwari Ice & Cold Storage P Ltd. (Sarveshwari); (207) Satya Seafoods Private Limited (Satya); (208) Satyam Marine Exports (Satyam); (209) Sawant Food Products (Sawant); (210) S B Agro (India) Ltd. (S B Agro); (211) S Chanchala Combines (S Chanchala); (212) Sea Rose Marines (P) Ltd (Sea Rose); (213) Sealand Fisheries Ltd (Sealand); (214) Seaperl Industries (Seaperl); (215) Selvam Exports Private Limited (Selvam); (216) Sheimar Seafoods Ltd (Sheimar); (217) Sharon Exports (Sharon); (218) Shimpo Exports (Shimpo); (219) Shipper Exporter National Steel; (220) Shivaganga Marine Products (Shivaganga); (221) Shroff Processed Food & Cold ZStorage P Ltd. (Shroff); (222) Siddiq Seafoods (Siddiq); (223) Silver Seafood (Silver); (224) Sita Marine Exports (Sita); (225) S K Exports (P) Ltd (S K); (226) Skyfish; (227) SLS Exports Pvt. Ltd. (SLS); (228) Sonia Fisheries (Sonia); (229) Sourab; (230) Sprint Exports (Sprint); (231) Sree Vaialakshrm Exports (Sree); (232) Sreevas Export Enterprises (Sreevas); (233) Sri Satya Marine Exports (Sri Satya); (234) Sri Sidhi Freezers & Exporters Pvt. Ltd (Sri Sidhi); (235) Sri Venkata Padmavathi Marine Foods Pvt. Ltd. (Sri Venkata); (236) SSFLtd; (237) S S International (S S); (238) Star Agro Marine Exports Private Limited (Star Agro); (239) Star Fish Exports (Star Fish); (240) Sterling Foods (Sterling); (241) Surya Marine Exports (Surya); (242) Supreme Exports (Supreme); (243) Swama Seafoods Ltd (Swama); (244) TBR Exports Pvt Ltd (TBR); (245) Teekay Maine P. Ltd. (Teekay); (246) The Canning Industries (Cochin) Ltd. (The Canning); (247) The Waterbase Ltd. (Waterbase I); (248) Theva & Company (Theva); (249) Tim Tim Far East Export Trading Co. (P) Ltd. (Tim Tim); (250) Tony Harris Seafoods Ltd (Tony); (251) Tri Marine Foods Pvt. Ltd (Tri Marine); (252) Trinity Exports; (253) Tri-Tee Seafood Company (Tri-Tee); (254) Ulka Seafoods (P) Ltd. (Ulka); (255) Upasana Exports (Upasana); (256) Usha Seafoods (Usha); (257) Varnta Cold Storage (Varnita); (258) Veraval Marines & Chemicals P Ltd (Veraval); (259) Vijayalaxmi Seafoods (Vijayalaxmi); (260) Vinner Marine (Vinner); (261) V Marine Exports (V Marine); (262) V.S Exim Pvt Ltd. (V.S); (263) Waterbase (Waterbase II); (264) Wellcome Fisheries Limited (Wellcome I); (265) Wellcome Fisheries (P) Ltd. (Wellcome II); (266) Winner Seafoods (Winner); (267) Wisdom Marine Exports (Wisdom); and (268) Z A. Food Products (Z A.). Section 351.213(d)(1) of the Department's regulations requires that the Secretary rescind an administrative review if a party requesting a review withdraws the request within 90 days of the date of publication of the notice of initiation. Therefore, because all requests for administrative reviews were timely withdrawn for the companies listed above, in accordance with 19 CFR 351.213(d)(1), we are rescinding this review with regard to these companies.

In addition, from April through June 2006, the Department received information that the *Notice of Initiation* contained duplicate company names for five entities. Specifically, we received requests for review of four of these companies from both the petitioner and the respondent with variations: (1) Devi Marine Food Exports Ltd. and Devi Marine Food Exports Private Limited; (2) Kader Exports and Kader Exports Private Limited; (3) Magnum Estate Private and Magnum Estate Private Limited; and (4) Manufacturer Falcon Marine Exports and Falcon Marine Exports Limited. For a fifth company, the petitioner requested a review of the company twice: Navyauga Exports and Navayuga Exports Ltd. We have received information on the record of this proceeding showing that: (1) These company-name variation pairs refer to the same companies; and (2) the correct legal names for these companies are Devi Marine Food Exports Private Limited; Kader Exports Private Limited; Magnum Estate Private Limited; Falcon Marine Exports Limited; and Navayuga Exports Ltd. We clarify that we will include these companies in our administrative review only once. Therefore, because the companies identified above will be included in this administrative review and because keeping the incorrect company names with the list of companies included in this administrative review creates administrative difficulties, we are rescinding the review of "Devi Marine Food Exports Ltd.", "Kader Exports", "Magnum Estate Private", "Manufacturer Falcon Marine Exports", and "Navyauga Exports".

In June 2006, the Department also received information indicating that one of the companies named in the *Notice of Initiation* is now doing business under a different name. This company is Surya Marine Exports/Suryamitra Exim Pvt. Ltd. Therefore, in order to determine whether this company is subject to this proceeding, the Department must make a successor-in-interest finding with respect to it. We intend to make such a finding no later than the preliminary results in this case.

Partial Rescission of Review

As noted above, the petitioner and certain respondents withdrew their requests for an administrative review for the following companies within the time limits set forth in 19 CFR 351.213(d)(1): Abad; Accelerated I; Accelerated II; Adani; Aditya; Agri Marine; AL Mustafa; Alapatt; Alfuzz; Allana; AMI; All Seas; Alsa; Ameena; Ananda I; Ananda II; Andaman; Anjaneya; Anjani; Apex; Aqua; Arsha; A.S Marine; ASF; Ashwini; Asvini I; Asvini II; Asvini III; Asvrm; Aswin; Atta; Avanti; Baby Marine Sarass; Bell; Bengal; Bharat; Bhavani; Bhisti; Bijaya; Bilal; Bluefin; Bluepark; Blue Water; BMR; Brilliant; Britto; Capital; Capithan; Castlecrock; Central Calcutta; Cham I; Cham II; Cham III; Chand; Chemmeens; Choice I; Choice II; Corlim; C P Aquaculture; Danda; Dariapur; Deepmala; Devi I; Devi II; Devi III; Dhanamjaya; Diamond; Digha; Dorothy; Edhayam; El-Te; Esmorio; Excel; Exporter Coreline Exports; Fernando; Firoz; Five Star I; Five Star II; Forstar; Freeze; Frigerio; Frontline; G A; Gadre; Galaxy; Gausia; Gayathri; Geo Aquatic; Geo Seafoods; G.K S; Goan Bounty; Gold; Golden; Gopal Seafoods; Grandtrust; Gtc; GVR I; GVR II; Hanjar; Hanswati; HIC ABF; Hiravata; Hiravati I; Hiravati II; HMG; Honest; I Ahamed; India; Indian I; Indian II; Indo Aquatics; Interfish; International Freezefish; Interseas; Jagadeesh; Jaya Lakshmi I; Jaya Satya; Jaya Lakshmi II; Jinny Marine; J R K; Kaushalya; Kay Kay; Keshodwala; Key; King Fish; KNR; Koluthara; Konkan; K.R.M.; K.V Marine; Lakshmi; Lansea; Laxmi; Lewis Natural; L.G Seafoods; Libran; Lourde; Malabar; Malnad; Mamta; Marina; Marine; Markoorlose; Meenaxi; Miki; M K; M.R.H.; Msngr; Mumbai; Naga Hanuman; Naik I; Naik II; Nas; National; N.C; Nekkanti; New Royal; Noble; Noorani; Omsons; Overseas; Padmaja; Partytime; Philips; Pijikay; Pisces; Premier I; Premier II; Pronto; Rahul I; Rahul II; Raj; Ramalmgeswara; Rameshwar; Raunaq; Ravi; Raysons; Razban; RBT; Reddy & Reddy; Regent; Relish; Riviera; R K; Rohi; Royal I; Royal II; Rubian; Ruby; Ruchi; RVR; S A; S & S Sabri; Safa; Sagar Foods; Sagar Grandhi; Sagar Samrat; Sagrvihar; Sai; Salet; Samrat; Sanchita; Sandhya; Santhi; Sarveshwari; Satya; Satyam; Sawant; S B Agro; S Chanchala; Sea Rose; Sealand; Seaperl; Selvam; Sheimar; Sharon; Shimpo; Shipper Exporter National Steel; Shivaganga; Shroff; Siddiq; Silver; Sita; S K; Skyfish; SLS; Sonia; Sourab; Sprint; Sree; Sreevas; Sri Satya; Sri Sidhi; Sri Venkata; SSFLtd; S S; Star Agro; Star Fish; Sterling; Surya; Supreme; Swarna; TBR; Teekay; The Canning; Theva; Tim Tim; Tony; Tri Marine; Trinity Exports; Tri-Tee; Ulka; Upasana; Usha; Varnita; Veraval; Vijayalaxmi; Vinner; V Marine; V.S; Waterbase I; Waterbase II; Wellcome I; Wellcome II; Winner; Wisdom; and Z A. Therefore, because no other interested party requested a review for these companies, in accordance with 19 CFR 351.213(d)(1), we are rescinding this review with respect to these companies.

Additionally, as noted above, we are rescinding the review of "Devi Marine Food Exports Ltd.", "Kader Exports", "Magnum Estate Private", "Manufacturer Falcon Marine Exports", and "Navyauga Exports".

This notice is published in accordance with section 751 of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: July 17, 2006.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 06–6380 Filed 7–20–06; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

International Trade Administration

A–533–808

Stainless Steel Wire Rods from India: Notice of Court Decision Not in Harmony

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On July 7, 2006, the United States Court of International Trade (CIT) affirmed the Department of Commerce's (the Department's) redetermination on remand of the final results of the antidumping duty administrative review on stainless steel wire rods from India. See *Carpenter Technology, Corp. v. United States and Viraj Group*, Slip Op. 06–102 (CIT July 7, 2006). The Department is now issuing this notice of court decision not in harmony.

EFFECTIVE DATE: July 21, 2006.

FOR FURTHER INFORMATION CONTACT: John Holman or Minoo Hatten, AD/CVD Operations, Office 5, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3683 or (202) 482–1690, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 29, 2002, the Department published the final results of administrative review of the antidumping duty order on stainless steel wire rods from India for the period December 1, 1999, through November 30, 2000. See *Stainless Steel Wire Rods from India; Final Results of Antidumping Duty Administration Review*, 67 FR 37391 (May 29, 2002) (*Final Results*). In the underlying administrative review the Department collapsed Viraj Forgings Limited (VFL), Viraj Impoexpo Limited (VIL), and Viraj Alloys Limited (VAL). See *Final Results* and accompanying Issues and Decision Memorandum at Comment 1 and *Collapsing Memorandum of the Viraj Group, Limited*, dated December 31, 2001 (*Collapsing Memo*). Carpenter Technology Corporation (the Petitioner) contested the collapsing of these companies.

On August 16, 2004, the CIT issued a decision remanding one aspect of the *Final Results*, the collapsing of three of the Viraj companies. The CIT ordered the Department, "in the absence of any agency showing herein that dispels this logic based upon substantial evidence on the record," to calculate and impose individual antidumping–duty margins upon VFL and VIL in the manner of the approach taken by the agency, and affirmed by the CIT, in *Viraj Group, Ltd. v. United States*, 162 F. Supp. 2d 656 (CIT 2001). On February 22, 2005, the Department filed the final results of its remand redetermination with the CIT. Due to the fact that only VFL and VIL made sales to the United States during the period of review, we did not include VAL's sales or cost data in our revised margin analyses for VFL and VIL. On July 7, 2006, the CIT affirmed the Department's final results of redetermination pursuant to remand.

The changes to our calculations with respect to VFL and VIL resulted in a weighted–average margin of 1.29 percent for VFL and a weighted–average margin of 3.77 percent for VIL for the period of review. Accordingly, absent an appeal, or, if appealed, upon a "conclusive" decision by the Court of Appeals for the Federal Circuit (CAFC)

which is consistent with the CIT's decision, we will amend our final results of these reviews to reflect the recalculation of margins for VFL and VIL.

Suspension of Liquidation

The CAFC has held that the Department must publish notice of a decision of the CIT or the CAFC which is not in harmony with the Department's determination. See *Timken Company v. United States*, 893 F.2d 337, 341 (CAFC 1990). Publication of this notice fulfills that obligation. The CAFC also held that, in such a case, the Department must suspend liquidation until there is a "conclusive" decision in the action. *Id.* Therefore, the Department must suspend liquidation pending the expiration of the period to appeal the CIT's July 7, 2006, decision affirming the Department's remand results or pending a final decision of the CAFC if that decision is appealed.

The Department will not order the lifting of the suspension of liquidation on entries of stainless steel wire rods during the review period before a court decision in this lawsuit becomes final and conclusive.

We are issuing and publishing this notice in accordance with section 516A(c)(1) of the Act.

Dated: July 17, 2006.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E6–11626 Filed 7–20–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–854]

Certain Tin Mill Products from Japan: Continuation of Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (the Department) and the International Trade Commission (ITC) that revocation of the antidumping duty order on certain tin mill products from Japan would be likely to lead to continuation or recurrence of dumping and of material injury to an industry in the United States within a reasonably foreseeable time, the Department is publishing notice of the continuation of this antidumping duty order.

EFFECTIVE DATE: July 21, 2006.

FOR FURTHER INFORMATION CONTACT: Stephen Bailey, Office 7, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0193.

SUPPLEMENTARY INFORMATION:

Background

On July 1, 2005, the Department initiated and the ITC instituted a sunset review of the antidumping duty order on tin mill products from Japan pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). *See Initiation of Five-year ("Sunset") Reviews*, 70 FR 38101 (July 1, 2005). As a result of its review, the Department found that revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping and notified the ITC of the magnitude of the margins likely to prevail were the order to be revoked. *See Certain Tin Mill Products from Japan; Final Results of the Expedited Sunset Review of the Antidumping Duty Order*, 70 FR 67448 (November 7, 2005). On June 13, 2006, the ITC determined, pursuant to section 751(c) of the Act, that revocation of the antidumping duty order on tin mill products from Japan would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See Tin- and Chromium–Coated Steel Sheet From Japan*, 71 FR 37944 (July 3, 2006), and ITC Publication 3860 (June 2006), entitled Tin- and Chromium–Coated Steel Sheet From Japan: Investigation No. 731–TA–860 (Review).

Scope of the Order

The scope of this order includes tin mill flat–rolled products that are coated or plated with tin, chromium or chromium oxides. Flat–rolled steel products coated with tin are known as tin plate. Flat–rolled steel products coated with chromium or chromium oxides are known as tin–free steel or electrolytic chromium–coated steel. The scope includes all the noted tin mill products regardless of thickness, width, form (in coils or cut sheets), coating type (electrolytic or otherwise), edge (trimmed, untrimmed or further processed, such as scroll cut), coating thickness, surface finish, temper, coating metal (tin, chromium, chromium oxide), reduction (single–or double–reduced), and whether or not coated with a plastic material. All products that meet the written physical description are within the scope of this order unless specifically excluded. The following products, by way of example, are outside and/or specifically excluded from the scope of this order:- Single reduced electrolytically chromium coated steel with a thickness 0.238 mm (85 pound base box) (10%) or 0.251 mm (90 pound base box) (10%) or 0.255 mm (10%) with 770 mm (minimum width) (1.588 mm) by 900 mm (maximum length if sheared) sheet size or 30.6875 inches (minimum width) (1/16 inch) and 35.4 inches (maximum length if sheared) sheet size; with type MR or higher (per ASTM) A623 steel chemistry; batch annealed at T2 1/2 anneal temper, with a yield strength of 31 to 42 kpsi (214 to 290 Mpa); with a tensile strength of 43 to 58 kpsi (296 to 400 Mpa); with a chrome coating restricted to 32 to 150 mg/square meter; with a chrome oxide coating restricted to 6 to 25 mg/m with a modified 7B ground roll finish or blasted roll finish; with roughness average (Ra) 0.10 to 0.35 micrometers, measured with a stylus instrument with a stylus radius of 2 to 5 microns, a trace length of 5.6 mm, and a cut–off of 0.8 mm, and the measurement traces shall be made perpendicular to the rolling direction; with an oil level of 0.17 to 0.37 grams/base box as type BSO, or 2.5 to 5.5 mg/square meter as type DOS, or 3.5 to 6.5 mg/square meter as type ATBC; with electrical conductivity of static probe voltage drop of 0.46 volts drop maximum, and with electrical conductivity degradation to 0.70 volts drop maximum after stoving (heating to 400 degrees F for 100 minutes followed by a cool to room temperature).

- Single reduced electrolytically chromium- or tin–coated steel in the gauges of 0.0040 inch nominal, 0.0045 inch nominal, 0.0050 inch nominal, 0.0061 inch nominal (55 pound base box weight), 0.0066 inch nominal (60 pound base box weight), and 0.0072 inch nominal (65 pound base box weight), regardless of width, temper, finish, coating or other properties.
- Single reduced electrolytically chromium coated steel in the gauge of 0.024 inch, with widths of 27.0 inches or 31.5 inches, and with T–1 temper properties.
- Single reduced electrolytically chromium coated steel, with a chemical composition of 0.005% max carbon, 0.030% max silicon, 0.25% max manganese, 0.025% max phosphorous, 0.025% max sulfur, 0.070% max aluminum, and the balance iron, with a metallic chromium layer of 70–130 mg/square meter, with a chromium oxide layer of 5–30 mg/square meter, with a tensile strength of

260–440 N/square millimeter, with an elongation of 28–48%, with a hardness (HR–30T) of 40–58, with a surface roughness of 0.5–1.5 microns Ra, with magnetic properties of Bm (kg) 10.0 minimum, Br (kg) 8.0 minimum, Hc (Oe) 2.5–3.8, and Mu 1400 minimum, as measured with a Riken Denshi DC magnetic characteristic measuring machine, Model BHU–60.

- Bright finish tin–coated sheet with a thickness equal to or exceeding 0.0299 inch, coated to thickness of 3/4 pound (0.000045 inch) and 1 pound (0.00006 inch).
- Electrolytically chromium coated steel having ultra flat shape defined as oil can maximum depth of 5/64 inch (2.0 mm) and edge wave maximum of 5/64 inch (2.0 mm) and no wave to penetrate more than 2.0 inches (51.0 mm) from the strip edge and coilset or curling requirements of average maximum of 5/64 inch (2.0 mm) (based on six readings, three across each cut edge of a 24 inches (61 cm) long sample with no single reading exceeding 4/32 inch (3.2 mm) and no more than two readings at 4/32 inch (3.2 mm)) and (for 85 pound base box item only: crossbuckle maximums of 0.001 inch (0.0025 mm) average having no reading above 0.005 inch (0.127 mm)), with a camber maximum of 1/4 inch (6.3 mm) per 20 feet (6.1 meters), capable of being bent 120 degrees on a 0.002 inch radius without cracking, with a chromium coating weight of metallic chromium at 100 mg/square meter and chromium oxide of 10 mg/square meter, with a chemistry of 0.13% maximum carbon, 0.60% maximum manganese, 0.15% maximum silicon, 0.20% maximum copper, 0.04% maximum phosphorous, 0.05% maximum sulfur, and 0.20% maximum aluminum, with a surface finish of Stone Finish 7C, with a DOS–A oil at an aim level of 2 mg/square meter, with not more than 15 inclusions/foreign matter in 15 feet (4.6 meters) (with inclusions not to exceed 1/32 inch (0.8 mm) in width and 3/64 inch (1.2 mm) in length), with thickness/temper combinations of either 60 pound base box (0.0066 inch) double reduced CADR8 temper in widths of 25.00 inches, 27.00 inches, 27.50 inches, 28.00 inches, 28.25 inches, 28.50 inches, 29.50 inches, 29.75 inches, 30.25 inches, 31.00 inches, 32.75 inches, 33.75 inches, 35.75 inches, 36.25 inches, 39.00 inches, or 43.00 inches, or 85 pound base box (0.0094 inch) single reduced CAT4 temper in widths of 25.00 inches, 27.00 inches, 28.00 inches, 30.00 inches, 33.00 inches, 33.75 inches, 35.75 inches, 36.25 inches, or 43.00 inches, with width tolerance of 1/8 inch, with a thickness tolerance of 0.0005 inch, with a maximum coil weight of 20,000 pounds (9071.0 kg), with a minimum coil weight of 18,000 pounds (8164.8 kg) with a coil inside diameter of 16 inches (40.64 cm) with a steel core, with a coil maximum outside diameter of 59.5 inches (151.13 cm), with a maximum of one weld (identified with a paper flag) per coil, with a surface free of scratches, holes, and rust.
- Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents in the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.7 mg/square foot of chromium applied as a cathodic dichromate treatment, with coil form having restricted oil film weights of 0.3–0.4 grams/base box of type DOS–A oil, coil inside diameter ranging from 15.5 to 17 inches, coil outside diameter of a maximum 64 inches, with a maximum coil weight of 25,000 pounds, and with temper/coating/dimension combinations of: 1) CAT 4 temper, 1.00/.050 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 33.1875 inch ordered width; or 2) CAT5 temper, 1.00/0.50 pound/base box coating, 75 pound/base box (0.0082 inch) thickness, and 34.9375 inch or 34.1875 inch ordered width; or 3) CAT5 temper, 1.00/0.50 pound/base box coating, 107 pound/base box (0.0118 inch) thickness, and 30.5625 inch or 35.5625 inch ordered width; or 4) CADR8 temper, 1.00/0.50 pound/base box coating, 85 pound/base box (0.0093 inch) thickness, and 35.5625 inch ordered width; or 5) CADR8 temper, 1.00/0.25 pound/base box coating, 60 pound/base box (0.0066 inch) thickness, and 35.9375 inch ordered width; or 6) CADR8 temper, 1.00/0.25 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 32.9375 inch, 33.125 inch, or 35.1875 inch ordered width.
- Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents on the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.5 mg/square foot of chromium applied as a cathodic dichromate treatment, with ultra flat scroll cut sheet form, with CAT 5 temper with 1.00/0.10 pound/base box coating, with a lithograph logo printed in a uniform pattern on the 0.10 pound coating side with a clear protective coat, with both sides waxed to a level of 15–20 mg/216 sq. in., with ordered dimension combinations of 1) 75 pound/base box (0.0082 inch) thickness and 34.9375 inch x 31.748 inch scroll cut dimensions; or 2) 75 pound/base box (0.0082 inch) thickness and 34.1875 inch x 29.076 inch scroll cut dimensions; or 3) 107 pound/base box (0.0118 inch) thickness and 30.5625 inch x 34.125 inch scroll cut dimension.
- Tin–free steel coated with a metallic chromium layer between 100–200 mg/square meter and a chromium oxide layer between 5–30 mg/square meter; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon, 0.60% maximum manganese, 0.02% maximum phosphorous, and 0.02% maximum sulfur; magnetic flux density ("Br") of 10 kg minimum and a coercive force ("Hc") of 3.8 oe minimum.
- Tin–free steel laminated on one or both sides of the surface with a polyester film, consisting of two layers (an amorphous layer and an outer crystal layer), that contains no more than the indicated amounts of the following environmental hormones: 1 mg/kg BADGE (BisPhenol A Di–glycidyl Ether), 1 mg/kg BFDGE (BisPhenol F Di–glycidyl Ether), and 3 mg/kg BPA (BisPhenol -- A).

The merchandise subject to this order is classified in the Harmonized Tariff Schedule of the United States ("HTSUS"), under HTSUS subheadings 7210.11.0000, 7210.12.0000, 7210.50.0000, 7212.10.0000, and 7212.50.0000 if of non–alloy steel and under HTSUS subheadings 7225.99.0090, and 7226.99.0000 if of alloy steel. Although the subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive.

Determination

As a result of the determinations by the Department and ITC that revocation

of this antidumping duty order would be likely to lead to continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping duty order on certain tin mill products from Japan.

U.S. Customs and Border Protection will continue to collect antidumping duty cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of continuation of this order will be the date of publication in the **Federal Register** of this Notice of Continuation. Pursuant to sections 751(c)(2) and 751(c)(6) of the Act, the Department intends to initiate the next five-year review of this order not later than July 2011. These five-year (sunset) reviews and this notice are in accordance with section 751(c) of the Act.

Dated: July 17, 2006.

Joseph A. Spetrini,

Acting Assistant Secretaryfor Import Administration.

[FR Doc. E6–11623 Filed 7–20–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

C–423–806

Preliminary Results of Full Sunset Review: Cut–to-Length Carbon Steel Plate from Belgium

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On November 1, 2005, the Department of Commerce (the Department) initiated a sunset review of the countervailing duty (CVD) order on cut–to-length carbon steel plate from Belgium, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). On the basis of a notice of intent to participate and an adequate substantive response filed on behalf of the domestic interested parties and adequate responses from respondent interested parties, the Department determined to conduct a full sunset review of this CVD order pursuant to section 751(c) of the Act and 19 CFR 351.218(e)(2). As a result of our analysis, the Department preliminarily finds that revocation of the CVD order would be likely to lead to continuation or recurrence of a countervailable subsidy at the level indicated in the "Preliminary Results of Review" section of this notice.

EFFECTIVE DATE: July 21, 2006.

FOR FURTHER INFORMATION CONTACT: Martha Douthit or Sean Carey, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–5050 or (202) 482–3964, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 1, 2005, the Department initiated the second sunset review of the CVD order on cut–to-length carbon steel plate (CTL plate) from Belgium, pursuant to section 751(c) of the Act. *See Initiation of Five-year ("Sunset") Reviews*, 70 FR 65884 (November 1, 2005). The Department received notices of intent to participate from the following domestic interested parties: Oregon Steel Mills, IPSCO Steel Inc., Mittal Steel USA Inc., Nucor Corporation, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO-CLC (USW) (hereinafter, collectively domestic interested parties), within the deadline specified in 19 CFR 351.218(d)(1)(i). The domestic interested parties claimed interested party status under sections 771 (9)(C) and (D) of the Act, as domestic producers of CTL plate in the United States or as a certified union which is representative of an industry engaged in the manufacture, production, or wholesale of CTL plate in the United States. The Department received substantive responses from the domestic interested parties and the following respondent interested parties: the Government of Belgium (GOB), the European Union Delegation of the European Commission (the EC), Duferco Clabecq S.A. (Duferco), which purchased Forges de Clabecq S.A.(Clabecq), and Arcelor S.A., claiming to be the successor–in-interest to both Fabrique de Fer de Charleroi (Fafer)[1] and Cockerill Sambre (Cockerill).[2]

On December 21, 2005, the Department determined that the participation of the respondent interested parties was adequate, and that it was appropriate to conduct a full sunset review. *See* Memorandum to Steven J. Claeys, Deputy Assistant Secretary, Import Administration, Re: *Adequacy Determination; Sunset Review of the Countervailing Duty Order on Cut–to-Length Carbon Steel Plate from Belgium* dated December 21, 2005, and on file in CRU. On February 10, 2006, the Department extended the time limit for the preliminary and final results of the sunset review of the CVD order on CTL plate from Belgium. *See Cut–to-Length Carbon Steel Plate from Belgium, Sweden, and the United Kingdom; Extension of Time Limits for Preliminary and Final Results of Full Five-year ("Sunset") Reviews of Countervailing Duty Orders*, 71 FR 7017. The Department extended the preliminary results to no later than July 14, 2006, and the final results to no later than September 27, 2006.

Scope Of The Order

The product subject to this CVD order includes hot–rolled carbon steel universal mill plates (i.e., flat–rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 millimeters but not exceeding 1,250 millimeters and of a thickness of not less than 4 millimeters, not in coils and without patterns in relief), of rectangular shape, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances; and certain hot–rolled carbon steel flat–rolled products in straight lengths, of rectangular shape, hot rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 millimeters or more in thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the United States Harmonized Tariff Schedule ("HTS") under item numbers: 7208.31.0000, 7208.32.0000, 7208.33.1000, 7208.33.5000, 7208.41.0000, 7208.42.0000, 7208.43.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.11.0000, 7211.12.0000, 7211.21.0000, 7211.22.0045,

[1] In other proceedings under this order, Fafer has at times been referred to as "Fabfer."

[2] Although Duferco reported that it purchased Forges de Clabecq S.A., and Arcelor claims to be successor-in-interest to the other two original respondent companies, the Department has not made a determination in the past that Duferco and Arcelor are the successors-in-interest to the respective respondent companies and is not making such a determination in this sunset review. However, we have considered in this sunset review the historical information provided with respect to Duferco and Arcelor for purposes of our privatization and change-in-ownership analyses. *See* Memorandum to Stephen J. Claeys, Deputy Assistant Secretary, Import Administration, Re: *Sunset Review of Countervailing Duty Order on Cut-to-Length Carbon Steel Plate from Belgium; Analysis of Changes in Ownership*, dated concurrently with this notice and on file in the Central Records Unit, Room B-099 of the Department of Commerce building (CRU).

7211.90.0000, 7212.40.1000, 7212.40.5000, and 7212.50.5000. Included in this CVD order are flat–rolled products of non–rectangular cross-section where such cross-section is achieved subsequent to the rolling process (i.e., products which have been "worked after rolling")--for example, products which have been beveled or rounded at the edges. Excluded from this order is grade X–70 plate. The HTS item numbers are provided for convenience and customs purposes. The written description remains dispositive.

The Court of Appeals for the Federal Circuit found, in Duferco Steel, Inc. v. United States, 296 F.3d 1087 (July 12, 2002), that imported floor plate is excluded from this CVD order on steel plate.

Analysis Of Comments Received

All issues raised in this review are addressed in the Preliminary Issues and Decision Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration (*Preliminary Decision Memorandum*), dated concurrently with this notice and which is hereby adopted by this notice. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendation in this public memorandum which is on file in the Central Records Unit, room B–099 of the main Commerce building. In addition, a complete version of the *Preliminary Decision Memorandum* can be accessed directly on the Web at *http://ia.ita.doc.gov/frn*. The paper copy and electronic version of the *Preliminary Decision Memorandum* are identical in content.

Preliminary Results Of Review

The Department preliminarily determines that revocation of the CVD order would likely lead to continuation or recurrence of a countervailable subsidy. The net countervailable subsidy likely to prevail if the order were revoked is:

Producers/exporters	Net Countervailable Subsidy (percent)
Cockerill	2.82
Fafer	0.56
All others (including Clabecq)	0.50

Interested parties may submit case briefs and hearing requests no later than two weeks after the date of publication of these preliminary results, in accordance with 19 CFR 351.309(c)(1)(i) and 19 CFR 351.310(c). Rebuttal briefs, which must be limited to issues raised in the case briefs, may be filed not later than five days from the filing of the case briefs, in accordance with 19 CFR 351.309(d). If a hearing is requested, parties will be notified of the date, time and location. The Department will issue a notice of final results of this sunset review no later than September 27, 2006, which will include the results of its analysis of issues raised in any such comments.

We are issuing and publishing these preliminary results and notice in accordance with sections 751(c), 752, and 777(i)(1) of the Act.

Dated: July 14, 2006.

David M. Spooner,

Assistant Secretaryfor Import Administration.

[FR Doc. E6–11622 Filed 7–20–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 070306C]

Vessel Monitoring Systems; Mobile Transmitter Unit and Enhanced Mobile Transmitter Unit Reimbursement Program

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

ACTION: Notice of vessel monitoring systems reimbursement program.

SUMMARY: The National Marine Fisheries Service announces the availability of approximately $4.5 million in grant funds for fiscal year (FY) 2006 for vessel owners and/or operators who have purchased an Mobile Transmitter Unit (MTU) or Enhanced-Mobile Transmitter Unit (E-MTU) for the purpose of complying with fishery regulations requiring the use of Vessel Monitoring System (VMS) that became effective during FY 2006. The funds will be used to reimburse vessel owners and/or operators for the purchase price of the MTU or E-MTU. The maximum award per reimbursement is dependent upon the requirements of the applicable fishery management rule.

ADDRESSES: For a reimbursement application contact Pacific States Marine Fisheries Commission (PSMFC), 45 SE 82nd Drive, Suite 100, Gladstone, Oregon 97027–2522, phone 503–650–5300, fax 503–650–5426. To obtain copies of the list of NOAA-approved VMS mobile transmitting units and NOAA-approved VMS communications service providers write to: VMS Support Center, NOAA Fisheries Office for Law Enforcement (OLE), 8484 Georgia Avenue, Suite 415, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: For current listing information contact Mark Oswell, Outreach Specialist, phone 301–427–2300, fax 301–427–2055. For questions regarding MTU or E-MTU type approval or information regarding the status of VMS systems being evaluated by NOAA for approval, contact Jonathan Pinkerton, National VMS Program Manager, phone 301–427–2300; fax 301–427–2055. For questions regarding VMS installation or activation checklists, contact the VMS Support Center, NOAA Fisheries Office for Law Enforcement (OLE), 8484 Georgia Avenue, Suite 415, Silver Spring, MD 20910, phone 888–219–9228, fax 301–427–0049. For questions regarding reimbursement applications contact Randy Fisher, Executive Director, Pacific States Marine Fisheries Commission (PSMFC), 45 SE 82nd Drive, Suite 100, Gladstone, Oregon 97027–2522, phone 503–650–5300, fax 503–650–5426.

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

This reimbursement opportunity is available to fishing vessel owners and/or operators that have purchased MTU or E-MTU devices in order to comply with fishery regulations developed in accordance with the Magnuson-Stevens Fishery Conservation and Management Act(Manguson-Stevens Act), Public Law 94–265. Only those vessel owners and/or operators purchasing a MTU or E-MTU for compliance to fishery management rules becoming effective on or after October 1, 2005, are eligible for this funding opportunity.

The primary purpose of this reimbursement program is to offset the costs associated with compliance with fishery regulations developed pursuant to the Magnuson-Stevens Act. Reimbursable expenses include the purchase price of a MTU or E-MTU type-approved for a fishery requiring the use of VMS for which the owner and/or operator holds a valid commercial fishery permit in compliance with fishery regulations.

II. Eligibility

To be eligible to receive reimbursement vessel owners and/or operators must first purchase a MTU or E-MTU type-approved for the fishery requiring VMS for which the vessel owner and/or operator holds a valid commercial fishing permit. The vessel

owner and/or operator must have the MTU or E-MTU properly installed on the vessel and activated utilizing a type-approved communications provider. Upon completion of the installation and activation process, the vessel owner and/or operator must contact the VMS Support Center by calling 888–219–9228 to ensure the vessel is properly registered in the VMS system. OLE does not consider a vessel in compliance until the MTU or E-MTU signal has been received and processed by OLE.

III. Process

Vessel owners and/or operators that have purchased a MTU or E-MTU, and have validated their compliance with the applicable regulations through OLE, may contact the PSMFC, 45 SE 82nd Drive, Suite 100, Gladstone, Oregon 97027–2522, phone 503–650–5300, fax 503–650–5426, for a reimbursement application. Once the application is received and completed by the vessel owner and/or operator, it must be returned to PSMFC along with proof of eligibility in order to qualify for an award. The required proof of eligibility includes proof of a valid commercial fishing permit for fishery requiring VMS; proof of purchase and the purchase price of a type-approved MTU or E-MTU; and a valid compliance confirmation code issued by OLE.

Vessel owners and/or operators are not restricted as to which type-approved MTU or E-MTU device they can purchase. However, the amount of the reimbursement will be limited to the cost of the least expensive MTU or E-MTU type-approved for their permitted fishery. Vessel owners and/or operators are encouraged to compare the features of all MTU and E-MTU devices type-approved for their permitted fishery prior to making their purchase decision. Vessel owners/operators are limited to reimbursement of the cost of purchasing one MTU or E-MTU per permitted vessel.

Dated: July 11, 2006.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. E6–11550 Filed 7–20–06; 8:45 am]

BILLING CODE 3510–22–S

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 06–C0005]

Tiffany and Company, a Corporation, Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the **Federal Register** in accordance with the terms of 16 CFR 1118.20(e). Published below is a provisionally-accepted Settlement Agreement with Tiffany and Company, a corporation, containing a civil penalty of $262,500.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by August 7, 2006.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 06–C0005, Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

FOR FURTHER INFORMATION CONTACT: William J. Moore, Jr., Trial Attorney, Office of Compliance, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504–7583.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

Dated: July 18, 2006.

Todd A. Stevenson,

Secretary.

In the Matter of Tiffany and Company, a Corporation

Settlement Agreement and Order

1. This Settlement Agreement is made by and between the staff (the "staff") of the U.S. Consumer Product Safety Commission (the "Commission") and Tiffany and Company ("Tiffany"), a corporation, in accordance with 16 CFR 1118.20 of the Commission's procedures for Investigations, Inspections, and Inquiries under the Consumer Product Safety Act ("CPSA"). This Settlement Agreement and the incorporated attached Order resolve the staff's allegations set forth below.

The Parties

2. The Commission is an independent federal regulatory agency responsible for the enforcement of the Consumer Product Safety Act, 15 U.S.C. 2051–2084.

3. Tiffany is a corporation organized and existing under the laws of the State of New York with its principal corporate office located at 727 Fifth Avenue, New York, New York. At all times relevant herein Tiffany marketed, distributed and sold fine jewelry, timepieces, china, crystal, silverware and silver baby rattles and teethers, among other consumer products.

Staff Allegations

4. From November 2002 through February 2004, Tiffany sold in United States commerce approximately 4,255 sterling silver rattle/teethers with small farm animal figures ("Teethers").

5. The Teethers are "consumer products" and, at the times relevant herein, Tiffany was a "retailer" of "consumer products", which were "distributed in commerce" as those terms are defined in sections 3(a)(1), (6), (11), and (12) of the CPSA, 15 U.S.C. 2052(a)(1), (6), (11), and (12).

6. The Teethers are defective because a metal bar at the center of the Teether can break off at its soldered joints during use releasing small round beads and small animal figures. The small beads and figures can pose an aspiration and choking hazard to babies.

7. Between November and December 2003, Tiffany learned about at last two incidents of Teethers cracking at the soldered joint. In February 2004, Tiffany learned about one incident in which a Teether broke at the soldered joint, and a baby was reported to be mouthing a small animal figure that fell off of the Teether. Tiffany determined that hand polishing during Teether manufacture could weaken the cross bar solder joints and lead to separation of that metal bar from the Teether ring.

8. Tiffany suspended Teether sales following the February 2004 incident. Tiffany did not report the problem to the Commission. Tiffany received two more reports of Teethers cracking in March 2004. The firm did not report to the Commission until June 2004, after the Commission opened its own investigation and requested Tiffany to do so.

9. Although Tiffany had obtained sufficient information to reasonably support the conclusion that the Teethers contained a defect which could create a substantial product hazard, it failed to inform the Commission of such defect and risk and required by Section 15(b)(2) of the CPSA, 15 U.S.C. 2064(b)(2). In failing to do so, Tiffany "knowingly" violated Section 19(a)(4) of the CPSA, 15 U.S.C. 2068(a)(4), as the

term "knowingly" is defined in Section 20(d) of the CPSA, 15 U.S.C. 2069(d).

10. Pursuant to Section 20 of the CPSA, 15 U.S.C. 2069, Tiffany is subject to the imposition of a civil penalty for its failure to make a report pursuant to Section 15(b) of the CPSA, 15 U.S.C. 2064(b).

Response of Tiffany

11. Tiffany denies the allegations set forth in Paragraphs 4–10 above. Tiffany specifically denies that the Teethers contain a defect that could create a substantial product hazard, that the company had obtained information to reasonably support the conclusion that the Tethers were so defective or posed such a risk, that the company was obligated to report to the Commission under Section 15(b) of the CPSA, or that the company violated Section 19(a)(4) of the CPSA or any other section of the CPSA, "knowingly" or otherwise.

12. Tiffany stopped sale of the Teethers immediately upon receiving notice of the one incident in which a Teether broke, and in May contacted customers who had purchased Teethers, urging them to return the item. Tiffany also filed a report with the Commission, at the request of the staff.

13. Tiffany is not aware of any consumer injury related in any way to the Teethers, nor has the staff alleged that any injuries have occurred.

14. Tiffany enters into this Settlement Agreement for the purposes of compromise and settlement only, to avoid incurring additional legal costs and expenses.

Agreement of the Parties

15. The Commission has jurisdiction over this matter and over Tiffany under the CPSA, 15 U.S.C. 2051–2084.

16. The parties enter into this Settlement Agreement for settlement purposes only. The Settlement Agreement does not constitute a determination by the Commission that Tiffany violated the CPSA or any other law or regulation, nor an admission by Tiffany of any liability or wrongdoing by Tiffany, or that Tiffany violated the CPSA or any other law or regulation.

17. In settlement of the staff's allegations, Tiffany agrees to pay a civil penalty of two hundred sixty-two thousand five hundred dollars ($262,500.00) within ten (10) calendar days of receiving service of the Final Order of the Commission accepting this Settlement Agreement. This payment shall be made by check payable to the order of the United States Treasury.

18. Upon provisional acceptance of this Settlement Agreement and Order by the Commission, the Commission shall place this Agreement and Order on the public record and shall publish it in the **Federal Register** in accordance with the procedure set forth in 16 CFR 1118.20(e). If the Commission does not receive any written request not to accept the Settlement Agreement and Order within 15 calendar days, the Agreement and Order shall be deemed finally accepted on the 16th calendar day after the date it is published in the **Federal Register.**

19. Upon final acceptance of this Settlement Agreement by the Commission and issuance of the Final Order, Tiffany knowingly, voluntarily and completely waives any rights it may have in this matter to the following: (i) An administrative or judicial hearing; (ii) judicial review or other challenge or contest of the validity of this Agreement and Order as issued and entered; (iii) a determination by the Commission as to whether Tiffany failed to comply with the CPSA and its underlying regulations; (iv) a statement by the Commission of findings of fact and conclusions of law; and (v) any claims under the Equal Access to Justice Act.

20. The Commission and Tiffany may publicize the terms of the Settlement Agreement and Order.

21. This Settlement Agreement and Order shall apply to, be binding upon, and inure to the benefit of, Tiffany and each of its successors and assigns.

22. The Commission's Order in this matter is issued under the provisions of the CPSA, 15 U.S.C. 2051–2084, and a violation of the Order may subject Tiffany to appropriate legal action.

23. This Settlement Agreement may be used in interpreting the Order. Agreements, understandings, representations, or interpretations made outside of this Settlement Agreement and Order may not be used to vary or to contradict its terms.

24. This Settlement Agreement and Order shall not be waived, changed, amended, modified, or otherwise altered without written agreement thereto executed by the party against whom such amendment, modification, alteration, change, or waiver is sought to be enforced and approval by the Commission.

25. This Settlement Agreement becomes effective only upon its final acceptance by the Commission and service on Tiffany of the incorporated Final Order.

26. If, after the effective date hereof, any provision of this Settlement Agreement and Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Settlement Agreement and Order, such provision shall be fully severable. The rest of the Settlement Agreement and Order shall remain in full effect, unless the Commission and Tiffany determine that severing the provision materially changes the purpose of the Settlement Agreement and Order.

Tiffany and Company

Dated: May 11, 2006.

By: Patrick B. Dorsey,
Senior Vice President, Secretary and General Counsel, Tiffany and Company.

Dated: May 24, 2006.

By: Philip Katz,
Hogan & Hartson, L.L.P., 555 Thirteenth Street, NW., Washington, DC 20004.

U.S. Consumer Product Safety Commission

John Gibson Mullan,
Director, Office of Compliance & Field Operations.

Ronald G. Yelenik,
Acting Director, Legal Division, Office of Compliance.

Dated: July 18, 2006.

By: William J. Moore, Jr.,
Senior Trial Attorney, Legal Division, Office of Compliance.

In the Matter of Tiffany and Company, a Corporation

Order

Upon consideration of the Settlement Agreement entered into between Tiffany and Company ("Tiffany") and the staff of the U.S. Consumer Product Safety Commission (the "Commission"), and the Commission having jurisdiction over the subject matter and over Tiffany, and it appearing that the Settlement Agreement is in the public interest, it is

I.

Ordered that the Settlement Agreement be, and hereby is, accepted; and it is

II.

Further ordered that Tiffany shall pay a civil penalty of two hundred sixty-two thousand five hundred dollars ($262,500.00) within ten (10) calendar days of service of the Final Order of the Commission accepting the Settlement Agreement. This payment shall be made by check payable to the order of the United States Treasury. Upon the failure of Tiffany to make full and timely payment or upon the making of a late payment, (i) The entire amount of the civil penalty shall become due and payable, and (ii) interest on the outstanding balance shall accrue and be paid at the Federal legal rate of interest under the provisions of 28 U.S.C. 1961(a) and (b).

Provisionally accepted and Provision Order issued on the 18th day of July, 2006.

By Order of the Commission.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 06–6402 Filed 7–20–06; 8:45 am]

BILLING CODE 6355–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary

[No. DOD–2006–HA–0161]

Proposed Collection; Comment Request

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs, DoD.

ACTION: Notice.

In accordance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Assistant Secretary of Defense for Health affairs announces the extension of a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by September 19, 2006.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection, please write to TRICARE Management Activity, Medical Benefits and Reimbursement Systems, 16401 East Centretch Parkway, ATTN: David Bennett, Aurora, CO 80011–9043, or call TRICARE Management Activity, Medical Benefits and Reimbursement Systems, at (303) 676–3494.

Title and OMB Number: Application for TRICARE-Provider Status: Corporation Services Provider; OMB Number 0720–0020.

Needs and Uses: The information collection will allow eligible providers to apply for Corporate Services Provider status under the TRICARE program.

Affected Public: Businesses or other for-profit; not-for-profit institutions.

Annual Burden Hours: 200.

Number of Respondents: 200.

Responses for Respondent: 1.

Average Burden per Response: 60 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

On March 10, 1999, TRICARE Management Activity (TMA), formerly known as OCHAMPUS, published a finale rule in the **Federal Register** (64 FR 11765), creating a fourth class of TRICARE providers consisting of freestanding corporations and foundations that render principally professional ambulatory or in-home care and technical diagnostic procedures. The intent of the rule was not to create additional benefits that ordinarily would not be covered under TRICARE if provided by a more traditional health care delivery system, but rather to allow those services which would otherwise be allowed except for an individual provider's affiliation with a freestanding corporate facility. The addition of the corporate class will recognize the current range of providers within today's health care delivery structure, and give beneficiaries access to another segment of the health care delivery industry. Corporate services providers must be approved for Medicare payment, or when Medicare approval status is not required, be accredited by a qualified accreditation organization to gain provider authorization status under TRICARE. Corporate services providers must also enter into a participation agreement which will be sent out as part of the initial authorization process. The participation agreement will ensure that TRICARE determined allowable payments, combined with the cost-share/copayment, deductible, and other health insurance amounts, will be accepted by the provider as payment in full.

The application for TRICARE-Provider Status: Corporate Services Provider, will collect the necessary information to ensure that the conditions are met for authorization as a TRICARE corporate services provider: *i.e.*, the provider (1) is a corporation or a foundation, but not a professional corporation or professional association; (2) provides services and related supplies of a type rendered by TRICARE individual professional providers or diagnostic technical services; (3) is approved for Medicare payment or when Medicare approval status is not required, is accredited by a qualified accreditation organization; and (4) has entered into a participation agreement approved by the Executive Director, TMA or a designee.

The collected information will be used by TRICARE contractors to process claims and verify authorized provider status. Verification involves collecting and reviewing copies of the provider's licenses, certificates, accreditation documents, etc. If the criteria are met, the provider is granted TRICARE-autorization status. The documentation and information are collected when: (1) A provider requests permission to become a TRICARE-authorized provider; (2) a claim is filed for care received from a provider who is not listed ont he contractors' computer listing of authorized providers; or (3) when a former TRICARE-authorized provider requests reinstatement.

The contractors develop the forms used to gather information based on TRICARE conditions for participation listed above. Without the collection of this information, contractors cannot determine if the provider meets TRICARE-authorization requirements for corporate services providers. If the contractor is unable to verify that a provider meets these authorization requirements, the contractor may not reimburse either the provider or the beneficiary for the provider's health care services.

To reduce the reporting burden to a minimum, TRICARE has carefully selected the information requested from respondents. Only that information which has been deemed absolutely essential is being requested. If necessary, contractors may verify credentials with Medicare, JCAHO and other national organizations by telephone. TRICARE is also participating with Medicare in the development of a National Provider System which will eliminate duplication of provider certification

data collection among Federal government agencies.

TRICARE contractors are required to maintain a computer listing of all providers that have submitted the appropriate authorization information and documentation. To avoid duplicate inquires, the contractors must search the computer provider listing before requesting documentation from providers. Since the providers affected by this information collection generally have not previously been eligible to be authorized providers, TRICARE contractors will have no information on file. The providers will have to submit the information requested on the data collection form (Application for TRICARE-Providers Status: Corporate Services Provider) in order to obtain provider authorization status under TRICARE.

The information will usually be collected from each respondent only once. It is estimated that there will be approximately 200 applicants per year. TRICARE will request the provider authorization documentation and information when the provider asks to become TRICARE-authorized or when a claim is filed for a new provider's services. If after a provider has been authorized by a contractor, no claims are filed during two-year period of time, the provider's information will be placed in the inactive file. To reactivate a file, the provider must verify that the information is still correct, or supply new or changed information. The total annual reporting burden is estimated to be 200 hours.

Dated: July 17, 2006.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 06–6394 Filed 7–20–06; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Advisory Committee on Military Personnel Testing

AGENCY: Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Notice of meeting.

SUMMARY: Pursuant to Public Law 92–463, notice is hereby given that a meeting of the Defense Advisory Committee on Military Personnel Testing is scheduled to be held. The purpose of the meeting is to review planned changes and progress in developing computerized and paper-and-pencil enlistment tests.

DATES: August 3, 2006, from 8 a.m. to 4 p.m., and August 4, 2006, from 8 a.m. to 4 p.m.

ADDRESSES: The meeting will be held at the Cheyenne Mountain Resort Hotel, 3225 Broadmoor Valley Road, Colorado Springs, Colorado 80906.

FOR FURTHER INFORMATION CONTACT: Dr. Jane. M. Arabian, Assistant Director, Accession Policy, Office of the Under Secretary of Defense (Personnel and Readiness), Room 2B271, The Pentagon, Washington, DC 20301–4000, telephone (703) 697–9271.

SUPPLEMENTARY INFORMATION: Persons desiring to make oral presentations or submit written statements for consideration at the Committee meeting must contact Dr. Jane M. Arabian at the address or telephone number above no later than July 26, 2006.

C. R. Choate,

Alternate Federal Register Liaison Officer, Department of Defense.

[FR Doc. 06–6389 Filed 7–20–06; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Air Force

[No. USAF–2006–0008]

Proposed Collection; Comment Request

AGENCY: National Museum of the United States Air Force, DoD.

ACTION: Notice.

In compliance with section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995*, the National Museum of the United States Air Force (NMUSAF) announces the proposed extension of a public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by September 19, 2006.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the National Museum of the United States Air Force, Attn: Bonnie Holtmann, 1100 Spaatz St, Wright-Patterson Air Force Base, OH 45433–7102, or call the Museum Volunteer Program Office at 937.255.8099, ext 313.

Title; Associated Form; and OMB Number: USAF Heritage Program Volunteer Application/Registration, AF IMT 3569, 20030819, V1, OMB Number 0701–0127.

Needs and Uses: The information collection requirement is necessary to provide (a) the general public an instrument to interface with the USAF Heritage Program Volunteer Program; (b) the USAF Heritage Program the means with which to select respondents pursuant to the USAF Heritage Program Volunteer Program. The primary use of the information collection includes the evaluation and placement of respondents within the USAF Heritage Program Volunteer Program.

Affected Public: Business or other for profit; Not-for-profit institutions.

Annual Burden Hours: 49.5.

Number of Respondents: 198.

Responses Per Respondent: 1.

Average Burden Per Response: 15 minutes.

Frequency: On Occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

Respondents are individuals expressing an interest in participating in the USAF Heritage Program Volunteer Program authorized by 10 U.S.C. 81, Sec 1588 and regulated by the Air Force Instruction 84–103. AFI 84–103, 3.5.3.

requires the use of AF Form 3569. AF Form 3569 provides the most expedient means to secure basic personal information (*i.e.*, name, telephone number, address and experience pursuant to the USAF Heritage Program Volunteer Program requirements) to be employed solely by the USAF Heritage Volunteer Program and to recruit, evaluate and make work assignment decisions. AF Form 3569 is the only instrument that exists which facilitates this purpose. The NMUSAF Museum Volunteer Program is an integral function in the operation of the USAF Heritage Program. Volunteers provide valuable time, incalculable talent, skill, and knowledge of USAF aviation history so that all visitors to the many USAF Heritage Program facilities throughout the United States may enjoy the important contribution of USAF historical heritage.

Dated: June 20, 2006.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 06–6390 Filed 7–20–06; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Air Force

[No. DOD–2006–DARS–0154]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by August 21, 2006.

Title, Form and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 232, Contract Financing, and the clauses at DFARS 252.232–7002 Progress Payments for Foreign Military Sales Acquisition; OMB Control Number 0704–0321.

Type of Request: Extension.

Number of Respondents: 263.

Responses per Respondent: 12.

Annual Responses: 3156.

Average Burden per Response: .5 hours (response)/12 hours (recordkeeping).

Annual Burden Hours: 4,734 hours (includes 1,578 response hours plus 3,156 recordkeeping hours).

Needs and Uses: Section 22 of the Arms Export Control Act (22 U.S.C. 2762) requires the U.S. Government to use foreign funds, rather than U.S. appropriated funds, to purchase military equipment for foreign governments. To comply with this requirement, the Government needs to know how much to charge each country. The clause at 252.232–7002, Progress Payments for Foreign Military Sales Acquisitions, requires each contractor whose contract includes foreign military sales (FMS) requirements to submit a separate progress payment request for each progress payment rate, and to submit a supporting schedule that clearly distinguishes the contract's FMS requirements from U.S. requirements. The Government uses this information to determine how much of each country's funds to disburse to the contractor.

Affected Public: Business or other for-profit; not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Hillary Jaffe.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jaffe at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contract information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: July 11, 2006.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 06–6393 Filed 7–20–06; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice of Intent (NOI) To Prepare an Environmental Impact Statement (EIS) for a Proposed Aircraft Conversion for the Massachusetts National Guard at Westfield-Barnes Airport, Westfield, MA

AGENCY: Department of the Air Force, National Guard Bureau, DOD.

ACTION: Notice of intent.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321, *et seq.*), the Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), and Air Force policy and procedures (32 CFR part 989), the National Guard Bureau is issuing this notice to advise the public of its intent to prepare an EIS to assess the potential environmental impacts that could result from an aircraft conversion and implementation of the proposed construction and demolition program for the Massachusetts National Guard at Westfield-Barnes Airport in Westfield, Massachusetts. Additionally, the Federal Aviation Administration (FAA), Westfield-Barnes Airport, and the Massachusetts Aeronautics Commission (MAC) join the National Guard Bureau as cooperating agencies. The proposal consists of an aircraft conversion from 15 A–10 primary assigned aircraft (PAA) and 2 backup aircraft inventory (BAI) to 18 F–15 PAA and 2 BAI aircraft. This conversion is a result of the 2005 Base Realignment and Closure (BRAC) Commission Final and Approved Recommendations. In association with the aircraft conversion, the current close air support mission associated with the A–10 aircraft would change to an air superiority/air sovereignty alert mission associated with the F–15 aircraft. As part of the aircraft conversion and mission change, the 104th Fighter Wing (104 FW) would have an increase of 139 full-time and 111 part-time authorized personnel; and the Army National Guard would have in increase of 25 full-time and 274 part-time. To accommodate these changes, the Massachusetts National Guard proposes to implement several construction projects at their installation at Westfield-Barnes Airport, as well as to correct several existing facility deficiencies through modifications to existing facilities and construction of several new facilities. In addition to the proposed action, the no-action

alternative will be analyzed in the EIS. The National Guard Bureau will conduct a scoping meeting to solicit public input concerning the proposal. The scoping process will help identify issues to be addressed in the environmental analysis. In addition to the comments received at the scoping meetings, written comments on the scope of the EIS will be accepted by the National Guard Bureau at the address below through September 1, 2006. The National Guard Bureau will accept relevant comments at any time during the environmental analysis process.

DATES: Notices will be posted and published in the Springfield Union News, The Sunday Republican, Westfield Evening News, and Daily Hampshire Gazette. The scoping meetings will be held at Westfield North Middle School, 350 Southampton Road, Westfield, Massachusetts, August 15, from 6–9 p.m.

FOR FURTHER INFORMATION CONTACT: Please direct any written comments or requests for information to Captain Matthew Mutti, 104th FW/PA, and 175 Falcon Drive, Westfield, MA 01085–1482l (413) 568–9151 ext.1800; *matthew.mutti@mabarn.ang.af.mil.*

Bao-Ahn Trinh,

Air Force Federal Register Liaison Officer.

[FR Doc. E6–11594 Filed 7–20–06; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF DEFENSE

Department of the Air Force

U.S. Air Force Academy Board of Visitors Meeting

AGENCY: Department of the Air Force, U.S. Air Force Academy Board of Visitors, DOD.

ACTION: Notice of meeting.

SUMMARY: Pursuant to Section 9355, Title 10, United States Code, the U.S. Air Force Academy Board of Visitors will meet at the United States Air Force Academy, Colorado Springs, Colorado, 28 & 29 July 2006. The purpose of the meeting is to consider the morale and discipline, curriculum, instruction, physical equipment, fiscal affairs, academic methods; and other matters relating to the Academy. A portion of the meeting will be open to the public while the other will be closed to the public to discuss matters listed in Paragraphs (2) and (6) of Subsection (c) of Section 552b, Title 5, United States Code. The determination to close one session is based on the consideration that portions of the briefings and discussion will relate to information of a personal nature that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. The balance of the closed session will address the internal policies and administrative practices of the Board of Visitors of the Academy. Meeting sessions will be held in the Officers' Club, USAFA, CO.

DATES: The U.S. Air Force Academy Board of Visitors will meet at the United States Air Force Academy, Colorado Springs, Colorado, 28 & 29 July 2006.

FOR FURTHER INFORMATION CONTACT: Major Rich Cole, Chief, USAFA Policy and Programs Support, Directorate of Airman Development, Deputy Chief of Staff, Manpower & Personnel, AF/A1DOA, 1040 Air Force Pentagon, Washington, DC, 20330–1040, (703) 695–4456. To attend the 28 & 29 July Board of Visitors meeting call Mr. Johnny Whitaker, Director of Communications, USAFA/CM, U.S. Air Force Academy, 2304 Cadet Dr. Suite 320, USAF Academy, CO 80840, (719) 333–7714.

Bao-Anh Trinh,

Air Force Federal Register Liaison Officer.

[FR Doc. E6–11593 Filed 7–20–06; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Intent To Grant Exclusive Patent License to Cardiovascular Resonance LLC

AGENCY: Department of the Army, DoD.

ACTION: Notice of intent.

SUMMARY: In compliance with 37 CFR part 404 *et seq.*, the Department of the Army hereby gives notice of its intent to grant to Cardiovascular Resonance LLC, a corporation having its principle place of business at 517 A Spring Forest Road, Greenville, NC 27834–7254, an exclusive license relative to an ARL patent; US patent # 5,853,005, issued December 29, 1998, entitled "Acoustic Monitoring System"; Mike Scanlon inventor.

DATES: Anyone wishing to object to the grant of this license must file written objections along with supporting evidence, if any, not later than 15 days from the date of this notice.

ADDRESSES: Send written objectives to Michael D. Rausa, U.S. Army Research Laboratory, Office of Research and Technology Applications, Attn: AMSRD–ARL–DP–T/Bldg. 434, Aberdeen Proving Ground, MD 21005–5425.

FOR FURTHER INFORMATION CONTACT: Michael D. Rausa, telephone (410) 278–5028.

SUPPLEMENTARY INFORMATION: None.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 06–6392 Filed 7–20–06; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Invention for Licensing; Government-Owned Invention

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The invention listed below is assigned to the United States Government as represented by the Secretary of the Navy and is available for licensing by the Department of the Navy. Navy Case No. 96,141: MULTIFUNCTIONAL SELF-DECONTAMINATING SURFACE COATINGS and any continuations, continuations-in-part, divisionals, or reissues thereof.

ADDRESSES: Requests for copies of the invention cited should be directed to the Naval Research Laboratory, Code 1004, 4555 Overlook Avenue, SW., Washington DC 20375–5320, and must include the Navy Case number.

FOR FURTHER INFORMATION CONTACT: Head, Technology Transfer Office, NRL Code 1004, 4555 Overlook Avenue, SW., Washington DC 20375–5320, telephone 202–767–7230. Due to temporary U.S. Postal Service delays, please fax 202–404–7920, E-Mail *techtran@utopia.nrl.navy.mil,* or use courier delivery to expedite response.

Authority: 35 U.S.C. 207, 37 CFR part 404.)

Dated: July 17, 2006.

M.A. Harvison,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E6–11596 Filed 7–20–06; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the Chief of Naval Operations (CNO) Executive Panel

AGENCY: Department of the Navy, DoD.

ACTION: Notice of closed meeting.

SUMMARY: The CNO Executive Panel will form consensus advice for the final

report on the findings and recommendations of the Beyond Iraq Subcommittee to the Chief of Naval Operations. The meeting will consist of discussions of potential future operating environments and force posture implications.

DATES: The meeting will be held on August 3, 2006 from 9 a.m. to 10 a.m.

ADDRESSES: The meeting will be held in the Center for Naval Analysis Corporation boardroom at 4825 Mark Center Drive, Alexandria, VA 22311–1846.

FOR FURTHER INFORMATION CONTACT: CDR James Gibson, CNO Executive Panel, 4825 Mark Center Drive, Alexandria, VA 22311, 703–681–4909.

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of the Federal Advisory Committee Act (5 U.S.C. App. 2), these matters constitute classified information that is specifically authorized by Executive Order to be kept secret in the interest of national defense and are, in fact, properly classified pursuant to such Executive Order. Accordingly, the Secretary of the Navy has determined in writing that the public interest requires that all sessions of this meeting be closed to the public because they will be concerned with matters listed in section 552b(c)(1) of title 5, United States Code.

Dated: July 14, 2006.

M.A. Harvison,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E6–11595 Filed 7–20–06; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Sunshine Act Meeting; Notice

July 13, 2006.

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C 552b:

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission.

DATE AND TIME: July 20, 2006. 10 a.m.

PLACE: Room 2C, 888 First Street, NE., Washington, DC 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED: Agenda: *Note—Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: Magalie R. Salas, Secretary, Telephone: (202) 502–8400.

For a recorded listing item stricken from or added to the meeting, call (202) 502–8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all papers relevant to the items on the agenda; however, all public documents may be examined in the Public Reference Room.

907th—Meeting

Regular Meeting: July 20, 2006; 10 a.m.

Item No.	Docket No.	Company
	Administrative Agenda	
A–1	AD02–1–000	Agency Administrative Matters.
A–2	AD02–7–000	Customer Matters, Reliability, Security and Market Operations.
A–3	AD06–3–000	Energy Market Update.
A–4	AD05–13–000	Joint Boards on Security Constrained Economic Dispatch.
A–5	AD06–2–000	Demand Response Report.
	Electric	
E–1	RM05–34–002	Transactions Subject to FPA Section 203.
E–2	RM06–8–000	Long-Term Firm Transmission Rights in Organized Electricity Markets.
E–3	RM06–4–000	Promoting Transmission Investment through Pricing Reform.
E–4	EL06–54–000	Allegheny Energy, Inc., Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company.
E–5	RR06–1–000	North American Electric Reliability Corporation.
E–6	RR06–2–000	Governors of Arizona, California, Colorado, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming.
E–7	ER05–764–000 ER05–764–002	Montana Alberta Tie, Ltd.
E–8	ER06–451–002 ER06–1047–000	Southwest Power Pool, Inc.
E–9	Omitted.	
E–10	ER98–1150–004 ER98–1150–005 ER98–1150–006 EL05–87–000	Tucson Electric Power Company.
E–11	Omitted.	
E–12	TX05–1–007	East Kentucky Power Cooperative, Inc.
E–13	ER04–230–023	New York Independent System Operator, Inc.
E–14	Omitted.	
E–15	EL06–50–000	American Electric Power Service Corporation.
E–16	Omitted.	
E–17	EF04–3031–001	United States Department of Energy—Southeastern Power Administration (Jim Woodruff Project).
E–18	RM02–12–002	Standardization of Small Generator Interconnection Agreements and Procedures.
E–19	Omitted.	
E–20	ER06–448–001	Southwest Power Pool, Inc.

Item No.	Docket No.	Company
E–21	EL04–87–000	Southern Company Services, Inc.
	ER04–563–002	
	ER04–563–003	
	ER05–413–003	
	ER05–413–004	
	ER03–379–003	
	ER03–355–004	
	ER05–518–002	
E–22	Omitted.	
	Miscellaneous	
M–1	RM05–32–002	Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005.
	Gas	
G–1	OR06–8–000	Colonial Pipeline Company.
G–2	TS06–8–000	High Island Offshore System, L.L.C.
	TS06–9–000	Petal Gas Storage, L.L.C.
	TS05–13–000	NGO Transmission, Inc.
	TS04–286–001	Exelon Corporation.
	TS04–287–001	
	TS06–10–000	Ozark Gas Transmission, L.L.C.
	TS05–9–000	Texas Gas Service Company.
	TS04–3–001	NorthWestern Energy.
	TS04–260–001	Williston Basin Interstate Pipeline.
	TS05–18–000	Attala Transmission, L.L.C.
	TS06–1–000	The Detroit Edison Company.
G–3	TS04–248–001	National Fuel Gas Distribution Corporation.
	TS04–270–000	Equitrans, Inc.
	TS06–7–000	PacifiCorp and TransAlta Centralia Generation, LLC.
	OA06–4–000	
	TS04–249–002	Kinder Morgan Pipelines.
	TS04–252–001	Ohio Valley Electric Corporation and Indiana-Kentucky Electric Corporation.
	TS04–62–000	NewCorp Resources Electric Cooperative, Inc.
	TS04–62–001	
G–4**	Omitted.	
	Hydro	
H–1	P–6188–016	Sierra Hydro, Inc.
H–2	P–8800–021	Western Hydro Electric, Inc.
H–3	P–459–153	Union Electric Company d/b/a Ameren UE.
	Certificates	
C–1	CP06–5–000	Empire State Pipeline and Empire Pipeline, Inc.
	CP06–6–000	
	CP06–7–000	
C–2	CP06–71–000	Carolina Gas Transmission Corporation, SCG Pipe-line, Inc. and South Carolina Pipeline Corporation.
	CP06–72–000	
	CP06–73–000	
C–3	CP06–66–000	Port Barre Investments, L.L.C. d/b/a Bobcat Gas Storage.
	CP06–67–000	
	CP06–68–000	
C–4	CP06–18–000	Tennessee Gas Pipeline Company.

A free Webcast of this event is available through *http://www.ferc.gov*. Anyone with Internet access who desires to view this event can do so by navigating to http://www.ferc.gov's Calendar of Events and locating this event in the Calendar. The event will contain a link to its Webcast. The Capitol Connection provides technical support for the free Webcasts. It also offers access to this event via television in the DC area and via phone bridge for a fee. If you have any questions, visit *http://www.CapitolConnection.org* or contact Danelle Perkowski or David Reininger at 703–993–3100.

Immediately following the conclusion of the Commission Meeting, a press briefing will be held in the Commission Meeting Room. Members of the public may view this briefing in the designated overflow room. This statement is intended to notify the public that the press briefings that follow Commission meetings may now be viewed remotely at Commission headquarters, but will not be telecast through the Capitol Connection service.

Magalie R. Salas,

Secretary.

[FR Doc. 06–6420 Filed 7–19–06; 11:47 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2005–0530; FRL–8201–9]

Agency Information Collection Activities; Proposed Collection; Comment Request; Application for Reference or Equivalent Method Determination; EPA ICR No. 0559.09 OMB Control No. 2080–0005

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 21, 2006

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–ORD–2005–0530, to (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to Office of Environmental Information (OEI) Docket, *oei.docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, 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: Robert W. Vanderpool, U.S. Environmental Protection Agency, Human Exposure and Atmospheric Sciences Division, Process Modeling Research Branch, Mail Drop D205–03, Research Triangle Park, NC 27711; telephone number: 919–541–7877; facsimile number: 919–541–1153; e-mail: *Vanderpool.Robert@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 4, 2006 (71 FR 16771), 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–ORD–2005–0530, which is available for online viewing at *http://www.regulations.gov*, or in person viewing at the Office of Environmental Information Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 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 Office of Environmental Information Docket is 202–566–1752.

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, 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: Application for Reference and Equivalent Method Determination.

ICR numbers: EPA ICR No. 0559.09; OMB Control No. 2080–0005.

ICR Status: This ICR is scheduled to expire on January 31, 2008. 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: To determine compliance with the NAAQS, State air monitoring agencies are required to use, in their air quality monitoring networks, air monitoring methods that have been formally designated by the EPA as either reference or equivalent methods under EPA regulations at 40 CFR part 53. A manufacturer or seller of an air monitoring method (e.g. an air monitoring sampler or analyzer) that seeks to obtain such EPA designation of one of its products must carry out prescribed tests of the method. The test results and other information must then be submitted to the EPA in the form of an application for a reference or equivalent method determination in accordance with 40 CFR part 53. The EPA uses this information, under the provisions of part 53, to determine whether the particular method should be designated as either a reference or equivalent method. After a method is designated, the applicant must also maintain records of the names and mailing addresses of all ultimate purchasers of all analyzers or samplers sold as designated methods under the method designation. If the method designated is a method for fine particulate matter ($PM_{2.5}$) and coarse particulate matter ($PM_{10-2.5}$), the applicant must also submit a checklist signed by an ISO-certified auditor to indicate that the samplers or analyzers sold as part of the designated method are manufactured in an ISO 9001-registered facility. Also, an applicant must submit a minor application to seek approval for any proposed modifications to previously designated methods.

A response to this collection of information is voluntary, but it is required to obtain the benefit of EPA designation under 40 CFR part 53. Submission of some information that is claimed by the applicant to be confidential business information may be necessary to make a reference or equivalent method determination. The confidentiality of any submitted information identified as confidential business information by the applicant will be protected in full accordance with 40 CFR 53.15 and all applicable provisions of 40 CFR part 2.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 341 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: State, local, or tribal government.

Estimated Number of Respondents: 22.

Frequency of Response: Annual.

Estimated Total Annual Hour Burden: 7,492 hours.

Estimated Total Annual Cost: $650,494, includes $132,668 annualized capital or O&M costs.

Changes in the Estimates: There is an increase of 50 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This increase is due to the nature of the proposed revisions to the National Ambient Air Quality Standard for particulate matter.

Dated: July 11, 2006.

Sara Hisel McCoy,

Acting Director, Collection Strategies Division.

[FR Doc. E6–11606 Filed 7–20–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2005–0080; FRL–8201–8]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Integrated Iron and Steel Manufacturing (Renewal), EPA ICR Number 2003.03, OMB Control Number 2060–0517

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (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 collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before August 21, 2006.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2005–0080, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 2201T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: 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: María Malavé, Compliance Assessment and Media Programs Division (Mail Code 2223A), Office of Compliance, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–7027; fax number: (202) 564–0050; e-mail address: *malave.maria@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 September 21, 2005 (70 FR 55368), 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 number EPA–HQ–OECA–2005–0080, which is available for online viewing at *http://www.regulations.gov*, in person viewing at the Enforcement and Compliance Docket and Information Center in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Avenue, 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 Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1927.

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, 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: NESHAP for Integrated Iron and Steel Manufacturing (Renewal).

ICR Numbers: EPA ICR Number 2003.03, OMB Control Number 2060–0517.

ICR Status: This ICR is scheduled to expire on August 31, 2006. 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: The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Integrated Iron and Steel Manufacturing were proposed on July 13, 2001 (66 FR 36835), and promulgated on May 20, 2003 (68 FR 27645). The proposed amendments were published August 30, 2005 (70 FR 51306). These standards apply to new and existing sinter plants, blast furnaces, and basic oxygen process furnace (BOPF) shops at integrated iron and steel manufacturing facilities that are major sources of hazardous air pollutants (HAPs), or are collocated at major sources. This information is being collected to assure compliance with 40 CFR part 63, subpart FFFFF.

Owners and operators of affected sources are subject to the monitoring, recordkeeping and reporting requirements of 40 CFR part 63, subpart A, the General Provisions, unless specified otherwise in the regulation. This rule requires sources to submit initial notifications, conduct performance tests if source is using an add-on control device, and submit periodic compliance reports. In addition, sources are required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation if using an add-on control device; any period during which the monitoring system is inoperative; parametric monitoring data; system maintenance and calibration; and work practices to demonstrate

initial and ongoing compliance with the regulation. Records of such measurements and actions are to be retained two years on-site of the required total five years. All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 419 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: Owners or operators of integrated iron and steel manufacturing facilities.

Estimated Number of Respondents: 18.

Frequency of Response: On occasion, semiannually, and initially.

Estimated Total Annual Hour Burden: 18,421.

Estimated Total Annual Cost: $67,000, includes O&M costs only.

Changes in the Estimates: The increase from 4,772 hours to 18,421 hours in the annual labor burden to industry from the most recently approved ICR is due to adjustments. The increase in burden from the most recently approved ICR is due to the assumption that respondents are in full compliance with the rule's periodic requirements since the compliance date of the rule passed. The active ICR burden calculation was based on the assumption that a subset of the respondents (i.e., 6 of a total of 18 sources each year) would be implementing the initial rule requirements over the three year period of the ICR, and would not have to comply with the rule on-going requirements since the compliance date for the rule was not due until 3 years after rule promulgation.

The increase from $64,000 to $67,000 in the total annualized capital and operations and maintenance (O&M) costs is due to the assumption that respondents are in full compliance with the rule on-going requirements, as mentioned above. Even when there are no capital and startup costs for this ICR, the costs for operation and maintenance for baghouses and continuous capacity monitors increased significantly since we are accounting such costs for all three years of this ICR.

Dated: July 11, 2006.

Sara Hisel McCoy,

Acting Director, Collection Strategies Division.

[FR Doc. E6–11607 Filed 7–20–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2005–0050; FRL–8201–6]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Notification of Chemical Exports—TSCA Section 12(b); EPA ICR No. 0795.12, OMB No. 2070–0030

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that the following Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval: Notification of Chemical Exports—TSCA Section 12(b); EPA ICR No. 0795.12, OMB No. 2070–0030. The ICR, which is abstracted below, describes the nature of the information collection activity and its expected burden and costs.

DATES: Additional comments may be submitted on or before August 21, 2006.

ADDRESSES: Submit your comments, referencing docket ID Number EPA–HQ–OPPT–2005–0050 to (1) EPA online using *http://www.regulations.gov* (our preferred method), by email to *oppt.ncic@epa.gov* or by mail to: Document Control Office (DCO), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, Mail Code: 7407T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: 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: Barbara Cunningham, Acting Director, Environmental Assistance Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, Mailcode: 7408–M, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–554–1404; e-mail address: *TSCA-Hotline@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 November 8, 2005 (70 FR 67697), EPA sought comments on this renewal ICR. EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received one comment during the comment period, which is addressed in the Supporting Statement of the ICR. Any comments related to 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–OPPT–2005–0050, which is available for online viewing at *http://www.regulations.gov*, or in person inspection at the OPPT Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center 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 Pollution Prevention and Toxics Docket is 202–566–0280. Use *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, key in the docket ID number identified above, then click on the "submit" button.

EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in *http://www.regulations.gov*. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official

docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in *http://www.regulations.gov*. For further information about the electronic docket, go to *http://www.regulations.gov*.

Title: Notification of Chemical Exports—TSCA Section 12(b).

ICR Numbers: EPA ICR Number 0795.12, OMB Control Number 2070–0030.

ICR Status: This is a request to renew an existing approved collection. This ICR is scheduled to expire on August 31, 2006. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB.

Abstract: Section 12(b)(2) of the Toxic Substances Control Act (TSCA) requires that any person who exports or intends to export to a foreign country a chemical substance or mixture that is regulated under TSCA sections 4, 5, 6 and/or 7 submit to EPA notification of such export or intent to export. Upon receipt of notification, EPA will advise the government of the importing country of the U.S. regulatory action with respect to that substance. EPA uses the information obtained from the submitter via this collection to advise the government of the importing country.

Responses to the collection of information are mandatory (see 40 CFR part 707). Respondents may claim all or part of a notice as CBI. EPA will disclose information that is covered by a CBI claim only to the extent permitted by, and in accordance with, the procedures in 40 CFR part 2.

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**, are listed in 40 CFR part 9 and included on the related collection instrument or form, if applicable.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 0.878 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; 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: Entities potentially affected by this action are companies that export from the United States to foreign countries, or that engage in wholesale sales of, chemical substances or mixtures.

Frequency of Collection: Annual.

Estimated Average Number of Responses for Each Respondent: 25.

Estimated Number of Respondents: 350.

Estimated Total Annual Burden on Respondents: 7,550 hours.

Estimated Total Annual Costs: $382,130.

Changes in Burden Estimates: This request reflects an increase of 100 hours (from 7,450 hours to 7,550 hours) in the total estimated respondent burden from that currently in the OMB inventory. This increase represents the net effect of an increase in the estimated number of notices sent to EPA and a decrease in the number of firms sending notices, based on EPA's recent experiences with TSCA section 12(b) notices. This increase is an adjustment.

Dated: July 11, 2006.

Sara Hisel McCoy,

Acting Director, Collection Strategies Division.

[FR Doc. E6–11608 Filed 7–20–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2005–0291; FRL–8201–7]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Tolerance Petitions for Pesticides on Food/Feed Crops and New Inert Ingredients, EPA ICR No. 0597.09, OMB Control No. 2070–0024

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (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. This ICR is scheduled to expire on August 31, 2006. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before August 21, 2006.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OPP–2005–0291, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by mail to: Public Information and Records Integrity Branch (PIRIB), Mail Code: 7502C, Office of Pesticide Programs (OPP), Environmental Protection Agency, 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: Nathanael R. Martin, Field and External Affairs Division, Office of Pesticide Programs, 7506C, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 305–6475; fax number: (703) 305–5884; e-mail address: *martin.nathanael@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 November 16, 2005 (70 FR 69548), 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–OPP–2005–0291, which is available for public viewing at the OPP Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room telephone number is (202) 566–1744. An electronic version of the public docket is available through *http://www.regulations.gov*. Use *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. 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, CBI, or other information whose public disclosure is restricted by statute.

Title: Tolerance Petitions for Pesticides on Food/Feed Crops and New Inert Ingredients.

ICR numbers: EPA ICR No. 0597.09; OMB Control No. 2070–0024.

Abstract: This information collection will enable EPA to collect adequate data to support the establishment of pesticide tolerances pursuant to section 408 of the Federal Food, Drug and Cosmetic Act (FFDCA). A pesticide may not be used on food or feed crops unless EPA has established a tolerance for the pesticide residues on that crop, or established an exemption from the requirement to have a tolerance. Responses to this collection are required to obtain tolerances or exemptions from tolerances for pesticides used on food or feed crops, pursuant to section 408 of FFDCA, 21 U.S.C. 346a, as amended by FQPA (Pub. L. 104–170). Confidential Business Information (CBI) submitted to EPA in response to this information collection is protected from disclosure under FIFRA section 10.

This ICR only applies to the information collection activities associated with the submission of a petition for a tolerance action. It is EPA's responsibility to ensure that the maximum residue levels likely to be found in or on food/feed crops are safe for human consumption through a careful review and evaluation of residue chemistry and toxicology data. In addition, it must ensure that adequate enforcement of the tolerance can be achieved through the testing of submitted analytical methods. If the data are adequate for EPA to determine that there is a reasonable certainty that no harm will result from aggregate exposure, the Agency will establish the tolerance or grant an exemption from the requirement of a tolerance.

Under the FFDCA, any person may petition EPA to propose the issuance of a regulation establishing, modifying, or revoking (a) a tolerance for a pesticide chemical residue in or on food, or (b) an exemption from the requirement to have a tolerance for such residue. Section 408 of FFDCA requires petitioners submit an information summary of the petition and of the data, information and arguments submitted or cited in support of the petition. In addition, EPA encourages petitioners to voluntarily submit additional data in support of their petitions to help the Agency determine whether there is a reasonable certainty that no harm will result from aggregate exposure.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 1,726 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: Any person seeking a tolerance action.

Estimated Number of Respondents: 150.

Frequency of Response: As Needed.

Estimated Total Annual Hour Burden: 258,900.

Estimated Total Annual Labor Cost: $23,973,150.

Changes in the Estimates: There is no increase or decrease in hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens.

Dated: July 11, 2006

Sara Hisel McCoy,

Acting Director, Collection Strategies Division.

[FR Doc. E6–11609 Filed 7–20–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OECA–2005–0050; FRL–8201–5]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Coke Oven Pushing Quenching and Battery Stacks, EPA ICR Number 1995.03, OMB Control Number 2060–0521

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (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 collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before August 21, 2006.

ADDRESSES: Submit your comments, referencing docket ID number EPA–OECA–2005–0050, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 2201T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: 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: María Malavé, Compliance Assessment and Media Programs Division (Mail Code 2223A), Office of Compliance, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–7027; fax number: (202) 564–0050; e-mail address: *malave.maria@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 6, 2005 (70 FR 24020), 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 number EPA–OECA–2005–0050, which is available for public viewing online at *http://www.regulations.gov*, in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Avenue, 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 Reading Room is (202) 566–1744, and

the telephone number for the Enforcement and Compliance Docket is (202) 566–1927.

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, 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: NESHAP for Coke Oven Pushing Quenching and Battery Stacks (40 CFR Part 63, Subpart CCCCC).

ICR Numbers: EPA ICR Number 1995.03, OMB Control Number 2060–0521.

ICR Status: This ICR is scheduled to expire on August 31, 2006. 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: The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Coke Oven Pushing Quenching and Battery Stacks were proposed on July 3, 2001 (66 FR 35325) and, promulgated on April 14, 2003 (68 FR 18007). The respondents are owners or operators of coke plants that are major sources of hazardous air pollutant (HAP) emissions. The national emission standard for hazardous air pollutants (NESHAP) applies to emissions from pushing, soaking, quenching, and battery stacks on new and existing coke oven batteries. This information is being collected to assure compliance with 40 CFR part 63, subpart CCCCC.

Owners and operators of affected sources are subject to the monitoring, recordkeeping and reporting requirements of 40 CFR part 63, subpart A, the General Provisions, unless specified otherwise in the regulation. This rule requires sources to submit initial notifications, conduct performance tests if source is using an add-on control device, and submit periodic compliance reports. In addition, sources are required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation if using an add-on control device; any period during which the monitoring system is inoperative; parametric monitoring data; system maintenance and calibration; and work practices to demonstrate initial and ongoing compliance with the regulation. Records of such measurements and actions are to be retained two years on-site of the required total five years. All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 223 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: Owners or operators of coke oven facilities.

Estimated Number of Respondents: 19.

Frequency of Response: On occasion, semiannually, weekly and initially.

Estimated Total Annual Hour Burden: 25,208.

Estimated Total Annual Cost: $169,500, includes O&M costs only.

Changes in the Estimates: The increase from 2,209 hours to 25.208 hours in the annual labor burden to industry from the most recently approved ICR is due to adjustments. The increase in burden from the most recently approved ICR is due to the assumption that all existing sources are in full compliance with the rule on-going monitoring, recordkeeping and reporting requirements since the compliance date has passed. The active ICR burden calculation was based on sources only complying with the initial rule requirements.

The increase from $83,000 to $169,500 in the total annualized capital and operations and maintenance (O&M) costs are due to the assumption that respondents are in full compliance with the rule on-going requirements, as mentioned above. Even when there are no capital and startup costs for this renewal of the ICR, the costs for operation and maintenance of bag leak detectors and continuous opacity monitors increased significantly since we are accounting such costs for all three years of this ICR.

Dated: July 11, 2006.

Sara Hisel McCoy,

Acting Director, Collection Strategies Division.

[FR Doc. E6–11610 Filed 7–20–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–SFUND–2006–0361; FRL–8201–4]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Trade Secret Claims for Emergency Planning and Community Right-to-Know Act (EPCRA Section 322) (Renewal); EPA ICR No. 1428.07, OMB Control No. 2050–0078

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 21, 2006.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–SFUND–2006–0361, to (1) EPA online using *http://www.regulations.gov* (our

preferred method), by e-mail to, *superfund.docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Superfund Docket, Mail Code 5305T, 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: Sicy Jacob, Office of Solid Waste and Emergency Response, Office of Emergency Management, Mail Code 5104A, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–8019; fax number: (202) 564–2620; e-mail address: *jacob.sicy@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 26, 2006, (71 FR 24670), 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–SFUND–2006–0361, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Superfund Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Docket is 202–566–0276.

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, 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: Trade Secret Claims for Emergency Planning and Community Right-to-Know Act (EPCRA Section 322) (Renewal).

ICR number: EPA ICR No. 1428.07, OMB Control No. 2050–0078.

ICR Status: This ICR is scheduled to expire on October 31, 2006. 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: This information collection request pertains to trade secrecy claims submitted under section 322 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA). EPCRA contains provisions requiring facilities to report to State and local authorities, and EPA, the presence of extremely hazardous substances (described in section 302), inventory of hazardous chemicals (described in sections 311 and 312) and manufacture, process and use of toxic chemicals (described in section 313). Section 322 of EPCRA allows a facility to withhold the specific chemical identity from these EPCRA reports if the facility asserts a claim of trade secrecy for that chemical identity. The provision establishes the requirements and procedures that facilities must follow to request trade secrecy treatment of chemical identities, as well as the procedures for submitting public petitions to the Agency for review of the "sufficiency" of trade secrecy claims.

Trade secrecy protection is provided for specific chemical identities contained in reports submitted under each of the following EPCRA sections: (1) 303(d)(2)—Facility notification of changes that have or are about to occur, (2) 303(d)(3)—Local Emergency Planning Committee (LEPC) requests for facility information to develop or implement emergency plans, (3) 311—Material Safety Data Sheets (MSDSs) submitted by facilities, or lists of those chemicals submitted in place of the MSDSs, (4) 312—Tier II emergency and hazardous chemical inventory forms, and (5) 313—Toxic chemical release inventory forms.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 9.7 hours per claim. 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: Entities potentially affected by this action are manufacturers or non-manufacturers subject to reporting under sections 303, 311/312 or 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA).

Estimated Number of Respondents: 481.

Frequency of Response: On occasion.

Estimated Total Annual Hour Burden: 4,658.

Estimated Total Annual Cost: $309,000, includes $0 annualized capital or O&M costs and $309,000 annual labor costs.

Changes in the Estimates: There is an increase of 1,175 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. The total burden hours (annual) has increased from the previous ICR due to number of trade secret claim submitters increased.

Dated: July 11, 2006.

Sara Hisel McCoy,

Acting Director, Collection Strategies Division.

[FR Doc. E6–11611 Filed 7–20–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6677–5]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at 202–564–7167.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 7, 2006 (71 FR 17845).

Draft EISs

EIS No. 20060048, ERP No. D–FRC–K05061–CA, Lake Elsinore Advanced Pumped Storage (LEAPS) Project, Construction and Operation, Application for Hydroelectric License, Special-Use-Permit, FERC No. 11858, City of Lake Elsinore, Riverside County, CA.

Summary: EPA expressed concerns about the impacts to watershed resources, including water quality and riparian habitat, and to air quality. Rating EC2.

EIS No. 20060158, ERP No. D–SFW–E99015–AL, Gulf Highlands Condominium and Beach Club West Residential/ Recreational Condominium Projects, Application for Two Incidental Take Permits for the Construction and Occupancy, Fort Morgan Peninsula, Baldwin County, AL.

Summary: EPA does not object to the proposed action. Rating LO.

EIS No. 20060194, ERP No. D–AFS–J65464–00, Kootenai National Forest Invasive Plant Management, Proposes to Manage Noxious Weed and Invasive Plant Species, Lincoln Sanders, Flathead Counties, MT and Bonner and Boundary Counties, ID.

Summary: EPA expressed concern about herbicide transport to surface and groundwater. EPA requested the development of design criteria for herbicide application and a detailed monitoring plan. Rating EC2.

EIS No. 20060209, ERP No. D–NPS–D65037–PA, Flight 93 National Memorial, Designation of Crash Site to Commemorate the Passengers and Crew of Flight 93, Implementation, Stonycreek Township, Somerset County, PA.

Summary: EPA does not object to the proposed project. Rating LO.

Final EISs

EIS No. 20060191, ERP No. F–FAA–E51051–FL, Panama City-Bay County International Airport (PFN), Proposed Relocation to a New Site, NPDES Permit and U.S. Army COE Section 404 Permit, Bay County, FL.

Summary: EPA continues to have environmental concerns about wetland and secondary impacts and requested that the ROD include mitigation commitments to reduce those impacts.

EIS No. 20060201, ERP No. F–NRS–G31004–AR, Little Red River Irrigation Project, Develop a Water Management Plan for Irrigation Purposes in Seary, U.S. Army COE Section 404 Permit, Raft Creek, White County, AR.

Summary: No formal comment letter was sent to the preparing agency.

EIS No. 20060231, ERP No. F–IBR–G28013–NM, Carlsbad Project Water Operations and Water Supply Conservation, Changes in Carlsbad Project Operations and Implementation of Water Acquisition Program, U.S. COE Section 404 Permit, NPDES, Eddy, De Baca, Chaves, and Guadelupe Counties, NM.

Summary: No formal comment letter was sent to the preparing agency.

EIS No. 20060255, ERP No. F–NPS–H65026–IA, Hoover Creek Stream Management Plan, Implementation, Herbert Hoover National Historic Site, IA.

Summary: No formal comment letter was sent to the preparing agency.

Dated: July 18, 2006.

Ken Mittelholtz,

Environmental Protection Specialist, Office of Federal Activities.

[FR Doc. E6–11602 Filed 7–20–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6677–4]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements.

Filed 7/10/2006 through 7/14/2006. Pursuant to 40 CFR 1506.9.

EIS No. 20060292, Draft EIS, SFW, CA, Orange County Southern Subregion Habitat Conservation Plan (HCP), Implementation, Application for and Incidental Take Permit, Orange County, CA,

Comment Period Ends: 9/18/2006, Contact: Karen Goebel , 760–431–9440.

EIS No. 20060293, Final EIS, SFW, 00, Upper Mississippi River National Wildlife and Fish Refuge, Comprehensive Conservation Plan, A New Alternative E: Modified Wildlife and Integrated Public Use, Implementation, MN, WI, Il and IA,

Wait Period Ends: 8/21/2006, Contact: Don Hultman 507–452–4232.

This document is available on the Internet at *http://www.fws.gov/midwet/planning/UpperMiss/FinalEIS.html.*

EIS No. 20060294, Draft Supplement, AFS, CA, Rock Creek Recreational Trails Project, Updated Information on Habitat Status and Population Trend for the Pacific Deer Herd, Implementation, Eldorado National Forest, Eldorado County, CA,

Comment Period Ends: 9/5/2006, Contact: Charis Parker, 530–333–4312.

EIS No. 20060295, Draft EIS, BLM, WY, Casper Field Office Planning Area Resource Management Plan, Implementation, Natrona, Converse, Goshen, and Platte Counties, WY,

Comment Period Ends: 09/18/2006, Contact: Linda Stone 307–261–7600.

EIS No. 20060296, Draft EIS, AFS, CA, South Yuba Canal Maintenance Project, Hazardous Trees Removal, Implementation, Tahoe National Forest, Nevada County, CA,

Comment Period Ends: 9/5/2006, Contact: Dennis W. Stevens, 530–478–6253.

EIS No. 20060297, Draft EIS, FHW, NC, NC–24 Transportation Improvements, from west of I–95 to I–40, Funding, U.S. Army COE 404 Permit, Cumberland, Sampson, and Duplin Counties, NC,

Comment Period Ends: 9/11/2006 Contact: John Sullivan, III, 919–856–4346.

EIS No. 20060298, Draft EIS, AFS, CO, Arapahoe Basin 2006 Improvement Plan, Enhancing the Recreational Experience Addressing Lifts, Parking, and Terrain Network, Montezuma Bowl, Implementation, U.S. Army COE 404 Permit, White River National Forest, Summit County, CO,

Comment Period Ends: 9/5/2006, Contact: Peech Keller, 970–468–5400.

EIS No. 20060299, Draft EIS, FRC, NY, Niagara Project, Hydroelectric Relicensing Application FERC No. 2216, Niagara River, Niagara County, NY,

Comment Period Ends: 9/5/2006, Contact: Steve Kartalia, (202) 502–6131.

Dated: July 18, 2006.

Ken Mittelholtz,

NEPA Compliance Division, Office of Federal Activities.

[FR Doc. E6–11603 Filed 7–20–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8202–3]

Notice of Open Meeting of the Environmental Financial Advisory Board (EFAB)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The United States Environmental Protection Agency's (EPA) Environmental Financial Advisory Board (EFAB) will hold an open board meeting. EFAB is an EPA advisory committee chartered under the Federal Advisory Committee Act (FACA) to provide advice and recommendations to EPA on creative approaches to funding environmental programs, projects, and activities.

A meeting of the full board will be held to discuss progress with work products under EFAB's current strategic action agenda and develop an action agenda to direct the Board's ongoing and new activities through FY 2007. Topics of discussion include financial assurance mechanisms; innovative environmental financing tools; non-point source (watershed) financing; useful life financing of water facilities; water infrastructure financing; and smartway transportation partnerships. The meeting is open to the public; however, seating is limited. All members of the public who wish to attend the meeting must register in advance, no later than Friday, August 4, 2006.

DATES: August 14, 2006 from 1 p.m.–5 p.m. and August 15, 2006 from 8:30 a.m.–5 p.m.

ADDRESSES: Hotel Nikko San Francisco, 222 Mason Street, San Francisco, CA 94102.

FOR FURTHER INFORMATION CONTACT: For information on access or services for individuals with disabilities, please contact Alecia Crichlow at (202) 564–5188 or *crichlow.alecia@epa.gov.* To request accommodations of a disability, please contact Alecia Crichlow at least ten days prior to the meeting date.

Dated: July 12, 2006.

Joseph Dillon,

Director, Office of Enterprise Technology and Innovation.

[FR Doc. E6–11601 Filed 7–20–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[Docket EPA–RO4–SFUND–2006–00594; FRL–8201–2]

Prestige Chemical Company Superfund Site Senoia, Coweta County, GA; Notice of Amendment to Settlement

AGENCY: Environmental Protection Agency.

ACTION: Notice of amendment to settlement.

SUMMARY: Under Section 122 (h) (1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLS), the United States Environmental Protection Agency has amended the settlement Docket # CER–04–2002–3782 concerning the Prestige Chemical Company Superfund Site located in Senoia, Coweta County, Georgia which was first published in the **Federal Register** on November 18, 2002 (67 FR 69528).

DATES: The Agency will consider public comments on the amended portion of the settlement until August 21, 2006. The Agency will consider all comments received and may modify or withdraw its consent to the amended portion of the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate.

ADDRESSES: Copies of the amended portion of the settlement are available from Ms. Paula V. Batchelor. Submit your comments, identified by Docket ID No. EPA–RO4–SFUND–2006–0594 or Site name Prestige Chemical Company Superfund Site by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: Batchelor.Paula@epa.gov.*
- *Fax:* 404/562–8842/Attn Paula V. Batchelor.
- *Mail:* Ms. Paula V. Batchelor, U.S. EPA Region 4, WMD-SEIMB, 61 Forsyth Street, S.W., Atlanta, Georgia 30303. "In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St. NW., Washington, DC 20503."

Instructions: Direct your comments to Docket ID No. EPA–R04–SFUND–2006–0594. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the U.S. EPA Region 4 office located at 61 Forsyth Street, SW., Atlanta, Georgia 30303. Regional office is open from 7 am until 6:30 pm. Monday through Friday, excluding legal holidays. Written comments may be submitted to Ms. Batchelor within 30 calendar days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: Paula V. Batchelor at 404/562–8887.

Dated: July 6, 2006.

Greg Armstrong,

Acting Chief, Superfund Enforcement & Information Management Branch, Waste Management Division.

[FR Doc. E6–11605 Filed 7–20–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8201–1]

Notice of Tentative Approval and Solicitation of Request for a Public Hearing for Public Water System Supervision Program Revision for the State of West Virginia

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of tentative approval and solicitation of requests for a public hearing.

SUMMARY: Notice is hereby given in accordance with the provision of section 1413 of the Safe Drinking Water Act as amended, and the rules governing National Primary Drinking Water Regulations Implementation that the State of West Virginia has revised its approved Public Water System Supervision Program and revised its regulations for issuing variances and exemptions. EPA has determined that these revisions are no less stringent than the corresponding Federal regulations. Therefore, EPA has decided to tentatively approve these program revisions. All interested parties are invited to submit written comments on this determination and may request a public hearing.

DATES: Comments or a request for a public hearing must be submitted by August 21, 2006. This determination shall become effective on August 21, 2006 if no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on his own motion, and if no comments are received which cause EPA to modify its tentative approval.

ADDRESSES: Comments or a request for a public hearing must be submitted to the U.S. Environmental Protection Agency Region III, 1650 Arch Street, Philadelphia, PA 19103–2029. Comments may also be submitted electronically to Ghassan Khaled at *khaled.ghassan@epa.gov*. All documents relating to this determination are available for inspection between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, at the following offices:

- Drinking Water Branch (3WP21), Water Protection Division, U.S. Environmental Protection Agency Region III, 1650 Arch Street, Philadelphia, PA 19103–2029.
- Office of Environmental Health Services, West Virginia Department of Health and Human Resources, 1 Davis Square, Suite 200, Charleston, WV 25301.

FOR FURTHER INFORMATION CONTACT: Ghassan Khaled, Drinking Water Branch (3WP21) at the Philadelphia address given above; telephone (215) 814–5780 or fax (215) 814–2318.

SUPPLEMENTARY INFORMATION: All interested parties are invited to submit written comments on this determination and may request a public hearing. All comments will be considered and, if necessary, EPA will issue a response. Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator. However, if a substantial request for a public hearing is made by August 21, 2006, a public hearing will be held.

A request for public hearing shall include the following: (1) The name, address, and telephone number of the individual, organization, or other entity requesting a hearing; (2) a brief statement of the requesting person's interest in the Regional Administrator's determination and of information that the requesting person intends to submit at such a hearing; and (3) the signature of the individual making the request; or if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

Dated: July 12, 2006.

W.T. Wisniewski,

Acting Regional Administrator, EPA, Region III.

[FR Doc. E6–11604 Filed 7–20–06; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center Web site at *http://www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 7, 2006.

A. Federal Reserve Bank of Chicago (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. Marshall & Ilsley Corporation, Milwaukee, Wisconsin; to acquire, through its wholly-owned subsidiary, Metavante Corporation, Milwaukee, Wisconsin 100 percent of the votings shares of VICOR, Inc., Richmond, California, and thereby engage in data processing activities, management consulting and counseling activities, pursuant to section 225.28(b)(9)(i)(A) and 225.28(b)(14)(i) of Regulation Y.

Board of Governors of the Federal Reserve System, July 18, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E6–11619 Filed 7–20–06; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

[File No. 061 0114]

Linde AG and The BOC Group PLC; Analysis of Agreement Containing Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent

agreement—that would settle these allegations.

DATES: Comments must be received on or before August 16, 2006.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to "Linde AG and BOC, File No. 061 0114," to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/ Office of the Secretary, Room 135–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, must be clearly labeled "Confidential," and must comply with Commission Rule 4.9(c). 16 CFR 4.9(c) (2005).[1] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments that do not contain any nonpublic information may instead be filed in electronic form as part of or as an attachment to e-mail messages directed to the following e-mail box: *consentagreement@ftc.gov*.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

FOR FURTHER INFORMATION CONTACT: Sean G. Dillon, Bureau of Competition, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3575.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 of the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for July 18, 2006), on the World Wide Web, at *http://www.ftc.gov/os/2006/07/index.htm*. A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

Analysis of Agreement Containing Consent Order To Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission") has accepted from Linde AG ("Linde"), subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement"), which is designed to remedy the anticompetitive effects resulting from Linde's acquisition of the entire share capital of The BOC Group plc ("BOC").

Under the terms of the Consent Agreement, Linde is required to divest air separation units ("ASUs") and related assets currently owned and operated by Linde in the following eight locations in which the proposed acquisition would lessen competition: (1) Canton, Ohio; (2) Dayton, Ohio; (3) Madison, Wisconsin; (4) Waukesha, Wisconsin; (5) Carrollton, Georgia; (6) Jefferson, Georgia; (7) Rockhill, South Carolina; and (8) Bozrah, Connecticut. The Consent Agreement also requires Linde to divest bulk refined helium assets, including helium source contracts, ancillary distribution assets, and customer contracts, to Taiyo Nippon Sanso Corporation ("Nippon Sanso").

The proposed Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed Consent Agreement, and will decide whether it should withdraw from the proposed Consent Agreement or make it final.

Pursuant to a tender offer and agreement dated March 6, 2006, Linde announced its intention to acquire the entire share capital of BOC for an aggregate purchase price of approximately $14.4 billion. Consummation of this transaction is subject to acceptance of the offer by a sufficient number of the shareholders of BOC. The Commission's complaint alleges the facts described below and that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, by lessening competition in the market for bulk refined helium worldwide, and certain regional markets in the United States for liquid oxygen and liquid nitrogen.

II. The Parties

Linde is a global supplier of industrial and medical gases and related equipment. Linde LLC is the parent corporation of the United States subsidiary that manufactures and sells a variety of industrial gases, including oxygen, nitrogen, argon, helium, and many other industrial and speciality gases for use in a variety of industries, including the medical, welding, and metal production fields. Linde is the fifth-largest industrial gas supplier in the United States with 11 liquid atmospheric gas producing plants in the United States, most of which are concentrated in the Midwest, Northeast, and Southeast.

BOC is the world's second-largest industrial gas supplier, and the fourth-largest supplier in the United States. BOC operates 23 liquid atmospheric gas producing plants in the United States, many of which are concentrated in the Midwest, Northeast, and Southeast regions, as well as the West and Gulf Coast regions.

III. Liquid Oxygen and Liquid Nitrogen

Both Linde and BOC own and operate ASUs in the United States that produce liquid atmospheric gases, including liquid oxygen and liquid nitrogen. Each gas has specific properties that make it uniquely suited for the applications in which it is used. For most of these applications, there is no substitute for the use of oxygen or nitrogen. Customers would not switch to another gas or product even if the price of liquid oxygen or liquid nitrogen increased by five to ten percent.

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. See Commission Rule 4.9(c), 16 CFR 4.9(c).

There are three distinct methods of distributing oxygen and nitrogen: in cylinders, in liquid form, and through on-site ASUs or pipelines. Customers choose a distribution method based on the volume of gas required. Customers who use liquid oxygen or liquid nitrogen require volumes of these gases that are too large to purchase economically in cylinders, but too small to justify the expense of an on-site ASU or pipeline. Thus, even if the price of liquid oxygen or liquid nitrogen increased by five to ten percent, customers would not switch to another method of distribution.

Due to high transportation costs, liquid oxygen and liquid nitrogen may only be purchased economically from a supplier with an ASU located within 150 to 250 miles of the customer. Therefore, it is appropriate to analyze the competitive effects of the proposed acquisition in local geographic markets for liquid oxygen and liquid nitrogen. The relevant geographic markets in which to analyze the effects of the proposed acquisition are the Northeast, the Chicago-Milwaukee Metropolitan Area, the Eastern Midwest, and the Southeast.

The markets for liquid oxygen and liquid nitrogen are highly concentrated. In each of the relevant geographic markets, Linde and BOC are two of only five companies supplying liquid oxygen and liquid nitrogen to customers. As a result of the proposed acquisition, a significant competitor would be eliminated, and a small number of viable competitors would remain. In addition, certain market conditions, including the relative homogeneity of the firms and products involved and availability of detailed market information, are conducive to the firms reaching terms of coordination and detecting and punishing deviations from those terms. Therefore, the proposed acquisition would enhance the likelihood of collusion or coordinated action between or among the remaining firms in each market. Furthermore, by eliminating direct competition between these two suppliers in these areas, the proposed acquisition likely would allow Linde to exercise market power unilaterally, thereby increasing the likelihood that purchasers of liquid oxygen or liquid nitrogen would be forced to pay higher prices in these areas. The proposed acquisition provides Linde a larger base of sales on which to enjoy the benefit of a unilateral price increase and also eliminates a competitor to which customers otherwise could have diverted their sales in markets where alternative sources of supply likely are already limited. In addition, in certain geographic markets, Linde and BOC are the two closest competitors to a significant number of customers.

Significant impediments to new entry exist in the markets for liquid oxygen and liquid nitrogen. In order to be cost competitive in these markets, an ASU must produce at least 250 to 300 tons per day of liquid product. The cost to construct a plant sufficiently large to be cost effective can be 30 to 40 million dollars, most of which are sunk costs and cannot be recovered. Although an ASU can theoretically be constructed within two years, it is not economically justifiable to build an ASU before contracting to sell a substantial portion of the plant's capacity, either to an on-site customer or to liquid customers. On-site customers normally sign long-term contracts. Because such opportunities to contract with these customers are rare, it is uncertain whether such an opportunity would arise in the near future in any of the areas affected by the acquisition. It is even more difficult and time-consuming for a potential new entrant to try to contract with enough liquid gas customers to justify building a new ASU. These customers are generally locked into contracts with existing suppliers that typically last between five and seven years. Even if the new entrant were able to contract with enough customers to justify constructing a new ASU in any of the affected markets, the new entrant may still need to rely on suppliers already in the market to obtain liquid gases to service the new entrant's customers while the ASU was constructed. Given the difficulties of entry, it is unlikely that new entry could be accomplished in a timely manner in the liquid oxygen and liquid nitrogen markets to defeat a likely price increase caused by the acquisition.

IV. Bulk Refined Helium

Both Linde and BOC are suppliers of bulk refined helium. Bulk refined helium has specific properties that make it uniquely suited for the applications in which it is used. For most of these applications, there is no substitute for bulk refined helium. Customers likely would not switch to another gas or product even if the price of bulk refined helium increased by five to ten percent.

Refined helium is available to customers in two distinct distribution methods: Cylinder form or bulk form. Customers choose a distribution method based on the volume of gas required. Bulk form is generally used by customers that require large volumes of refined helium. In bulk form, refined helium may be packaged into containers known as "dewars" and then distributed in liquid form to customers. Refined helium may also be converted into gaseous form and distributed in high-pressure "tube trailers" in bulk quantities to customers. Bulk refined helium customers obtain helium in bulk form (liquid dewars or gaseous tube trailers) because it is the most cost-effective method of purchasing the volume of refined helium they require. Therefore, customers would not switch to purchasing refined helium via another method of distribution even if the prices of bulk refined helium distributed by one method increased by five to ten percent.

Refined helium is a rare and expensive gas. Because of its high value, refined helium can be, and is, transported economically on a worldwide basis. Because helium is transported globally, foreign helium capacity and demand impact the demand and pricing for domestically-produced helium. Therefore, it is appropriate to analyze the competitive effects of the proposed acquisition using a worldwide market for bulk refined helium.

The market for bulk refined helium is highly concentrated. Linde and BOC are two of only five companies in the world with access to refined bulk helium; BOC is the second-largest supplier, and a combined Linde/BOC would become the largest. While Linde is currently the smallest of the five, it has substantial new reserves coming on line in the near future, and already is an aggressive participant in the market for refined bulk helium. In addition, certain market conditions, including the relative homogeneity of the firms and products involved and availability of detailed market information, are conducive to the firms reaching terms of coordination and detecting and punishing deviations from those terms. The Commission's complaint charges that the proposed acquisition would enhance the likelihood of collusion or coordinated action among the remaining firms in the market.

There are substantial barriers to entry in the bulk refined helium market. The most significant impediment to entry is securing a source of refined helium. There are no sources of refined helium available that are not committed to market incumbents in long term contracts. A new entrant would need to locate a new source of crude helium and build a refinery. In addition, tens of millions of dollars would be needed to acquire the necessary infrastructure and ancillary distribution assets, including transfill facilities, cryogenic storage trailers, high-pressure tube trailers and

liquid dewars, capable of transporting helium from the refinery to customers. While the costs of entering are high, opportunities to recoup these costs are comparatively limited. As with other industrial gases, helium is sold pursuant to long-term contracts, so only a fraction of the market is available at a given time. Given the difficulties of entering the market, it is unlikely that new entry sufficient to counteract the competitive impact of the proposed acquisition would occur in a timely manner in the market for bulk refined helium.

V. The Consent Agreement

A. Liquid Oxygen and Liquid Nitrogen

The proposed Consent Agreement remedies the acquisition's likely anticompetitive effects in the markets for liquid oxygen and liquid nitrogen. Pursuant to the Consent Agreement, Linde will divest all of its merchant liquid oxygen and nitrogen producing business in the identified geographic markets. Thus, Linde will divest the eight ASUs listed in Section I to a single purchaser that will operate the ASUs as a going concern. The Consent Agreement provides that Linde must find a buyer for the ASUs, at no minimum price, that is acceptable to the Commission, no later than six months from the date the Consent Agreement becomes final. If the Commission determines that Linde has not provided an acceptable buyer for the ASUs within this time period, or that the manner of the divestiture is not acceptable, the Commission may appoint a trustee to divest the assets. The trustee would have the exclusive power and authority to accomplish the divestiture.

The acquirer of the divested assets must receive the prior approval of the Commission. The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed acquirer of divested assets must not itself present competitive problems. Numerous entities are interested in purchasing the divested ASUs, including industrial gas suppliers that currently have a regional presence in the industry, but do not compete in the areas affected by the acquisition, as well as entities in related fields that are interested in entering the production and sale of industrial gases. The Commission is therefore satisfied that sufficient potential buyers for the divested liquid oxygen and liquid nitrogen assets exist.

The Consent Agreement also contains an Agreement to Hold Separate and Maintain Assets. This will serve to protect the viability, marketability, and competitiveness of the divestiture asset package until the assets are divested to a buyer approved by the Commission. The Agreement to Hold Separate and Maintain Assets became effective on the date the Commission accepted the Consent Agreement for placement on the public record and will remain in effect until Linde successfully divests the divestiture asset package according to the terms of the Decision and Order.

The Commission has appointed Richard Klein to oversee the management of the divestiture asset package until the divestiture is complete, and for a brief transition period after the sale. Mr. Klein has approximately 23 years experience as the Chief Executive Officer of a global specialty chemicals manufacturer, and is well-respected in the industry. In order to ensure that the Commission remains informed about the status of the proposed divestitures, the proposed Consent Agreement requires the parties to file periodic reports with the Commission until the divestiture is accomplished.

B. Bulk Refined Helium

The Consent Agreement resolves the proposed acquisition's likely anticompetitive effects in the bulk refined helium market by requiring Linde to divest bulk refined helium assets, including helium source contracts, ancillary distribution assets, and customer contracts, to Nippon Sanso no later than ten days after the acquisition. A buyer upfront remedy was required in this market because the helium assets to be divested do not constitute a stand-alone business and require key third-party consents for their transfer under the Order.

Nippon Sanso is particularly well-positioned to compete successfully with the divested helium assets. Nippon Sanso is the largest industrial and speciality gas company in Japan, and is the sixth-largest industrial gas company in the world. Matheson Tri-Gas, Nippon Sanso's U.S. subsidiary, is the sixth-largest industrial gas supplier in the United States. Although it lacks helium sourcing contracts, Nippon Sanso is one of the world's largest helium distributors, selling helium to end-users in the United States and Japan. (Nippon Sanso, however, does not have current access to bulk refined helium.) Having access to the helium sourcing contracts and other ancillary helium assets will provide Nippon Sanso the ability to grow its helium business in the U.S., European, and Asian markets. Nippon Sanso should be successful in restoring the competition that likely would be lost if the proposed Linde/BOC transaction were to proceed unremedied.

If the Commission determines that Nippon Sanso is not an acceptable purchaser, or the manner of the divestiture is not acceptable, the parties must unwind the sale to Nippon Sanso and divest the bulk refined helium assets within six months of the date the Order becomes final to another Commission-approved acquirer. If the parties fail to divest within six months, the Commission may appoint a trustee to divest the bulk refined helium assets.

The Consent Agreement also contains an Order to Maintain Assets. This will serve to ensure that the helium assets are protected and divested in substantially the same condition existing at the time the Consent Agreement was signed. The Order to Maintain Assets became effective on the date the Commission accepted the Consent Agreement for placement on the public record and will remain in effect until Linde successfully divests the helium assets according to the terms of the Decision and Order.

The Commission has also appointed Mr. Klein to oversee the transition in ownership of the divested helium assets to Nippon Sanso and to ensure Linde's and BOC's compliance with all of the provisions of the proposed Consent Agreement. In order to ensure that the Commission remains informed about the status of the proposed divestitures, the proposed Consent Agreement requires Mr. Klein to file reports with the Commission periodically until the divestiture is accomplished.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or the Agreement to Hold Separate, or to modify their terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E6–11624 Filed 7–20–06; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10180, CMS–319, CMS–317, CMS–R–199, and CMS–588]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections 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 function; (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.

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* State Children's Health Insurance Program (SCHIP) Report on Payables and Receivables; *Use:* Collection of SCHIP data and the calculation of the SCHIP Incurred But Not Reported (IBNR) estimate are pertinent to CMS' financial audit. The CFO auditors have reported the lack of an estimate for SCHIP IBNR payables and receivables as a reportable condition in the FY 2005 audit of CMS's financial statements. It is essential that CMS collect the necessary data from State agencies in FY 2006, so that CMS continues to receive an unqualified audit opinion on its financial statements. Program expenditures for the SCHIP have increased since its inception; as such, SCHIP receivables and payables may materially impact the financial statements. The SCHIP Report on Payables and Receivables will provide the information needed to calculate the SCHIP IBNR.; *Form Number:* CMS–10180 (OMB #: 0938–0988); Frequency: Reporting—Annually; *Affected Public:* State, local or tribal governments; *Number of Respondents:* 56; *Total Annual Responses:* 56; *Total Annual Hours:* 336.

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* State Medicaid Eligibility Quality Control (MEQC) Sample Selection Lists and Supporting Regulations in 42 CFR 431.800–431.865; *Use:* State Medicaid Eligibility Quality Control (MEQC) is operated by the State Title XIX agency to monitor and improve the administration of its Medicaid system. The MEQC system is based on State reviews of Medicaid beneficiaries identified through statistically reliable statewide samples of cases selected from the eligibility files. These reviews are conducted to determine whether or not the sampled cases meet applicable State Title XIX eligibility requirements by States performing the traditional sample process. The reviews are also used to assess beneficiary liability, if any, and to determine the amounts paid to provide Medicaid services for these cases. At the beginning of each month, State agencies still performing the traditional sample are required to submit sample selection lists which identify all of the cases selected for review in the States' samples. The sample selection lists contain identifying information on Medicaid beneficiaries such as: State agency review number; beneficiary's name and address; the name of the county where beneficiary resides; Medicaid case number, etc. The submittal of the sample selection lists is necessary for regional office (RO) validation of State reviews. Without these lists, the integrity of the sampling results would be suspect and the ROs would have no data on the adequacy of the States' monthly sample draw or review completion status.; *Form Number:* CMS–319 (OMB #: 0938–0147); Frequency: Reporting—Monthly; *Affected Public:* State, local or tribal governments; *Number of Respondents:* 10; *Total Annual Responses:* 120; *Total Annual Hours:* 960.

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* State Medicaid Eligibility Quality Control Sampling Plan and Supporting Regulations in 42 CFR 431.800–431.865; *Use:* MEQC is operated by the State Title XIX agency to monitor and improve the administration of its Medicaid system. The MEQC system is based on monthly State reviews of Medicaid cases by States performing the traditional sampling process identified through statistically reliable statewide samples of cases selected from the eligibility files. These reviews are conducted to determine whether or not the sampled cases meet applicable State Title XIX eligibility requirements. The reviews are also used to assess beneficiary liability, if any, and to determine the amounts paid to provide Medicaid services for these cases.; *Form Number:* CMS–317 (OMB #: 0938–0146); Frequency: Recordkeeping and Reporting—Semi-annually; *Affected Public:* State, local or tribal governments; *Number of Respondents:* 10; *Total Annual Responses:* 20; *Total Annual Hours:* 480.

4. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medicaid Report on Payables and Receivables; *Use:* The Chief Financial Officers (CFO) Act of 1990, as amended by the Government Management Reform Act (GMRA) of 1994, requires government agencies to produce auditable financial statements.

Because the Centers for Medicare & Medicaid Services (CMS) fulfills its mission through its contractors and the States, these entities are the primary source of information for the financial statements. There are three basic categories of data: Expenses, payables, and receivables. The CMS–64 is used to collect data on Medicaid expenses. The CMS–R–199 collects Medicaid payable and receivable accounting data from the States.; *Form Number:* CMS–R–199 (OMB #: 0938–0697); Frequency: Reporting—Annually; *Affected Public:* State, local or tribal governments; *Number of Respondents:* 57; *Total Annual Responses:* 57; *Total Annual Hours:* 342.

5. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Electronic Funds Transfer Authorization Agreement; *Use:* Section 1815(a) of the Social Security Act provides the authority for the Secretary of Health and Human Services to pay providers/suppliers of Medicare services at such time or times as the Secretary determines appropriate (but no less frequently than monthly). Under Medicare, CMS, acting for the Secretary, contracts with Fiscal Intermediaries and Carriers to pay claims submitted by providers/suppliers who furnish services to Medicare beneficiaries. Under CMS' payment policy, Medicare providers/suppliers have the option of receiving payments electronically. Form number CMS–588 authorizes the use of electronic fund transfers (EFTs).; *Form Number:* CMS–588 (OMB #: 0938–0626); *Frequency:* Recordkeeping and Reporting—On occasion; *Affected*

Public: Business or other for-profit, Not-for-profit institutions, and State, local or tribal governments; *Number of Respondents:* 100,000; *Total Annual Responses:* 100,000; *Total Annual Hours:* 100,000.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

Written comments and recommendations for the proposed information collections must be mailed or faxed within 30 days of this notice directly to the OMB desk officer: OMB Human Resources and Housing Branch, Attention: Carolyn Lovett, New Executive Office Building, Room 10235, Washington, DC 20503. Fax Number: (202) 395–6974.

Dated: July 14, 2006.

Michelle Shortt,

Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. E6–11576 Filed 7–20–06; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10179]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections 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.

1. *Type of Information Collection Request:* New Collection; *Title of Information Collection:* Requests by Hospitals for an Alternative Cost-to-Charge Ration Instead of the Statewide Average Cost-to-Charge Ratio; *Use:* Because of the extensive gaming of outlier payments, CMS implemented new regulations in 42 CFR 412.84(i)(2) for inpatient hospitals and 42 CFR 412.525(a)(4)(ii) and 412.529(c)(5)(ii) for Long Term Care Hospitals (LTCH) to allow a hospital to contact its fiscal intermediaries to request that its cost-to-charge ratio (CCR) (operating and/or capital CCR for inpatient hospitals or the total (combined operating and capital) CCR for LTCHs), otherwise applicable, be changed if the hospital presents substantial evidence that the ratios are inaccurate for inpatient hospitals. Any such requests would have to be approved by the CMS Regional Office with jurisdiction over that FI. *Form Number:* CMS–10179 (OMB#: 0938–NEW); *Frequency:* Reporting—On occasion; *Affected Public:* Individuals or Households and Federal Government; *Number of Respondents:* 18; *Total Annual Responses:* 18; *Total Annual Hours:* 144.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received at the address below, no later than 5 p.m. on September 19, 2006.

CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development—B, Attention: William N. Parham, III, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: July 14, 2006.

Michelle Shortt,

Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. E6–11582 Filed 7–20–06; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Notice of Hearing: Reconsideration of Disapproval of Alaska State Plan Amendment 05–06

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice of hearing.

SUMMARY: This notice announces an administrative hearing to be held on August 29, 2006, at the Blanchard Plaza Building, 2201 Sixth Avenue, 11th Floor Conference Room, Seattle, WA 98121, to reconsider CMS' decision to disapprove Alaska State plan amendment 05–06.

Closing Date: Requests to participate in the hearing as a party must be received by the presiding officer by August 7, 2006.

FOR FURTHER INFORMATION CONTACT: Kathleen Scully-Hayes, Presiding Officer, CMS, Lord Baltimore Drive, Mail Stop LB–23–20, Baltimore, Maryland 21244. Telephone: (410) 786–2055.

SUPPLEMENTARY INFORMATION: This notice announces an administrative hearing to reconsider CMS' decision to disapprove Alaska State plan amendment (SPA) 05–06, which was submitted on August 1, 2005. This SPA was disapproved on April 21, 2006. Under SPA 05–06, Alaska proposed to add certain school-based behavioral health services under the rehabilitation services benefit.

This amendment was disapproved because it did not comport with the requirements of section 1902(a) of the Social Security Act (the Act) and implementing regulations. Specifically, the following issues will be considered on reconsideration: (1) Whether the State demonstrated that the proposed services would be within the scope of "medical assistance" under the State plan pursuant to section 1902(a)(10) of the Act, as defined at section 1905(a) of the Act; (2) whether the State has assured that there is non-Federal funding as required under section 1902(a)(2) to support expenditures that would be claimed under the State plan as the basis for Federal matching funding in light of financial arrangements that do not appear to result in net expenditures; (3) whether the proposed payment rates meet the requirements of section 1902(a)(30)(A) of the Act to be consistent with efficiency, economy, and quality of care, in light of financial arrangements under which the providers do not retain

Medicaid payments; and (4) whether the State plan complied with the requirements of section 1902(a) generally, and implementing Federal regulations at 42 CFR 430.10, to include all information necessary to serve as the basis for Federal financial participation. We describe each of these issues in detail below.

Section 1902(a)(10) of the Act requires that the State plan provide for making medical assistance available to eligible beneficiaries. The State did not establish that the proposed "school-based rehabilitative services" are within the scope of "medical assistance," which is defined in section 1905(a) of the Act. While we understand the State has placed the proposed services under the rehabilitative services benefit in the State plan, the State has provided no clear definition of the proposed services so that CMS can determine whether they are, indeed, within the scope of the rehabilitation benefit. After repeated requests for further information, the State did not provide any description of what elements the "behavioral health services (including medication services)" encompass, and how they are different (or the same) as services in the currently approved State plan. It is not clear whether this is an expansion of coverage or a different payment methodology for school providers. Absent such information, SPA 05–06 did not comply with the requirements of section 1902(a)(10) of the Act to provide for medical assistance as defined in section 1905(a) of the Act.

Section 1902(a)(2) of the Act provides that the State plan must assure adequate funding for the non-Federal share of expenditures from State or local sources for the amount, duration, scope, or quality of care and services available under the plan. Section 1902(a)(30)(A) of the Act requires that State plans provide for payment for care and services available under the plan that is "consistent with economy, efficiency, and quality of care." In order to assess compliance with these provisions, State officials were asked to provide information related to Alaska's funding mechanisms for payments, and the net State and local expenditures that are incurred. Nor did Alaska respond to requests for descriptions of any transfers of funds between providers and State or local governments, and information as to whether the providers keep 100 percent of the total computable funds given as Medicaid payments.

According to a flow chart provided by the State, the Medicaid agency pays the schools 100 percent of the claimed amount. A quarterly bill for the State match is then submitted to school providers who transfer to the Medicaid agency the State share of the services provided. This transfer of funds is made after the schools have been reimbursed for the services they provide, and is effectively a refund by the schools for part of their Medicaid payments. As a result of this refund, the net expenditure by the State Medicaid agency is wholly federally funded. In light of this refund arrangement, we cannot conclude that the proposed payment rate reflects the net expenditure by the State for Medicaid services provided by schools, and that the net non-Federal share meets the requirements of section 1902(a)(2) of the Act. Moreover, the refund is an indication that the full payment amount is not required to ensure Medicaid beneficiaries' access to the providers' services. The result is that proposed payments under this section of the plan would not be in compliance with the requirement under section 1902(a)(30)(A) of the Act that payment rates must be consistent with economy, efficiency, and quality of care.

Finally, the proposed SPA does not comply with the general provisions of section 1902(a), including section 1902(a)(4) of the Act, as implemented in part by Federal regulations at 42 CFR 430.10. This regulation requires that States include in their State plans all information necessary for CMS to determine whether the plan can be approved to serve as a basis for Federal financial participation. There is absent information that would more precisely identify the covered services. Therefore, the proposed SPA does not comply with this requirement.

For the reasons cited above, and after consultation with the Secretary, as required by Federal regulations at 42 CFR 430.15(c)(2), Alaska SPA 05–06 was disapproved.

Section 1116 of the Act, and Federal regulations at 42 CFR part 430, establish Department procedures that provide an administrative hearing for reconsideration of a disapproval of a State plan or plan amendment. CMS is required to publish a copy of the notice to a State Medicaid agency that informs the agency of the time and place of the hearing, and the issues to be considered. If we subsequently notify the agency of additional issues that will be considered at the hearing, we will also publish that notice.

Any individual or group that wants to participate in the hearing as a party must petition the presiding officer within 15 days after publication of this notice, in accordance with the requirements contained in Federal regulations at 42 CFR 430.76(b)(2). Any interested person or organization that wants to participate as *amicus curiae* must petition the presiding officer before the hearing begins in accordance with the requirements contained in Federal regulations at 42 CFR 430.76(c). If the hearing is later rescheduled, the presiding officer will notify all participants.

The notice to Alaska announcing an administrative hearing to reconsider the disapproval of its SPA reads as follows:

Mr. Jerry Fuller, Medicaid Director, State of Alaska, Department of Health and Social Services, Office of the Commissioner, P.O. Box 110601, Juneau, AK 99811–0601.

Dear Mr. Fuller: I am responding to your request for reconsideration of the decision to disapprove the Alaska State plan amendment (SPA) 05–06, which was submitted on August 1, 2005, and disapproved on April 21, 2006. Under SPA 05–06, Alaska was proposing to add certain school-based behavioral health services under the rehabilitation services benefit. This amendment was disapproved because it did not comport with the requirements of section 1902(a) of the Social Security Act (the Act) and implementing regulations, as discussed in more detail below.

Specifically, the following issues will be considered on reconsideration: (1) Whether the State demonstrated that the proposed services would be within the scope of "medical assistance" under the State plan pursuant to section 1902(a)(10) of the Act, as defined at section 1905(a) of the Act; (2) whether the State has assured that there is non-Federal funding as required under section 1902(a)(2) of the Act to support expenditures that would be claimed under the State plan as the basis for Federal matching funding in light of financial arrangements that do not appear to result in net expenditures; (3) whether the proposed payment rates meet the requirements of section 1902(a)(30)(A) of the Act to be consistent with efficiency, economy, and quality of care, in light of financial arrangements under which the providers do not retain Medicaid payments; and (4) whether the State plan complied with the requirements of section 1902(a) of the Act generally, and implementing Federal regulations at 42 CFR 430.10, to include all information necessary to serve as the basis for Federal financial participation. We describe each of these issues in detail below.

Section 1902(a)(10) of the Act requires that the State plan provide for making medical assistance available to eligible beneficiaries. The State did not establish that the proposed "school-based rehabilitative services" are within the scope of "medical assistance," which is defined in section 1905(a) of the Act. While we understand the State has placed the proposed services under the rehabilitative services benefit in the State plan, the State has provided no clear definition of the proposed services so that the Centers for Medicare & Medicaid Services (CMS) can determine whether they are, indeed, within the scope of the rehabilitation benefit. After repeated requests for further information, the State provided no

description of what elements the "behavioral health services (including medication services)" encompass, and how they are different (or the same) as services in the currently approved State plan. It is not clear whether this is an expansion of coverage or a different payment methodology for school providers. Absent such information, SPA 05–06 did not comply with the requirements of section 1902(a)(10) of the Act to provide for medical assistance as defined in section 1905(a) of the Act.

Section 1902(a)(2) of the Act provides that the State plan must assure adequate funding for the non-Federal share of expenditures from State or local sources for the amount, duration, scope, or quality of care and services available under the plan. Section 1902(a)(30)(A) of the Act requires that State plans provide for payment for care and services available under the plan that is "consistent with economy, efficiency, and quality of care." In order to assess compliance with these provisions, State officials were asked to provide information related to Alaska's funding mechanisms for payments, and the net State and local expenditures that are incurred. Nor did Alaska respond to requests for any transfers of funds between providers and State or local governments, and information as to whether the providers keep 100 percent of the total computable funds given as Medicaid payments.

According to a flow chart provided by the State, the Medicaid agency pays the schools 100 percent of the claimed amount. A quarterly bill for the State match is then submitted to school providers who transfer to the Medicaid agency the State share of the services provided. This transfer of funds is made after the schools have been reimbursed for the services they provide, and is effectively a refund by the schools for part of their Medicaid payments. As a result of this refund, the net expenditure by the State Medicaid agency is wholly federally funded. In light of this refund arrangement, we cannot conclude that the proposed payment rate reflects the net expenditure by the State for Medicaid services provided by schools, and that the net non-Federal share meets the requirements of section 1902(a)(2) of the Act. Moreover, the refund is an indication that the full payment amount is not required to ensure Medicaid beneficiaries' access to the providers' services. The result is that proposed payments under this section of the plan would not be in compliance with the requirement under section 1902(a)(30)(A) of the Act that payment rates must be consistent with economy, efficiency, and quality of care.

Finally, the proposed SPA does not comply with the general provisions of section 1902(a), including section 1902(a)(4) of the Act, as implemented in part by Federal regulations at 42 CFR section 430.10. This regulation requires that States include in their State plans all information necessary for CMS to determine whether the plan can be approved to serve as a basis for Federal financial participation. As discussed above, Alaska did not provide information that would more precisely identify the covered services or the non-Federal funding source. Therefore the proposed SPA does not comply with this requirement.

For the reasons cited above, and after consultation with the Secretary, as required by Federal regulations at 42 CFR 430.15(c)(2), Alaska SPA 05–06 was disapproved.

I am scheduling a hearing on your request for reconsideration to be held on August 29, 2006, at the Blanchard Plaza Building, 2201 Sixth Avenue, 11th Floor Conference Room, Seattle, WA 98121, to reconsider the decision to disapprove SPA 05–06. If this date is not acceptable, we would be glad to set another date that is mutually agreeable to the parties. The hearing will be governed by the procedures prescribed by Federal regulations at 42 CFR part 430.

I am designating Ms. Kathleen Scully-Hayes as the presiding officer. If these arrangements present any problems, please contact the presiding officer at (410) 786–2055. In order to facilitate any communication which may be necessary between the parties to the hearing, please notify the presiding officer to indicate acceptability of the hearing date that has been scheduled, and provide names of the individuals who will represent the State at the hearing.

Sincerely,
Mark B. McClellan, M.D., PhD.

Section 1116 of the Social Security Act (42 U.S.C. 1316; 42 CFR 430.18)

(Catalog of Federal Domestic Assistance Program No. 13.714, Medicaid Assistance Program)

Dated: July 14, 2006.

Mark B. McClellan,

Administrator.

[FR Doc. E6–11577 Filed 7–20–06; 8:45 am]
BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Privacy Act of 1974; Report of a New System of Records

AGENCY: Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS).

ACTION: Notice of a New System of Records (SOR).

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, we are proposing to establish a new system titled, "Medicare Chiropractic Coverage Demonstration and Evaluation (MCCDE), System No. 09–70–0577." The demonstration entitled, "Expansion of Coverage of Chiropractic Services Demonstration" was established under provisions of Section 651 (d) of the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003 (Public Law (Pub. L.) 108–173). The MCCDE will focus on selected beneficiaries, residing within the four demonstration regions or their respective control regions, who have Medicare chiropractic-eligible diagnoses [i.e., neuromusculoskeletal conditions (NMS)]. The system will contain: Demographic information from Medicare enrollment files; Medicare claims data on utilization of NMS-related Medicare services with associated costs, for demonstration participants and their matched, non-participant controls; and participant satisfaction survey data for the subset randomly surveyed. The MCCDE has four goals: (1) To determine whether eligible beneficiaries who use chiropractic services under the demonstration use a lesser overall amount of items and services for which payment is made under the Medicare program than eligible beneficiaries who do not use such services; (2) to determine the cost of providing payment for chiropractic services under the Medicare program; (3) to further determine whether the demonstration achieves budget neutrality, and if not, the amount of any cost excess to be recouped by Medicare from the chiropractic profession; and (4) finally, to ascertain the satisfaction of eligible beneficiaries participating in the demonstration projects and their perceived quality of care received.

The primary purpose of the system is to collect and maintain individually identifiable information on beneficiaries, physicians, participating chiropractors, and providers of service participating in the demonstration and evaluation program. Information retrieved from this system may be disclosed to: (1) Support regulatory, reimbursement, and policy functions performed within the agency or by a contractor, consultant or grantee; (2) assist another Federal or state agency with information to contribute to the accuracy of CMS's proper payment of Medicare benefits, enable such agency to administer a Federal health benefits program, or to enable such agency to fulfill a requirement of Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds; (3) support an individual or organization for a research project or in support of an evaluation project related to the prevention of disease or disability, the restoration or maintenance of health, or payment related projects; (4) support litigation involving the agency; and (5) combat fraud and abuse in certain Federally-funded health benefits programs. We have provided background information about the new system in the

SUPPLEMENTARY INFORMATION section below.

Although the Privacy Act requires only that CMS provide an opportunity for interested persons to comment on the proposed routine uses, CMS invites comments on all portions of this notice. See "Effective Dates" section for comment period.

DATES: *Effective Date:* CMS filed a new SOR report with the Chair of the House Committee on Government Reform and Oversight, the Chair of the Senate Committee on Homeland Security & Governmental Affairs, and the Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) on July 14, 2006. To ensure that all parties have adequate time in which to comment, the new system will become effective 30 days from the publication of the notice, or 40 days from the date it was submitted to OMB and the Congress, whichever is later. We may defer implementation of this system or one or more of the routine use statements listed below if we receive comments that persuade us to defer implementation.

ADDRESSES: The public should address comment to the CMS Privacy Officer, Mail-stop N2–04–27, 7500 Security Boulevard, Baltimore, Maryland 21244–1850. Comments received will be available for review at this location by appointment during regular business hours, Monday through Friday from 9 a.m.–3 p.m., eastern time.

FOR FURTHER INFORMATION CONTACT: Carol Magee, Division of Beneficiary Research, Research and Evaluation Group, Office of Research Development and Information, CMS, Mail Stop C3–19–07, 7500 Security Boulevard, Baltimore, Maryland 21244–1849. Her telephone number is (410) 786–6611, and her e-mail is *Carol.Magee@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION: The Medicare demonstration being evaluated by MCCDE is entitled, "Expansion of Coverage of Chiropractic Services Demonstration" and was established under Section 651 of the of the MMA, for the purpose of evaluating the feasibility and advisability of providing additional Medicare coverage for chiropractic services, beyond the usual covered care allowed for spinal manipulation to correct spinal subluxation. The two-year demonstration, operates within four geographic regions (two rural and two urban, with one including a health professional shortage area (HPSA) and one a non-HPSA area, respectively in each). For the demonstration, CMS has approved an expanded list of NMS conditions, all typical among users of chiropractic, as well as various additional diagnostic tests, which may be billed without physician approval to Part B Medicare by participating chiropractors. Participation in this expanded payment demonstration is determined individually by chiropractic provider practices and any Medicare Advantage Plans located within the four regions. Congress has mandated budget neutrality; consequently, any overall excess costs to Medicare, within this two-year span of expanded chiropractic coverage, must be subsequently recouped by Medicare from the chiropractic profession.

The MCCDE to enable conduct of the mandated evaluation of this chiropractic demonstration will acquire and aggregate data relative to beneficiaries receiving chiropractic services. The beneficiary survey data will address patient satisfaction and quality of care issues, while the relevant abstracted Medicare claims file data elements on NMS diagnoses, services, and costs will enable determination of costs and utilization patterns, and of demonstration budget neutrality. Additionally the evaluation will address cost aspects relative to the potential for expansion of chiropractic coverage to the national Medicare program.

I. Description of the Proposed System of Records

A. Statutory and Regulatory Basis for SOR. The statutory authority for this system is given under the Section 651 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Pub. L. 108–173).

B. Collection and Maintenance of Data in the System. This system will maintain individually-identifiable and other data collected by CMS and its contractors on Medicare participants and providers of service in the chiropractic coverage demonstration, and on selected beneficiaries as non-participant controls, in order to analyze relevant data for the mandated evaluation and as means to select and contact participant beneficiaries for the survey.

Information collected will include, but is not limited to, beneficiary health insurance claim number, beneficiary identification code, beneficiary name and address, race/ethnicity, gender type, date of birth, diagnostic code(s), relevant procedural codes and dates of service, dates of admissions and discharges, diagnostic review group, unique provider identification number, as well as self-reported survey information regarding health status, demographic utilization issues, and satisfaction with care relating to chiropractic services.

II. Agency Policies, Procedures, and Restrictions on the Routine Use

A. The Privacy Act permits us to disclose information without an individual's consent if the information is to be used for a purpose that is compatible with the purpose(s) for which the information was collected. Any such disclosure of data is known as a "routine use." The Government will only release MCCDE information that can be associated with an individual as provided for under "Section III. Proposed Routine Use Disclosures of Data in the System." Both identifiable and non-identifiable data may be disclosed under a routine use. We will only collect the minimum personal data necessary to achieve the purpose of MCCDE.

CMS has the following policies and procedures concerning disclosures of information that will be maintained in the system. Disclosure of information from the system will be approved only to the extent necessary to accomplish the purpose of the disclosure and only after CMS:

1. Determines that the use or disclosure is consistent with the reason that the data is being collected; e.g., to collect and maintain individually identifiable information on beneficiaries, physicians, participating chiropractors, and providers of service participating in the demonstration and evaluation program.

2. Determines that:

a. The purpose for which the disclosure is to be made can only be accomplished if the record is provided in individually identifiable form;

b. The purpose for which the disclosure is to be made is of sufficient importance to warrant the effect and/or risk on the privacy of the individual that additional exposure of the record might bring; and

c. There is a strong probability that the proposed use of the data would in fact accomplish the stated purpose(s).

3. Requires the information recipient to:

a. Establish administrative, technical, and physical safeguards to prevent unauthorized use of disclosure of the record;

b. Remove or destroy, at the earliest time, all patient-identifiable information; and

c. Agree to not use or disclose the information for any purpose other than the stated purpose under which the information was disclosed.

4. Determines that the data are valid and reliable.

III. Proposed Routine Use Disclosures of Data in the System

A. The Privacy Act allows us to disclose information without an individual's consent if the information is to be used for a purpose that is compatible with the purpose(s) for which the information was collected. Any such compatible use of data is known as a "routine use." The proposed routine uses in this system meet the compatibility requirement of the Privacy Act. We are proposing to establish the following routine use disclosures of information maintained in the system:

1. To agency contractors, consultants, or grantees, who have been engaged by the agency to assist in the performance of a service related to this collection and who need to have access to the records in order to perform the activity.

We contemplate disclosing information under this routine use only in situations in which CMS may enter into a contractual or similar agreement with a third party to assist in accomplishing CMS function relating to purposes for this system.

CMS occasionally contracts out certain of its functions when doing so would contribute to effective and efficient operations. CMS must be able to give a contractor, consultant, or grantee whatever information is necessary for the contractor, consultant, or grantee to fulfill its duties. In these situations, safeguards are provided in the contract prohibiting the contractor, consultant, or grantee from using or disclosing the information for any purpose other than that described in the contract and requires the contractor, consultant, or grantee to return or destroy all information at the completion of the contract.

2. To another Federal or state agency to:

a. Contribute to the accuracy of CMS's proper payment of Medicare benefits;

b. Enable such agency to administer a Federal health benefits program, or, as necessary, to enable such agency to fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds; and/or

c. Assist Federal/state Medicaid programs within the state.

Other Federal or state agencies, in their administration of a Federal health program, may require MCCDE information in order to support evaluations and monitoring of Medicare claims information of beneficiaries, including proper reimbursement for services provided.

3. To an individual or organization for a research project or in support of an evaluation project related to the prevention of disease or disability, the restoration or maintenance of health, or payment related projects.

The MCCDE data will provide for research or support of evaluation projects and a broader, longitudinal, national perspective of the status of Medicare beneficiaries. CMS anticipates that many researchers will have legitimate requests to use these data in projects that could ultimately improve the care provided to Medicare beneficiaries and the policies that govern their care.

4. To the Department of Justice (DOJ), court or adjudicatory body when:

a. The agency or any component thereof, or

b. Any employee of the agency in his or her official capacity, or

c. Any employee of the agency in his or her individual capacity where the DOJ has agreed to represent the employee, or

d. The United States Government is a party to litigation or has an interest in such litigation, and, by careful review, CMS determines that the records are both relevant and necessary to the litigation and that the use of such records by the DOJ, court or adjudicatory body is compatible with the purpose for which the agency collected the records.

Whenever CMS is involved in litigation, and occasionally when another party is involved in litigation and CMS policies or operations could be affected by the outcome of the litigation, CMS would be able to disclose information to the DOJ, court or adjudicatory body involved.

5. To a CMS contractor (including, but not necessarily limited to, fiscal intermediaries and carriers) that assists in the administration of a CMS-administered health benefits program, or to a grantee of a CMS-administered grant program, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud or abuse in such program.

We contemplate disclosing information under this routine use only in situations in which CMS may enter into a contractual, grantee, cooperative agreement or consultant relationship with a third party to assist in accomplishing CMS functions relating to the purpose of combating fraud and abuse. CMS occasionally contracts out certain of its functions or makes grants or cooperative agreements when doing so would contribute to effective and efficient operations. CMS must be able to give a contractor, grantee, consultant or other legal agent whatever information is necessary for the agent to fulfill its duties. In these situations, safeguards are provided in the contract prohibiting the agent from using or disclosing the information for any purpose other than that described in the contract and requiring the agent to return or destroy all information.

6. To another Federal agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States (including any State or local governmental agency), that administers, or that has the authority to investigate potential fraud or abuse in, a health benefits program funded in whole or in part by Federal funds, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud or abuse in such programs.

Other agencies may require MCCDE information for the purpose of combating fraud and abuse in such Federally-funded programs.

B. Additional Provisions Affecting Routine Use Disclosures.

To the extent this system contains Protected Health Information (PHI) as defined by HHS regulation "Standards for Privacy of Individually Identifiable Health Information" (45 CFR parts 160 and 164, Subparts A and E) 65 FR 82462 (12–28–00). Disclosures of such PHI that are otherwise authorized by these routine uses may only be made if, and as, permitted or required by the "Standards for Privacy of Individually Identifiable Health Information." (See 45 CFR 164.512(a)(1)).

In addition, our policy will be to prohibit release even of data not directly identifiable, except pursuant to one of the routine uses or if required by law, if we determine there is a possibility that an individual can be identified through implicit deduction based on small cell sizes (instances where the patient population is so small that because of the small size, use of this information could allow for the deduction of the identity of the beneficiary).

IV. Safeguards

CMS has safeguards in place for authorized users and monitors such users to ensure against excessive or unauthorized use. Personnel having access to the system have been trained in the Privacy Act and information security requirements. Employees who maintain records in this system are instructed not to release data until the intended recipient agrees to implement

appropriate management, operational and technical safeguards sufficient to protect the confidentiality, integrity and availability of the information and information systems and to prevent unauthorized access.

This system will conform to all applicable Federal laws and regulations and Federal, HHS, and CMS policies and standards as they relate to information security and data privacy. These laws and regulations may apply but are not limited to: The Privacy Act of 1974; the Federal Information Security Management Act of 2002; the Computer Fraud and Abuse Act of 1986; the Health Insurance Portability and Accountability Act of 1996; the E–Government Act of 2002, the Clinger-Cohen Act of 1996; the Medicare Modernization Act of 2003, and the corresponding implementing regulations. OMB Circular A–130, Management of Federal Resources, Appendix III, Security of Federal Automated Information Resources also applies. Federal, HHS, and CMS policies and standards include but are not limited to: All pertinent National Institute of Standards and Technology publications; the HHS Information Systems Program Handbook and the CMS Information Security Handbook.

V. Effects of the Proposed System of Records on Individual Rights

CMS proposes to establish this system in accordance with the principles and requirements of the Privacy Act and will collect, use, and disseminate information only as prescribed therein. Data in this system will be subject to the authorized releases in accordance with the routine uses identified in this system of records.

CMS will take precautionary measures to minimize the risks of unauthorized access to the records and the potential harm to individual privacy or other personal or property rights of patients whose data are maintained in this system. CMS will collect only that information necessary to perform the system's functions. In addition, CMS will make disclosure from the proposed system only with consent of the subject individual, or his/her legal representative, or in accordance with an applicable exception provision of the Privacy Act. CMS, therefore, does not anticipate an unfavorable effect on individual privacy as a result of information relating to individuals.

Dated; July 13, 2006.

John R. Dyer,

Chief Operating Officer, Centers for Medicare & Medicaid Services.

SYSTEM NO. 09–70–0577

SYSTEM NAME:

"Medicare Chiropractic Coverage Demonstration and Evaluation (MCCDE)," HHS/CMS/ORDI.

SECURITY CLASSIFICATION:

Level Three Privacy Act Sensitive Data.

SYSTEM LOCATION:

Centers for Medicare & Medicaid Services (CMS) Data Center, 7500 Security Boulevard, North Building, First Floor, Baltimore, Maryland 21244–1850 and at various co-locations of CMS agents as follows:

- Brandeis University, 415 South Street, Waltham, Massachusetts 002454–9110.
- Battelle Institute, Suite 200, 6115 Falls Road, Baltimore, Maryland 21209.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system will maintain individually-identifiable and other data collected by CMS and its contractors on Medicare participants and providers of service in the chiropractic coverage demonstration, and on selected beneficiaries as non-participant controls, in order to analyze relevant data for the mandated evaluation and as means to select and contact participant beneficiaries for the survey.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information collected will include, but is not limited to, beneficiary health insurance claim number (HICN), beneficiary identification code, beneficiary name and address, race/ethnicity, gender type, date of birth, diagnostic code(s), relevant procedural codes and dates of service, dates of admissions and discharges, diagnostic review group, unique provider identification number (UPIN), as well as self-reported survey information regarding health status, demographic utilization issues, and satisfaction with care relating to chiropractic services.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The statutory authority for this system is given under the Section 651 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Pub. L. 108–173).

PURPOSE(S) OF THE SYSTEM:

The primary purpose of the system is to collect and maintain individually identifiable information on beneficiaries, physicians, participating chiropractors, and providers of service participating in the demonstration and evaluation program. Information retrieved from this system may be disclosed to: (1) Support regulatory, reimbursement, and policy functions performed within the agency or by a contractor, consultant or grantee; (2) assist another Federal or state agency with information to contribute to the accuracy of CMS's proper payment of Medicare benefits, enable such agency to administer a Federal health benefits program, or to enable such agency to fulfill a requirement of Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds; (3) support an individual or organization for a research project or in support of an evaluation project related to the prevention of disease or disability, the restoration or maintenance of health, or payment related projects; (4) support litigation involving the agency; and (5) combat fraud and abuse in certain Federally-funded health benefits programs.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OR USERS AND THE PURPOSES OF SUCH USES:

A. The Privacy Act allows us to disclose information without an individual's consent if the information is to be used for a purpose that is compatible with the purpose(s) for which the information was collected. Any such compatible use of data is known as a "routine use." The proposed routine uses in this system meet the compatibility requirement of the Privacy Act. We are proposing to establish the following routine use disclosures of information maintained in the system:

1. To agency contractors, consultants, or grantees, who have been engaged by the agency to assist in the performance of a service related to this collection and who need to have access to the records in order to perform the activity.

2. To another Federal or state agency to:

a. Contribute to the accuracy of CMS's proper payment of Medicare benefits;

b. enable such agency to administer a Federal health benefits program, or, as necessary, to enable such agency to fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds; and/or

c. assist Federal/state Medicaid programs within the state.

3. To an individual or organization for a research project or in support of an evaluation project related to the prevention of disease or disability, the

restoration or maintenance of health, or payment related projects.

4. To the Department of Justice (DOJ), court or adjudicatory body when:

a. The agency or any component thereof, or

b. any employee of the agency in his or her official capacity, or

c. any employee of the agency in his or her individual capacity where the DOJ has agreed to represent the employee, or

d. the United States Government, is a party to litigation or has an interest in such litigation, and, by careful review, CMS determines that the records are both relevant and necessary to the litigation and that the use of such records by the DOJ, court or adjudicatory body is compatible with the purpose for which the agency collected the records.

5. To a CMS contractor (including, but not necessarily limited to, fiscal intermediaries and carriers) that assists in the administration of a CMS-administered health benefits program, or to a grantee of a CMS-administered grant program, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud or abuse in such program.

6. To another Federal agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States (including any State or local governmental agency), that administers, or that has the authority to investigate potential fraud or abuse in, a health benefits program funded in whole or in part by Federal funds, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud or abuse in such programs.

B. Additional Provisions Affecting Routine Use Disclosures.

To the extent this system contains Protected Health Information (PHI) as defined by HHS regulation "Standards for Privacy of Individually Identifiable Health Information" (45 CFR parts 160 and 164, subparts A and E) 65 FR 82462 (12–28–00). Disclosures of such PHI that are otherwise authorized by these routine uses may only be made if, and as, permitted or required by the "Standards for Privacy of Individually Identifiable Health Information." (See 45 CFR 164.512(a)(1)).

In addition, our policy will be to prohibit release even of data not directly identifiable, except pursuant to one of the routine uses or if required by law, if we determine there is a possibility that an individual can be identified through implicit deduction based on small cell sizes (instances where the patient population is so small that because of the small size, use of this information could allow for the deduction of the identity of the beneficiary).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

All records will be stored electronically and on hard copy.

RETRIEVABILITY:

The collected data are retrieved by an individual identifier; e.g., beneficiary name or HICN.

SAFEGUARDS:

CMS has safeguards in place for authorized users and monitors such users to ensure against excessive or unauthorized use. Personnel having access to the system have been trained in the Privacy Act and information security requirements. Employees who maintain records in this system are instructed not to release data until the intended recipient agrees to implement appropriate management, operational and technical safeguards sufficient to protect the confidentiality, integrity and availability of the information and information systems and to prevent unauthorized access.

This system will conform to all applicable Federal laws and regulations and Federal, HHS, and CMS policies and standards as they relate to information security and data privacy. These laws and regulations may apply but are not limited to: The Privacy Act of 1974; the Federal Information Security Management Act of 2002; the Computer Fraud and Abuse Act of 1986; the Health Insurance Portability and Accountability Act of 1996; the E-Government Act of 2002, the Clinger-Cohen Act of 1996; the Medicare Modernization Act of 2003, and the corresponding implementing regulations. OMB Circular A–130, Management of Federal Resources, Appendix III, Security of Federal Automated Information Resources also applies. Federal, HHS, and CMS policies and standards include but are not limited to: All pertinent National Institute of Standards and Technology publications; the HHS Information Systems Program Handbook and the CMS Information Security Handbook.

RETENTION AND DISPOSAL:

CMS will retain information for a total period not to exceed 25 years. All claims-related records are encompassed by the document preservation order and will be retained until notification is received from DOJ.

SYSTEM MANAGER AND ADDRESS:

Director, Office of Research, Development, and Information, CMS, Mail Stop C3–20–11, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

NOTIFICATION PROCEDURE:

For purpose of access, the subject individual should write to the system manager who will require the system name, employee identification number, tax identification number, national provider number, and for verification purposes, the subject individual's name (woman's maiden name, if applicable), HICN, and/or SSN (furnishing the SSN is voluntary, but it may make searching for a record easier and prevent delay).

RECORD ACCESS PROCEDURE:

For purpose of access, use the same procedures outlined in Notification Procedures above. Requestors should also reasonably specify the record contents being sought. (These procedures are in accordance with Department regulation 45 CFR 5b.5(a)(2)).

CONTESTING RECORD PROCEDURES:

The subject individual should contact the system manager named above, and reasonably identify the record and specify the information to be contested. State the corrective action sought and the reasons for the correction with supporting justification. (These procedures are in accordance with Department regulation 45 CFR 5b.7).

RECORDS SOURCE CATEGORIES:

Data sources will include Medicare claims for beneficiaries with relevant neuromusculoskeletal conditions diagnoses, and responses from the survey instrument administered to participant beneficiaries. The collected information from Medicare claims and enrollment data and the survey instrument, will include all of the data elements that reside within the Medicare National Claims History File and the Medicare Enrollment Data Base, as well as the self-reported beneficiary survey responses.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. E6–11579 Filed 7–20–06; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Office of Refugee Resettlement; Division of Community Resettlement; Supplement to Community Refugee and Immigration Services

AGENCY: Office of Refugee Resettlement, Division of Community Resettlement, Administration for Children And Families, HHS.

ACTION: Program expansion supplement.

SUMMARY: Notice is hereby given that the Office of Refugee Resettlement, Division of Community Resettlement, will award supplemental funds without competition to Community Refugee and Immigration Services (CRIS). This supplement is being awarded for a project that will deliver comprehensive services to meet the housing, employment and case management needs of the Somali Bantu.

The arrival of more than 200 Somali Bantu refugee secondary migrants into Columbus, Ohio, has severely impacted CRIS' ability to provide employment and other services as well as the capacity of the local homeless shelter system in the community. This supplement will provide assistance with the needs of these refugees to ensure that they have adequate housing and other services to assist in their successful resettlement into this community.

The grantee, Community Refugee and Immigration Services, is the Ohio affiliate of Church World Service and is engaged in the primary resettlement of newly arriving refugees in Franklin County.

These supplemental funds will support 3 months of assistance at a cost of $116,133 in Federal support.

FOR FURTHER INFORMATION CONTACT: Sue Benjamin, Office of Refugee Resettlement, Division of Community Resettlement, 370 L'Enfant Promenade, SW., Washington, DC 20447, Phone: 202–401–4851.

Dated: July 14, 2006.

Martha E. Newton,

Director, Office of Refugee Resettlement.

[FR Doc. E6–11578 Filed 7–20–06; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request; Educational Needs Assessment of International Drug Abuse Researchers

Summary: Under the provisions of section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institute on Drug Abuse (NIDA), the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on March 1, 2006 [Pages 10539–10540] and allowed 60-days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection: Title: The NIDA International Program Research Training Modules for International Application Needs Assessment Survey. *Type of Information Collection Request:* NEW. *Need and Use of Information Collection:* This is a request for a one-time clearance to undertake an educational needs assessment survey of NIDA's collaborating international drug abuse researchers. The purpose of this survey is to more precisely define the educational needs of the international drug abuse research community before proceeding with the development of formal distance learning programs. Reviews of distance education programs in the developing world often reveal that systematically organized learning needs assessments are continually absent. (USAID 2001: The Use and Effect of Distance Education in Healthcare: What Do We Know? Operations Research Issue Paper 2). This survey will address that issue.

The survey is based on recommendations received from current international drug abuse researchers and NIDA grantees. It is designed to be brief (2 pages) and succinct, asking respondents to prioritize their educational needs. The questions have been previously tested with persons who speak English as a second language. Total time to complete the survey is less than five minutes. The survey will cover the following elements: (1) Respondent background, including availability of educational technologies, (2) Educational needs, including a ranking of 10 proposed topics in drug abuse education, and (3) Collaborative needs, including an estimate of the value of online tools for research collaboration. The survey will not collect name, address, or other identifying information. *Frequency of Response:* This project will be conducted once. *Affected Public:* International drug abuse researchers who are currently affiliated with or wish to be affiliated with the U.S. drug abuse research community. *Type of Respondents/Drug Abuse Researchers:* physicians, scientists, mental health workers, and scientists-in-training. The reporting burden is as follows: *Estimated Total Annual Number of Respondents:* 250; *Estimated Number of Responses per Respondent:* 1; *Average Burden Hours per Response:* 0.09. *Estimated Total Annual Burden Hours Requested:* 22.5. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report. The estimated annualized burden is summarized below.

Drug abuse researcher respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total burden hours
Physicians	100	1	0.09	9.0
PhD Scientists	70	1	0.09	6.3
Mental Health/Drug	40	1	0.09	3.6
Abuse Professionals	40	1	0.09	3.6
Scientists-in-Training	40	1	0.09	3.6
Annualized Totals	250	1	0.09	22.5

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.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the information collection plans, contact Dale Weiss, Project Officer, National Institute on Drug Abuse, 6001 Executive Boulevard, Room 5274, Bethesda, MD 20892, or call non-toll-free number 301–402–6683; fax 301–443–9127; or by e-mail to *dweiss@nida.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: July 14, 2006.

Laura Rosenthal,

Associate Director for Management, National Institute on Drug Abuse.

[FR Doc. E6–11612 Filed 7–20–06; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; ODS Assessment of Dietary Supplement Education

Summary: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Office of Dietary Supplements (ODS), the National Institutes of Health (NIH), will submit to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. A notice of this proposed information collection was previously published in the **Federal Register** on April 20, 2006, pages 20410 and 20411, and allowed 60 days for public comment. No comments were received in response to the notice. The purpose of this notice is to announce a final 30 days for public comment. NIH may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection

Title: ODS Assessment of Dietary Supplement Education.

Type of Information Collection Request: New data collection.

Need and Use of Information Collection: The mission of ODS is to strengthen knowledge and understanding of dietary supplements by evaluating scientific information, stimulating and supporting research, disseminating research results, and educating the public to foster an enhanced quality of life and health for the U.S. population. To assist ODS in prioritizing educational and training needs for researchers in the field, ODS is requesting OMB Clearance for a survey of members of academic health institutions. This effort involves a dual method (mail/Web) survey consisting of nine questions (including four two-part questions), which will be attempted with an estimated 2600 individuals at approximately 1000 academic institutions, yielding an annual total of approximately 1820 respondents (based on a 70 percent response rate). The survey results will help ODS in measuring the scope of higher education's curriculum on dietary supplements, identifying gaps in dietary supplement education, and determining the level of interest in potential ODS seminars and programs, and the specific content needs.

Frequency of Response: This is a one-time data collection.

Affected Public: Academic institutions.

Type of Respondents: Faculty members at academic institutions.

The annual reporting burden is as follows.

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
Telephone or Web Survey Completion				
Individuals at academic institutions	1820	1	0.12	218
Review of Course Information for Survey Completion				
Individuals at academic institutions	1820	1	0.25	455
Collection and Submission of Materials				
Individuals at academic institutions	910	1	0.50	455
Annualized totals	1820			1128

The annualized cost to respondents is estimated at $31,978.86, $6,189.46 for survey completion, and $12,894.70 for the review of course information and collection and submission of materials, respectively.

There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on the following points: (1) 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) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions; (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 those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Paul M. Coates, Director, Office of Dietary Supplements, National Institutes of Health, Suite 3B01, 6100 Executive Boulevard, Bethesda, MD 20892–7517; or fax your request to 301–480–1845; or e-mail *ods@nih.gov*. Dr. Coates can be contacted by telephone at 301–435–2920.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: July 12, 2006.

Paul M. Coates,

Director, Office of Dietary Supplements, National Institutes of Health.

[FR Doc. E6–11613 Filed 7–20–06; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request; Customer/Partner Satisfaction Surveys; The NIDA Primary Care Physician Outreach Project

Summary: Under the provisions of Section 3507(a) (1) (D) of the Paperwork Reduction Act of 1995, the National Institute on Drug Abuse (NIDA), the National Institutes of Health has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** (on October 27, 2005 Vol. 70, No. 207, p61979), and allowed 60-days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment.

Proposed Collection

Title: The NIDA Primary Care Physician Outreach Project.

Type of Information Collection Request: NEW.

Need and Use of Information Collection: This is a request for a four-year clearance to study the extent to which NIDA is (1) increasing awareness among primary care physicians and other medical professionals about drug addiction as a major public health issue, (2) increasing their awareness of NIDA and NIDA-funded research, and (3) providing them with the information resources needed to incorporate such research findings into their clinical practices. Primary care physicians and other medical professionals, especially those who care for adolescents, are front line individuals helping patients with drug abuse—or drug addiction-related health and mental health problems. Each has key roles in obtaining, disseminating, and applying drug abuse and addiction resource materials in clinical practice. This effort is made according to Executive Order 12862, which directs Federal agencies that provide significant services directly to the public to survey customers to determine the kind and quality of services they want and their level of satisfaction with existing services.

Formative, process and outcome evaluations using a multi-method (surveys, focus groups, case studies) will be employed to determine the most appropriate resources and also the usefulness of the materials developed for physicians and other medical professionals. Measures will include the following variables: The information needs and learning styles and preferences of physicians and other medical professionals; their knowledge/awareness of NIDA and the NIDA resources developed for them; their use of the resources developed by NIDA; and ways to strengthen NIDA's knowledge dissemination activities.

Frequency of Response: This project will be conducted annually or biennially.

Affected Public: Individuals, organizations, and businesses.

Type of Respondents: Physicians, physician assistants, nurses, medical office managers, hospital/clinic based health educators, and hospital/clinic based social workers. The annual reporting burden is calculated as follows:

Estimated Total Annual Number of Respondents: 1118.

Estimated Number of Responses per Respondent: 2.

Average Burden Hours per Response: 0.39.

Estimated Total Annual Burden Hours Requested: 872.24.

There are no Capital Costs to report. There are no Operating or Maintenance Costs to report. The estimated annualized burden is summarized below.

Respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total burden hours
Physicians	2873	2	0.39	2240.94
Physician Assistants	320	2	0.39	249.6
Nurses	320	2	0.39	249.6
Medical Office Managers	320	2	0.39	249.6
Hospital/Clinic Based Health Educators	320	2	0.39	249.6
Hospital/Clinic Based Social Workers	320	2	0.39	249.6
Total	4,473			3,488.94
Annualized Totals (clearance for 4-year project)	1,118			872.24

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) The accuracy of the agency's estimate of the burden of the proposed collection of information; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Jan Lipkin, Project Officer, National Institute on Drug Abuse, NIDA/NIH/DHHS, 6001 Executive Boulevard, Room 5219, Bethesda, MD 20852; or call non-toll-free number (301) 443–1124; fax (301) 443–7397; or e-mail your request, including your address to: *jlipkin@nida.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

Dated: July 14, 2006.

Laura Rosenthal,

Associate Director for Management, National Institute on Drug Abuse.

[FR Doc. E6–11614 Filed 7–20–06; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting.

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel, Mucosal Immune System: Infection and Inflammation.

Date: August 10, 2006.

Time: 12 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge 6700, 6700B Rockledge Drive, Room 3131, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Katherine L. White, PhD, Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, 301–435–1615, *kw174b@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. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: July 17, 2006.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 06–6397 Filed 7–20–06; 8:45 am]

BILLING CODE 4140–01–M

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. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel, NINDS Clinical Trials SEP.

Date: August 7, 2006.

Time: 8:30 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites Chevy Chase, at Chevy Chase Pavillion, 4300 Military Road, NW., Washington, DC.

Contact Person: Shantadurga Rajaram, PhD, Scientific Review Administrator, Scientific Review Branch, NIH/NINDS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20852, (301) 435–6033, *rajarams@mail.nih.gov.*

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel, CounterACT–U01.

Date: August 9–10, 2006.

Time: 8 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Willard Intercontinental Hotel, 1401 Pennsylvania Avenue, Washington, DC 20004.

Contact Person: Richard D. Crosland, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, (301) 594–0635, *rc218u@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: July 17, 2006.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 06–6398 Filed 7–20–06; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2006–24525]

Collection of Information Under Review by Office of Management and Budget: OMB Control Number 1625–0087

AGENCY: Coast Guard, DHS.

ACTION: Request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this request for comments announces that the Coast Guard is forwarding one Information Collection Request (ICR),

abstracted below, to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB) to request a reinstatement of a previously-approved collection of information: 1625–0087, U.S. Coast Guard International Ice Patrol (IIP) Customer Survey. Our ICR describes the information we seek to collect from the public. Review and comment by OIRA ensures that we impose only paperwork burdens commensurate with our performance of duties.

DATES: Please submit comments on or before August 21, 2006.

ADDRESSES: To make sure that your comments and related material do not reach the docket [USCG–2006–24525] or OIRA more than once, please submit them by only one of the following means:

(1)(a) By mail to the Docket Management Facility, U.S. Department of Transportation (DOT), Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001. (b) By mail to OIRA, 725 17th Street, NW., Washington, DC 20503, to the attention of the Desk Officer for the Coast Guard.

(2)(a) By delivery to room PL–401 at the address given in paragraph (1)(a) above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329. (b) By delivery to OIRA, at the address given in paragraph (1)(b) above, to the attention of the Desk Officer for the Coast Guard.

(3) By fax to (a) the Facility at (202) 493–2298 and (b) OIRA at (202) 395–6566. To ensure your comments are received in time, mark the fax to the attention of Mr. Nathan Lesser, Desk officer for the Coast Guard.

(4)(a) Electronically through the Web site for the Docket Management System (DMS) at *http://dms.dot.gov.* (b). By e-mail to *nlesser@omb.eop.gov.*

The Docket Management Facility maintains the public docket for this notice. Comments and material received from the public, as well as documents mentioned in this notice as being available in the docket, will become part of this docket and will be available for inspection or copying at room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at *http://dms.dot.gov.*

Copies of the complete ICR is available through this docket on the Internet at *http://dms.dot.gov,* and also from Commandant (CG–611), U.S. Coast Guard Headquarters, Room 1236 (Attn: Ms Barbara Davis), 2100 2nd Street, SW., Washington, DC 20593–0001. The telephone number is (202) 475–3523.

FOR FURTHER INFORMATION CONTACT: Ms Barbara Davis, Office of Information Management, telephone (202) 475–3523 or fax (202) 475–3929, for questions on these documents; or Ms. Renee V. Wright, Program Manager, Docket Operations, (202) 493–0402, for questions on the docket.

SUPPLEMENTARY INFORMATION: The Coast Guard invites comments on the proposed collection of information to determine whether the collection is necessary for the proper performance of the functions of the Department. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collection; (2) the accuracy of the estimated burden of the collection; (3) ways to enhance the quality, utility, and clarity of the information that is the subject of the collection; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology.

Comments to DMS or OIRA must contain the OMB Control Number of the ICR. Comments to DMS must contain the docket number of this request, [USCG 2006–24525]. For your comments to OIRA to be considered, it is best if OIRA receives them on or before the August 21, 2006.

Public participation and request for comments: We encourage you to respond to this request for comments by submitting comments and related materials. We will post all comments received, without change, to *http://dms.dot.gov,* and they will include any personal information you have provided. We have an agreement with DOT to use their Docket Management Facility. Please see the paragraph on DOT's "Privacy Act Policy" below.

Submitting comments: If you submit a comment, please include your name and address, identify the docket number for this request for comment [USCG–2006–24525], indicate the specific section of this document or the ICR to which each comment applies, and give the reason for each comment. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**, but please submit them by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope.

The Coast Guard and OIRA will consider all comments and material received during the comment period. We may change the documents supporting this collection of information or even the underlying requirements in view of them.

Viewing comments and documents: To view comments, as well as documents mentioned in this notice as being available in the docket, go to *http://dms.dot.gov* at any time and conduct a simple search using the docket number. You may also visit the Docket Management Facility in room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone can search the electronic form of all comments received in 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 Privacy Act Statement of DOT in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://dms.dot.gov.*

Previous Request for Comments.

This request provides a 30-day comment period required by OIRA. The Coast Guard has already published the 60-day notice (71 FR 23939, April 25, 2006) required by 44 U.S.C. 3506(c)(2). That notice elicited no comments.

Information Collection Request

Title: U.S. Coast Guard International Ice Patrol (IIP) Customer Survey.

OMB Control Number: 1625–0087.

Type of Request: Reinstatement of a previously-approved collection.

Affected Public: Masters, crewmembers, scientists, government employees, or other persons using International Ice Patrol products.

Forms: None.

Abstract: The International Ice Patrol monitors the extent of the iceberg danger near the Grand Banks of Newfoundland and provides iceberg warnings to the maritime community by broadcasting the southeastern, southern, and southwestern limits of all known ice in two message bulletins and one radiofacsimile chart each day. Customer satisfaction surveys are required by Executive Order 12862 to evaluate services and customer satisfaction.

Burden Estimate: The estimated burden has decreased from 125 hours to 120 hours a year.

Dated: July 18, 2006.

R.T. Hewitt,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. E6–11628 Filed 7–20–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5040–N–01]

Ginnie Mae Multiclass Securities Program Documents (Forms and Electronic Data Submissions); Notice of Proposed Information Collection: Comment Request

AGENCY: Office of the President of Government National Mortgage Association (Ginnie Mae), HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* September 19, 2006.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, QDAM, Information Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., L'Enfant Plaza Building, Room 800a, Washington, DC 20410; e-mail *Lillian_L._Deitzer@hud.gov*; telephone (202) 708–2374. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

FOR FURTHER INFORMATION CONTACT: Debra Murphy, Ginnie Mae, 451 7th Street, SW., Room B–133, Washington, DC 20410; e-mail: *Debra_L._Murphy@hud.gov*; telephone (202) 475–4923 (this is not a toll-free number); fax: 202–485–0225 or the Ginnie Mae Web site at *http://www.ginniemae.gov* for other available information.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and 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: Ginnie Mae Multiclass Securities Program Documents (Forms and Electronic Data Submissions).

OMB Control Number, if applicable: 2503–0017.

Description of the need for the information and proposed use: This information collection is required in connection with the operation of the Ginnie Mae Multiclass Securities program. Ginnie Mae's authority to guarantee multiclass instruments is contained in 306(g)(1) of the National Housing Act ("NHA") (12 U.S.C. 1721(g)(1)), which authorizes Ginnie Mae to guarantee "securities * * * based on or backed by a trust or pool composed of mortgages. * * *" Multiclass securities are backed by Ginnie Mae securities, which are backed by government insured or guaranteed mortgages. Ginnie Mae's authority to operate a Multiclass Securities program is recognized in Section 3004 of the Omnibus Budget Reconciliation Act of 1993 ("OBRA"), which amended 306(g)(3) of the NHA (12 U.S.C. 1271(g)(3)) to provide Ginnie Mae with greater flexibility for the Multiclass Securities program regarding fee structure, contracting, industry consultation, and program implementation. Congress annually sets Ginnie Mae's commitment authority to guarantee mortgage-backed ("MBS") pursuant to 306(G)(2) of the NHA (12 U.S.C. 1271(g)(2)). Since the multiclass are backed by Ginnie Mae Single Class MBS, Ginnie Mae has already guaranteed the collateral for the multiclass instruments.

The Ginnie Mae Multiclass Securities Program consists of Ginnie Mae Real Estate Mortgage Investment Conduit ("REMIC") securities, Stripped Mortgage-Backed Securities ("SMBS"), and Platinum securities. The Multiclass Securities program provides an important adjunct to Ginnie Mae's secondary mortgage market activities, allowing the private sector to combine and restructure cash flows Ginnie Mae Single Class MBS into securities that meet unique investor requirements in connection with yield, maturity, and call-option protection. The intent of the Mutliclass Securities program is to increase liquidity in the secondary mortgage market and to attract new sources of capital for federally insured or guaranteed loans. Under this program, Ginnie Mae guarantees, with the full faith and credit of the United States, the timely payment of principal and interest on Ginnie Mae REMIC, SMBS and Platinum securities.

Agency form numbers, if applicable: Not applicable.

Members of affected public: For-profit business (mortgage companies, thrifts, savings & loans, etc.).

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:

REMIC SECURITIES

Type of information collection	Prepared by	Number of potential sponsors	Estimated annual frequency per respondent	Total annual responses	Est. average hrly burden	Est. annual burden hrs
Pricing Letter	Sponsor	19	8	152	0.5	76
Structured Term Sheet	Sponsor	19	8	152	3	456
Trust (REMIC) Agreement	Attorney for Sponsor	19	8	152	1	152
Trust Opinion	Attorney for Sponsor	19	8	152	4	608
MX Trust Agreement	Attorney for Sponsor	19	8	152	0.16	24.32

REMIC SECURITIES—Continued

Type of information collection	Prepared by	Number of potential sponsors	Estimated annual frequency per respondent	Total annual responses	Est. average hrly burden	Est. annual burden hrs
MX Trust Opinion	Attorney for Sponsor	19	8	152	4	608
RR Certificate	Attorney for Sponsor	19	8	152	0.08	12.16
Sponsor Agreement	Attorney for Sponsor	19	8	152	0.05	7.6
Table of Contents	Attorney for Sponsor	19	8	152	0.33	50.16
Issuance Statement	Attorney for Sponsor	19	8	152	0.5	76
Tax Opinion	Attorney for Sponsor	19	8	152	4	608
Transfer Affidavit	Attorney for Sponsor	19	8	152	0.08	12.16
Supplemental Statement	Attorney for Sponsor	19	8	152	1	152
Final Data Statements (attached to closing letter).	Attorney for Sponsor	19	8	152	32	4864
Accountants' Closing Letter.	Accountant	19	8	152	8	1216
Accountants' OSC Letter	Accountant	19	8	152	8	1216
Structuring Data	Accountant	19	8	152	8	1216
Financial Statements	Accountant	19	8	160	1	160
Principal and Interest Factor File Specifications.	Trustee	19	8	152	16	2432
Distribution Dates and Statement.	Trustee	19	8	152	0.42	63.84
Term Sheet	Sponsor	19	8	152	2	304
New Issue File Layout	Trustee	19	8	152	4	608
Flow of Funds	Attorney for Trustee	19	8	152	0.16	24.32
Trustee Receipt	Trustee Attorney	19	8	152	2	304
Data Verification Form	Trustee	19	8	152	0.08	12.16
Total				3808		15262.72

SMBS SECURITIES

Type of information collection	(Prepared by)	No. of potential sponsors	Estimated annual frequency per respondent	Total annual responses	Est. average hrly burden	Est. annual burden hrs
Pricing Letter	Sponsor	19	1	19	0.5	9.5
Strucutred Term Sheet	Sponsor	19	1	19	3	57
Trust (REMIC) Agreement	Attorney for Sponsor	19	1	19	1	19
Trust Opinion	Attorney for Sponsor	19	1	19	4	76
MX Trust Agreement	Attorney for Sponsor	19	1	19	0.16	3.04
MX Trust Opinion	Attorney for Sponsor	19	1	19	4	76
RR Certificate	Attorney for Sponsor	19	1	19	0.08	1.52
Sponsor Agreement	Attorney for Sponsor	19	1	19	0.05	0.95
Table of Contents	Attorney for Sponsor	19	1	19	0.33	6.27
Issuance Statement	Attorney for Sponsor	19	1	19	0.5	9.5
Tax Opinion	Attorney for Sponsor	19	1	19	4	76
Transfer Affidavit	Attorney for Sponsor	19	1	19	0.08	1.52
Supplemental Statement	Attorney for Sponsor	19	1	19	1	19
Final Data Statements (attached to closing letter).	Attorney for Sponsor	19	1	19	32	608
Accountants' Closing Letter.	Accountant	19	1	19	8	152
Accountants' OSC Letter	Accountant	19	1	19	8	152
Structuring Data	Accountant	19	1	19	8	152
Financial Statements	Accountant	19	1	160	1	160
Principal and Interest Factor File Specifications.	Trustee	19	1	19	16	304
Distribution Dates and Statement.	Trustee	19	1	19	0.42	7.98
Term Sheet	Sponsor	19	1	19	2	38
New Issue File Layout	Trustee	19	1	19	4	76
Flow of Funds	Attorney for Trustee	19	1	19	0.16	3.04
Trustee Receipt	Trustee Attorney	19	1	19	2	38
Data Verification Form	Trustee	19	1	19	0.08	1.52
Total				616		2047.84

PLATINUM SECURITIES

Type of information collection	Prepared by	Number of potential sponsors	Estimated annual frequency per respondent	Total annual responses	Estimated average hourly burden	Estimated annual burden hours
Deposit Agreement	Depositor	19	10	190	1	190
MBS Schedule	Depositor	19	10	190	0.16	30.4
New Issue File Layout	Depositor	19	10	190	4	760
Principal and Interest Factor File Specifications.	Trustee	19	10	190	16	3040
Data Verification Form	Trustee	19	10	190	0.08	12.2
Total				950		4035.6
Total Burden Hours						21346.16

Calculation of Burden Hours:

Sponsors × Frequency per Year = Est. Annual Frequency.

Estimated Annual Frequency × Estimated Average Completion Time = Estimated Annual Burden Hours

Status of the proposed information collection: Reinstatement, with change, of a previously approved collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35 as amended.

Dated: July 14, 2006.

Michael J. Frenz,

Executive Vice President, Ginnie Mae.

[FR Doc. 06–6384 Filed 7–20–06; 8:45 am]

BILLING CODE 4210–67–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5041–N–23]

Notice of Proposed Information Collection: Comment Request; Debt Resolution Program

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* September 19, 2006.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., L'Enfant Plaza Building, Room 8001, Washington, DC 20410 or *Lillian_Deitzer@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Lester J. West, Director, Albany Financial Operations Center, Department of Housing and Urban Development, telephone (518) 464–4200 extension 4206 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Debt Resolution Program.

OMB Control Number, if applicable: 2502–0483.

Description of the need for the information and proposed use: HUD is required to collect debt owed to the agency. As part of the collection process, demand for repayment is made on the debtor(s). In response, debtors opt to ignore the debt, pay the debt, or dispute the debt. Disputes and offers to repay result in information collections. Borrowers who wish to pay less than the full amount due must submit a Personal Financial Statement and Settlement Offier. HUD uses the information to analyze debtors' financial positions and then approve settlements, repayment agreements, and pre-authorized electronic payments to HUD. Borrowers who wish to dispute must provide information to support their position.

Agency form numbers, if applicable. HUD–56141, HUD–56142, HUD–56146, HUD–55509, and HUD–92090.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The estimated total number of hours needed to prepare the information collection is 862, the number of respondents is 850 generating approximately 2,790 annual responses, the frequency of response is on occasion, and the estimated time needed to prepare the response varies from 5 to 30 minutes.

Status of the proposed information collection: This is a revision of a currently approved collection. The revision seeks to incorporate additional items, such as a debtor authorizatrion to speak to a third party, requests for copies of cancelled checks, information submitted to dispute a debt, and verbal agreement confirmation letters.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: July 14, 2006.

Frank Davis,

General Deputy Assistant Secretary for Housing-Deputy Federal Housing Commissioner.

[FR Doc. 06–6385 Filed 7–20–06; 8:45 am]

BILLING CODE 4210–67–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5045–N–29]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

DATES: *Effective Dae:*July 21, 2006.

FOR FURTHER INFORMATION CONTACT: Kathy Ezzell, Department of Housing and Urban Development, Room 7262, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impared (202) 708-2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2508–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: July 13, 2006.

Mark R. Johnston,

Acting Deputy Assistant Secretary for Special Needs.

[FR Doc. 06–6277 Filed 7–20–06; 8:45 am]

BILLING CODE 4210–67–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Marin Islands National Wildlife Refuge Draft Comprehensive Conservation Plan and Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces that the Marin Islands National Wildlife Refuge (Refuge) Draft Comprehensive Conservation Plan and Environmental Assessment (Draft CCP/EA) is available for review and comment. Also available for review with the Draft CCP/EA are the draft compatibility determinations for research and monitoring; wildlife observation and photography; environmental education and interpretive guided tours; and sport fishing.

DATES: To ensure that the Service has adequate time to evaluate and incorporate suggestions and other input into the planning process, comments should be received on or before August 21, 2006.

ADDRESSES: For information on obtaining documents and submitting comments, see "Review and Comment" under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Christy Smith, Refuge Manager, (707) 769–4200, or Winnie Chan, Refuge Planner, (510) 792–0222.

SUPPLEMENTARY INFORMATION: The Draft CCP/EA was prepared pursuant to the National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd *et seq.*) (Improvement Act), and the National Environmental Policy Act of 1969, as amended, and describes how the Service proposes to manage this Refuge over the next 15 years. Refuge management changes proposed in the draft CCP include: Restoration of coastal scrub and oak woodland habitats; opportunities for public use including wildlife observation, photography, interpretation, and environmental education; and cultural resource interpretation and preservation.

The National Wildlife System Administration Act of 1966, as amended by the National Wildlife Refuge Improvement Act of 1997, requires the Service to develop a CCP for each National Wildlife Refuge. The purpose in developing a CCP is to provide refuge managers with a 15-year strategy for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and Service policies. In addition to outlining broad management direction on conserving wildlife and their habitats, the CCP identifies wildlife-dependent recreational opportunities available to the public, which can include opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation.

Review and Comment

Copies of the Draft CCP/EA may be obtained by writing to Winnie Chan, Refuge Planner, Marin Islands NWR CCP, San Francisco Bay NWR Complex, P.O. Box 524, Newark, California 94560. Copies of the Draft CCP/EA may be viewed at this address and are also available for viewing and downloading online at: *http://www.fws.gov/pacific/planning/.*

Hard copies of the Draft CCP/EA are also available at the following locations:

San Francisco Bay National Wildlife Refuge Complex, 1 Marshlands Road, Newark, CA 94536.

San Pablo Bay National Wildlife Refuge, 7715 Lakeville Highway, Petaluma, CA 94954.

Marin County Civic Center Library, 3501 Civic Center Drive #427, San Rafael, CA 94903.

Comments on the Draft CCP/EA should be address to: Winnie Chan, Refuge Planner, Marin Islands NWR CCP, San Francisco Bay NWR Complex, P.O. Box 524, Newark, California 94560. Comments may also be faxed to (510) 792–5828 or e-mailed to: *sfbaynwrc@fws.gov.*

Background

The Refuge is located off the shoreline of the City of San Rafael, Marin County, in San Pablo Bay. The 339-acre Refuge of tidelands and 2 islands was established in 1992 "for the development, advancement, management, conservation, and protection of fish and wildlife resources". The various parcels of land within the Refuge are under the ownership of the California Department of Fish and Game, California State Lands Commission, or the Fish and Wildlife Service. The California Department of Fish and Game-owned lands are designated as a State Ecological Reserve. These lands and the Service-owned lands are designated and administered as the Marin Islands National Wildlife Refuge. The Service provides day-to-day management of the

entire Marin Islands Refuge and State Ecological Reserve under the National Wildlife Refuge System Administration Act, as amended, and pursuant to a memorandum of understanding with other landowning agencies.

The Refuge supports one of the largest heron and egret colonies in northern California. The primary purpose of the Refuge is "to protect an important existing egret and heron rookery on West Marin Island and to increase colonial nesting bird use on East Marin Islands," as described in the 1992 Environmental Assessment.

Proposed Action

The Proposed Action is to provide an integrated set of management actions consistent with the purposes for which the Refuge was established; the mandates of the Refuge System; and the vision, goals, and objectives defined in the CCP. The CCP identifies the Refuge's roles in support of the mission of the Refuge System and describes the Service's proposed management actions. The CCP must be consistent with sound principles of fish and wildlife science and conservation, and legal mandates and Service policies. In addition to outlining refuge management direction for conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public.

Alternatives

The Draft CCP/EA identifies and evaluates 3 alternatives for managing Marin Islands National Wildlife Refuge for the next 15 years. Each alternative describes a combination of wildlife, habitat, and public use management prescriptions designed to achieve Refuge purposes. Of the alternatives described below, the Service believes Alternative C would best achieve the purposes of the Refuge, and is, therefore identified as the Preferred Alternative.

Alternative A, the no-action alternative, assumes no change from current management programs and is considered the baseline to compare other alternatives. Under this alternative, the focus of the Refuge would be to continue to maintain and restore native coastal scrub and oak woodland habitat for migratory birds. The Refuge would remain closed to the public other than existing, supervised volunteer opportunities and fishing in the Refuge's submerged area. Wildlife observation and photography would not be allowed on the Refuge's islands.

Alternative B would accelerate habitat restoration of the coastal scrub and oak woodland habitat to provide potential habitat for the migratory birds that nest at the Refuge. The Refuge would remain closed to public access under this Alternative, but fishing from boats would continue. Impacts from trespassing would be reduced through increased law enforcement monitoring. Raven predation of the heron and egret colonies would be monitored to determine declines in the colonies' population.

Alternative C, the preferred alternative, would also include accelerated habitat restoration, increased law enforcement monitoring, fishing from boats, and raven predation monitoring. In addition, public use, environmental education, and cultural resource preservation would be provided. Guided tours would be established to provide wildlife observation, environmental education, and cultural resource interpretation opportunities. Off-refuge environmental education opportunities include school and community presentations. Cultural resources on the Refuge will be assessed and preserved according to regulatory requirements.

Public Comments

After the review and comment period ends for this Draft CCP/EA, comments will be analyzed by the Service and addressed in the Final CCP/EA. All comments received from individuals, including names and addresses, become part of the official public record and may be released. Requests for such comments will be handled in accordance with the Freedom of Information Act, the Council on Environmental Quality's NEPA regulations, and Service and Departmental policies and procedures.

Ken McDermond,

Acting Manager, California/Nevada Operations Office, Sacramento, California.

[FR Doc. E6–11597 Filed 7–20–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–060–1610–DP]

Notice of Availability of the Casper Draft Resource Management Plan and Associated Environmental Impact Statement, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability (NOA) of the Draft Casper Resource Management Plan\Environmental Impact Statement (Draft RMP\EIS).

SUMMARY: In accordance with Section 202 of the National Environmental Policy Act of 1969 (NEPA), and the Federal Land Policy and Management Act of 1976 (FLPMA) the Bureau of Land Management (BLM), in cooperation with the Environmental Protection Agency (EPA), National Park Service (NPS), State of Wyoming, county governments, and conservation districts located in the planning area, has prepared a draft revision to the Casper RMP and associated environmental impact statement. By this notice, the BLM announces the availability of the Draft Casper RMP/EIS for public review and the opening of the period during which the public may submit their comments to the BLM. Consistent with Federal regulations, the BLM announces that a public hearing regarding coal leasing will be scheduled during the public review period and prior to the approval of the final RMP.

DATES: The Draft Casper RMP/EIS will be available for review for 90 calendar days from the date the EPA publishes the NOA in the **Federal Register**. The BLM can best utilize your comments and resource information submissions if received within the review period.

All meetings or hearings and any other public involvement opportunities to submit comments on the Draft RMP\EIS will be announced at least 15 days in advance through public notices, media news releases, Casper RMP Web site announcements, or mailings.

ADDRESSES: A copy of the Draft RMP\EIS has been sent to affected Federal, State, and local Government agencies and to interested parties. The document will be available electronically on the following Web site: *http://www.blm.gov/rmp/casper*. Copies of the Draft RMP\EIS will be available for public inspection at the following locations:

- Bureau of Land Management, Wyoming State Office, 5353 Yellowstone Road, Cheyenne, Wyoming 82003.
- Bureau of Land Management, Casper Field Office, 2987 Prospector Drive, Casper, Wyoming 82604.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Slone, Project Manager, BLM Casper Field Office, 2987 Prospector Drive, Casper, WY 82604. Requests for information may be sent electronically to *CRMP_wymail@blm.gov* with "Attention: Casper RMP Information Request" in the subject line. Ms. Slone may also be reached at (307) 261–7520.

SUPPLEMENTARY INFORMATION: The Draft RMP\EIS describes and analyzes alternatives for the planning and management of public lands and

resources administered by the BLM Casper Field Office. The administrative area is located in east-central Wyoming and includes approximately 8.5 million acres of land in most of Natrona County, and all of Converse, Goshen, and Platte Counties. Public land in the southwestern corner of Natrona County is administered by the BLM's Lander Field Office. Within the Casper administrative area, the BLM administers approximately 1.4 million acres of BLM-administered public land surface and 4.7 million acres of Federal mineral estate.

Cooperating agencies under NEPA in the preparation of the Draft RMP\EIS included the Environmental Protection Agency; National Park Service, Fort Laramie National Historic Site; State of Wyoming; Converse, Natrona, and Platte Counties; and Converse, Natrona, Lingle-Fort Laramie, North Platte Valley, and South Goshen Conservation Districts. The Draft RMP\EIS documents the direct, indirect, and cumulative environmental impacts of five alternatives for management of BLM-administered public lands within the Casper Field Office. When completed, the revised RMP will fulfill the obligations set forth by the NEPA, the FLPMA, and associated Federal regulations. Because the Draft RMP\EIS addresses coal leasing and to meet requirements found at 43 Code of Federal Regulations (CFR) 1610.2, a hearing will be combined with a public meeting to be scheduled and announced during the comment period allotted in this notice. In 1985 the BLM approved the Platte River RMP that established management direction for the surface and mineral estates and associated resources administered by the BLM Casper Field Office, Wyoming. In September 2000 an evaluation of the Platte River RMP, predecessor to the Casper RMP, was completed. The evaluation concluded that the RMP needed revising to address changing conditions and demands on the area's resources.

Under the provisions found at 43 CFR1610.2 the BLM published a Notice of Intent (NOI) in the **Federal Register**, November 20, 2003, announcing that it would prepare a revised plan and associated EIS that would be used to review and analyze current conditions, consider new data, new or revised policies and circumstances affecting the entire or major portions of the geographic area addressed in the Platte River RMP. To reflect changes in administrative units, the BLM also established that the revised plan would henceforth be known as the Casper RMP. The Draft RMP\EIS describes the physical, mineral, biological, heritage and visual, land, and socioeconomic resources in and around the planning area. The focus for impact analysis is based on resource issues and concerns identified during scoping and public involvement activities and opportunities. Potential impacts of concern regarding possible management direction and planning decisions (not in priority order) are:

(1) Energy and mineral resource exploration and development;

(2) Land ownership adjustments and access/transportation on BLM lands;

(3) Fire management, including wildland-urban interface;

(4) Wildlife habitat and management of crucial habitat and migration corridors;

(5) Management and the cumulative effects of land uses and human activities on threatened, endangered, candidate, and sensitive species and their habitat;

(6) Livestock grazing and management of vegetation, including impacts of invasive, nonnative species;

(7) Air and water quality; and

(8) Management of cultural, including National Historic Trails and paleontological resources, recreation and off-highway vehicle management, and visual resource management.

Four alternatives and a Preferred Alternative were developed and are analyzed in detail:

1. *Alternative A.* Continuation of Existing Management Direction or the "No Action" Alternative continues to balance the use and development of resources.

2. *Alternative B.* Emphasizes conservation of physical, biological, and heritage resources with constraints on resource uses.

3. *Alternative C.* Provides physical, biological, and heritage resource conservation similar to current management while allowing for more recreation experiences.

4. *Alternative D.* Emphasizes resource uses (*e.g.*, energy and mineral development, recreation, and forest products).

5. *Alternative E.* Preferred Alternative conserves physical, biological, and heritage resources while emphasizing moderate constraints.

There are currently two areas of critical environmental concern (ACECs), Jackson Canyon and Salt Creek Hazardous ACECs, totaling approximately 249,350 acres of mixed Federal surface and private land ownership as established in the Platte River RMP (1985). There are five potential ACECs proposed in the draft Casper RMP. These are:

- *Alcova Fossil Area*—(7,073 acres; mostly federal surface) Values of concern include rare fossil tracks and additional fossils from two geological periods;
- *Black-tailed Prairie Dog Complex*—(22,937 acres; mostly non-federal surface) Values of concern include protection of habitat and other species dependent on prairie dog colonies;
- *Cedar Ridge*—(21,742 acres; over 60 percent Federal surface) Values of concern include historic cultural resources, including traditional ceremonial sites in use by the Shoshone, Arapaho and other tribes;
- *North Platte River*—(85,392 acres; mostly non-Federal surface) Values of concern include fisheries and wildlife habitats and high recreational and scenic values; and
- *South Bighorns/Red Wall*—(369,325 acres; over 55 percent Federal surface) Values of concern include crucial wildlife habitat, cultural resources, intact vegetation communities and outstanding scenery.

Alternative E proposes to maintain ACEC status for Jackson Canyon; remove ACEC status for Salt Creek Hazardous Area; and add the following to be managed as ACECs in the future: Alcova Fossil Area. The following areas would be established as special management areas (SMAs): Bates Hole, Salt Creek, Sand Hills, South Bighorns/Red Wall, and Wind River Basin.

Agency Preferred Alternative: BLM's preferred alternative is Alternative E.

The Casper Draft RMP\EIS considers, and is in conformance with, BLM's National Fire Plan and Healthy Forest Initiative. The National Energy Policy is also considered. The potential for energy development in the planning area is high, both north and west of Casper, Wyoming. Based on the high potential within the area administered by the Casper Field Office, the Draft RMP\EIS considers oil and gas, coal, and wind energy development in support of the National Energy Plan.

Since the publication of the NOI in the **Federal Register**, open houses, surveys, and mailings have been conducted to solicit comments and input. The Casper Field Office has been coordinating with various county governments, conservation districts, and the State of Wyoming throughout the development of the Draft RMP\EIS. Tribal governments with interests in the Casper area were also contacted. Starting November 20, 2003, the date that BLM's NOI was published in the **Federal Register**, the BLM has solicited for and received in excess of 500 comments from interested parties. In addition, a series of public meetings were held to provide the public with an opportunity to acquire information

about the RMP revision process, as well as provide the public with an opportunity to submit comments. Public meetings were held in: Wheatland, Wyoming, November 10, 2003; Torrington, Wyoming, November 11, 2003; Douglas, Wyoming, November 12, 2003; and Casper, Wyoming, November 13, 2003. All comments presented throughout the process have been considered. Background information and maps used in developing the Draft RMP\EIS are available for public viewing at the Casper Field Office.

How To Submit Comments

The BLM encourages you to review the Casper Draft RMP\EIS, attend public meetings or hearings, and submit your comments. Written comments may be submitted as follows:

1. The Casper RMP Revision Web site at *http://www.blm.gov/rmp/casper/* is designed to allow commenters to submit comments electronically by resource subject directly onto a comment form posted on the Web site;
2. Comments may be uploaded in an electronic file directly to the above Web site;
3. Written comments may be mailed directly, or delivered to, the BLM at: Casper RMP/EIS, Bureau of Land Management Casper Field Office, 2987 Prospector Drive, Casper, WY 82604–2968.
4. Comments may be sent by facsimile to (307) 261–7587; or
5. Written comments may be submitted during the public meetings and hearings that will be held at a later date.

BLM will only accept comments on the Casper RMP and DEIS if they are submitted in the methods described above. To be given consideration by BLM all DEIS comment submittals must include the commenter's name and street address. Whenever possible, please include reference to either the page or section in the document to which the comment applies. To facilitate analysis of comments and information submitted, we strongly encourage the public to submit comments in an electronic format through either the Web site or electronic mail.

Our practice is to make comments, including the names and street addresses of each respondent, available for public review at the BLM office listed above during business hours (7:45 a.m. to 4:30 p.m.), Monday through Friday, except for Federal holidays. Your comments may be published as part of the EIS process. Individual respondents may request confidentiality. If you wish to withhold your name or street address or both from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comments. Such requests will be honored to the extent allowed by law. Anonymous comments will not be considered. All submissions from organizations or businesses will be made available for public inspection in their entirety.

Dated: April 21, 2006.

Donald A. Simpson,

Acting Associate State Director.

[FR Doc. E6–11583 Filed 7–20–06; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR 120 5882 CD99; HAG# 6–161]

Notice of Public Meeting, Coos Bay Resource Advisory Committee Meeting

AGENCY: Bureau of Land Management, Department of the Interior.

ACTION: Notice of Bureau of Land Management (BLM) Coos Bay District Resource Advisory Committee (RAC) Meeting as identified in Section 205(f)(2) of the Secure Rural Schools and Community Self-Determination Act of 2000, Public Law 106–393.

SUMMARY: The BLM Coos Bay District RAC is scheduled to meet on August 3, 2006 from 9 a.m. until 4:30 p.m. at the BLM Coos Bay District Office. The BLM Office is located at 1300 Airport Lane in North Bend, Oregon. The purpose of this meeting will be for the RAC to recommend funding for Title II projects, as identified under Public Law 106–393. There will be an opportunity for the public to address the RAC at approximately 11 a.m. at this meeting. The RAC may also meet on August 10, 2006 for the same purpose. The need for this meeting will be dependent upon the progress made in making recommendations at the August 3, 2006 meeting. The scheduled meeting time and location for the August 10, 2006 meeting will be the same as for the meeting scheduled on August 3, 2006.

FOR FURTHER INFORMATION CONTACT: Mark Johnson, Coos Bay District Manager, at (541) 756–0100 or Glenn Harkleroad, District Restoration Coordinator, at (541) 751–4361 or *glenn_harkleroad@or.blm.gov*. The mailing address for the BLM Coos Bay District Office is 1300 Airport Lane, North Bend, Oregon 97459.

Dated: July 10, 2006.

Mark E. Johnson,

Coos Bay District Manager.

[FR Doc. E6–11566 Filed 7–20–06; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–060–06–1430; UTU–81536]

Notice of Realty Action; Cancellation; Noncompetitive Lease of Public Land; Grand County, UT

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action; Cancellation.

SUMMARY: This notice announces the cancellation of the Notice of Realty Action published in the **Federal Register** on March 14, 2006.

FOR FURTHER INFORMATION CONTACT: Mary von Koch, Realty Specialist, Moab Field Office, 435–259–2128.

SUPPLEMENTARY INFORMATION: The decision to cancel the Notice of Realty Action is based on the comments received during the 45-day comment period. Interested parties pointed out uncertainties with allocation of water rights that are critical for the proposed agricultural lease, they objected to BLM's determination that no competitive interests exist, and stated that the separation of public and State Trust lands for a separate use from the private lands will create haphazard inholdings and access problems for private landowners and grazing permittees. BLM has determined that cancellation of the NORA and continued management of the parcels for existing uses, pending exchange with State Trust, is in the public interest.

Dated: June 27, 2006.

A. Lynn Jackson,

Assistant Field Manager, Resources.

[FR Doc. 06–6388 Filed 7–20–06; 8:45 am]

BILLING CODE 4310–DQ–M

DEPARTMENT OF THE INTERIOR

National Park Service

Construction of New Utah Museum of Natural History, Draft Environmental Impact Statement, Salt Lake County, UT

AGENCY: National Park Service, Department of Interior.

ACTION: Notice of availability of the Draft Environmental Impact Statement

for the construction and operation of a proposed new Utah Museum of Natural History at the University of Utah.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), the National Park Service and the University of Utah announce the availability of a Draft Environmental Impact Statement for the Construction and Operation of a Proposed New Utah Museum of Natural History at the University of Utah, Salt Lake County, Utah.

DATES: The University of Utah and the National Park Service will accept comments on the Draft Environmental Impact Statement from the public through September 19, 2006. A public meeting will be held at a time, data, and place to be announced. Public meeting information will be posted on the project Web site (see url below).

ADDRESSES: Information will be available for public review and comment online at *http://www.umnh.utah.edu*, (click on About UMNH, New Building Updates, Environmental Impact Statement), or at Bear West Company, 145 South 400 East, Salt Lake City, Utah 84111, phone 801–355–8816.

FOR FURTHER INFORMATION CONTACT: Ralph Becker, 145 South 400 East, Salt Lake City, Utah 84111, 801–355–8816, e-mail *rbecker@bearwest.com*.

SUPPLEMENTARY INFORMATION: If you wish to comment, you may submit your comments by any one of several methods. You may mail comments to UMNH EIS, c/o Bear West, 145 South 400 East, Salt Lake City, Utah 84111. You may also comment via e-mail to *bcall@bearwest.com*. If you do not receive a confirmation that your e-mail message was received, contact us directly by calling Bridger Call at 801–355–8816. Finally, you may hand-deliver comments to Bear West, 145 South 400 East, Salt Lake City, Utah 84111. Our practice is to make comments, including names, home addresses, home phone numbers, and e-mail addresses of respondents, available for public review. Individual respondents may request that we withhold their names and/or home addresses, etc., but if you wish us to consider withholding this information you must state this prominently at the beginning of your comments. In addition, you must present a rationale for withholding this information. This rationale must demonstrate that disclosure would constitute a clearly unwarranted invasion of privacy. Unsupported assertions will not meet this burden. In the absence of exceptional, documentable circumstances, this information will be released. We will always make submissions from organizations or businesses, and from individuals identifying themselves as representatives of or officials of organizations or businesses, available for public inspection in their entirety.

Dated: July 13, 2006.

Michael D. Snyder,

Director, Intermountain Region, National Park Service.

[FR Doc. 06–6322 Filed 7–20–06; 8:45 am]

BILLING CODE 4310–70–M

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[FES–06–19]

Long-Term Miscellaneous Purposes Contract, Carlsbad Irrigation District, New Mexico

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of Availability for the Long-Term Miscellaneous Purposes Contract Final Environmental Impact Statement, Eddy County, New Mexico.

SUMMARY: The Bureau of Reclamation (Reclamation) and the New Mexico Interstate Stream Commission (NMISC), as joint lead agencies, have prepared and made available to the public a final environmental impact statement (FEIS) pursuant to Section 102(2)(c) of the National Environmental Policy Act of 1969, as amended, 42 United States Code 4332.

ADDRESSES: Copies of the FEIS are available for public inspection and review at the following locations:

- Bureau of Reclamation, Upper Colorado Regional Office, 125 South State Street, Room 7220, Salt Lake City, Utah 84138–1102.
- Bureau of Reclamation, Albuquerque Area Office, Attention: Marsha Carra, 555 Broadway NE., Suite 100, Albuquerque, New Mexico 87102.
- New Mexico Interstate Stream Commission, Attention: Elisa Sims, 230 West Manhattan Avenue, 2nd Floor, Santa Fe, New Mexico 87501.
- Carlsbad Public Library, 101 South Halagueno Street, Carlsbad, New Mexico 88221.
- Carlsbad Irrigation District, 201 South Canal Street, Carlsbad, New Mexico 88220.

The FEIS is also available on the Internet at the following Web address: *http://www.usbr.gov/uc/albuq/envdocs/index.html*. In addition, interested parties may contact Ms. Aleta Powers, ERO Resources Corporation, 1842 Clarkson Street, Denver, Colorado 80218; telephone (303) 830–1188; e-mail: *apowers@eroresources.com*.

FOR FURTHER INFORMATION CONTACT: Ms. Marsha Carra, Bureau of Reclamation, Albuquerque Area Office, 555 Broadway NE., Suite 100, Albuquerque, New Mexico 87102; telephone (505) 462–3602; facsimile (505) 462–3780; e-mail: *mcarra@uc.usbr.gov* or Elisa Sims, New Mexico Interstate Stream Commission, P.O. Box 25102, Santa Fe, New Mexico 87504–5102, telephone (505) 827–3918.

SUPPLEMENTARY INFORMATION: Between 1987 and the present, New Mexico has satisfied its water delivery obligations to Texas under the Pecos River Compact (Compact) and Amended Decree. In some years, New Mexico has over-delivered water to the state line and in other years it has under-delivered. New Mexico has been able to satisfy its Compact obligations in large part because of its leasing program and the fallowing of irrigated land within the Carlsbad Irrigation District (CID). The leasing program within the CID has operated under an existing short-term miscellaneous purposes contract since 1992, which allows foregone, leased irrigation water to be delivered to the state line on behalf of the NMISC.

The State of New Mexico *ex rel.* the State Engineer, NMISC, Reclamation, the CID, and the Pecos Valley Artesian Conservancy District entered into a Settlement Agreement on March 25, 2003, that resolves litigation, implements a plan to ensure delivery of water to the CID and New Mexico-Texas state line, and settles many water management issues on the Pecos River. An ad hoc committee comprised of water users in the Pecos River Basin was formed to develop a solution for long-term compliance with the Pecos River Compact and Amended Decree, resulting in the Settlement Agreement. In addition, the implementation of the Settlement Agreement is contingent upon fulfilling certain requirements, including the execution of a long-term miscellaneous purposes contract.

On February 28, 2003, Reclamation published a notice in the **Federal Register** (68 FR 9715–9722) stating plans to execute a contract with the CID that would allow the NMISC to lease water allotted for up to 6,000 acres, or other available Carlsbad Project water (Project water), for purposes other than irrigation, i.e., bypassing water, allowing it to be delivered to Texas. These 6,000 acres, plus 164 acres that the NMISC currently owns within the boundaries of the CID, would be

fallowed under this contract. The Commissioner of Reclamation has granted approval to negotiate and execute a long-term miscellaneous purposes contract, pursuant to authority provided by the Sale of Water for Miscellaneous Purposes Act of February 25, 1920, whereby the NMISC would be limited to using or leasing a maximum of 50,000 acre-feet of Project water per year.

Purpose and Need for Action

The purpose of Reclamation's proposed Federal action is to allow the NMISC to use Project water allotted to land located inside the boundaries of the CID that NMISC owns or leases from other members of the CID, or other Project water that NMISC leases, for purposes other than irrigation, specifically for delivery to Texas. As a member of the CID, the NMISC needs to use Project water for purposes other than irrigation to maintain long-term compliance with the Pecos River Compact and the United States Supreme Court Amended Decree in *Texas* v. *New Mexico*. The long-term miscellaneous purposes contract would replace a 1999 short-term contract that Reclamation currently has with the CID that allows the NMISC to use Project water for miscellaneous purposes.

Proposed Federal Action

Reclamation's preferred alternative is the execution of a long-term miscellaneous purposes contract and approval of any related third-party contracts. The FEIS assesses the potential effects that the alternative may have on biological, hydrologic, and cultural resources; social and economic settings; and Indian trust assets as well as any potential disproportionate effects on minority or low-income communities (environmental justice). The FEIS also evaluates the effects of the alternatives on the State of New Mexico's ability to meet annual state line delivery obligations associated with the Pecos River Compact and Amended Decree.

The Long-Term Miscellaneous Purposes Contract Draft Environmental Impact Statement (DEIS) was filed with the Environmental Protection Agency on January 12, 2006, and a Notice of Availability for the DEIS was published in the **Federal Register** on that same date. The 60-day review and comment period for the DEIS ended on March 13, 2006. During the comment period, one public meeting was held in Carlsbad, New Mexico. All comments received on the DEIS were carefully reviewed and considered in preparing the FEIS. Where appropriate, revisions were made to the document in response to specific comments. The comments and responses, together with the final environmental impact statement, will be considered in determining whether or not to implement the proposed action.

No decision will be made on the proposed Federal action until 30 days after release of the FEIS. After the 30-day waiting period, Reclamation will complete a Record of Decision. The Record of Decision will state the action that will be implemented and discuss all factors leading to that decision.

Dated: June 9, 2006.

Dave Sabo,

Assistant Regional Director—UC Region, Bureau of Reclamation.

[FR Doc. E6–11678 Filed 7–20–06; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Notice of Preparation of Supplemental Draft Environmental Impact Statement and Supplemental Information Regarding Red River Valley Water Supply Project, North Dakota

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of preparation of a supplemental draft environmental impact statement (SDEIS) and notice of the current status and future activities related to the draft environmental impact statement (DEIS) for the Red River Valley Water Supply Project (Project).

SUMMARY: The Bureau of Reclamation (Reclamation) and State of North Dakota's designee, Garrison Diversion Conservancy District (Garrison Diversion), as joint lead agencies preparing the DEIS, are continuing work under the National Environmental Policy Act on the environmental impact statement (EIS) for the proposed Red River Valley Water Supply Project, located in North Dakota and Minnesota. This notice is being published to provide information related to the current status of the DEIS and preparation of a SDEIS.

DATES: The formal comment period on the DEIS remains open and we will continue to receive and consider relevant public comments as the SDEIS is prepared.

ADDRESSES: Send comments to Signe Snortland, Red River Valley Water Supply Project, Bureau of Reclamation, Dakotas Area Office, P.O. Box 1017, Bismarck, ND 58502, or fax to (701) 250–4326. You may submit e-mail to *ssnortland@gp.usbr.gov.*

FOR FURTHER INFORMATION CONTACT: Signe Snortland, telephone: (701) 250–4242 extension 3619. You may access the Red River Valley Water Supply Project Web site at *http://www.rrvwsp.com.*

SUPPLEMENTARY INFORMATION: Reclamation and Garrison Diversion, as joint lead agencies preparing the EIS, believe that new information and/or additional analyses, relevant to environmental concerns and issues raised by (EPA) and the public, regarding potential effects of the Project, indicate a need to prepare a SDEIS consistent with the CEQ regulations (40 CFR 1502.9(a)). This may lead to development of alternatives that would need to be described and included in the SDEIS and be subject to public review and comment.

The notice of intent to prepare the DEIS was published in the **Federal Register** on October 8, 2002 (67 FR 195, 62813). The notice of availability of the DEIS, notice of public hearings, and additional information on the Red River Valley Water Supply Project was published in the **Federal Register** on December 30, 2005 (70 FR 250, 77425–77427). In response to requests by United States Environmental Protection Agency (EPA) and others, Reclamation and Garrison Diversion extended the comment period, through March 30, 2006 (71 FR 34, 8873–8874), then through April 14, 2006 (71 FR 68, 18116), and then announced on April 13, 2006 that the formal comment period would remain open while the SDEIS is being prepared. Availability of the SDEIS will be announced in the **Federal Register** later in 2006. All comments received on the DEIS and the SDEIS will be fully considered and responded to in the final EIS (FEIS). The FEIS is scheduled for release by December 31, 2006.

Public Disclosure Statement

Our practice is to make comments, including names, home addresses, home phone numbers, and e-mail addresses of respondents, available for public review. Individual respondents may request that we withhold their names and/or home addresses, etc., but if you wish us to consider withholding this information you must state this prominently at the beginning of your comments. In addition, you must present a rationale for withholding this information. This rationale must demonstrate that disclosure would constitute a clearly unwarranted invasion of privacy. Unsupported assertions will not meet this burden. In the absence of exceptional,

documentable circumstances, this information will be released. We will always make submissions from organizations or businesses, and from individuals identifying themselves as representatives of or officials of organizations or businesses, available for public inspection in their entirety.

Dated: July 14, 2006.

Donald E. Moomaw,

Acting Regional Director, Great Plains Region.

[FR Doc. E6–11598 Filed 7–20–06; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–703 and 705 (Second Review)]

Furfuryl Alcohol From China and Thailand

AGENCY: International Trade Commission.

ACTION: Scheduling of expedited five-year reviews concerning the antidumping duty orders on furfuryl alcohol from China and Thailand.

SUMMARY: The Commission hereby gives notice of the scheduling of expedited reviews pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(3)) (the Act) to determine whether revocation of the antidumping duty orders on furfuryl alcohol from China and Thailand would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* July 7, 2006.

FOR FURTHER INFORMATION CONTACT: Olympia DeRosa Hand (202–205–3182), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background—On July 7, 2006, the Commission determined that the domestic interested party group response to its notice of institution (71 FR 16587, April 3, 2006) of the subject five-year reviews was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting full reviews.[1] Accordingly, the Commission determined that it would conduct expedited reviews pursuant to section 751(c)(3) of the Act.

Staff report—A staff report containing information concerning the subject matter of the reviews will be placed in the nonpublic record on August 14, 2006, and made available to persons on the Administrative Protective Order service list for these reviews. A public version will be issued thereafter, pursuant to § 207.62(d)(4) of the Commission's rules.

Written submissions—As provided in § 207.62(d) of the Commission's rules, interested parties that are parties to the reviews and that have provided individually adequate responses to the notice of institution,[2] and any party other than an interested party to the reviews may file written comments with the Secretary on what determinations the Commission should reach in the reviews. Comments are due on or before August 17, 2006, and may not contain new factual information. Any person that is neither a party to the five-year reviews nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the reviews by August 17, 2006. However, should the Department of Commerce extend the time limit for its completion of the final results of its reviews, the deadline for comments (which may not contain new factual information) on Commerce's final results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by § 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II(C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Determination—The Commission has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B).

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.62 of the Commission's rules.

By order of the Commission.

Issued: July 17, 2006.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E6–11563 Filed 7–20–06; 8:45 am]

BILLING CODE 7020–02–P

[1] Commissioner Charlotte R. Lane concluded that circumstances warranted full reviews. A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's Web site.

[2] The Commission has found the response submitted by domestic producer Penn Specialty Chemicals, Inc. to be adequate. Comments from other interested parties will not be accepted (see 19 CFR 207.62(d)(2)).

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 332–350 and 332–351]

Monitoring of U.S. Imports of Tomatoes; Monitoring of U.S. Imports of Peppers

AGENCY: United States International Trade Commission.

ACTION: Notice of opportunity to submit information for 2006 monitoring reports.

DATES: *Effective Date:* July 12, 2006.

SUMMARY: Pursuant to statute (see below), the Commission monitors U.S. imports of fresh or chilled tomatoes and fresh or chilled peppers, other than chili peppers, for the purpose of expediting an investigation under certain U.S. safeguard laws, should an appropriate petition be filed. As part of that monitoring, the Commission compiles data on imports and the domestic industry, and has made its data series available electronically to the public on an annual basis since 1994. The Commission is in the process of preparing its data series for the period

ending June 30, 2006, and is seeking input from interested members of the public. The Commission expects to make its data series available to the public in November 2006 in electronic format, posted on the Commission's Web site.

FOR FURTHER INFORMATION CONTACT: Timothy McCarty (202–205–3324, *timothy.mccarty@usitc.gov*) or Jonathan Coleman (202–205–3465, *jonathan.coleman@usitc.gov*), Agriculture and Fisheries Division, Office of Industries, U.S. International Trade Commission, 500 E Street, SW., Washington DC, 20436, for general information, or William Gearhart (202–205–3091, *william.gearhart@usitc.gov*), Office of the General Counsel, U.S. International Trade Commission, for information on legal aspects.

SUPPLEMENTARY INFORMATION:

Background.—Section 316 of the North American Free-Trade Agreement Implementation Act (NAFTA Implementation Act) (19 U.S.C. 3881) requires that the Commission monitor U.S. imports of fresh or chilled tomatoes (HTS heading 0702.00) and fresh or chilled peppers, other than chili peppers (HTS subheading 0709.60.00), until January 1, 2009, for purposes of expediting an investigation concerning provisional relief under section 202 of the Trade Act of 1974 or section 302 of the NAFTA Implementation Act. Section 316 does not require that the Commission publish reports on this monitoring activity or otherwise make the information available to the public. However, the Commission maintains current data files on tomatoes and peppers in order to conduct an expedited investigation should a request be received. In response to the monitoring requirement, the Commission instituted investigation No. 332–350, *Monitoring of U.S. Imports of Tomatoes* (59 FR 1763) and investigation No. 332–351, *Monitoring of U.S. Imports of Peppers* (59 FR 1762).

The Commission will make its reports available to the public in electronic format, and will maintain electronic copies of its reports on its Web site until one year after the monitoring requirement expires on January 1, 2009. The most recent Commission monitoring reports in this series were published in November 2005 and are available on the Commission's Web site.

Written submissions.—The Commission does not plan to hold a public hearing in connection with preparation of these reports. However, interested persons are invited to submit written statements containing data and other information concerning the matters to be addressed in the reports. All submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street SW., Washington, DC 20436, and should be received no later than the close of business on August 31, 2006. All written submissions must conform with the provisions of section 201.8 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.8). Section 201.8 of the rules requires that a signed original (or a copy designated as an original) and fourteen (14) copies of each document be filed. In the event that confidential treatment of the document is requested, at least four (4) additional copies must be filed, in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). The Commission's rules do not authorize filing submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *ftp://ftp.usitc.gov/pub/reports/electronic_filing_handbook.pdf*).

Any submissions that contain confidential business information must also conform with the requirements of section 201.6 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the "confidential" or "non-confidential" version, and that the confidential business information be clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available in the Office of the Secretary to the Commission for inspection by interested parties.

The Commission will not publish such confidential business information in the monitoring reports it posts on its Web site in a manner that would reveal the operations of the firm supplying the information. However, the Commission may include such information in the report it sends to the President under section 202 of the Trade Act of 1974 or section 302 of the NAFTA Implementation Act, if it is required to conduct an investigation involving these products under either of these statutory authorities. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting our TDD terminal on (202) 205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS–ON LINE) at *http://edis.usitc.gov*. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

By order of the Commission.

Issued: July 17, 2006.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E6–11565 Filed 7–20–06; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11330, et al.]

Proposed Exemptions; The Young Men's Christian Association Retirement Fund-Retirement Plan (the Plan)

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N–5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Attention: Application No. _____, stated in each Notice of Proposed *Exemption*. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: *moffitt.betty@dol.gov*, or by FAX to (202) 219–0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

The Young Men's Christian Association Retirement Fund-Retirement Plan, (the Plan) Located in New York, NY, [Application No. D–11330].

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

Transactions and Conditions

(a) If the proposed exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, effective July 1, 2006, to:

(1) Any arrangement, agreement or understanding between The Young Men's Christian Association Retirement Fund-Retirement Plan (the Plan) and any participating employer whose employees are covered by the Plan, whereby the time is extended for the making of a contribution by such a participating employer to such Plan, if the following conditions are met:

(i) Prior to entering into such arrangement, agreement or understanding, the Plan has made, or has caused to be made, such reasonable, diligent and systematic efforts as are appropriate under the circumstances to collect such contribution;

(ii) The terms of such arrangement, agreement or understanding are set forth in writing and are reasonable under the circumstances based on the likelihood of collecting such contribution or the approximate expenses that would be incurred if the Plan continued to attempt to collect such contribution through means other than such arrangement, agreement or understanding;

(iii) Such arrangement, agreement or understanding is entered into or renewed by the Plan in connection with the collection of such contribution and for the exclusive purpose of facilitating the collection of such contribution;

(iv) The Plan's procedures and the guidelines to be followed in undertaking to collect such contributions are described in a notice provided to all the employers participating in the Plan. This notice details the Plan's standard operating guidelines for the collection of late employer contributions (the Notice). The Notice provided to all participating employers contains the methodology of the Plan that applies with respect to the determination to extend the time period for the making of such delinquent contribution or to permit such delinquent contribution to be made in periodic payments. New participating employers will receive the Notice within 30 days of signing the written participation agreement; and

(v) The extension of time does not apply to any failure of an employer to timely remit participant contributions to the Plan.

(2) A determination by the Plan to consider a contribution due to the Plan from any participating employer any of whose employees are covered by the Plan as uncollectible and to terminate efforts to collect such contribution, if the following conditions are met:

(i) Prior to making such determination, the Plan has made, or has caused to be made, such reasonable, diligent and systematic efforts as are appropriate under the circumstances to collect such contribution or any part thereof;

(ii) Such determination is set forth in writing and is reasonable and appropriate based on the likelihood of collecting such contribution or the approximate expenses that would be incurred if the Plan continued to attempt to collect such contribution or any part thereof;

(iii) The Notice provided to all participating employers, which is described in section (a)(1)(iv) above, must also contain the methodology used by the Plan with respect to the determination that the delinquent contribution is uncollectible and in deciding to terminate efforts to collect such contribution; and

(iv) The determination that the contribution is uncollectible and the decision to terminate efforts to collect such contribution do not apply to any failure of an employer to timely remit participant contributions to the Plan.

(b) If an employer any of whose employees are covered by the Plan enters into an arrangement, agreement or understanding with the Plan as described in subparagraph (a)(1) with respect to the payment of such contribution, or if the Plan makes a determination described in subparagraph (a)(2), such employer shall not be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, except in the case of an arrangement, agreement or understanding described in subparagraph (a)(1), where the terms thereof are clearly unreasonable under the circumstances based on the likelihood of collecting such contribution or the approximate expenses that would be incurred if the Plan continued to attempt to collect such contribution through means other than such arrangement, agreement or understanding.

(c) The Plan maintains for a period of six years the records necessary to enable the persons described in paragraph (d)

below to determine whether the conditions of this exemption have been met, except that:

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Plan, the records are lost or destroyed prior to the end of the six-year period, and

(2) No party in interest other than the Plan's fiduciaries shall be subject to the civil penalty that may be assessed under section 502(i) of ERISA or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or not available for examination as required by paragraph (d) below.

(d)(1) Except as provided in subparagraph (d)(2) below and notwithstanding any provisions of section 504(a)(2) and (b) of ERISA, the records referred to in paragraph (c) above are unconditionally available at their customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service;

(ii) Any fiduciary of the Plan or any duly authorized employee or representative of such fiduciary;

(iii) Any participating employer of the Plan; and

(iv) Any participant or beneficiary of the Plan or duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in subparagraph (d)(1)(ii), (iii) and (iv) above shall be authorized to examine commercial or financial information which is privileged or confidential, or records that are unrelated to the Plan.

DATES: *Effective Date:* This proposed exemption, if granted, will be effective as of July 1, 2006, the date of the beginning of the Plan year.

Summary of Facts and Representations

1. The Application for this proposed exemption was submitted on behalf of the Young Men's Christian Association Retirement Fund (the Sponsor or Fund) and the Plan it sponsors, The Young Men's Christian Association Retirement Fund—Retirement Plan (the Plan) with respect to the Plan's procedures for the collection of employer contributions from participating employers in the Plan for plan years commencing July 1, 2006 and thereafter. The Applicant states that no provision of the proposed exemption would extend to the failure of an employer to timely forward participant contributions to the Plan.

The Fund is the named fiduciary for the Plan and acts as trustee of the Plan. The Applicant states that other ERISA fiduciaries include the senior officers of the Fund in their capacity as plan administrator. These executive officers are employees of the Fund, who may act as plan administrator, and they acknowledge fiduciary responsibility in that context. The Sponsor will bear the costs of the exemption application and notifying interested persons.

2. The Applicant states that the Plan is a multiple employer church money purchase pension plan under Code section 401(a). The Applicant further states that as of July 1, 2006, the Plan will be treated as having made an election under Code section 410(d) and, thus, will be an "electing" money purchase defined contribution church plan, subject to the applicable provisions of ERISA and the Code.[1] The Sponsor is a separately incorporated New York not-for-profit corporation, which was established in 1921 for the express purpose of providing retirement benefits to employees of Young Men's Christian Associations (YMCAs or employers) throughout the United States.

Since its founding, the Plan has provided retirement benefits to the employees of participating YMCAs. As of June 30, 2005, the Plan covered more than 75,000 participants, including over 8,600 retired participants and beneficiaries. The Plan's participating employers consist entirely of separately incorporated YMCAs throughout the United States. As of May 5, 2006, there were 967 corporate chartered YMCAs that operate 2,600 branches. As of June 30, 2005, the Plan had 920 participating employers, and in the last year, has received over $168 million in plan contributions. As of June 30, 2005, the most recent available valuation date for the Plan, the aggregate fair market value of the Plan's assets was $2,171,230,098, and as of June 30, 2005, the fair market value of the total assets that are attributable to the contributions to the Plan was approximately $803,355,137. The fair market value of the total assets that are attributable to contributions made to the Plan in the three year period ending June 30, 2005 was $480 million of which approximately $400,000 represented delinquent employer contributions. The delinquent amounts represent less than one tenth of 1% of such contribution to the Retirement Plan.

3. The Applicant states that, under the Plan, a participant's benefit is based upon the sum of the contributions made by the participant and his employer, plus interest that is periodically credited as determined by the Board of Trustees of the Sponsor. According to the Applicant, pursuant to the terms of the Plan, participation by a YMCA employer in the Plan is voluntary but if a YMCA does participate, it is mandatory that the YMCA submit employer contributions to the Plan on behalf of all of its eligible employees, including employees located at the YMCA's various chapters (also known as branches). The Applicant represents that, pursuant to the Legislation, commencing with the plan year beginning on July 1, 2006, the Plan (but not any reserves held by the Sponsor with respect to such Plan or other assets held by the Sponsor) will be treated as having made an election under Code section 410(d). At that time, the Plan will be treated as an "electing" church plan subject to the applicable provisions of ERISA and the Code.

The Applicant notes that, pursuant to Sections 1.4 and 14.3 of the Plan, participating YMCA employers are required to sign a written participation agreement with the Board of Trustees of the Sponsor, pursuant to which the employer agrees to make participation in the Plan a condition of employment for all new employees and also agrees to enroll its eligible employees and make regular timely payments required by the Plan on behalf of its employees. In addition, each participating association agrees to permit auditors selected by the Sponsor's Board of Trustees to examine the books and records of the participating employer to determine whether the participating employer is participating in accordance with the provisions of the Plan.

4. The Applicant asserts that the Plan, like many other multiple employer plans, especially plans analogous in size, from time to time encounters participating employers who fail to make timely contributions to the Plan. This delinquency in the past has resulted from various reasons, including personnel changes at the participating YMCA which caused an administrative failure to make the contribution on time and failures relating to data collection issues at the participating employers. These delinquencies have been pursued through reasonable, diligent and systematic collection efforts by the Sponsor, which require that the employer make up the contributions with interest.

[1] The Applicant notes that pursuant to legislation passed by Congress and signed into law by President Bush on December 21, 2004 (Pub. L. 108–476) (Legislation), the Sponsor's status as a church pension fund (within the meaning of Code section 414(e)(3)(A)) and the Plan's status as a defined contribution money purchase church pension plan (within the meaning of Code section 414(e)) was confirmed.

The YMCA Retirement Fund Collection Procedure submitted by the Applicant in a June 28, 2006 correspondence to the Department provides that employer contributions are required to be transmitted by the YMCA employers to the Fund by the 15th business day of the month following the due date. On the 9th business day of the following month, the Fund sends an "urgent reminder" fax or email to the Plan Administrator of the participating employers who have not yet remitted their contributions. On the 12th business day, a second notice is sent to the employer's CFO and on the 14th business day, a third notice is sent to the employer's CEO. On the 16th day, the Fund sends a letter indicating contributions are delinquent to the employer's CFO and copies the CEO and the Chairman of the employer's Board of Trustees. At 2 months past due, a personal letter is sent to the CEO of the employer and at 3 months past due, a personal letter is sent to the CEO and the Chairman. At 4 months past due, the Fund sends a letter to each participant at the employer outlining the situation with copies to the CEO and the Chairman. At 5 months past due, the Fund sends a letter to the CEO and the Chairman detailing the IRS consequences for delinquent contributions and offering assistance in working out a payment schedule if the YMCA is experiencing "extreme financial hardship." At 6 to 8 months past due, there are continued efforts to encourage payments by the employer and a possible warning of expulsion from the Fund.

Delinquencies are reported monthly to the corporate offices of the YMCA of the U.S.A. and to the appropriate regional Network Consultants after the close of the month. Quarterly confirmations are sent to the CEO of each employer indicating whether contributions were made timely. The Fund's Finance Department periodically runs reports to track any employers that are delinquent and the Executive V.P. of the Fund maintains a "Past Due Contributions Report" on the status of each delinquent employer. The Fund's management may determine that yearly reminders or questionnaires regarding timely remittance of employer contributions should be sent to previously delinquent employers to encourage compliance. On occasion, the Fund's internal audit staff will conduct on-site reviews to access an employer's compliance.

5. The Plan will distribute a notice to the participating employers describing the Plan's procedures for the collection of late employer contributions and the determination by the Plan that a delinquent contribution is uncollectible (the Notice).[2] New participating employers will receive the Notice within 30 days of signing the written participation agreement. The Notice will provide the participating employers with a detailed explanation of the steps used by the Plan to determine: the time period for the making of such delinquent contribution; whether to permit such delinquent contribution to be made in periodic payments; that the delinquent contribution is uncollectible; and whether to terminate efforts to collect such contribution.

6. The Applicant states that often the delinquency is a result of an administrative failure, and as a result of its diligent collection efforts, the contributions and interest, are made to the Plan. The Applicant notes, however, that in certain situations, the participating employer is not able to make the required contributions, for example, when the participating employer's solvency is in jeopardy or where there are other adverse financial conditions that exist. In such cases, the Sponsor still seeks full contributions from the participating employer, although often the Sponsor will agree to accept the required contributions over a longer period of time in installments until the solvency issues are resolved. In rare cases, the Sponsor decides to terminate further collection efforts based on the participating employer's insolvency coupled with the expense of continued collection efforts with respect to such participating employer. The Sponsor may, as it deems appropriate, expel a delinquent YMCA employer and preclude it from all future participation in the Plan or pursue civil action against a delinquent YMCA employer to collect contributions. The Applicant further states that, although the Sponsor seeks to prevent such delinquent payments through communication and the use of the audit function permitted by the Plan, given the size of the Plan, the number of participating employers, and the varying size of the workforces at the participating employers, it is likely that the Plan will face delinquent contributions in the future. This is even more significant given the amount of contributions the Plan receives.

The approximately 920 participating employers in the Plan vary in size and financial health, which can at times result in the delinquent payment of contributions to the Plan. The Plan, through diligent and systematic collection efforts, has been able to recover delinquent employer contributions, plus interest. By virtue of the Plan's efforts to collect delinquent payments, including extending the time by which participating employers must make such contributions, the Plan has benefited by increasing the total assets available to provide retirement benefits to its participants. By continuing such collection efforts, the participants and beneficiaries of the Plan will benefit through the receipt of the full amount of their promised plan benefits.

7. Once the Plan's Code section 410(d) election becomes effective, for the July 1, 2006 plan year and plan years thereafter, the Plan will be subject to the prohibited transaction provisions of section 406 of ERISA. Under ERISA sections 406(a)(1)(B) and 406(a)(1)(D), a fiduciary shall not cause a plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect (i) lending of money or other extension of credit between the plan and a party in interest; or (ii) a transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. Section 4975 of the Code contains parallel prohibited transaction provisions. By allowing participating employers to make payments at a later date, over a longer period of time than prescribed by the Plan or in rare instances, ceasing collection efforts against a participating employer (where the costs of collection may far outweigh the amounts involved), the Plan may be viewed as extending credit from the Plan to the participating employer, (*i.e.*, a party in interest pursuant to ERISA section 3(14)(C)), or transferring plan assets to a participating employer in violation of ERISA sections 406(a)(1)(B) and 406(a)(1)(D) (and the related parallel prohibited transaction provisions under the Code).

The Applicant represents that the Sponsor, as a church pension fund sponsoring a multiple employer church pension plan under the Code, is a unique organization. However, in the context of multiple employer plans generally, the practice of delaying or extending the time for payment of employer contributions under the plan is not uncommon. Prohibited Transaction Class Exemption 76–1 (41 FR 12740, Mar. 26, 1976) (PTE 76–1) provides an exemption from ERISA sections 406(a) and 407(a) for multiple employer plans maintained pursuant to one or more collective bargaining agreements between an employee organization and more than one employer. The preamble to the proposed

[2] The Notice will be distributed in conjunction with the notice to interested persons that is required to be provided within 30 days after this proposed exemption is published in the **Federal Register**.

class exemption recognizes that "multiemployer plans are often confronted with the problem of delinquency in participating employer contributions * * * and at times one or more participating employers may be delinquent in making such contributions." 40 FR 23798 (Jun. 2, 1975). Further, the preamble notes, "[I]n the course of their collection efforts, multiemployer plans frequently delay or extend the time for payment of contributions pursuant to understandings, arrangements or agreements in circumstances where it appears that collection of the full amount due the plan would be jeopardized were the plan to attempt to force immediate full payment." *Id.*

8. The Applicant states that although PTE 76–1 was reserved for multiple employer plans [3] maintained pursuant to a collective bargaining agreement, such fact does not decrease the significance of the acknowledgement that multiple employer plans (regardless of the industry or whether it is pursuant to a collective bargaining agreement) face the same issues that were the basis for such class exemption. Any multiple employer plan, especially one that is similar in size to the Plan, would confront the issue of delinquent contributions and the need for reasonable and cost effective collection procedures.

The Department notes that the preamble to PTE 76–1 recognized that the delinquency problem existed in other contexts in responding to a comment received from an employer association, the sponsor of an employee benefit plan which was not collectively bargained, that had a significant number of unaffiliated employers contributing to the plan. The employer association stated that its plan had many of the same problems regarding delinquent employer contributions that are encountered by multiemployer plans and, therefore, PTE 76–1 should be made applicable to plans that are not collectively bargained. The Department responded that "because plans which are not collectively bargained are not jointly administered within the meaning of section 302(c)(5) of the LMRA, the circumstances and safeguards involved in the collection of delinquent employer contributions by such plans may be different from those involved in collectively bargained, jointly administered multiple employer plans." The Department further noted that the "letter of comment did not contain sufficient information regarding this question and, therefore, the Department and the Service are not able at this time to grant a class exemption covering plans which are not collectively bargained." The Department, however, noted that the agencies are "prepared to consider applications for an exemption for transactions involving the collection of delinquent employer contributions by employee benefit plans which are not collectively bargained."

9. The Applicant asserts that the Plan requires employers to make contributions in order to provide participants and beneficiaries with retirement benefits. To the extent that an employer does not make such required contributions, delinquent contributions would directly and adversely affect the value of the account balances for the plan participants of that employer, which in turn could adversely affect the amount converted into a retirement annuity by the Sponsor for such participants. As a defined contribution plan, benefits are measured directly by the value of a participant's account balance, which account is credited with employer contributions. Failure to receive all required contributions will diminish a participant's account balance value and, thus, his or her retirement benefit amount and post-retirement financial security. Participants have a reasonable expectation that the full amount of their employer's contributions will be made on their behalf. The Sponsor's procedure for the recovery of delinquent contributions allows the participants' retirement benefit expectations to be realized.

Additionally, the Applicant states that the extended payment plan contributions are required under Plan procedures to include lost earnings (based upon the Plan's crediting interest rate) and thus, the Plan's procedures are designed to make the participants whole.

The Applicant notes that, because the proposed transaction is expected to be a recurring transaction between the Plan and the participating employers, the Plan has established specified written collection procedures, which create appropriate safeguards that should make it feasible for the Department to grant the requested exemption. The proposed transaction is in the interests of the Plan and its participants and beneficiaries since the ability of the Plan to collect employer contributions promotes the purpose of the Plan of providing retirement benefits to its participants and beneficiaries. Additionally, the ability of the Plan to delay or extend the time for a participating employer to make its contributions to the Plan aides the Plan in helping a participating employer manage its retirement plan obligations when the participating employer is going through a difficult financial period or when it experiences personnel changes or administrative issues that prevent the employer from making its contributions on time.

The Applicant believes the proposed exemption will permit the Plan to facilitate employer participation, which, in turn, supports the provision of retirement benefits to all YMCA employees. The proposed transaction is protective of the rights of the Plan participants and its beneficiaries because the ability to collect delinquent employer contributions will result in increased assets for the Plan. The Applicant adds that the manner in which collection of such delinquent contributions is proposed to be carried out protects participants' and beneficiaries' interests.

10. In summary, the Applicant represents that the proposed transactions meet the requirements set forth in the proposed exemption in light of the Plan's adoption of procedures for the orderly collection of delinquent employer contributions that involve reasonable, diligent and systematic methods for the review of employer contribution accounts. Prior to the Plan entering into an alternative arrangement, agreement or understanding, the Plan uses reasonable, diligent and systematic efforts, as appropriate under the circumstances, to collect outstanding employer contributions. The terms of such arrangement or the Plan's determination to consider a contribution due to the Plan as uncollectible and to terminate efforts to collect such contribution, are in writing and are reasonable under the circumstances in light of the likelihood of collecting the contributions weighed against the expenses that would be incurred by continuing to attempt to collect the contributions through other means. Any arrangement by the Plan in connection with the collection of such contributions will be for the exclusive purposes of facilitating the collection of such contributions. The Plan's procedures and the general guidelines to be followed in undertaking to collect such contributions or in determining that the delinquent contribution is uncollectible and in deciding to terminate efforts to collect such contribution are described in a notice to be provided to all the participating employers in the Plan.

[3] As the Department noted in paragraph (5) of the General Information section of the preamble, this class exemption covers not only multiemployer plans, but also other multiple employer plans.

Notice to Interested Persons

The notice to interested persons, along with the supplemental statement required by Department Regulation 2570.43(b)(2), will be provided by mailing notices to all terminated YMCA employees who have a deferred vested benefit under the Plan by first-class mail to their last known address on the books and records of the Fund and to all active YMCA employees who currently participate in the Plan by posting such notice at their place of employment in those locations which are customarily reserved for employer-employee communications or by personal delivery. Interested persons include all active employees who currently participate in the Plan and all former YMCA employees with deferred vested benefits. The notice to interested persons, which will contain the information required by Department Regulation § 2570.43, will be mailed, posted or delivered, as the case may be, within 30 days after the Notice of Proposed Exemption is published in the **Federal Register**. The notice to interested persons will inform such persons of their right to comment on the proposed exemption within 60 days after the Notice of Proposed Exemption is published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Wendy M. McColough of the Department, telephone (202) 693–8540. (This is not a toll-free number.) Little Rock Diagnostic Clinic, P.A., Profit Sharing Plan (the Plan). Located in Little Rock, AR, [Application No. D–11350].

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed cash sale by the Plan of a leased fee interest (the Leased Fee Interest) in certain real property (the Property) to LRDC Real Estate, LLC (the LLC), a party in interest with respect to the Plan.

This proposed exemption is subject to the following conditions:

(a) The sale is a one-time transaction for cash.

(b) The sales price for the Leased Fee Interest is based on its fair market value as established by a qualified, independent appraiser, who updates the appraisal on the date the sale is consummated.

(c) The terms of the proposed transaction are at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party.

(d) The Plan does not pay any real estate fees or commissions in connection with the sale.

(e) An independent fiduciary is appointed to approve and monitor the sale transaction on behalf of the Plan.

(f) Within 90 days of the date the notice granting this exemption is published in the **Federal Register**, the Little Rock Diagnostic Clinic, P.A. (LRDC), the Plan sponsor, files a Form 5330 with the Internal Revenue Service (the Service) and pays all applicable excise taxes that are attributed to the past and continued leasing arrangement (the Ground Lease) between the Plan and the LRDC Land Company (the Land Company) of certain land (the Land) comprising part of the Property.

Summary of Facts and Representations

1. The Plan is a defined contribution profit sharing plan, which as stated above, is sponsored by LRDC. The Plan's current trustees and decision makers with respect to Plan investments are Richard W. Houk, J. Neal Beaton and Paul Williams (the Trustees). The Trustees are employees and shareholders of LRDC, and participants in the Plan.

As of December 31, 2005, the Plan had 137 participants and beneficiaries. As of December 31, 2005, the Plan had approximately $23,917,262 in assets.

2. LRDC is a professional corporation located on the campus of the Baptist Medical Center at 10001 Lile Drive, Little Rock, Arkansas. LRDC provides medical services in the internal medicine field as well as ancillary services such as laboratory work and radiology services.

3. The Land Company is a general partnership that was created in 1974 for the sole purpose of leasing real property to LRDC for the operation of a medical clinic. The Land Company is owned 24% by current shareholder/employees of LRDC. The 76% remainder of the Land Company is owned by former shareholder/employees of LRDC and former employees of LRDC who were not shareholders of LRDC.

4. The LLC is a limited liability company that was formed in 2005 for the purpose of purchasing real estate. The principals of the LLC are LRDC physicians. Six of the physician owners are also partners in the Land Company.

5. Among the assets of the Plan is its Leased Fee Interest in the Property, which also bears the 10001 Lile Drive address and is legally described as "Lot 4A, Baptist Medical Center Development, City of Little Rock, Pulaski County, Arkansas." The Plan's Leased Fee Interest or "leased fee estate"[4] consists of a present possessory interest in approximately 4.444 acres of land that was acquired by the Plan in 1972 for $56,000 from an unrelated party. The Land is subject to the provisions of the Ground Lease executed between the Plan and the Land Company. In addition, the Plan's Leased Fee Interest includes a future reversionary interest in a 64,945 square foot medical building (the Building) that was constructed on the Land by the Land Company in 1976. The Land Company leases the Building to LRDC. At the conclusion of the Ground Lease, both the Land and the Building will revert to the Plan. The Land and the Building, which are together referred to herein as "the Property," are contiguous to other real property owned by the LLC.[5]

6. On July 20, 1982, the Department granted Prohibited Transaction Exemption (PTE) 82–126 at 47 FR 31457. PTE 82–126 permitted the Plan to lease the Land[6] underlying the Building to the Land Company under the provisions of the Ground Lease. In addition, PTE 82–126 allowed the Plan to subordinate its title on the leased premises to the mortgage lien holder of the Building constructed thereon, which was an unrelated bank.

The Ground Lease was divided into two parts. It had a temporary term beginning April 1, 1974 and ending July 31, 1975, and a permanent term of 25 years, beginning August 1, 1975 and ending July 31, 2000. The rent for the temporary term was equal to the 1974 real estate taxes and any other taxes assessed against the premises. The rent for the permanent term was equal to $27,000 per year subject to adjustment every five years based on the Cost of

[4] The term "leased fee estate" refers to an ownership interest held by a landlord with the right of use and occupancy conveyed by lease to others. The rights of the lessor (the leased fee estate owner) and the lessee are specified by contract terms contained within the lease. See APPRAISAL INSTITUTE, THE DICTIONARY OF REAL ESTATE APPRAISAL (4th ed. 2002).

[5] Specifically, in Final Authorization Number 2005–11E (July 11, 2005), the Department approved a transaction involving the sale by the Plan to the LLC of a 2.2 acre tract of vacant real property (Tract 2), that is adjacent to the subject Property.

[6] Although PTE 82–126 states that the Land consists of 4.368 acres, this description is in error and should have been revised to read "4.444 acres."

Living Index published by the Department. At the time the proposal underlying PTE 82–126 was published in the **Federal Register** (see 47 FR 22251, May 21, 1982), the annualized rent being paid to the Plan was $41,196 or $3,433 per month, which was in excess of fair market value. The Ground Lease was triple net to the Plan and it could be extended for two additional five year terms, provided appropriate notice was given to the Plan.

Pursuant to an agreement dated May 8, 1974 and commencing August 1, 1975 for a period of 25 years (but subject to extensions), the Land Company started leasing the Building to LRDC under the provisions of a written lease (the Building Lease). Rents generated from the Building Lease were intended to pay the Land Company's obligations under the Ground Lease and to amortize its indebtedness under the mortgage. (In effect, LRDC also commenced subleasing the Land from the Land Company under the established leasing arrangements.)

Eventually, the Trustees and the Land Company proposed to amend the Ground Lease to provide for annual cost of living adjustments. On April 8, 1982, the partners of the Land Company, who had a net worth in excess of $8 million agreed to indemnify the Plan from all losses, damages, and expenses the Plan might sustain by the subordination of its title under the terms of an indemnification agreement. No other modifications of the Ground Lease were made.

The fair market rental value of the amended Ground Lease was determined by Ronald E. Bragg, MAI, a qualified, independent appraiser. In an appraisal report dated August 28, 1981, Mr. Bragg placed the fair market rental value of the Land at $3,161.67 per month or $37,940, annually. Mr. Bragg also determined that the fair market value of the Land was $271,000 as of August 1981.

On September 10, 1981, Twin City Bank (TCB) of North Little Rock, Arkansas, was appointed as an "independent real estate investment manager." In this capacity, TCB had sole responsibility and discretion to direct the Trustees regarding the management of real property held by the Plan. TCB was responsible for making the determination that the amended Ground Lease was an appropriate and suitable investment for the Plan and in the best interests of the Plan's participants and beneficiaries. TCB was required to reconsider the appropriateness of the amended Ground Lease prior to the time of its execution and to monitor and enforce the terms of such lease on behalf of the Plan, including making demand for timely payment, bringing suit in the event of a breach, keeping accurate records regarding computations of the cost-of-living adjustments, and reporting annually to the Trustees.

Further, TCB reviewed the subordination provision of the amended Ground Lease.[7] In this regard, TCB determined that the subordination provisions were in accordance with normal business practices and the requirements of lenders in the area and this factor did not alter its opinion of the contemplated transactions.

On December 31, 1983, the Ground Lease was again amended to make the cost of living adjustment annual instead of once every five years and to remove an option to purchase provision. In addition, the base period for the calculating the cost of living adjustment was revised to "June 30, 1980" instead of "December 31, 1981."

7. The Ground Lease is currently in its first five year extension and there is no mortgage encumbering the Building.[8] As of August 31, 2005, the amount of monthly rental was $7,994, which is above fair market rental value. At the end of the Ground Lease on July 31, 2010, the Land and the Building will revert to the Plan.[9] Although it is represented that the provisions of the Ground Lease have been complied with by the parties (*i.e.*, rent has been paid in a timely manner and there have been no defaults or delinquencies), LRDC acknowledges that the "independent real estate investment manager" described in the proposal to PTE 82–126 was not always present to oversee such lease. Accordingly, LRDC has agreed to file a Form 5330 with the Service within 90 days of the date the notice granting this proposed exemption is published in the **Federal Register** and pay all applicable excise taxes that are attributed to the past and continued prohibited leasing of the Land between the Plan and the Land Company under the Ground Lease, due to the lack of oversight of such lease on a continuing basis by a qualified, independent fiduciary.[10]

8. Although there has been development around the vicinity of the Property, the value of the Property has not appreciated significantly in recent years. Moreover, the Building is a single-use building that was constructed in 1976. Due to the age of the Building, significant improvements would be required to bring it up to current medical office standards. The Property has been on the market since December 2001 but it has drawn no firm offers. In order that the Plan may divest itself of its Leased Fee Interest in the Property, the Trustees propose to sell such interest to the LLC. Accordingly, an administrative exemption is requested from the Department.

If the exemption is granted, the sale will allow the Plan to convert the Property into a liquid asset and provide a better opportunity for growth and permit Plan participants to direct their account balances in the Plan into other investment vehicles. Also, in order to pay participants who will retire in the coming years, a significant amount of liquidity will be needed in the Plan's portfolio. Therefore, a cash sale of the Property will provide the needed liquidity. Furthermore, due to its ownership of a Leased Fee Interest, the Plan's options for administration and management are limited.

9. The proposed sale will be a one-time transaction for cash. The sales price for the Leased Fee Interest will be based upon its fair market value, as determined by a qualified, independent appraiser on the date the sale is consummated. Moreover, the Plan will not be required to pay any real estate fees or commissions in connection with the transaction.

10. The Property has been appraised annually by Mr. Ronald Bragg, the same qualified, independent appraiser utilized in PTE 82–126. Mr. Bragg represents that he is independent of the parties involved in the proposed transaction, and states that he derives less than 1% of his gross annual revenues from LRDC and its affiliates. Mr. Bragg also states he is aware that his appraisal will be used by the LLC for purposes of obtaining an administrative exemption from the Department.

[7] The original loan for the construction of the Building was $1.35 million. At the time PTE 82–126 was proposed, the loan balance was approximately $1.2 million. TCB estimated that the fair market value of the Building was $2.28 million as of July 1, 1980 and that there was sufficient equity present to protect the Plan and its participants.

[8] Similarly, the Building Lease is subject to two five year extensions.

[9] The term "reversionary right" refers to "the right to possess and resume full and sole use and ownership of real property that has been temporarily alienated by a lease, an easement, etc.; [sic] may become effective at a stated time or under certain conditions, *e.g.*, the termination of a leasehold, the abandonment of a right of way, the end of the estimated economic life of the improvements." See APPRAISAL INSTITUTE, THE DICTIONARY OF REAL ESTATE APPRAISAL (4th ed. 2002).

[10] The Department is of the view that the presence of an independent fiduciary to represent the Plan's interest with respect to the Leased Fee Interest was a material factor in the Department's determination to grant exemptive relief. Accordingly, PTE 82–126 was no longer effective when TCB stopped acting on behalf of the Plan as the "independent real estate investment manager."

In an appraisal report dated January 6, 2006 (the 2006 Appraisal), Mr. Bragg states that the Property rights being appraised are the rights of the holder of a "leased fee estate." Mr. Bragg notes that this ownership interest does not confer to the Plan direct ownership rights in the Building. However, he explains that the Plan will have reversion rights to the Building upon the termination of the Ground Lease. For these reasons, Mr. Bragg does not believe the sales comparison approach or the cost approach to valuation is applicable. Nonetheless, he states that the sales comparison approach will be utilized in projecting the future reversion value of the Property.

Therefore, Mr. Bragg concludes in the 2006 Appraisal that the only approach to valuation that can directly address the ownership benefits that accrue to the Plan is the income capitalization approach. He explains that the ownership benefits are limited to the Plan's right to receive rental income under the Ground Lease and the right to the reversion of the Land and the Building at the termination of the Ground Lease. Under the income capitalization approach, he notes that the valuation would consist of a discounted cash flow analysis based upon the projected net cash flows to be generated under the terms of the Ground Lease and the projected reversion. This analysis would include current rent, projections of future rent increases as required by the Ground Lease, and an estimate of the net reversion value upon the termination of the Ground Lease.

Mr. Bragg states that based on his inspection, investigation and analysis of the Property, it is his opinion that the fair market value of the Leased Fee Interest was $3.1 million as of December 31, 2005. In making this determination, Mr. Bragg projected the Plan's reversionary interest in the Property at $4.6 million upon the termination of the Ground Lease. Then, selecting a discount rate of 12% to discount the Property's income stream, Mr. Bragg arrived at the $3.1 million estimated market value of the Leased Fee Interest. Mr. Bragg will update his appraisal on the date of the sale.

Thus, based upon the 2006 Appraisal, the Leased Fee Interest represents approximately 13% of the Plan's assets.

11. In an addendum to the 2006 Appraisal dated January 9, 2006, Mr. Bragg has provided three related value issues concerning the subject Property: (a) The fee simple value of the Property, as if unencumbered by the Ground Lease; (b) the contributory present value of the projected future reversion value of the Property; and (c) the relationship between the current rent paid by the Land Company under the Ground Lease and the current fair market ground rent.

With respect to the fee simple value of the Property, Mr. Bragg states that it would be the fair market value of the Property if it were not encumbered by either the Ground Lease or the Building Lease. In the 2006 Appraisal, he states that he provided an estimate of $4.6 million as the projected reversion value of the Property upon the termination of the Ground Lease. He says this estimate of value can also be considered as an estimate of the fee simple value of the Property at that point in time when it is no longer encumbered by either the Ground Lease or the Building Lease.

With respect to the contributory present value of the Property upon the termination of the Ground Lease, Mr. Bragg again utilizes the $4.6 million projected reversion value for the Property. He also has utilized a discount rate of 12% in converting the projected reversion value (and the projected ground rent) into an indication of present value. On the basis of his calculations, Mr. Bragg concludes that the projected reversion value of $4.6 million, four years and seven months from January 9, 2006, discounted at 12% would be $2,736,476.

As for the relationship between contract rent under the Ground Lease and the current fair market ground rent, Mr. Bragg states that if the Ground Lease was negotiated today, the first year's rent would be based upon 10% of the fee simple value of the Land ($700,000). Mr. Bragg explains that the annualized rent would be $70,000 or $5,833.33 per month. Because the current ground rent of $7,994 per month is contract rent, Mr. Bragg further explains that such rent substantially exceeds the fair market rental value of the Land. He notes that this is not a recent occurrence.

12. With respect to the proximity of the subject Property to other real property owned by the LLC (*i.e.*, Tract 2, see Footnote 2), Mr. Bragg maintains that the proximity of the Property to Tract 2 had no impact on his estimate of the fair market value of the Leased Fee Interest and that no premium is warranted. In this regard, Mr. Bragg notes that there is an abundance of vacant, undeveloped land on the Baptist Medical Center Campus and it is "basic supply and demand that creates value." According to Mr. Bragg, market value does not consider the specific buyer and seller but rather the market at large. Although Mr. Bragg concedes that the Property is adjacent to Tract 2, he states that the Property is also contiguous to vacant land along its southern and western sides. Due to the presence of the vacant land, Mr. Bragg represents that prospective buyers would have choices. Therefore, he does not believe the LLC should be required to pay a premium in order to acquire the Leased Fee Interest.

13. The Bank of Ozarks (the Bank) located in Little Rock, Arkansas will act on behalf of the Plan as the independent fiduciary with respect to the proposed sale. Specifically, the Bank through its Trust Division, has agreed to undertake the duties of the independent fiduciary. The Bank is a custodian of plan assets only and it maintains no retail banking relationship with LRDC, its affiliates, or their principals.

Writing on behalf of the Bank, Mr. Rex W. Kyle, President of the Bank's Trust Division states, in a letter dated January 4, 2006, that the Bank is an Arkansas state-chartered bank with trust powers. He explains that the Trust Division administers and/or manages in excess of $500 million in accounts which include ERISA accounts.

Mr. Kyle states that the Bank is the largest state chartered bank fiduciary in Arkansas and has $2.1 billion in assets. Moreover, he indicates that the Bank's staff has over 150 years of combined experience and has served as both an independent and special trustee in various fiduciary capacities. Mr. Kyle represents that the Bank understands and accepts its duties, responsibilities and liabilities under the Act in serving as independent fiduciary for the Plan.

14. In determining whether the sale transaction is in the best interest of the Plan and its participants and beneficiaries, Mr. Kyle states that the Bank has relied on various appraisals of the Property, including the 2006 Appraisal. Based on these appraisals, Mr. Kyle states that the sale would permit the conversion of an illiquid investment with potentially high future maintenance costs into cash. Mr. Kyle also notes that the Building is over 20 years old and extensive renovations would be necessary to modernize it. He explains that without these renovations, LRDC would be required to move. Because there are no potential tenants in the immediate area, Mr. Kyle indicates that the Plan would hold an asset that would generate no income.

Mr. Kyle states that based on the 2006 Appraisal, the sale is consistent with sales of similar properties which might be achieved in the marketplace. He also indicates that the sale would eliminate any conflict of interest and associated administrative burdens of ongoing supervision that would be involved in continuing the Ground Lease. Moreover, Mr. Kyle notes that the current rent

under the Ground Lease exceeds fair market rent for the Land.

Additionally, Mr. Kyle states that the sale would allow a greater portion of the Plan's assets to be allocated to participant-directed accounts and would lower the overall cost of administration of the Plan.

As independent fiduciary, the Bank will monitor the sale transaction on behalf of the Plan and take all actions that are necessary and proper to enforce and protect the rights of the Plan and its participants and beneficiaries. In this regard, the Bank will be given full and complete discretion regarding all aspects of the sale.

15. In summary, it is represented that the proposed sale transaction will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The sale will be a one-time transaction for cash.

(b) The sales price for the Leased Fee Interest will be based on its fair market value as established by a qualified, independent appraiser, who will update the appraisal on the date of the sale is consummated.

(c) The terms of the sale will be at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party.

(d) The Plan will not pay any real estate fees or commissions in connection with the sale.

(e) An independent fiduciary will approve and monitor the proposed sale transaction on behalf of the Plan.

(f) Within 90 days of the date the notice granting this exemption is published in the **Federal Register**, LRDC will file a Form 5330 with the Service and pay all applicable excise taxes that are attributed to the past and continued prohibited leasing of the Land under the provisions of the Ground Lease.

Notice to Interested Persons

Notice of the proposed exemption will be given to interested persons within 5 calendar days of the publication of the notice of proposed exemption in the **Federal Register**. The notice will be provided to active participants in the Plan by personal delivery and it will be mailed by first-class mail to all others. The notice will inform interested persons of their right to comment on and/or to request a hearing with respect to the proposed exemption. Comments and requests for a hearing are due within 35 days of the publication of the proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Ekaterina A. Uzlyan, U.S. Department of Labor, telephone (202) 693–8552. (This is not a toll-free number).

American Maritime Officers Safety & Education Plan (the S&E Plan); American Maritime Officers Pension Plan (the Pension Plan); American Maritime Officers Vacation Plan (the Vacation Plan); American Maritime Officers Medical Plan (the Medical Plan); and American Maritime Officers 401(k) Plan (the 401(k) Plan); (Collectively the AMO Plan(s)). Located in Dania Beach, Florida and Toledo, Ohio, [Exemption Application Nos. L–11148; D–11149; L–11150; L–11151; D–11152; and D–11153].

Proposed Exemption

The Department is considering granting the following exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990).

Section I

If the exemption is granted, the restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act shall not apply to: (1) the S&E Plan entering into an arrangement with the American Maritime Officers (the Union), which is a party in interest with respect to the AMO Plans, for the Union to pay the S&E Plan, where appropriate and at the rate established by the independent fiduciary (the I/F), for the portion of the Union trustees' food and lodging provided by the S&E Plan that is attributable to attendance at certain Union meetings (Union Transactions) at the Dania Beach, Florida (the Dania Beach facility) and Toledo, Ohio (the Toledo facility) (collectively, the Facilities); (2) the S&E Plan entering into an arrangement with the Union and certain contributing employers, who are parties in interest with respect to the AMO Plans, to pay the S&E Plan at a rate established by the I/F, for food and lodging provided by the S&E Plan at the Facilities for the representatives of the Union and the respective contributing employers that is attributable to attendance at various conferences (Conference Transactions); and (3) the S&E Plan entering into an arrangement with the governing bodies of the American Maritime Officers Joint Employment Committee (the JEC), and the American Maritime Officers Service (AMOS), who are parties in interest with respect to the AMO Plans, to pay the S&E Plan at a rate established by the I/F, for food and lodging provided by the S&E Plan at the Facilities (Non-Plan Transactions).

Section II

If the exemption is granted, the restrictions of sections 406(a) and 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to: (1) The AMO Plans sharing expenses based on an internal expense allocation model (the Allocation Model) for the provision of food and lodging by the S&E Plan at the Facilities to the AMO Plans' trustees (the Trustees) (Collectively the Trustee Transactions); and (2) The AMO Plans, the JEC and AMOS sharing expenses based on the Allocation Model for the provision of food and lodging by the S&E Plan at the Facilities (Professionals' Transactions).

Section III

If the exemption is granted, the restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act shall not apply to: (1) Contributing employers contracting with the S&E Plan to provide one of its regular courses at a special time (Specially Scheduled Training); and (2) The S&E Plan designing training programs or undertaking special research or modeling that is tailored to the needs of a particular contributing employer or its vessels (Specially-Designed Training).

Conditions

This proposed exemption is subject to the following conditions:

(a) Each AMO Plan will pay its appropriate share of expenses based on the Allocation Model;

(b) The I/F retained by the AMO Plans will:

(1) Make a determination of whether the proposed transactions (the Transaction(s)) are prudent and in the best interest of the relevant AMO Plan(s);

(2) Establish the terms for each of the Transactions, including:

(i) The price to be charged for the services provided pursuant to the Transactions; and

(ii) The terms and conditions ensuring that the Transactions are fair to the involved AMO Plans;

(3) Develop policies and guidelines for the implementation of the Transactions;

(4) Monitor the Transactions on an on-going basis, including periodic reviews of the Transactions, to ensure compliance with the I/F policies and guidelines;

(5) On a periodic basis, review the terms of each of the Transactions, including the fair market value of the services provided; and

(6) Prepare an annual report, summarizing the Transactions for that year;

(c) The costs associated with recordkeeping and all forms of independent oversight will be included in the daily rate established by the I/F for food and lodging provided by the S&E Plan at the Facilities;

(d) An independent auditor will perform annual audits of all the AMO Plans to identify and reconcile any discrepancies regarding the recordkeeping involving the Transactions and provide an annual evaluation of all allocation models and produce approval letters explicitly affirming that the models are satisfactory;

(e) The Room Master Software System (RM Software) will create an invoice for lodging and food service accounting functions and related services at the Facilities;

(f) The AMO Plans' fiduciaries maintain or cause to be maintained, for a period of six years from the date of the covered transactions, such records as are necessary to enable the persons described in paragraph (g) to determine whether the conditions of this exemption were met, except that:

(1) If the records necessary to enable the persons described in paragraph (g) to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of the AMO Plans' fiduciaries, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than the AMO Plans' fiduciaries responsible for recordkeeping, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (g) below;

(g)(1) Except as provided below in paragraph (g)(2) and notwithstanding the provisions of section (a)(2) and (b) of section 504 of the Act, the records referred to above in paragraph (f) are unconditionally available for examination during normal business hours at their customary location by the following persons or an authorized representative thereof:

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(ii) any fiduciary of the AMO Plans or any duly authorized employee or representative of such fiduciary; or

(iii) any contributing employer and any employee organization whose members are covered by the AMO Plans, or any authorized employee or representative of these entities; or

(iv) any participant or beneficiary of the AMO Plans or the duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in paragraphs (ii), (iii) and (iv) of paragraph (g)(1) shall be authorized to examine trade secrets or commercial or financial information which is privileged or confidential.

Summary of Facts and Representations

Description of the AMO Plans

The S&E Plan is a multiemployer training plan funded pursuant to a collective bargaining agreement. The purposes of the S&E Plan are to (a) develop and execute programs for the education, development and improvement of licensed marine officers, (b) develop and execute programs to increase safety in the operation of marine vessels, (c) create and execute programs to develop and maintain a skilled pool of licensed marine officers and (d) develop and execute a research program on a variety of issues of interest to S&E Plan participants and their employers. The S&E Plan conducts training at the Facilities and accommodates the students attending training at the Facilities as well. As of January 6, 2006, the S&E Plan has 3,495 participants and beneficiaries and $43,563,887 in plan assets.

The Pension Plan is a multiemployer defined benefit pension plan funded by contributions from contributing employers pursuant to collective bargaining agreements. The purpose of the Pension Plan is to provide pension and retirement benefits, including death benefits, to eligible participants and their beneficiaries. The Pension Plan also features a money purchase pension component. As of January 6, 2006, the Pension Plan has 6,238 participants and beneficiaries and $515,160,000 in plan assets.

The Vacation Plan is a multiemployer welfare benefit plan funded by contributions from contributing employers pursuant to collective bargaining agreements. The purpose of the Vacation Plan is to provide paid vacation time to eligible participants. As of January 6, 2006, the Vacation Plan has 3,690 participants and beneficiaries and $29,464,387 in plan assets.

The Medical Plan is a multiemployer welfare benefit plan funded by contributions from contributing employers pursuant to collective bargaining agreements. The purpose of the Medical Plan is to provide medical and hospitalization benefits for participants and their families. As of January 6, 2006, the Medical Plan has 5,455 participants and beneficiaries and $32,363,519 in plan assets.

The 401(k) Plan is a multiemployer profit-sharing plan, with a cash or deferred arrangement, funded by contributions from participants and contributing employers pursuant to collective bargaining agreements. The purpose of the 401(k) Plan is to provide retirement benefits, including death benefits, to participants and their beneficiaries. As of January 6, 2006, the 401(k) Plan has 4,471 participants and beneficiaries and $157,636,687 in plan assets.

Section I Transactions

(1) *Union Transactions:* The Union often schedules its meetings at the same time as the Trustees' meetings to minimize travel burdens and ease scheduling. Scheduling Union meetings during this time facilitates the attendance of Union-side Trustees who are already at the Facility to attend Trustees' meetings. The Union Transactions will only occur when the Union meeting at issue (a) takes place during the same days as scheduled Trustees' meetings, (b) takes place on a day or days immediately and continuously preceding the days of scheduled Trustees' meetings, or (c) takes place on a day or days immediately and continuously following the days of the scheduled Trustees' meetings.

The AMO Plans wish to have their Trustees stay at one of the Facilities during the Trustees' meetings. Because the Union often schedules its meetings to coincide with Trustees' meetings, it would be unworkable or inefficient for affected Union-side Trustees to move to different lodging for the Union meetings. Instead, it is requested that the Union share in the costs of accommodating Union-side Trustees during multi-day meetings that include Union meetings.

The Union Transactions will not occur with respect to Union meetings scheduled entirely independent of and not attendant to Trustees' meetings. When the Union schedules its meetings at the Facilities to benefit from the presence of the Trustees, it would only be equitable that the Union should share, where appropriate, the food and lodging expenses incurred during the multi-day series of meetings that are attributable to non-S&E Plan business.

(2) *Conference Transactions:* The Joint Training Advisory Committee

(JTAC) and the Deep Sea Employer Conference (DSEC) are groups, which consist of representatives of Great Lakes contributing employers and Deep Sea contributing employers, respectively, and representatives of the Union.[11] The Union and contributing employers, who will pay for their respective representatives to attend JTAC and DSEC meetings, are parties in interest with respect to the S&E Plan.

The S&E Plan would like to provide food and lodging for the representatives of the Union and the respective contributing employers attending the JTAC and the DSEC meetings at the Facilities.

The JTAC and DSEC were formed in response to the rapidly changing regulatory environment in the maritime industry and in response to chronic manpower shortages. The Union and contributing employers thought it would be beneficial to have periodic meetings to address new regulatory requirements and strategies to address the shortage of trained officers, among other issues pertinent to the industry. The JTAC and DSEC meetings primarily focus on training needs, although matters relating to other AMO Plans are also discussed.

The contributing employers and the Union desire that the JTAC and DSEC meetings be held at the Facilities. The meetings would involve not only the use of meeting space, but also the use of overnight lodging and catering Facilities. The attendees of the JTAC and the DSEC meetings (or, more likely, the party on whose behalf they attend) would pay the S&E Plan for its costs incurred in hosting the meetings at the rates approved by the I/F.

Portions of JTAC and DSEC meetings pertain to the S&E Plan and S&E Plan personnel generally make presentations at such meetings. Thus, it would be convenient for the S&E Plan personnel to hold the meetings at the Facilities. The S&E Plan believes it is better able to make its presentations to the JTAC and DSEC meetings if they are held at the Facilities because the S&E Plan personnel would then have access to the technology and training capabilities at the Facilities.

The S&E Plan also believes that it benefits from the JTAC and DSEC meetings being held at the Facilities because regular communication with the Union and the employers on training needs and requirements serves one of the overall purposes of the S&E Plan, *i.e.*, to improve the quality of licensed marine officers. This type of interaction allows the S&E Plan to remain up-to-date on its participants' training needs. The S&E Plan believes that hosting the JTAC and DSEC meetings is particularly helpful because the representatives of the contributing employers attending such meetings are those responsible for training, and are not the Trustees or labor relations staff who are more likely to visit the Facility on other occasions, *e.g.*, Trustee meetings. Thus, the JTAC/DSEC meetings facilitate interaction between the S&E Plan and the representatives of the employers who are responsible for training.

The S&E Plan is requesting exemptive relief for the Conference Transactions because such meetings may be beyond the scope of those benefits provided in accordance with the S&E Plan through contributions made pursuant to collective bargaining agreements, even though the stated purposes of the S&E Plan are quite broad. As such, in the interest of caution, the S&E Plan requests exemptive relief.

The primary reason for entering into the Conference Transactions is that they serve the AMO Plan's primary purpose of providing training to participants covered by the S&E Plan. Representatives to the JTAC and DSEC meeting are not employer Trustees to the AMO Plans. The JTAC and DSEC gather periodically to address a variety of issues important to the maritime industry, including the training curriculum, course design, scheduling and budget issues.

(3) *Non-Plan Transactions:* The JEC is a labor management committee under section 302(c)(9) of the Labor Management Relations Act. Employers make contributions to the JEC pursuant to the terms of collective bargaining agreements and the JEC performs employment placement services for licensed maritime officers through an administrative services contract with the Union. Appropriately qualified and licensed Union members are placed with contributing employers who are seeking such personnel. The committee members of the JEC are also Trustees of various AMO Plans. The applicant represents that although the JEC is not a plan, it may nevertheless be classified as a party in interest with respect to the S&E Plan because it may be considered an employee organization whose members are covered by the S&E Plan.

The AMOS was formed to serve as a business league for the maritime industry. The JEC, and the AMOS will pay the S&E Plan for their proportionate share of the costs for food and lodging at the Facilities provided by the S&E Plan at the rates approved by the I/F. Because both entities share administrative services with the AMO Plans, they would pay the S&E Plan for their use of the Facilities based on the Allocation Model.

The JEC, and the AMOS take advantage of the scheduling of the Trustees' meetings to hold their meetings. Thus, these meetings become part of the multi-day agenda associated with the Trustees' meetings. Structuring the meeting schedule this way saves costs and minimizes the travel burdens on Trustees. Because a portion of the multi-day agenda will be devoted to the JEC, and the AMOS meetings, it would only be equitable for these entities to pay the S&E Plan their proportionate share of the costs.

The S&E Plan wishes to enter into the Transactions because of the efficiencies offered by consolidating the meetings and because it believes that holding such meetings at the Facilities benefits the S&E Plan overall by improving communication and interaction with these entities in ways that are helpful to the S&E Plan.

Section II Transactions

(1) *Trustee Transactions:* The Trustees of the AMO Plans may be parties in interest with respect to the S&E Plan for a number of different reasons. Those who are Trustees of the S&E Plan are parties in interest by reason of being fiduciaries. Others may be employees or officers of contributing employers or the Union.

The AMO Plans generally hold their respective Trustees' meetings at the Facilities. The AMO Plans typically schedule their Trustees' meetings over several consecutive days. Each AMO Plan's Trustees' meeting has a separate agenda and separate minutes are maintained for each meeting. The individual Trustees, however, are usually at the Facilities to attend a number of different Trustees' meetings and other meetings.

Each of the AMO Plans will pay the S&E Plan its share of the Trustees' room and board expenses based on the Allocation Model. Accommodating the Trustees at the Facilities during Trustees' meetings makes sense in light of the fact that the Trustees are at the Facilities for a number of days to attend a series of meetings. Providing food and lodging services to the Trustees at the Facilities maximizes the efficiency of such meetings by eliminating travel time to and from the meetings and by

[11] The applicant represents that the JTAC and DSEC are not incorporated or otherwise organized in any legal sense and membership in the groups is not fixed. Rather, the JTAC and DSEC are the names used to describe periodic gatherings of Union representatives and representatives of contributing employers to address issues of importance to the maritime industry.

encouraging and facilitating interaction among the Trustees, AMO Plans' participants and AMO Plans' personnel.

Another reason for entering into the Trustee Transactions is cost savings. It is likely to cost the AMO Plans less to provide food and lodging services to Trustees at the Facilities compared to providing such services at nearby hotels and restaurants. The AMO Plans must cover the reasonable expenses incurred by their Trustees while attending Trustees' meetings in any event. Thus, minimizing these expenses would be beneficial to the AMO Plans and their participants.

The AMO Plans believe that holding Trustees' meetings is necessary for the administration and operation of the AMO Plans, and that providing food and lodging for Trustees would appear to be a concomitant part therefore. It is not clear, however, whether the provision of lodging and food is the type of service that fits within any statutory or class exemptions.

The I/F will decide whether it is appropriate for an AMO Plan to enter into a Trustee Transaction with the S&E Plan for the Trustees' food and lodging. The Allocation Model will ensure that each AMO Plan pays its respective share of the expenses.

(2) *Professionals' Transactions:* Professionals providing services to the AMO Plans, such as attorneys, and accountants often need to visit the Facilities to attend to the business of one or more of the AMO Plans. The Allocation Model will ensure that each AMO Plan shares the appropriate expenses such professionals incur in visiting the Facility as an administrative expense of the respective AMO Plans. The respective AMO Plans, the JEC, and the AMOS would reimburse the S&E Plan for their proportionate share of the costs incurred in accommodating the visiting plan professionals at the rates approved by the I/F. The reimbursement would be made through the Allocation Model.

The AMO Plans believe that there is an advantage to having plan professionals stay and dine at the Facilities so that there are more opportunities for interaction between the professionals and the relevant Trustees, personnel and participants.

Section III Transactions

(1) *Specially Scheduled Training:* Contributing employers may need to contract with the S&E Plan to provide one of its regular courses at a special time. This need may arise when special circumstances, such as a shipping schedule, prevent the employees of a particular employer from attending one of the regularly scheduled training courses. The S&E Plan requests exemptive relief to contract with contributing employers to provide regular courses at special times to accommodate the employers' scheduling demands.

(2) *Specially-Designed Training:* A contributing employer may wish the S&E Plan to design training programs or undertake special research or modeling that is tailored to the needs of that particular employer or its vessels. In these circumstances, contributing employers will need to contract with the S&E Plan to develop special training programs or conduct specially designed research or modeling to meet their particular needs. The S&E Plan requests exemptive relief to provide such services tailored to the special needs of a particular contributing employer or its vessels.

The S&E Plan wishes to enter into the special training transactions to meet the needs of participants in a way that is fair to all employers without requiring the renegotiation of the collective bargaining agreements.

In addition, coordinating with employers to develop specially designed training and research programs benefits the purposes of the S&E Plan by developing and executing programs to improve the overall quality of maritime officers. Once special courses are designed, the materials from such courses are available to all participants in the S&E Plan and to all S&E Plan instructors. The S&E Plan believes that entering into these contracts with the contributing employers improves the quality of the instruction provided by the S&E Plan by expanding the knowledge and expertise of the S&E Plan instructors and expanding the training curriculum.

For both Specially Scheduled Training and Specially-Designed Training, the contributing employer would pay the S&E Plan directly for (1) the specially scheduled training, and (2) the specially designed training, research, and modeling. The individual employer would be responsible for paying the S&E Plan for such services in order to avoid the inequity of burdening all contributing employers with the additional costs of the S&E Plan's efforts to meet the needs of an individual contributing employer. Payment amounts would be at the rates approved by the I/F.

The Allocation Model: The costs of the Trustee Transactions and the Professionals' Transactions are allocated to the AMO Plans, the Maritime Building Realty Holding Trust (the MBRHT), the AMOS, and the JEC (the MBRHT, AMOS, and the JEC are collectively referred to as other entities (Other Entities)) based on the number of AMO Plans and Other Entities that each Trustee represents. For example, where a Trustee represents four AMO Plans and one Other Entity, one fifth of the costs attributed to that Trustee will be allocated to each AMO Plan or Other Entity.

The direct attendance expenses attributable to the Trustee meetings for each Trustee are allocated among the AMO Plans that the Trustee represents. Direct attendance expenses include the cost of items like travel, meals, and lodging. Those direct attendance expenses for meals and lodging that are not attributable to the Trustee meetings are deducted before the allocation. Non-attributable billable expenses are billed directly to AMO Plan professionals, Trustees and the Union as required by the AMO Plans Policy and Guidelines on Trustee Expense Reimbursement and are not allocated among the AMO Plans and Other Entities. Such costs arise when individuals arrive early or extend their stays beyond the dates of the Trustee meetings in order to attend a Union meeting.

The percentage of the total direct attendance expenses allocated to each AMO Plan or Other Entity is used as the basis for allocating the indirect attendance expenses. The indirect attendance expenses are the costs incurred by the AMO Plans' staff, counsel, and accountants and other expenses related to hosting the meeting. Again, non-attributable billable expenses, as described above, are not allocated among the AMO Plans and Other Entities.

Finally, the direct attendance expenses of AMO Plans' professionals and AMOS employees who are only attending meetings of specific AMO Plans are allocated among those AMO Plans based on the number of meetings that each individual is attending. Then the direct and indirect attendance expenses allocated to each AMO Plan are totaled.

Internal Plans Policy and Procedure: The AMO Plans have set up a series of systems, policies and procedures to internally track and audit use of the lodging and the Facilities and related services. These include the STAR Center Registrar (the Registrar), RM Software and the AMO Plans' Accounting Department (the Accounting Department). In order to maximize the effectiveness, security and accuracy of these systems, the Registrar is completely independent of RM Software. The Accounting Department, nonetheless, receives the records of both

for internal auditing purposes and compares these records to its own accounting records. In addition, the Accounting Department reviews records for consistency with the purposes of the Facilities, the S&E Plan and the STAR Center in mind.

More specifically, RM Software creates an invoice for lodging and food service accounting functions and related services at the Facilities, while the Registrar creates a record of curriculum, attendance and certifications. Records from both systems are turned over to Accounting for review, audit, billing, receiving, and resolution of discrepancies. These records serve as the basis for the allocation of expenses among the AMO Plans.

Records from all three sources are subject to audit by the external auditor and review and analysis by the I/F. When the I/F begins full operation the entire system will be subject to its review and, if required, adjustments will be made in response to its recommendations. The I/F and external auditor will also use these records to review and verify the accuracy of the allocation of expenses to each AMO Plan.

The Registrar: All AMO Plan participants interested in participating in training programs are required to contact the Star Center to register for specific classes. The Registrar maintains training records for all S&E Plan participants so that training history and requirements are easily retrievable. AMO Plan participants are registered for specific training programs on specific dates. The Registrar enables the Star Center to identify particular training requirements for individuals, ensure that the appropriate level of training is provided, and prevents unnecessary repetition of training programs. Course schedules, registration and attendance are also maintained at this level. Thus, the Registrar documents class attendance, exam results, training upgrades for the Coast Guard, and the required ratings and certifications.

Room Master: RM Software, a hotel software system, is used for lodging and food service accounting functions and related services. Room Master provides the reservation system for guest rooms, classrooms, and meeting rooms. It also tracks demand for housekeeping, dining, and other related services. Currently, AMO Plan participants attending training programs at the Star Center receive a room reservation through Room Master once their registration by the STAR Center Registrar is confirmed. Training participants also are given a welcome package that provides classroom information for their assigned course, and rules and regulations while on campus.

If this exemptive relief is provided, the use of RM Software will be expanded to provide the same reservation, recordkeeping, and reconciliation services for Trustees, Union representatives, AMO Plan professionals, non-plan entities, contributing employers and others whose use of the Facilities would serve the overall purposes of the AMO Plan. For example, RM Software would provide room reservations to Trustees, professionals or others attending meetings at the facility. Meeting and training rooms and food services also would be reserved through Room Master. In addition, Room Master would confirm the appropriateness of all lodging and food services arrangements with established meeting schedules and membership lists. Room Master records also provide daily occupancy information that can be compared to galley inventory and meal services to ensure consistency.

Upon arrival, the identification of each guest is verified and each guest is issued a photo ID, which must be worn at all times while at the Facilities. Guests are also provided with an electronic key to access perimeter gates and their guest rooms. Keys are only activated for the scheduled stay and automatically deactivate on the date of scheduled departure.

The Room Master system combined with the use of photo IDs and electronic keys helps to ensure that all guests are provided with only the accommodations and services appropriate for the designated and independently confirmed purpose of their visit.

Accounting Department: The Accounting Department is required to audit the use of the Facilities' lodging, food and related services against course registrations, contracts, billings and receipts, and the purpose of services provided. Any discrepancies are resolved promptly. For example, when the STAR Center finalizes an approved contract, the contract is turned over to Accounting. This contract is reviewed against Room Master for lodging information and against the Registrar to verify attendance at classes. The Accounting Department receives the lodging record of all guests on a daily basis and reviews these records against the Registrar System to identify and record the purpose of each guest's stay. The Accounting Department also reconciles lodging and attendance records with meal services provided to identify and remedy potential inconsistencies.

These systems will produce multiple and auditable records of the Facilities use. For example, with such systems in place, a Trustee's attendance at a Trustee meeting would generate a reviewable paper trail that begins with the Trustee's response to the notice of a Trustee meeting sent out by the Office of the Executive Director of the AMO Plans, which maintains a calendar of all scheduled Trustee meetings. The Trustees' response to the meeting notice would be entered into Room Master, documenting the response and setting up a reservation for the duration of the meeting.

When the Trustee arrives the Trustee would check in, receive an ID and a key that is activated for only the duration of the meeting. The Trustee's attendance at each meeting would be recorded. When the meeting is over, the Room Master record, containing all accrued expenses, and attendance records would be sent to the Accounting Department. The Accounting Department would review individual records for internal consistency and aggregated records for consistency with food, housekeeping and other expenses. The Accounting Department would also apply the allocation model so that business expenses could be distributed appropriately among the AMO Plans that the attending Trustee represents. The package of records, allocations, and analysis compiled by the Accounting Department then can be audited.

The I/F: To ensure that the interests of the AMO Plans and their participants are well protected, the AMO Plans have retained American Realty Advisors as the I/F with respect to the Transactions.[12] The I/F has extensive experience advising ERISA plans on the management of their real estate assets. The I/F will review each of the proposed uses of the Facilities and make determinations whether such uses are prudent, appropriate and in the best interest of the AMO Plans and their participants. The I/F will also have responsibility for monitoring the use of the Facilities to ensure that the Transactions never displace S&E Plan participants who wish to attend training at the Facilities.

The I/F will establish or approve reasonable terms and conditions for the Transactions, including the price to be charged and the Facilities being

[12] If it becomes necessary in the future to appoint a successor independent fiduciary (the Successor) to replace American Realty Advisors, the applicant will notify the Department sixty (60) days in advance of the appointment of the Successor. Any Successor will have the responsibilities, experience and independence similar to those of American Realty Advisors.

provided in the Transactions. The I/F will ensure that the Transactions are fair to all of the AMO Plans involved. The I/F will also develop guidelines pursuant to which the AMO Plans' personnel will carry out the approved Transactions.

The I/F will also have an on-going monitoring role, including periodic reviews of the Transactions to ensure compliance with the I/F policies and the terms of any exemption issued by the Department. The I/F will review all uses of the Facility on a periodic basis to determine whether the use thereof remains in the interests of the AMO Plans and their participants and whether the terms of the Transactions, including the amount charged for the Facilities provided, continue to be appropriate. The I/F will also prepare an annual report, summarizing the Transactions for that year.

The duties of the I/F will include the verification and monitoring of lodging and the Facilities use on a quarterly basis. It also will include review and analysis of the system used to allocate expenses among the AMO Plans as well as the actual allocations. American Realty also will develop and implement recommended policies and procedures for engaging in the transactions covered by the requested exemption. They will define precise requirements for staying at the facility, class attendance, use of the simulators, and other related activities.

In addition, American Realty will monitor the covered transactions on an on-going basis to verify compliance with the policies and procedures that they have developed and the terms of the prohibited transaction exemption. As part of its duties as I/F, American Realty also will develop policies and procedures to ensure that its recommendations are carried out.

The I/F role will ensure that the Transactions proposed herein remain in the AMO Plans' and participants' interest and are consistent with the conditions of the proposed exemption.

In addition, the AMO Plans have retained Bond Beebe C.P.A. (Bond Beebe) as outside auditors to perform the annual audit of all AMO Plans. Bond Beebe currently audits the S&E Plan including the use of lodging and the Facilities. They also identify and reconcile any discrepancies between the Registrar, Room Master and Accounting Department records. In addition, Bond Beebe will provide an annual evaluation of all allocation models and produce approval letters explicitly affirming that the models are satisfactory.

The responsibilities of the independent auditor will be expanded based on input from and the policies and procedures developed by the I/F. The costs associated with recordkeeping and all forms of independent oversight including the I/F will be allocated equally among the parties participating in each respective transaction.

In summary, the applicant represents that the proposed transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act for the following reasons: (a) Each AMO Plan will pay its appropriate share of expenses based on the Allocation Model; (b) The I/F retained by the AMO Plans will: (1) Make a determination of whether the proposed the Transaction(s) are prudent and in the best interest of the relevant AMO Plan(s); (2) Establish the terms for each of the Transactions, including: (i) The price to be charged for the services provided pursuant to the Transactions; and (ii) Ensuring that the Transactions are fair to the involved AMO Plans; (3) Develop policies and guidelines for the implementation of the Transactions; (4) Monitor the Transactions on an on-going basis, including periodic reviews of the Transactions, to ensure compliance with the I/F policies and guidelines; (5) On a periodic basis, review the terms of each of the Transactions, including the fair market value of the services provided; and (6) Prepare an annual report, summarizing the Transactions for that year; (c) The costs associated with recordkeeping and all forms of independent oversight will be included in the daily rate established by the I/F for food and lodging provided by the S&E Plan at the Facilities; (d) An independent auditor will perform annual audits of all the AMO Plans to identify and reconcile any discrepancies regarding the recordkeeping involving the Transactions and provide an annual evaluation of all allocation models and produce approval letters explicitly affirming that the models are satisfactory; and (e) RM Software will create an invoice for lodging and food service accounting functions and related services at the Facilities.

Notice to Interested Persons

Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and Department within 15 days of the date of publication in the **Federal Register.** Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Khalif Ford of the Department, telephone (202) 693–8562. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 14th day of July, 2006.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, Department Of Labor.

[FR Doc. E6–11548 Filed 7–20–06; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL PRISON RAPE ELIMINATION COMMISSION

Public Hearing; Public Announcement

Pursuant to the Prison Rape Elimination Act of 2003 (Pub. L. 108–79) [42 U.S.C. Section 15601, *et seq.*]

Agency Holding Meeting: National Prison Rape Elimination Commission.

Date and Time: 9 a.m. on Thursday, August 3, 2006.

Place: Theodore Levin United States Courthouse, 231 West Lafayette Boulevard, Detroit, Michigan.

Status: Open—Public Hearing.

Matters Considered: Federal, State, and local experience with investigating, disciplining, and prosecuting prison sexual assaults.

For Further Information Contact: Richard B. Hoffman, Executive Director, National Prison Rape Elimination Commission, (202) 514–7922.

Dated: July 11, 2006.

Richard B. Hoffman,

Executive Director, National Prison Rape Elimination Commission.

[FR Doc. 06–6391 Filed 7–20–06; 8:45 am]

BILLING CODE 4410–18–M

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549–0004.

Extension:

Rule 27e–1 and Form N–27E–1; SEC File No. 270–486; OMB Control No. 3235–0545.

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") is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget ("OMB") for extension and approval.

Section 27(e) of the Investment Company Act of 1940 ("Act") (15 U.S.C. 80a–27(e)) provides that a registered investment company issuing a periodic payment plan certificate, or any depositor or underwriter for such company, must notify in writing "each certificate holder who has missed three payments or more, within thirty days following the expiration of fifteen months after the issuance of the certificate, or, if any such holder has missed one payment or more after such period of fifteen months but prior to the expiration of eighteen months after the issuance of the certificate, at any time prior to the expiration of such eighteen month period, of his right to surrender his certificate * * * and inform the certificate holder of (A) the value of the holder's account * * *, and (B) the amount to which he is entitled * * *."

Section 27(e) authorizes the Commission to "make rules specifying the method, form, and contents of the notice required by this subsection." Rule 27e–1 (17 CFR 270.27e–1) under the Act, entitled "Requirements for Notice to Be Mailed to Certain Purchasers of Periodic Payment Plan Certificates Sold Subject to Section 27(d) of the Act," provides instructions for the delivery of the notice required by section 27(e).

Rule 27e–1(f) prescribes Form N–27E–1 (17 CFR 274.127e–1), which sets forth the language the issuing registered investment company or its depositor or underwriter must use "to inform certificate holders of their right to surrender their certificates pursuant to Section 27(d)." The instructions to the form require that a notice containing the language on the form be sent to certificate holders on the sender's letterhead. The issuer is not required to file with the Commission a copy of the Form N–27E–1 notice.

The Form N–27E–1 notice to certificate holders who have missed certain payments is intended to encourage certificate holders, in light of the potential for further missed payments, to weigh the anticipated costs and benefits associated with continuing to hold their certificates. The disclosure assists certificate holders in making careful and fully informed decisions about whether to continue investing in periodic payment plan certificates.

The frequency with which each of these issuers or their representatives must file the Form N–27E–1 notice varies with the number of periodic payment plans sold and the number of certificate holders who miss payments. The staff spoke with representatives of a number of firms in the industry that currently have periodic payment plan accounts. Based upon these conversations, the staff estimates that 3 respondents send out an aggregate of approximately 5054 notices per year through completely automated processes. The staff further estimates that all the issuers that send Form N–27E–1 notices use outside contractors to print and distribute the notice, and incur no hourly burden. The estimate of annual burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

Complying with the collection of information requirements of rule 27e–1 is mandatory for issuers of periodic payment plans or their depositors or underwriters in the event holders of plan certificates miss certain payments within eighteen months after issuance. The information provided pursuant to rule 27e–1 will be provided to third parties and, therefore, will not be kept confidential. The Commission is seeking OMB approval, because 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.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (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 respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to R. Corey Booth Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312, or send an e-mail to: *PRA_Mailbox@sec.gov.*

Dated: June 27, 2006.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E6–11567 Filed 7–20–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings; Notice

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meetings during the week of July 24, 2006:

An open meeting will be held on Wednesday, July 26, 2006 at 10 a.m. in the Auditorium, Room LL–002, and a Closed

Meeting will be held on Thursday, July 27, 2006 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(5), (6), (7), (9)(B), (10) and 17 CFR 200.402(a)(5), (6), (7), (9)(ii), and (10) permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Nazareth, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the Open Meeting scheduled for Wednesday, July 26, 2006 will be:

The Commission will consider whether to adopt amendments to the disclosure requirements for executive and director compensation, related party transactions, director independence and other corporate governance matters, and security ownership of officers and directors. The Commission will also consider whether to adopt final rules requiring that disclosure under the amended items generally be provided in plain English.

The subject matter of the closed meeting scheduled for Thursday, July 27, 2006 will be: Formal orders of investigation; Institution and settlement of injunctive actions; Institution and settlement of administrative proceedings of an enforcement nature; Collection matters; Resolution of litigation claims; Litigation matters; and An adjudicatory matter.

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 18, 2006.

Nancy M. Morris,

Secretary.

[FR Doc. 06–6408 Filed 7–19–06; 10:55 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54153; File No. SR–CBOE–2006–63]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Its Marketing Fee Program

July 14, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 30, 2006, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The CBOE has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the CBOE under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to amend its marketing fee program. Below is the text of the proposed rule change. Proposed new language is in *italics*; deleted language is in [brackets].

Chicago Board Options Exchange, Inc.

Fees Schedule

June [2]*30*, 2006

1. No Change.
2. MARKETING FEE (6)(16)—$.65
3.–4. No Change.

Footnotes:

(1)–(5) No Change.

(6) The Marketing Fee will be assessed only on transactions of Market-Makers, RMMs, e-DPMs, DPMs, and LMMs resulting from orders for less than 1,000 contracts (i) from payment accepting firms, or (ii) that have designated a "Preferred Market-Maker" under CBOE Rule 8.13 at the rate of $.65 per contract on all classes of equity options, options on HOLDRs, options on SPDRs, options on DIA, options on NDX, and options on RUT. The fee will not apply to: Market-Maker-to-Market-Maker transactions including transactions resulting from orders from non-member market-makers; transactions resulting from inbound P/A orders or a transaction resulting from the execution of an order against the DPM's account if an order directly related to that order is represented and executed through the Linkage Plan using the DPM's account; transactions resulting from accommodation liquidations (cabinet trades); and transactions resulting from dividend strategies, merger strategies, and short stock interest strategies as defined in footnote 13 of this Fees Schedule. This fee shall not apply to index options and options on ETFs (other than options on SPDRs, options on DIA, options on NDX, and options on RUT). A Preferred Market-Maker will only be given access to the marketing fee funds generated from a Preferred order if the Preferred Market-Maker has an appointment in the class in which the Preferred order is received and executed.

DPM/LMM Rebate/Carryover Process. If less than 80% of the marketing fee funds *collected in a given month* are paid out by the DPM/LMM [or Preferred Market-Maker in a given month], then the Exchange would refund such surplus at the end of the month on a pro rata basis based upon contributions made by the Market-Makers, RMMs, e-DPMs, DPMs and LMMs *in that month.* However, if 80% or more of the [accumulated] funds *collected* in a given month are paid out by the DPM/LMM [or Preferred Market-Maker], there will not be a rebate for that month and the *excess* funds will [carry over and will] be included in [the] *an* Excess [p]*P*ool of funds to be used by the DPM/LMM [or Preferred Market-Maker the following] *in subsequent* months. *The total balance of the Excess Pool of funds cannot exceed $25,000, and if in any month the balance were to exceed $25,000, the funds in excess of $25,000 would be refunded*[At the end of each quarter, the Exchange would then refund any surplus, if any,] on a pro rata basis based upon contributions made by the Market-Makers, RMMs, DPMs, e-DPMs and LMMs *in that month.*

Preferred Market-Maker Rebate/ Carryover Process. If less than 80% of the marketing fee funds are paid out by the Preferred Market-Maker in a given month, then the Exchange would refund such surplus at the end of the month on a pro rata basis based upon contributions made by the Market-Makers, RMMs, e-DPMs, DPMs and LMMs in that month. However, if 80%

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

or more of the accumulated funds in a given month are paid out by the Preferred Market-Maker, there will not be a rebate for that month and the funds will carry over and will be included in the pool of funds to be used by the Preferred Market-Maker the following month. At the end of each quarter, the Exchange would then refund any surplus, if any, on a pro rata basis based upon contributions made by the Market-Makers, RMMs, DPMs, e-DPMs and LMMs in the final month of the quarter. CBOE's marketing fee program as described above will be in effect until June 2, 2007.

Remainder of Fees Schedule—No change.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The CBOE proposes to amend its marketing fee to modify the manner in which marketing fee funds collected during a calendar quarter are refunded. The CBOE states that its marketing fee currently provides that if less than 80% of the marketing fee funds are paid out by the DPM/LMM or Preferred Market-Maker in a given month, then the Exchange would refund such surplus at the end of the month on a pro rata basis based upon contributions made by the Market-Makers, RMMs, e-DPMs, DPMs, and LMMs. However, if 80% or more of the accumulated funds in a given month are paid out by the DPM/LMM or Preferred Market-Maker, there will not be a rebate for that month and the funds will carry over and will be included in the pool of funds to be used by the DPM/LMM or Preferred Market-Maker the following month. At the end of each quarter, the Exchange would then refund any surplus, if any, on a pro rata basis based upon contributions made by the Market-Makers, RMMs, DPMs, e-DPMs, and LMMs.

The CBOE states that the purpose of this rule change is to modify the rebate process as it relates to DPMs. As amended, if less than 80% of the marketing fee funds collected in a given month are paid out by the DPM/LMM, then the Exchange would refund such surplus at the end of the month on a pro rata basis based upon contributions made by the Market-Makers, RMMs, e-DPMs, DPMs, and LMMs in that month. However, if 80% or more of the funds collected in a given month are paid out by the DPM/LMM, there would not be a rebate for that month and the excess funds would be included in an excess pool ("Excess Pool") of funds to be used by the DPM/LMM in subsequent months. The CBOE states that the total balance of the Excess Pool of funds could not exceed $25,000, and if in any month the balance were to exceed $25,000, the funds in excess of $25,000 would be refunded on a pro rata basis based upon contributions made by the Market-Makers, RMMs, DPMs, e-DPMs, and LMMs in that month. As before, in the event a DPM/LMM is also marked as a Preferred Market-Maker on a particular order, the funds collected from the order will be allocated to the DPM in its capacity as a DPM and not as a Preferred Market-Maker.

The Exchange states that the rebate and carryover process for Preferred Market-Makers will continue to operate on a quarterly basis. However, CBOE proposes to make one clarification to the rebate process for Preferred Market-Makers in the text of the Fees Schedule to make it consistent with the current process and procedure for rebating excess funds. As noted above, if less than 80% of the marketing fee funds are paid out by the Preferred Market-Maker in a given month, then the Exchange would refund such surplus at the end of the month on a pro rata basis based upon contributions made by the Market-Makers, RMMs, e-DPMs, DPMs, and LMMs. CBOE states that it refunds the money based on the contributions made by these market participants in that specific month.

If there are surplus funds at the end of the quarter, CBOE represents that it refunds the money on a pro rata basis based upon contributions made by the Market-Makers, RMMs, e-DPMs, DPMs, and LMMs in the final month of the quarter. CBOE believes that refunding surplus funds to market participants on a pro rata basis based upon contributions made in the final month of the quarter, as opposed to based upon contributions made during the preceding three months, would be an equitable allocation of dues and fees due to the manner in which the marketing fee funds collected are paid out and how CBOE accounts for the funds on a month-to-month basis. For example, if at least 80%, but less than 100%, of the funds collected in the 1st month of a quarter is paid out, the balance that carries over to the 2nd month is paid out first in that 2nd month. Similarly, if at least 80%, but less than 100%, of the funds collected in the 2nd month is paid out, the balance that carries over to the 3rd month is paid out first in that 3rd month. As a result, any surplus of funds at the end of the quarter (the 3rd month) was contributed by the Market-Makers, RMMs, e-DPMs, DPMs, and LMMs who were assessed the fee in that month.

CBOE states that it is not amending its marketing fee program in any other respects.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(4) of the Act,[6] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act[7] and Rule 19b–4(f)(2)[8] thereunder, because it establishes or changes a due, fee, or other charge imposed by the Exchange. Accordingly, the proposal will take effect upon filing with the Commission. At any time within 60 days of the filing of such proposed rule change the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public

[5] 15 U.S.C. 78f(b).
[6] 15 U.S.C. 78f(b)(4).
[7] 15 U.S.C. 78s(b)(3)(A)(ii).
[8] 17 CFR 240.19b–4(f)(2).

interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2006–63 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2006–63. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2006–63 and should be submitted on or before August 11, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E6–11568 Filed 7–20–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54147; File No. SR–CBOE–2006–64]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Extend Two Pilot Programs Until July 18, 2007 Related to the Exchange's Automated Improvement Mechanism

July 14, 2006.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 6, 2006, the Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to extend two pilot programs related to the Exchange's Automated Improvement Mechanism ("AIM") for one year, until July 18, 2007. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

In February 2006, CBOE obtained approval of a filing adopting the AIM auction process.[5] AIM exposes certain orders electronically to an auction process to provide such orders with the opportunity to receive an execution at an improved price. The AIM auction is available only for orders that an Exchange member represents as agent and for which a second order of the same size as the "Agency Order" (and on the opposite side of the market) is also submitted (effectively stopping the Agency Order at a given price).

Two components of AIM were approved on a pilot basis: (1) That there is no minimum size requirement for orders to be eligible for the auction, and (2) that the auction will conclude prematurely anytime there is a quote lock on the Exchange pursuant to Exchange Rule 6.45A(d).[6] In connection with the pilot programs, the Exchange has been submitting to the Commission monthly reports providing detailed AIM auction and order execution data. Extending the pilots for an additional year will allow the Commission more time to consider the impact of the pilot programs on AIM order executions. The proposed rule change merely extends the duration of the pilot programs until July 18, 2007.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with section 6(b) of the Act,[7] in general, and furthers

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 53222 (February 3, 2006), 71 FR 7069 (February 10, 2006).

[6] That rule relates to situations where a Market-Maker's quote interacts with the quote of another CBOE Market-Maker (*i.e.*, when internal quotes lock).

[7] 15 U.S.C. 78f(b).

the objectives of section 6(b)(5) of the Act,[8] in particular, in that it is designed to allow the Commission additional time to evaluate the AIM pilot programs, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) by its terms, become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii)[11] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay and designate the proposed rule change immediately operative upon filing. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because it would allow the pilots to continue without interruption until July 18, 2007. For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.[12]

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2006–64 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2006–64. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2006–64 and should be submitted on or before August 11, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E6–11572 Filed 7–20–06; 8:45 am]

BILLING CODE 8010–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54152; File No. SR–ISE–2006–36]

Self-Regulatory Organizations; International Securities Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Payment for Order Flow Fee Changes

July 14, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 3, 2006, the International Securities Exchange, Inc. ("ISE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The ISE has designated this proposal as one changing a fee imposed by the ISE under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to amend its Schedule of Fees regarding the payment for order flow fees collected by the Exchange. The text of the proposed rule change is available on the ISE's Web site at *http://www.iseoptions.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the ISE included statements concerning the purpose of and basis for the proposed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The ISE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The ISE is proposing to amend its Schedule of Fees regarding the payment for order flow ("PFOF") fees collected by the Exchange. The Exchange states that it currently operates a PFOF program as approved by the Commission.[5] The PFOF program is funded through a fee, currently set at $0.55 per contract, paid by Exchange market makers for each customer contract they execute. Currently, all funds collected by the Exchange are administered by specified market makers.[6] PFOF fees collected by the Exchange that are not distributed are rebated back to the market makers.

The Exchange proposes to increase its PFOF fee to $0.65 per contract to match the fee that the Chicago Board Options Exchange, Incorporated ("CBOE"), under the PFOF program it administers, currently charges its members. Additionally, the Exchange states that Complex Orders[7] are currently exempt from the ISE's PFOF fee. The Exchange represents that other options exchanges, however, notably CBOE, do not provide a similar exception. Accordingly, and also for competitive reasons, the Exchange proposes to charge a PFOF fee on Complex Orders traded on the ISE.

The ISE states that it is committed to matching other exchanges' PFOF programs in order to maintain its competitive position. The ISE states that its Board has provided management with delegated authority to increase the ISE's PFOF fee further in the event that increases in the PFOF fee of other exchanges present competitive challenges to the ISE.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[8] in general, and furthers the objectives of Section 6(b)(4) of the Act[9] in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among ISE members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act[10] and Rule 19b–4(f)(2)[11] thereunder, because it establishes or changes a due, fee, or other charge imposed by the Exchange. Accordingly, the proposal will take effect upon filing with the Commission. At any time within 60 days of the filing of such proposed rule change the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2006–36 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–ISE–2006–36. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2006–36 and should be submitted on or before August 11, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E6–11570 Filed 7–20–06; 8:45 am]

BILLING CODE 8010–01–P

[5] *See* Securities Exchange Act Release No. 43833 (January 10, 2001), 66 FR 7822 (January 25, 2001) (SR–ISE–00–10).

[6] The Exchange states that initially only Primary Market Makers administered PFOF pools. However, the Exchange recently amended its PFOF program to allow a Competitive Market Maker ("CMM") to administer the PFOF funds collected by the Exchange with respect to orders in a group of options classes preferenced to that CMM. *See* Securities Exchange Act Release No. 53127 (January 13, 2006), 71 FR 3582 (January 23, 2006) (SR–ISE–2005–57).

[7] *See* Securities Exchange Act Release No. 46646 (October 11, 2002), 67 FR 64428 (October 18, 2002) (Approving SR–ISE–2002–20, ISE's Complex Order Rule, on a permanent basis).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4(f)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54151; File No. SR–ISE–2006–27]

Self-Regulatory Organizations; International Securities Exchange, Inc.; Order Granting Approval of Proposed Rule Change Relating to Automatic Execution of Non-Customer Orders

July 14, 2006.

On May 15, 2006, the International Securities Exchange, Inc. ("ISE" or "Exchange"), filed with the Securities and Exchange Commission ("Commission") a proposed rule change pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] to amend ISE Rule 714 to provide that incoming Non-Customer Orders[3] would not be automatically executed at prices that are inferior to the best bid or offer disseminated by another national securities exchange ("NBBO") and that Non-Customer Orders that are not automatically executed would be rejected. The proposed rule change also would clarify the handling of Public Customer Orders[4] that are not automatically executed and update the rule text to conform with the Exchange's current handling of "fill-or-kill" orders. The proposed rule change was published for comment in the **Federal Register** on June 14, 2006.[5] The Commission received no comments on the proposal. This order approves the proposed rule change.

The Commission has reviewed carefully the proposed rule change and finds that it is consistent with the requirements of section 6 of the Act[6] and the rules and regulations thereunder applicable to a national securities exchange.[7] In particular, the Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act,[8] which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Commission believes that the proposed change should help to prevent Non-Customer Orders from automatically trading at prices that are inferior to the NBBO. The Commission also believes that the proposed rule change provides clarity with respect to the handling of Public Customer Orders and Non-Customer Orders when such orders are not automatically executed—Public Customer Orders would be handled by the Primary Market Maker pursuant to ISE Rule 803(c) and Non-Customer Orders would be automatically rejected. The Commission further believes that the proposed change relating to "fill-or-kill" orders clarifies for investors and market participants how such orders will be handled by the Exchange.

The Commission notes that the Exchange represents that the proposed rule change with respect to the handling of Non-Customer Orders requires the Exchange to implement a systems change that will be implemented by early September 2006. Therefore, this part of the proposed rule change will not be operative until such systems change is implemented.[9]

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[10] that the proposed rule change (SR–ISE–2006–27) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E6–11571 Filed 7–20–06; 8:45 am]

BILLING CODE 8010–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* ISE Rule 100(a)(23).

[4] *See* ISE Rule 100(a)(33).

[5] *See* Securities Exchange Act Release No. 53946 (June 6, 2006), 71 FR 34406 ("Notice").

[6] 15 U.S.C. 78f.

[7] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78f(b)(5).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54146; File No. SR–ISE–2006–39]

Self-Regulatory Organizations; International Securities Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to a One-Year Pilot Extension Until July 18, 2007 for the Price Improvement Mechanism

July 14, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 12, 2006, the International Securities Exchange, Inc. ("Exchange" or "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the Pilot Periods contained in paragraphs .03 and .05 of the Supplemental Material to Exchange Rule 723. The text of the proposed rule change is available on the Exchange's Web site (*http://www.iseoptions.com*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The pilot periods provided in paragraphs .03 and .05 of the Supplementary Material to ISE Rule 723 expire on July 18, 2006.[5] Paragraph .03 provides that there is no minimum size requirement for orders to be eligible for the Price Improvement Mechanism.

[9] The Exchange represents in the Notice that it would issue a Regulatory Information Circular notifying members at least five days prior to the operative date of the rule change.

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release Nos. 50819 (December 8, 2004), 69 FR 75093 (December 15, 2004); and 52027 (July 13, 2005), 70 FR 41804 (July 20, 2005).

Paragraph .05 concerns the termination of the exposure period by unrelated orders. The Exchange proposes to extend these pilots for an additional year to give the Exchange and the Commission additional time to evaluate the effects of the provisions before requesting permanent approval of the rules.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Act[6] in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. Since the Price Improvement Mechanism has only been operating for a relatively short period of time, the Exchange believes it is appropriate to extend the pilot periods to provide the Exchange and the Commission more data upon which to evaluate the rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) by its terms, become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii)[9] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay and designate the proposed rule change immediately operative upon filing. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because it would allow the pilots to continue without interruption until July 18, 2007. For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.[10]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2006–39 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2006–39. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2006–39 and should be submitted on or before August 11, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E6–11573 Filed 7–20–06; 8:45 am]

BILLING CODE 8010–01–P

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] 17 CFR 240.19b–4(f)(6)(iii).

[10] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54140; File No. SR–NYSE–2006–48]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Moratorium on the Qualification and Registration of New Competitive Traders and New Registered Competitive Market Makers, Governed by NYSE Rules 110 and 107A, Respectively, for an Additional Six Months

July 13, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 30, 2006, the New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a "non-controversial" rule change under Section 19(b)(3)(A)(iii) of the Act,[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend for six months the present moratorium, as modified, related to the qualification and registration of Competitive Traders ("CTs") pursuant to NYSE Rule 110 and Registered Competitive Market Makers ("RCMMs") pursuant to NYSE Rule 107A. The text of the proposed rule change is available on the NYSE's Web site (*http://www.nyse.com*), at the NYSE's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend for six months the present moratorium, as modified, related to the qualification and registration of CTs pursuant to NYSE Rule 110 and RCMMs pursuant to NYSE Rule 107A.

On September 22, 2005, the Exchange filed SR–NYSE–2005–63 [5] ("Filing 2005–63") with the Commission proposing to implement a moratorium on the qualification and registration of new CTs and RCMMS in order to allow the Exchange an opportunity to review the viability of CTs and RCMMs in the NYSE HYBRID MARKET℠ ("Hybrid Market").[6]

Subsequent to the filing of Filing 2005–63, the Exchange filed SR–NYSE–2006–11 [7] ("Filing 2006–11") proposing to modify the moratorium and grant RCMM firms the ability to replace a RCMM who relinquishes his or her registration and ceases to conduct business as a RCMM during the moratorium with a newly qualified and registered RCMM. The moratorium does not restrict RCMMs from joining any RCMM firm or becoming or remaining an independent RCMM. Neither does the moratorium restrict any RCMM firm from hiring any existing RCMMs. At that time, the Exchange represented to the Commission that it intended to complete its review regarding CTs and RCMMs by June 30, 2006.

In this filing, the Exchange seeks to extend the moratorium as amended for an additional six months in order to include in its review the impact of the Hybrid Market with respect to CTs and RCMMs. Additional phases of the Hybrid Market will be rolled out later this year and the Exchange plans to include the new data that these phases will provide into its evaluation.

The Exchange will issue an Information Memo announcing the extension of the moratorium. The review is currently estimated to be completed on or about December 31, 2006.

2. Statutory Basis

The Exchange believes that the basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) [8] that an exchange have rules that are designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and Rule 19b–4(f)(6) thereunder.[10]

A proposed rule change filed under Rule 19b–4(f)(6) [11] normally does not become operative prior to thirty days after the date of filing. NYSE requests that the Commission waive the 30-day operative delay, as specified in Rule 19b–4(f)(6)(iii), and designate the proposed rule change to become operative immediately. The Commission hereby grants the request. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the extension will give the Exchange time to fully study the future viability of CTs and RCMMs in order to improve their market.[12] For these reasons, the Commission designates the proposed rule change as effective and operative immediately.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such proposed rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule

[5] *See* Securities Exchange Act Release No. 52648 (October 21, 2005), 70 FR 62155 (October 28, 2005) (SR–NYSE–2005–63).

[6] *See* Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (SR–NYSE–2004–05).

[7] *See* Securities Exchange Act Release No. 53549 (March 24, 2006), 71 FR 16388 (March 31, 2006) (SR–NYSE–2006–11).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). Pursuant to Rule 19b–4(f)(6)(iii) under the Act, the Exchange is required to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has requested that the Commission waive the 5-day pre-filing notice requirement. The Commission has determined to waive this requirement.

[11] *Id.*

[12] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2006–48 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2006–48. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2006–48 and should be submitted on or before August 11, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E6–11569 Filed 7–20–06; 8:45 am]

BILLING CODE 8010–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54142; File No. SR–NYSE–2006–46]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Revise Equity Transaction Fees and to Exempt Specialist Firms From ETF Transaction Fees

July 13, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 10, 2006, the New York Stock Exchange LLC ("Exchange" or "NYSE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes (i) to revise the fees it charges to its member organizations in connection with transactions in equity securities, and (ii) to exempt specialist firms from the fees it charges to its member organizations in connection with transactions in Exchange Traded Fund ("ETF") securities. The fee changes will take effect on August 1, 2006. The text of the proposed rule change is available on NYSE's Web site (*http://www.nyse.com*), at NYSE's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes (i) to revise the fees it charges to its member organizations in connection with transactions in equity securities, and (ii) to exempt specialist firms from the fees it charges to its member organizations in connection with transactions in ETF securities. The fee changes will take effect on August 1, 2006. The amended section of the 2006 Exchange Price List was filed with the Commission as Exhibit 5 to the proposed rule filing. The fee changes are also described below.

The Exchange proposes to implement a more simplified transaction fee structure for equities that it believes will make its fees more transparent and will distribute costs more equitably across our customer base. In place of the current policy of charging a variable fee on equity transactions depending on the number of shares traded, the Exchange intends to implement a flat fee of $0.00025 per share, which will continue to be subject to the current $80 per transaction cap. System trades (trades executed electronically) for less than 2,100 shares, which were previously exempt from Exchange transaction fees, will be subject to the same $0.00025 per share fee as all other equity transactions. The Exchange is also eliminating the 1.2% rebate on floor brokerage (fees a member organization receives from another member organization for which it executes a transaction) previously paid to the member organization that had paid the floor brokerage.

Monthly equity transaction fees are currently capped at the lesser of: (i) $600,000 per month or (ii) 2% of the member organization's self-reported monthly net commissions.[5] The Exchange proposes to increase the cap, for the first time since 2003, from $600,000 to $750,000 per month and to eliminate the 2% cap alternative, which has been in place since 1981. The Exchange believes that doing so will enable it to grow its trading revenues

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A member organization's net commissions are calculated as the difference between gross commissions charged and commissions payable to other members.

over time, as it will be able to charge fees on certain transactions that are currently free because a significant number of member organizations routinely exceed the 2% cap. Since trading volume has increased substantially since 2003, the average fee per share executed by member organizations paying the $600,000 cap has deceased significantly over that period. The proposed increase is intended to raise the average fee per share paid by member organizations that pay under the cap to a level that is closer to the historical average paid by those member organizations. Raising the cap to $750,000 compensates the Exchange for additional system usage, but continues to reward customers that significantly enhance the NYSE liquidity pool.

Under the Exchange's historical structure as a member-owned New York not-for-profit corporation, the 2% fee cap was a requirement of Article X, Section 4 of the Exchange's constitution. At the annual members' meeting of the Exchange on April 7, 2005, the members of the Exchange adopted an amendment to Article X, Section 4 to eliminate the 2% cap. The Exchange's membership at the time of its 2005 annual meeting was composed largely of representatives of the Exchange's current member organizations. As such, while the Exchange is no longer a member-owned not-for-profit corporation, the Exchange's member organizations have previously accepted the removal of the 2% cap. The constitutional amendment approved by the members at the 2005 annual members' meeting specified that the Exchange's board would determine the effective date of the removal of the 2% cap. Although approved last year by the members, the Exchange has not implemented the elimination of the cap to this point as it had always intended to do so in conjunction with a broader revision of Exchange pricing.

The 2% cap was originally introduced in 1981 when the Exchange first moved away from charging members a fee based on their net commissions and introduced the variable, transaction-related fee structure in use today. The cap was intended to alleviate concerns of certain members at that time that the variable fee structure would result in substantially higher fees, thereby rendering trading activity unprofitable. However, as a result of the dramatic reduction in commission rates, a shift to business models not based on commissions, and a greater emphasis on principal trading as a source of revenue since 1981, many member organizations who continue to pay transaction fees based on the 2% cap currently pay disproportionately low transaction fees. The Exchange believes that the elimination of the 2% cap will allow it to more equitably allocate fees among member organizations based on system usage rates.

Since the implementation of the decimalization of equities trading in 2001 and the growing influence of program and algorithmic trading, there has been an increasing trend towards smaller order sizes. The average execution size on the Exchange is now less than 600 shares per trade. System orders constituted 72% of the Exchange's equity trading volume in the first six months of 2006, and in the week of June 26, 2006, 95% of system orders were for less than 2,100 shares. The Exchange expects even more trades to be executed in the form of system orders as its hybrid market initiative is fully implemented. In light of this trend, it is not a sustainable business model for the Exchange to continue to exempt these trades from fees. Given the Exchange's investment in technology and system redundancy, it is essential that the Exchange generate revenue from this large and growing aspect of the equities trading business.

The Exchange proposes to exempt specialists from the fees payable with respect to transactions in ETF securities. This is consistent with the Exchange's current policy of charging no fees in connection with trading by specialists in equity securities. The Exchange believes that the specialists are paying a sufficient amount for their transactions through the specialist trading privilege fee in connection with each stock or ETF for which they act as specialist.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act[6] in general and furthers the objectives of Section 6(b)(4)[7] in particular in that it is intended to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange has carefully considered the impact of the proposed fee changes on member organizations and does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The proposed fee changes are not designed to adversely impact any particular business model or any individual member organization or category of member organizations. In contrast with the current pricing system, under which some trades are completely free of charge, all trades will be charged the same $0.00025 per share fee. The $750,000 fee cap is a bulk discount to attract more business to the Exchange, which furthers competition among markets and is consistent with the Exchange's own historical fee structure and general industry practice. The Exchange's fee cap has not been changed in response to the large growth in trading volume since it was last increased in 2003, so the average fee per share executed by member organizations paying the cap has deceased significantly over that period. The proposed increase is intended to raise the average fee per share paid by member organizations that pay under the cap to a level that is closer to the historical average paid by those member organizations.

The Exchange has received written comments from two parties on the proposed rule change.[8] In addition, the Exchange has been provided with a letter that was submitted directly to the Commission.[9] The commenters argue that subjecting system trades of less than 2,100 shares to the same per share fee as all other transactions is unfairly discriminatory to smaller member organizations and smaller investors.[10] Moreover, they believe the proposed pricing will be advantageous to large member organizations whose fee obligations will be limited by the monthly cap.[11] One letter also notes that member organizations will lose the benefit of the cap of 2% of monthly commissions.[12]

The Exchange does not believe that it is anticompetitive or discriminatory to impose fees on system orders for less than 2,100 shares. The average execution size on the Exchange is now less than 600 shares per trade and the

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] *See* letter from Mark D. Fitterman, Partner, Morgan, Lewis & Bockius LLP, to John A. Thain, CEO, and Catherine R. Kinney, President and Co-COO, NYSE Group, Inc., dated June 27, 2006 (on behalf of Jeffries Execution Services, Inc.) ("Jeffries Letter"); and e-mail from Joseph McCaffrey, CEO and Managing LLC Member, Bay Crest Partners, LLC, to Bob Airo, Vice President, and Laura Morrison, Managing Director, NYSE Group, dated July 6, 2006 ("Bay Crest Letter").

[9] See letter from Mark D. Fitterman, Partner, Morgan, Lewis & Bockius LLP, to Nancy M. Morris, Secretary, Commission, dated June 30, 2006 (on behalf of RBC Capital Markets Corporation) ("RBC Letter").

[10] *See* Jeffries Letter at 2; RBC Letter at *passim*.

[11] *See* Jeffries Letter at 2; RBC Letter at 1; Bay Crest Letter at *passim*.

[12] *See* RBC Letter at 2.

Exchange expects even more trades to be executed in the form of system orders as its hybrid market initiative is fully implemented. System orders constituted 72% of the Exchange's equity trading volume in the first six months of 2006, and in the week of June 26, 2006, 95% of system orders were for less than 2,100 shares. This increasing trend towards smaller order sizes is largely attributable to changes in trading behavior in response to the introduction of the decimalization of equities trading in 2001 and the growing influence of program and algorithmic trading. In light of this trend, it is not a sustainable business model for the Exchange to continue to exempt these trades from fees. Given the Exchange's investment in technology and system redundancy, it is essential that the Exchange generate revenue from this large and growing aspect of the equities trading business.

The dramatic reduction in commission rates, a shift to business models not based on commissions, and a greater emphasis on principal trading as a source of revenue since the introduction of the 2% cap in 1981 has allowed many member organizations who continue to pay transaction fees based on the 2% cap to pay disproportionately low transaction fees. Rather than seeking to discriminatorily increase the fees levied on those member organizations, the Exchange is actually eliminating the 2% cap so as to more equitably allocate fees among member organizations.

The Exchange has examined the impact of the proposed fee changes on its member organizations by analyzing how much each member organization would pay based on its trading activity for the second half of 2005. The small number of member organizations that currently pay the Exchange's $600,000 fee cap would all reach the new $750,000 cap and would therefore pay $150,000 more in fees per month. The majority of member organizations would pay more in fees under the proposed fee structure. As is clear from these statistics, the Exchange is not seeking to discriminate in favor of the largest member organizations or against those that are smaller. Rather, the impact of the fee changes on a particular member organization will result from a number of variables, including its business model and the volume of trades it sends to the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others [13]

The Exchange has not solicited written comments on the proposed rule change and has received the two written comments and the letter addressed to the Commission described above.[14] The letters focus primarily on the commenters' belief that the proposed fees are anticompetitive, which is discussed in Section II.B. above. In addition, two commenters argued that it is inappropriate for the proposed fee changes to be filed for immediate effectiveness pursuant to Section 19(b)(3)(A) of the Act [15] and that the filing should be subject to the public notice and comment process of Section 19(b)(1) of the Act [16] prior to becoming effective.[17] The Exchange believes it is appropriate to file the proposed fee changes for immediate effectiveness pursuant to Section 19(b)(3)(A) of the Act. Pursuant to Section 19(b)(3)(A)(ii) of the Act [18] and Rule 19b–4(f)(2) thereunder,[19] a proposed rule change may take effect upon filing with the Commission if properly designated by the self-regulatory organization as establishing or changing a due, fee, or other charge applicable to a member. The proposed fee changes are of the type contemplated by Rule 19b–4(f)(2) and it has been the Exchange's consistent historical practice to file such fee changes for immediate effectiveness. The Exchange does not believe that there is any reason to do otherwise in this instance.

One letter asks why the Exchange has determined to exempt specialists from fees in connection with their trades in ETF securities.[20] This is consistent with the Exchange's current policy of charging no fees in connection with trading by specialists in equity securities. The Exchange believes that the specialists are paying a sufficient amount for their transactions through the specialist trading privilege fee in connection with each stock or ETF for which they act as specialist.

Two commenters claim that member organizations have had little notice of the proposed changes and a limited ability to provide input.[21] The Exchange notes that the elimination of the 2% cap, which is the most significant change, was voted on by the membership at the Exchange's April 2005 annual meeting. Member organizations were clearly aware from that time that the Exchange intended to eliminate the cap. Furthermore, the Exchange has communicated with member organizations since mid-2005 about its intention to undertake a significant revision of its pricing structure, soliciting member organizations' views on a number of proposed pricing structures since then. Indeed, the changes the commenters oppose have been among those the Exchange has discussed openly with member organizations during that period.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective upon filing pursuant to Section 19(b)(3)(A) of the Act [22] and Rule 19b–4(f)(2) [23] thereunder because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–NYSE–2006–46 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary,

[13] The Commission notes that subsequent to the filing of this proposed rule change, the Commission received a comment letter from Lek Securities Corporation, a NYSE member. *See* letter from Samuel F. Lek, CEO, Lek Securities Corporation, to Nancy M. Morris, Secretary, Commission, dated July 6, 2006.

[14] *See supra* notes 8 and 9 and accompanying text.

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 15 U.S.C. 78s(b)(1).

[17] *See* Jeffries Letter at 3; RBC Letter at 2.

[18] 15 U.S.C. 78s(b)(3)(A)(ii).

[19] 17 CFR 240.19b–4(f)(2).

[20] *See* RBC Letter at 2.

[21] *See* Jeffries Letter at 1; RBC Letter at 2.

[22] 15 U.S.C. 78s(b)(3)(A).

[23] 17 CFR 19b–4(f)(2).

Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2006–46. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commissions Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2006–46 and should be submitted on or before August 11, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[24]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E6–11575 Filed 7–20–06; 8:45 am]

BILLING CODE 8010–01–P

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54150; File No. SR–NYSE–2006–36]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to Exchange Rule 70 To Provide Floor Brokers With the Ability To Enter Discretionary Instructions and/or Pegging Instructions With Respect to Floor Broker Agency Interest Files (e-Quotes)

July 14, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 16, 2006, the New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On June 14, 2006, NYSE filed Amendment No. 1 to the proposed rule change.[3] On July 11, 2006, NYSE filed Amendment No. 2 to the proposed rule change.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 70 to reflect that Floor brokers will have the ability to enter discretionary instructions ("d-Quotes") with respect to their Floor broker agency interest files ("e-Quotes") and that their e-Quotes and d-Quotes will be able to peg to the Exchange best bid and offer. The Exchange also proposes to amend NYSE Rules 70.20, 123(e), 104, and 1000. Below is the text of the proposed rule change, as amended. Proposed new language is *italicized;* proposed deletions are in brackets.

* * * * *

Bids and Offers

Rule 70

.20 (a)(i) With respect to orders he or she is representing on the Floor, a Floor broker may place within the Display Book® system broker agency interest files at multiple price points on both sides of the market at or outside the Exchange best bid and offer with respect to each security trading in the [location(s) comprising the] Crowd such Floor broker is a part of, [with respect to orders he or she is representing on the Floor,] except that the agency interest files shall not include any customer interest that restricts the specialist's ability to be on parity pursuant to Exchange Rules 104.10(6)(i)(C) and 108(a). *Broker agency interest files shall also be referred to as "e-Quotes℠".*

* * * * *

(b) All Floor broker agency interest placed within files in the Display Book® system at the same price *and on the same side* shall be on parity with each other, except agency interest that establishes the Exchange best bid or offer shall be entitled to priority in accordance with Exchange Rule 72. No Floor broker agency interest placed within files in the Display Book® system shall be entitled to precedence based on size.

* * * * *

(j)(i) Floor broker agency interest placed within files may participate in the opening *and closing* trades in accordance with Exchange policies and procedures governing the open *and close.*

* * * * *

(k) The ability of a Floor broker to have reserve interest will not be available during the open and during the close. *During the close, a Floor broker's reserve interest, if any, will be added to the size of his or her displayed agency ("e-Quoted") interest.* The ability of a Floor broker to exclude volume from aggregated agency interest information available to the specialist will not be available during the open. Floor broker agency interest excluded from the aggregate agency interest information available to the specialist will not participate in the close.

.25 Discretionary Instructions for Bids and Offers Represented via Floor Broker Agency Interest Files (e-Quotes℠)

(a)(i) A Floor broker may enter discretionary instructions as to size and/or price with respect to his or her e-Quotes ("discretionary e-Quotes" or "d-Quotes"). The discretionary instructions relate to the price at which the d-Quote may trade and the number of shares to which the discretionary price instructions apply.

(ii) Discretionary instructions are active only when the e-Quote is at or

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, NYSE proposed additional changes and clarifications to the proposal.

[4] Amendment No. 2 supersedes and replaces the original proposed rule change and Amendment No. 1 in its entirety.

joins the existing Exchange best bid or best offer or would establish a new Exchange best bid or offer.

(iii) Discretionary instructions are active only with respect to automatic executions. Discretionary instructions are not active with respect to the opening and closing transactions.

(iv) Discretionary instructions will be applied only if all d-Quoting prerequisites are met. Otherwise, the d-Quote will be handled as a regular e-Quote, notwithstanding the fact that the Floor broker has designated the e-Quote as a d-Quote. For example, to be considered a discretionary e-Quote, an e-Quote must have a discretionary price range.

(v) The requirements for e-Quotes apply to d-Quotes, including the requirement that the Floor broker be in the Crowd.

(vi) A Floor broker may have multiple d-Quotes, with different discretionary price and size limitations, on the same side of the market. Such multiple d-Quotes do not compete with each other for executions. Trading volume is allocated by Floor broker, not number of d-Quotes participating in an execution.

(vii) Discretionary instructions apply to both displayed and reserve interest, including reserve interest that is excluded from the aggregate reserve size visible to the specialist on the Floor.

(viii) Neither the specialist on the Floor nor the specialist system employing algorithms will have access to the discretionary instructions entered by Floor brokers with respect to their e-Quotes.

(b) Price Discretion

(i) A Floor broker may set a discretionary price range within the Exchange best bid and offer that specifies the prices at which they are willing to trade. This discretion will be used, as necessary, to initiate or participate in a trade with an incoming order capable of trading at a price within the discretionary price range.

(ii) The minimum price range for a discretionary e-Quote is the minimum price variation set forth in Exchange Rule 62.

(iii) Floor brokers may specify that price discretion applies to all or only a portion of their d-Quote. Price discretion is necessary for d-Quotes. Therefore, if price discretion is provided for only a portion of the d-Quote, the residual will be treated as an e-Quote.

(iv) When price discretion is used, d-Quotes trade first from reserve volume, if any, and then from displayed volume.

(c) Discretionary Size

(i) A Floor broker may designate the amount of his or her e-Quote volume to which discretionary price instructions shall apply.

(ii) A Floor broker may designate a minimum and/or maximum size of contra-side volume with which it is willing to trade using discretionary price instructions.

(iii) Only displayed interest will be used by Exchange systems to determine whether the size of contra-side volume is within the d-Quote's discretionary size range. Contra-side reserve and other interest at the possible execution price will not be considered by Exchange systems when making this determination.

(iv) Interest displayed by other market centers at the price at which a d-Quote may trade will not be considered by Exchange systems when determining if the d-Quote's minimum and/or maximum size range is met, unless the Floor broker designates that such away volume should be included in this determination.

(v) An increase or reduction in the size associated with a particular price that brings the contra-side volume within a d-Quote's minimum or maximum discretionary size parameter, will trigger an execution of that d-Quote.

(vi) Once the total amount of a Floor broker's discretionary volume has been executed, the d-Quote's discretionary price instructions will become inactive and the remainder of that d-Quote will be treated as an e-Quote.

(d) Executions of Discretionary e-Quotes

(i) The goal of discretionary e-Quoting is to secure the largest execution for the d-Quote, using the least amount of price discretion. In so doing, d-Quotes may often improve the execution price of incoming orders. Conversely, if no discretion is necessary to accomplish a trade, none will be used.

(A) Future executions that may occur, such as those resulting from the execution of elected contra-side CAP–DI orders, will not be considered in determining when, and to what extent, price discretion is necessary to accomplish a trade.

(ii) Discretionary e-Quotes will automatically execute against a contra-side order that enters the Display Book® system if the order's price is within the discretionary price range and the order's size meets any minimum or maximum size requirements that have been set for the d-Quote.

(iii) Discretionary e-Quotes from different Floor brokers on the same side of the market with the same price instructions trade on parity after interest entitled to priority is executed.

(iv) Same-side d-Quotes from different Floor brokers compete for an execution, with the most aggressive price range (e.g. three cents vs. two cents) establishing the execution price. If an incoming order remains unfilled at that price, executions within the less aggressive price range may then occur.

(v) Discretionary e-Quotes compete with same-side specialist algorithmic trading messages targeting incoming orders. If the price of d-Quotes and specialist trading messages are the same, the d-Quotes and the specialist messages will trade on parity.

(vi) Discretionary e-Quotes from Floor brokers on opposite sides of the market will be able to trade with each other. The d-Quote that arrived at the Display Book® system last will use the most discretion necessary to effect a trade, except as provided below.

(A) When a protected bid or offer, as defined in Section 242.600(b)(57) of Regulation NMS ("Reg. NMS"), is published by another market center at a price that is better than the price at which contra-side d-Quotes would trade in accordance with (vi) above, the following applies:

(1) the amount of discretion necessary to permit a trade on the Exchange consistent with the Order Protection Rule (Section 242.611 of Reg. NMS) ("OPR") will be used; or

(2) such portion of the appropriate d-Quote as is necessary will be automatically routed in accordance with OPR in order to permit a trade to occur on the Exchange.

(vii) As with all executions on the Exchange, executions involving d-Quotes will comply with OPR.

(viii) Discretionary e-Quotes may provide price improvement to and trade with an incoming contra-side specialist algorithmic trading message to "hit bid/take offer," just as they can with any other marketable incoming interest.

(ix) Discretionary e-Quotes may initiate sweeps in accordance with and to the extent provided by Exchange Rules 1000–1004, but only to the extent of their price and volume discretion. Discretionary e-Quotes may participate in sweeps initiated by other orders but, in such cases, their discretionary instructions are not active.

(A) d-Quotes will not trade at a price that would trigger a liquidity replenishment point ("LRP") as defined in Exchange Rule 1000. Accordingly, a sweep involving a d-Quote will always stop at least one cent before an LRP price.

.26 Pegging for d-Quotes and e-Quotes

(i) An e-Quote, other than a tick-sensitive e-Quote, may be set to provide that it will be available for execution at the Exchange best bid (for an e-Quote that represents a buy order) or at the Exchange best offer (for an e-Quote that represents a sell order) as the Exchange best bid or offer changes, so long as the Exchange best bid or offer is at or within the e-Quote's limit price.

(ii) A d-Quote may also employ pegging.

(iii) Pegging is only active when auto-quoting is active.

(iv) Pegging e-Quotes and d-Quotes trade on parity with other interest at the Exchange best bid or offer after interest entitled to priority is executed.

(v) Pegging is reactive. An e-Quote or d-Quote will not establish the Exchange best bid or best offer as a result of pegging.

(vi) Price priority cannot be established by pegging, although existence of pegging instructions does not preclude an e-Quote or d-Quote from having priority.

(vii) Pegging e-Quotes and d-Quotes peg only to other non-pegging interest within the pegging range selected by the Floor broker.

(viii) An e-Quote or d-Quote will not sustain the Exchange best bid or best offer as a result of pegging if there is no other non-pegged interest at that price and such price is not the e-Quote's or d-Quote's limit price.

(A) If the lowest quotable price established by the Floor broker for a pegging e-Quote or d-Quote to buy is the Exchange best bid and all other interest at that price cancels or is executed, the pegging e-Quote or d-Quote will remain displayed at that best bid price.

(B) If the highest quotable price established by the Floor broker for a pegging e-Quote or d-Quote to sell is the Exchange best offer and all other interest at that price cancels or is executed, the pegging e-Quote or d-Quote will remain displayed at that best offer price.

(ix) A Floor broker may establish a price range for an e-Quote or d-Quote, beyond which the pegging function will not be available ("quote," "ceiling" and "floor" prices).

(A) The "quote price" is the lowest price to which a buy e-Quote or d-Quote may peg or the highest price to which a sell e-Quote or d-Quote may peg.

(B) The "ceiling price" is the highest price to which a buy-side e-Quote or d-Quote may peg.

(C) The "floor price" is the lowest price to which a sell-side e-Quote or d-Quote may peg.

(D) A quote, ceiling and floor price may be at a price other than the limit price of the order that is being e-Quoted or d-Quoted, but may not be inconsistent with the order's limit.

(x) As long as the Exchange best bid is at or within the pegging price range selected by the Floor broker with respect to a buy-side e-Quote or d-Quote, or the Exchange best offer is within the price range selected by the Floor broker with respect to a sell-side e-Quote or d-Quote, the pegging e-Quote or d-Quote will join such best bid or best offer as it is auto quoted.

(xi) If the Floor broker does not designate a pegging range, but has instructed that his or her e-Quote or d-Quote shall peg, the e-Quote or d-Quote will peg to the Exchange best bid (offer) as long as such bid (offer) is within the limit of the order that is being e-Quoted or d-Quoted.

(xii) As an e-Quote or d-Quote pegs, its discretionary price range, if any, moves along with it, subject to any floor or ceiling price set by the Floor broker.

(A) If the Exchange best bid is higher than the ceiling price of a pegging buy-side e-Quote or d-Quote, the e-Quote or d-Quote will remain at its quote price or the highest price at which there is other interest within its pegging price range, whichever is higher (consistent with the limit price of the order underlying the e-Quote or d-Quote).

(B) If the Exchange best offer is lower than the floor price of a pegging sell-side e-Quote or d-Quote, the e-Quote or d-Quote will remain at its quote price or the lowest price at which there is other interest within its pegging price range, whichever is lower (consistent with the limit price of the order underlying the e-Quote or d-Quote).

(C) If the Exchange best bid or best offer returns to a price within the pegging price range selected by the Floor broker, the e-Quote or d-Quote will once again peg to the Exchange best bid or best offer.

(xiii) A Floor broker may establish a minimum and/or maximum size of same-side volume to which his or her e-Quote or d-Quote will peg. Other pegging e-Quote or d-Quote volume will not be considered in determining whether the volume parameters set by the Floor broker have been met.

* * * * *

Dealings by Specialists

Rule 104

* * * * *

(c)

* * * * *

(ix) Specialist algorithmically-generated messages will compete with or trade along with same-side discretionary e-Quotes℠ in the manner described in Exchange Rule 70.25.

* * * * *

Record of Orders

Rule 123

* * * * *

(e) System Entry Required

* * * * *

8. Any limit price, [and/or] stop price, *discretionary price range, discretionary volume range, discretionary quote price, pegging ceiling price, pegging floor price and/or whether discretionary instructions are active in connection with interest displayed by other market centers;*

* * * * *

The Floor member must identify which orders or portions thereof are being made part of the Floor broker agency interest file *and, with respect to such orders or portions thereof, what discretionary and/or pegging instructions, if any, have been assigned* pursuant to such procedures as required by the Exchange.

* * * * *

NYSE Direct+®

Automatic Executions

Rule 1000

* * * * *

(d)

* * * * *

(D) After trading with the Exchange published best bid (offer), the unfilled balance of any incoming commitment to trade received through ITS shall be automatically cancelled, as described in Rule 13 (definition of immediate or cancel order).

(iii)(A) During a sweep, the residual shall trade with the orders on the Display Book® and any broker agency interest files and/or specialist interest file capable of execution in accordance with Exchange rules, at a single price, such price being the best price at which such orders and files can trade with the residual to the extent possible, ("clean-up price"). *A discretionary e-Quote shall participate in a sweep in accordance with and to the extent allowed by Exchange Rule 70.25(d)(ix).*

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change, and discussed any comments it received on the

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Exchange Rule 70.20 was initially approved by the Commission on December 14, 2005,[5] as part of a pilot permitting the implementation of Phase 1 of the NYSE HYBRID MARKET℠ ("Hybrid Market") and was permanently approved by the Commission on March 22, 2006.[6]

In order to fully participate in the Hybrid Market, Floor brokers have been given the ability to electronically represent their customers' orders by placing their trading interest at or outside the Exchange best bid and offer in Floor broker agency interest files within the Display Book® system[7] ("NYSE e-Quotes℠" or "e-Quotes").[8]

The following proposed changes are being made to clarify certain of Rule 70.20's provisions in response to questions that have arisen since the rule has been in effect:

1. Rule 70.20(a)(i): Duplicative language has been deleted.

2. Rule 70.20(b): The phrase "and on the same side" has been added to clarify which orders trade on parity pursuant to this provision.

3. Rule 70.20(j)(i): Reference to "the close" has been added to clarify that Floor broker agency interest files participate on the open and close in accordance with the policies and procedures of the Exchange.

4. Rule 70.20(k): A sentence has been added to clarify how a Floor broker's reserve interest will be handled on the close.

To further replicate in the Hybrid Market the manner in which Floor brokers utilize their judgment in quoting and trading on behalf of customers' orders today, the Exchange is proposing to provide Floor brokers with the ability to enter discretionary trading and/or pegging (discretionary quoting) instructions for their e-Quotes ("NYSE d-Quotes℠" or "d-Quotes").

Discretionary instructions for e-Quotes and pegging will give Floor brokers additional tools to compete with other interest, including the specialists' algorithmic trading and quoting ability. These proposed discretionary features and pegging will facilitate the ability of Floor brokers to participate in trades that they would not be able to reach in the Hybrid Market.

Discretionary Trading Instructions

In the mostly-manual pre-Hybrid Market, Floor brokers had an opportunity to make trading decisions with respect to arriving orders. In a more electronic trading environment, the Floor broker may not have that opportunity. While e-Quotes enable Floor brokers' customer interest to participate in automatic executions at the Exchange best bid and offer ("BBO") and in sweeps, they do not initiate trades with incoming orders at prices better than the BBO. In other words, currently, e-Quotes do not provide Floor brokers with the means to express a price range within which they are willing to actively trade. Thus, the proposed changes will provide Floor brokers with the ability not only to quote in an attempt to draw interest, but, at the same time, initiate trades with contra-side interest able to trade at prices at or within the BBO. By using d-Quotes, a Floor broker may set a discretionary price range and a discretionary size range. Discretionary size can apply to the amount of an e-Quote to which discretionary instructions apply and/or to the amount of contra-side volume with which the d-Quote is willing to trade, as described below. Discretionary instructions are only active when the e-Quote is at the BBO. Neither the specialist on the Floor nor the specialist system employing algorithms will have access to the discretionary instructions entered by the Floor broker.

Price Discretion

Discretionary instructions for e-Quotes will allow Floor brokers to set a price range for their d-Quotes within which they are willing to initiate or participate in a trade. This discretion will be used, as necessary, to initiate or participate in a trade with an incoming order capable of trading at a price within the discretionary range. Discretionary price instructions may apply to all or part of a d-Quote.

For example, the BBO is .05 bid, offered at .10. A Floor broker enters a d-Quote at .10, with price discretion of .04. A limit order to buy at .06 enters the market. The d-Quote will use its four cents of price discretion and initiate a trade at .06.

When a d-Quote is competing with same-side quoted or trading interest (*i.e.*, displayed interest at the BBO, other d-Quotes, or a same-side specialist algorithmic trading message, such as to provide price improvement), if the d-Quote can get a larger allocation by providing an additional penny (or more) of price improvement and the discretionary instructions permit the d-Quote to trade at that price, it will do so.

Volume Discretion

Floor brokers may designate that discretionary instructions apply only to a portion of their e-Quote. For example, a Floor broker may specify that only 20,000 shares of a 50,000-share e-Quote may use price discretion. The remaining 30,000-shares would be handled as a regular e-Quote, *i.e.*, one without discretionary instructions.

Floor brokers who use e-Quoting price discretion may also set a minimum and/or maximum size limit with respect to the size of contra-side interest with which it is willing to trade using price discretion. This allows for more specific order management by preventing the d-Quote from trading with opposite side interest that the Floor broker has judged to be too little or too great in the context of the order or orders he or she is managing.

For example, the BBO is .05 bid, offered at .10. A Floor broker e-Quotes stock at .10, with price discretion of .04 and minimum/maximum volume discretion of 1,000/10,000 shares. A limit order to buy 500 shares at .06 enters the market. No trade will occur, even though a trade at .06 is within the d-Quote's price discretion range, because the incoming order size is below the d-Quote's minimum discretionary volume size. A new best bid of .06 will be auto-quoted. An order to buy 1,500 shares at .06 enters the market. The d-Quote will initiate a transaction, selling 2,000 shares at .06, as the size available to trade at .06 is now within the d-Quote's discretionary volume parameters. Similarly, a sufficient reduction in the size of a bid or offer that was previously larger than the maximum discretionary volume will trigger an execution of a discretionary d-Quote.

---

[5] *See* Securities Exchange Act Release No. 52954 (December 14, 2005), 70 FR 75519 (December 20, 2005).

[6] *See* Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006).

[7] The Display Book® system ("Display Book" or "book") is an order management and execution facility that receives and displays orders to the specialist and provides a mechanism to execute and report transactions and publish the results to the Consolidated Tape. In addition, the Display Book is connected to a variety of other Exchange systems for the purposes of comparison, surveillance, and reporting information to customers and other market data and national market systems (*i.e.*, the Intermarket Trading System, Consolidated Tape Association, Consolidated Quotation System, etc.).

[8] *See* Exchange Rule 70.20.

Only published contra-side volume is considered when determining whether such volume is within the d-Quote's discretionary volume range. Reserve and other interest at the possible execution price is not considered, as it is not displayed. Interest displayed by other market centers at the price at which a d-Quote may trade is not considered when determining if the minimum volume range is met, unless the Floor broker electronically designates that such away volume should be included in this determination.

Pegging

In the Hybrid Market, a Floor broker needs to be represented in the BBO in order to participate in automatic executions. The e-Quotes provide Floor brokers with the mechanism to be part of the quote. However, in a more automated environment, the BBO may change rapidly and the e-Quoting process, as it currently exists, may not be sufficient to enable Floor brokers to stay with a quickly changing quote. The proposed pegging function will allow Floor brokers to keep their interest in the quote, even as the quote moves. Floor brokers will be able to designate a range to which their e-Quotes and d-Quotes will peg and, as long as the BBO is within that range, the e-Quote and d-Quote will be included. Buy side e-Quotes and d-Quotes will peg to the best bid, and sell side e-Quotes and d-Quotes will peg to the best offer.

In addition, pegging e-Quotes and d-Quotes may set a minimum and/or maximum size of same-side volume to which his or her e-Quote or d-Quote will peg. Pegging e-Quotes and d-Quotes may set a "quote price" specifying the lowest price to which a buy-side e-Quote or d-Quote may peg and the highest price to which a sell-side e-Quote or d-Quote may peg. A "ceiling price" may be set to establish the highest price to which a buy-side e-Quote or d-Quote may peg, and a "floor price" may be set to establish the lowest price to which a sell-side e-Quote or d-Quote may peg. The quote, ceiling and floor prices must be at or within the limit price of the order being e-Quoted or d-Quoted.

A pegging d-Quote's price discretion range will move along with the d-Quote as it pegs.

Pegging is a separate type of discretionary instruction and may occur with e-Quotes and/or with d-Quotes using discretionary price instructions.

Example

A Floor broker is representing an order to buy 4,000 shares of XYZ with a limit of .97, not-held.[9] He decides to electronically represent this order as a d-Quote, with a quote price of .92 and with price discretion of .02, in the hope of obtaining a better execution price for his customer. This means that the Floor broker is willing to participate in an execution at the following prices: .92, .93 and .94. Further, he has decided to display 1,000 shares, with 3,000 in reserve. In addition, the Floor broker has decided to have this order peg, with minimum and maximum volume sizes of 500 and 8,000 shares respectively. The Floor broker has set the ceiling price at .97. This means that as long as the Exchange best bid is a minimum of 500 shares and no more than 8,000 shares, the d-Quote would peg to any Exchange best bid at or between .92 and .97

The Exchange best bid becomes 2,000 shares bid for .94. As this is within the minimum and maximum pegging size range, the order will peg to the .94 bid, increasing the displayed size at that price to 3,000 shares (2,000 shares that established that price and the d-Quote's displayed 1,000 shares). The Exchange best bid then becomes 300 shares bid for .95. The d-Quote will not peg to that best bid, as its size is below the minimum pegging size designated by the Floor broker. If an additional 400 shares is added to the best bid as a result of other interest at that price, the d-Quote will peg to it, increasing the displayed size to 1,700 shares. Similarly, if the displayed volume at .95 increased from 300 shares to 10,000 shares (instead of 700 shares), the d-Quote would not peg to that price, as 10,000 shares is more than the maximum pegging size selected by the Floor broker (which was 8,000 shares, as noted above). Again, if the displayed volume at .95 decreases to 6,000 shares, for example, as a result of a trade at that price, the d-Quote will peg to the .95 bid, as the displayed volume size is now lower than the maximum selected by the Floor broker. 7,000 shares will be bid at .95, with the d-Quote's 3,000 shares in reserve.

As the d-Quote pegs, it continues to be able to use its price discretion of .02 to effect a trade. Accordingly, if 7,000 shares is bid at .95, comprised of 6,000 shares of other interest and 1,000 shares of the d-Quote (with 3,000 shares of the d-Quote in reserve at .95) and the Exchange best offer is .97 for 1,700 shares, the d-Quote will initiate an execution, trading 1,700 shares at .97. The d-Quote's reserve size will be decremented by the amount of the trade, leaving 1,300 shares to buy in reserve, with 1,000 shares displayed. The best bid continues to be .95, so the d-Quote remains pegged at that price. The displayed volume at .95 continues to be 7,000 shares, including the displayed portion of the d-Quote (1,000 shares).

General Principles Covering Discretionary e-Quotes and Pegging

The following describes in more detail the general principles governing d-Quotes (*i.e.*, an e-Quote with discretionary trading and/or pegging instructions):

- Discretionary instructions relate to the price at which the d-Quote may trade and the number of shares to which the discretionary price instructions apply.
- The goal of discretionary trading is to secure the largest execution for the d-Quote, using the least amount of price discretion. In so doing, d-Quotes may often improve the execution price of incoming orders. Conversely, if no discretion is necessary to accomplish a trade, none will be used.
- Discretionary instructions are only active when the d-Quote is at the BBO.
- Neither the specialist on the Floor nor the specialist system employing algorithms will have access to the discretionary instructions entered by the Floor broker.
- Specialists will not have the ability to enter discretionary trading or pegging instructions on behalf of a Floor broker.
- The minimum price range for a d-Quote is the minimum price variation set forth in Rule 62.
- The requirements for e-Quoting apply to the d-Quote, including the requirement that the Floor broker be in the Crowd.
- Discretionary instructions apply to displayed and reserve size, including reserve interest that is excluded from the aggregate volume visible to the specialist on the Floor.
- When price discretion is used, d-Quotes trade first from reserve volume, if any, and then from displayed volume.
- Once the total amount of a Floor broker's discretionary volume has been executed, the d-Quote's price instructions will become inactive and the remainder of that d-Quote will be treated as an e-Quote.
- Discretionary instructions are only applicable to automatic executions; they are not utilized in manual transactions.
- Discretionary instructions may be entered for all e-Quotes, however, these instructions are only active when the e-Quote is at or joins the existing

[9] A "not held" order is a market or limit order that gives the Floor broker both time and price discretion to attempt to get the best possible price for the customer.

Exchange BBO or would establish a new Exchange BBO.

• Multiple same-side d-Quotes from different Floor brokers will compete for an execution with the most aggressive price range (*e.g.*, three cents vs. two cents) establishing the execution price. If the incoming order remains unfilled at that price, executions within the less aggressive price range may occur.

• d-Quotes with the same discretionary price instructions on the same side will trade on parity, after any interest entitled to priority.

• d-Quotes on opposite sides of the market will be able to trade with each other. The d-Quote that arrived last will use the most discretion, if necessary, to effect a trade.

• d-Quotes will compete with same-side specialist algorithmic trading messages targeting incoming orders. If the price of d-Quotes and the trading messages are the same, the d-Quotes and the specialist messages will trade on parity.

• If a d-Quote is competing with same-side quoted or trading interest, including a same-side specialist algorithmic trading message (*i.e.*, to provide price improvement) and the d-Quote can get a larger allocation by providing an additional penny of price improvement (or other applicable minimum price variation), generally, it will do so.

• d-Quotes may price improve and trade with an incoming contra-side specialist algorithmically-generated message to "hit bid/take offer," just as they can with any other marketable incoming interest.

• d-Quotes may initiate sweeps, but only to the extent of their price and volume discretion. d-Quotes may participate in sweeps initiated by other orders, but their discretionary instructions will not be active.

• A sweep involving a d-Quote will always stop at least one cent (or other applicable minimum price variation) before a liquidity replenishment point is reached.

• Executions involving d-Quotes will comply with the Regulation NMS Order Protection Rule ("OPR").[10]

• When a better price is displayed by an away market and such price is in the middle of contra-side d-Quotes, the amount of price discretion extended to a participating d-Quote will be adjusted to permit a trade consistent with Reg. NMS OPR requirements.

• Discretionary instructions will be applied only if all d-Quoting prerequisites are met. Otherwise, the d-Quote will be handled as a regular e-Quote, notwithstanding the fact that the Floor broker has designated the e-Quote as a d-Quote.

• When price discretion is used, d-Quotes trade first from reserve volume, then from published volume. When no price discretion is used, the e-Quote's published volume trades first.

• Floor brokers may specify that price discretion applies to all or only a portion of their d-Quote. Price discretion is necessary for d-Quotes. Therefore, if price discretion is provided for only a portion of the d-Quote, the residual will be treated as an e-Quote.

• Floor brokers may have more than one e-Quote/d-Quote per side and price. Trading volume is allocated by broker, not e-Quote/d-Quote, in accordance with Exchange rules.

• Pegging e-Quotes and d-Quotes may set a "quote price" specifying the lowest price to which a buy-side e-Quote or d-Quote may peg and the highest price to which a sell-side e-Quote or d-Quote may peg. A "ceiling price" may be set to establish the highest price to which a buy-side e-Quote or d-Quote may peg, and a "floor price" may be set to establish the lowest price to which a sell-side e-Quote or d-Quote may peg. The quote, ceiling, and floor prices must be at or within the limit price of the order being e-Quoted or d-Quoted.

• Pegging will not establish a new BBO and it will not generally sustain a BBO when there is no other interest at that price. If the BBO is the lowest quotable price established by the Floor broker for a pegging buy-side e-Quote or d-Quote or the highest quotable price established by the Floor broker for a sell-side pegging e-Quote or d-Quote and all other interest at that price cancels or is executed, the pegging e-Quote or d-Quote will remain displayed at such BBO.

• Pegging will only occur at prices within the pegging price range designated by the Floor broker.

• Pegging applies to the entire e-Quote/d-Quote volume.

• Pegging is reactive and moves in both directions.

• Pegging e-Quotes and d-Quotes peg only to other non-pegging interest within the pegging range selected by the Floor broker.

• Pegging is available only when auto-quoting is on.

• Price priority cannot be established by pegging, although the existence of pegging instructions does not preclude an e-Quote or a d-Quote from having priority.

• Pegging e-Quotes and d-Quotes trade on parity with other interest on the same side at the Exchange best bid or offer after interest entitled to priority.

• Discretionary trading and pegging is not available for tick-sensitive e-Quotes.

• An e-Quote may have either or both discretionary trading and pegging instructions.

• As an e-Quote or d-Quote pegs, its discretionary price range, if any, moves along with it, subject to any floor or ceiling price set by the Floor broker.

• Pegging e-Quotes and d-Quotes may establish a minimum and/or maximum size of same-side volume to which it will peg. Other pegging e-Quote or d-Quote volume will not be considered in determining whether the volume parameters set by the Floor broker have been met.

Other Rule Changes

Rule 104

Rule 104(c)(ix) has been amended to reflect that a specialist's algorithmically-generated messages will compete with or trade along with same side d-Quote as described in NYSE Rule 70.25.

Rule 123

Exchange Rule 123(e)(8) which requires the entry of certain order information into the Exchange's Front End Systemic Capture (FESC") system before such order can be represented, has been amended to add certain required terms regarding e-Quotes and d-Quotes.

Rule 1000

Rule 1000(d)(iii) which governs sweeps has been amended to reflect that d-Quotes will participate in sweeps in the manner described in NYSE Rule 70.25(d)(ix).

Implementation Plans

At present, the Exchange plans to implement proposed Rules 70.25 and 70.26 as part of Phase 3 of the Hybrid Market. The Exchange will consult with the Commission with respect to any change to this implementation plan.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Act [11] because it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

[10] *See* 17 CFR 242.611.

[11] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change. The Exchange has received one comment letter on the proposed rule change and will respond to it after the comment period has concluded.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2006–36 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2006–36. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2006–36 and should be submitted on or before August 11, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E6–11581 Filed 7–20–06; 8:45 am]

BILLING CODE 8010–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #10528]

California Disaster #CA–00034 Declaration of Economic Injury

AGENCY: Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Economic Injury Disaster Loan (EIDL) declaration for the State of California; Disaster # CA–00034 dated 7/6/2006.

Incident: Fishery Resource Disaster.

Incident Period: 1/1/2001 through 12/31/2005.

Effective Date: 7/6/2006.

EIDL Loan Application Deadline Date: 4/6/2007.

ADDRESSES: Submit completed loan applications to: Small Business Administration National Processing and Disbursement Center, 14925 Kingsport Road Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Economic Injury Disaster Loan declaration for the fishery resource disaster under 308(b) of Interjurisdictional Fisheries Act of 1986, as amended, to help West Coast fishing communities in Oregon and California as determined by the Secretary of Commerce, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: San Luis Obispo, Santa Barbara.

Contiguous Counties: California: Kern, Ventura.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E6–11586 Filed 7–20–06; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #10513 and #10514]

Connecticut Disaster #CT–00005

AGENCY: Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Connecticut dated 7/13/2006.

Incident: Severe Storms and Flooding.

Incident Period: 6/2/2006.

Effective Date: 7/13/2006.

Physical Loan Application Deadline Date: 9/11/2006.

Economic Injury (EIDL) Loan Application Deadline Date: 4/13/2007.

ADDRESSES: Submit completed loan applications to: Small Business Administration National Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

[12] 17 CFR 200.30–3(a)(12).

Primary Counties: New Haven.
Contiguous Counties: Connecticut: Fairfield, Hartford, Litchfield, Middlesex.

	Percent
The Interest Rates are:	
Homeowners with Credit Available Elsewhere	5.875
Homeowners without Credit Available Elsewhere	2.937
Businesses with Credit Available Elsewhere	7.763
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Other (Including Non-profit Organizations) with Credit Available Elsewhere	5.000
Businesses and Non-profit Organizations without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 10513 6 and for economic injury is 10514 0.

The State which received an EIDL Declaration # is Connecticut.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: July 13, 2006.

Steven C. Preston,

Administrator.

[FR Doc. E6–11587 Filed 7–20–06; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #10517 and #10518]

Delaware Disaster #DE–00001

AGENCY: Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Delaware dated 7/13/2006.

Incident: Severe Storms and Flooding.

Incident Period: 6/25/2006.

Effective Date: 7/13/2006.

Physical Loan Application Deadline Date: 9/11/2006.

Economic Injury (EIDL) Loan Application Deadline Date: 4/13/2007.

ADDRESSES: Submit completed loan applications to: Small Business Administration National Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Sussex.
Contiguous Counties: Delaware: Kent; Maryland: Caroline, Dorchester, Wicomico, Worcester.

	Percent
The Interest Rates are:	
Homeowners with Credit Available Elsewhere	5.875
Homeowners without Credit Available Elsewhere	2.937
Businesses with Credit Available Elsewhere	7.763
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Other (Including Non-profit Organizations) with Credit Available Elsewhere	5.000
Businesses and Non-profit Organizations without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 10517 6 and for economic injury is 10518 0.

The States which received an EIDL Declaration # are Delaware, Maryland.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: July 13, 2006.

Steven C. Preston,

Administrator.

[FR Doc. E6–11588 Filed 7–20–06; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #10523 and #10524]

Maryland Disaster #MD–00002

AGENCY: Small Business Administration

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Maryland dated 07/13/2006.

Incident: Severe Storms and Flooding.

Incident Period: 6/22/2006 through 6/28/2006.

Effective Date: 7/13/2006.

Physical Loan Application Deadline Date: 9/11/2006.

Economic Injury (EIDL) Loan Application Deadline Date: 4/13/2007.

ADDRESSES: Submit completed loan applications to: Small Business Administration National Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Dorchester.
Contiguous Counties: Delaware: Sussex; Maryland: Caroline, Somerset, Talbot, Wicomico.

The Interest Rates are:

	Percent
Homeowners with Credit Available Elsewhere	5.875
Homeowners Without Credit Available Elsewhere	2.937
Businesses with Credit Available Elsewhere	7.763
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Other (Including Non-profit Organizations) with Credit Available Elsewhere	5.000
Businesses and Non-profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 10523 6 and for economic injury is 10524 0.

The States which received an EIDL Declaration # are Maryland, Delaware.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008).

Dated: July 13, 2006.

Steven C. Preston,

Administrator.

[FR Doc. E6–11585 Filed 7–20–06; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #10527]

Oregon Disaster #OR–00013 Declaration of Economic Injury

AGENCY: Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Economic Injury Disaster Loan (EIDL) declaration for the State of Oregon; Disaster #OR–00013 dated 7/6/2006.

Incident: Fishery Resource Disaster.

Incident Period: 1/1/2001 through 12/31/2005.

Effective Date: 7/6/2006.

EIDL Loan Application Deadline Date: 4/6/2007.

ADDRESSES: Submit completed loan applications to: Small Business Administration National Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Economic Injury Disaster Loan declaration for the fishery resource disaster under 308(b) of Interjurisdictional Fisheries Act of 1986, as amended, to help West Coast fishing communities in Oregon and California as determined by the Secretary of Commerce, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Clatsop.
Contiguous Counties: Washington: Wahiakum.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E6–11589 Filed 7–20–06; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 5471]

STATE–36 Security Records

Summary: Notice is hereby given that the Department of State proposes to alter an existing system of records, STATE–36, pursuant to the Provisions of the Privacy Act of 1974, as amended (5 U.S.C.(r)), and the Office of Management and Budget Circular No. A–130, Appendix I. The Department's report was filed with the Office of Management and Budget on June 1, 2006.

It is proposed that the current system will retain the name "Security Records." It is also proposed that due to the expanded scope of the current system, the altered system description will include revisions and/or additions to the following sections: System Location; Categories of Individuals covered by the System; Authority for Maintenance of the System; and Routine Uses of Records Maintained in the System, Including Categories of Users and Purposes of such Uses. Changes to the existing system description are proposed in order to reflect more accurately the Bureau of Diplomatic Security's recordkeeping system, the Authority establishing its existence and responsibilities, and the uses and users of the system.

Any persons interested in commenting on the altered system of records may do so by submitting comments in writing to Margaret P. Grafeld, Director; Office of Information Programs and Services; A/RPS/IPS; Department of State, SA–2; Washington, DC 20522–6001. This system of records will be effective 40 days from the date of publication, unless we receive comments that will result in a contrary determination.

This altered system description, "Security Records, STATE-36 will read as set forth below.

Dated: May 31, 2006.

Frank Coulter,

Acting Assistant Secretary for the Bureau of Administration, Department of State.

STATE–36

SYSTEM NAME:

Security Records.

SECURITY CLASSIFICATION:

Unclassified and Classified.

SYSTEM LOCATION:

Department of State, Bureau of Diplomatic Security, State Annex 1, 2401 E Street, NW., Washington, DC 20037; State Annex 7, 7943–59 Cluny Court, Springfield, VA 22153; State Annex 11, 2216 Gallows Road, Cedar Hill, Fairfax, VA 22222; State Annex 11A 2222 Gallows Road, Fairfax, VA 22222; State Annex 11B, 2230 Gallows Road, Fairfax, VA 22222; State Annex 14, 1400 Wilson Blvd., Arlington, VA 22209; State Annex 20, 1801 North Lynn Street, Washington, DC 20522–2008; State Annex 24, 5800 Barclay Drive, Springfield, VA 22315; State Annex 31, 7942 Angus Court, Bays G&H, Springfield, VA 22150; State Annex 33, 3507 International Place, Federal Building, NW., Washington, DC 20008; State Annex 42, 4020 Arlington Blvd., George P. Shultz (NFATC), Rosslyn, VA 22204–1500; Harry S Truman Building, 2201 C Street, NW., Washington, DC 20520; various field offices throughout the U.S.; and overseas at some U.S. Embassies, U.S. Consulates General, and U.S. Consulates.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Present and former employees of the Department of State including Diplomatic Security Special Agents; applicants for Department employment who have been or are presently being investigated for security clearance; contractors working for the Department; interns and detailees to the Department; individuals requiring access to the official Department of State premises who have undergone or are undergoing security clearance; some passport and visa applicants concerning matters of adjudication; individuals involved in matters of passport and visa fraud; individuals involved in unauthorized access to classified information; prospective alien spouses of American personnel of the Department of State; individuals or groups whose activities have a potential bearing on the security of Departmental or Foreign Service operations, including those involved in criminal or terrorist activity; visitors to the Department of State main building, (Harry S Truman Building) to its domestic annexes, field offices, missions, and to the United States embassies and consulates and missions overseas; and all other individuals requiring access to official Department of State premises who have undergone or are undergoing a security clearance. Other files include individuals issued security violations or infractions cyber security violations or cyber security infractions; litigants in civil suits and criminal prosecutions of interest to the Bureau of Diplomatic Security; individuals who have Department building passes; uniformed security officers; individuals named in congressional inquiries to the Bureau of Diplomatic security; individuals subject to investigations conducted abroad on behalf of other Federal agencies; individuals whose activities other agencies believe may have a bearing on U.S. foreign policy interests.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301 (Management of Executive Agencies); (b) 5 U.S.C. 7311 (Suitability, Security, and Conduct); (c) 5 U.S.C. 7531–33 (Adverse Actions, suspension and Removal, and effect on Other Statutes); (d) U.S.C. 1104 (Aliens and Nationality—passport and visa fraud investigations); (e) 18 U.S.C. 111 (Crimes and Criminal Procedures) (Assaulting, resisting, or impeding certain officers or employees); (f) 18 U.S.C. 112 (Protection of foreign officials, official guests, and internationally protected persons); (g) 18 U.S.C. 201 (Bribery of public officials and witnesses); (h) 18 U.S.C. 202 (Bribery, Graft, and Conflicts of Interest-Definitions); (i) 18 U.S.C. 1114 (Protection of officers and employees of the U.S.); (j) 18 U.S.C. 1116 (Murder or manslaughter of foreign officials, official guests, or internationally protected

persons); (k) 18 U.S.C. 1117 (Conspiracy to murder); (l) 18 U.S.C. 1541–1546 (Issuance without authority, false statement in application and use of passport, forgery or false use of passport, misuse of passport, safe conduct violation, fraud and misuse of visas, permits, and other documents); (m) 22 U.S.C. 211a (Foreign Relations and Intercourse) (Authority to grant, issue, and verify passports); (n) 22 U.S.C. 842, 846, 911 (Duties of Officers and Employees and Foreign Service Officers) (Repealed, but applicable to past records); (o) 22 U.S.C. 2454 (Administration); (p) 22 U.S.C. 2651a (Organization of the Department of State); (q) 22 U.S.C. 2658 (Rules and regulations; promulgation by Secretary; delegation of authority) (applicable to past records); (r) 22 U.S.C. 2267 (Empowered security officers of the Department of State and Foreign Service to make arrests without warrant) (Repealed, but applicable to past records); (s) 22 U.S.C. 2709 (Special Agents); (t) 22 U.S.C. 2712 (Authority to control certain terrorism-related services); (u) 22 U.S.C. 3921 (Management of service); (v) 22 U.S.C. 4802, 4804(3)(D) (Diplomatic Security) (generally) and (Responsibilities of Assistant Secretary for Diplomatic Security) (generally) (Repealed, but applicable to past records); (w) 22 U.S.C. 4831–4835 (Accountability review, accountability review board, procedures, findings and recommendations by a board, relation to other proceedings); (x) 44 U.S.C. 3101 (Federal Records Act of 1950, Sec. 506(a) as amended) (applicable to past records); (y) Executive Order 10450 (Security requirements for government employment); (z) Executive Order 12107, Title 5 (Relating to the Civil Service Commission and Labor-Management in the Federal Service); (aa) Executive Order 12958 and its predecessor orders (National Security Information); (bb) Executive Order 12968 (Access to Classified Information); (cc) 22 CFR Subchapter M (International Traffic in Arms) (applicable to past records); (dd) 40 U.S.C. Chapter 10 (Federal Property and Administrative Services Act (1949)); (ee) 31 U.S.C. (Tax Code); (ff) Pub. L. 99–399, 8/27/86; (Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended); (gg) Pub. L. 99–529, 10/24/86 (Special Foreign Assistance Act of 1986, concerns Haiti) (applicable to past records); (hh) Pub. L. 100–124, Section 155a (concerns special security program for Department employees responsible for security at certain posts) (applicable to past records); (ii) Pub. L. 100–202, 12/22/87 (Appropriations for Departments of Commerce, Justice, and State) (applicable to past records); (jj) Pub. L. 100–461, 10/1/88 (Foreign Operations, Export Financing, and Related Programs Appropriations Act); (kk) Pub. L. 102–138, 10/28/91 (Foreign Relations Authorization Act, Fiscal Years 1992 and 1993) (applicable to past records); (ll) Pub. L. 107–56, 115 Stat. 272, 10/26/2001 (USA PATRIOT Act); (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism); (mm) Pub. L. 108–066, 117 Stat.650, 4/30/2003 (PROTECT Act) (Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003); (nn) Executive Order 12356 (National Security Information) applicable to past records); (oo) Executive Order 9397 (Numbering System for Federal Accounts Relating to Individual Persons); (pp) HSPD–12, 7/24/2004 (Homeland Security Presidential Directive); (qq) Executive Order 13356, 8/27/04 (Strengthening the Sharing of Terrorism Information to Protect Americans); (rr) Pub. L. 108–458 (Sect. 1016) (Intelligence Reform and Terrorism Prevention Act of 2004).

CATEGORIES OF RECORDS IN THE SYSTEM:

Investigatory material relating to any category of individual described above, including case files containing items such as applications for passports and employment, photographs, fingerprints, birth certificates, credit checks, intelligence reports, security evaluations and clearances, other agency reports and informant reports; legal case pleadings and files; evidence materials collected during investigations; security violation files; training reports; weapons assignment data base; firing proficiency scores; availability for special protective assignments; language proficiency scores; intelligence reports; counterintelligence material; counterterrorism material; internal Departmental memoranda; internal personnel, fiscal, and other administrative documents. For Visitors: Name; Date of birth; Citizenship; ID type; ID number; temporary badge number; host's name; office symbol; room number; and telephone number; for all others: Name; date and place of birth; home address; employer; employer's address; badge number; home and office telephone numbers; Social Security Account Number; specific areas and times of authorized accessibility; escort authority; status and level of security clearance; issuing agency and issue date; and for all individuals: date and times of building entrance and exit. Additionally, security files contain information needed to provide protective services for the Secretary of State and visiting foreign dignitaries; and to protect the Department's official facilities. There are also information copies of investigations of individuals conducted abroad on behalf of other Federal agencies.

Finally, security files contain documents and reports furnished to the Department by other agencies concerning individuals whose activities the other agencies believe may have a bearing on U.S. foreign policy interests.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The information in the Security Records is used by: Department of State officials in the administration of their responsibilities; Appropriate Committees of the Congress in furtherance of their respective oversight functions; Department of the Treasury; U.S. Office of Personnel Management; Agency for International Development; U.S. Information Agency (past records); Department of Commerce; Peace Corps; Arms Control and Disarmament Agency (past records); U.S. Secret Service; Immigration and Naturalization Service; Department of Defense; Central Intelligence Agency; Department of Justice; Federal Bureau of Investigation; National Security Agency; Drug Enforcement Administration; National Counter Terrorism Center; and other Federal agencies inquiring pursuant to law or Executive Order in order to make a determination of general suitability for employment or retention in employment, to grant a contract or issue a license, grant, or security clearance; any Federal, State, municipal, foreign or international law enforcement or other relevant agency or organization for law enforcement or counterterrorism purposes: Threat alerts and analyses, protective intelligence and counterintelligence information, information relevant for screening purposes, and other law enforcement and terrorism-related information as needed by appropriate agencies of the Federal Government, states, or municipalities, or foreign or international governments or agencies. Any other agency or Department of the Federal Government pursuant to statutory intelligence responsibilities or other lawful purposes; any other agency or Department of the Executive Branch having oversight or review authority with regard to its investigative responsibilities; a Federal, State, local, foreign, or international agency or other public authority that investigates,

prosecutes or assists in investigation, prosecution or violation of criminal law or enforces, implements or assists in enforcement or implementation of statute, rule, regulation or order; a Federal, State, local or foreign agency or other public authority or professional organization maintaining civil, criminal, and other relevant enforcement or pertinent records such as current licenses; information may be given to a customer reporting agency: (1) In order to obtain information, relevant enforcement records or other pertinent records such as current licenses or (2) to obtain information relevant to an agency investigation, a decision concerning the hiring or retention of an employee or other personnel action, the issuance of a security clearance or the initiation of administrative, civil, or criminal action; Officials of the Department of other government agencies in the letting of a contract, issuance of a license, grant or other benefit, and the establishment of a claim; any private or public source, witness, or subject from which information is requested in the course of a legitimate agency investigation or other inquiry to the extent necessary to identify an individual; to inform a source, witness or subject of the nature and purpose of the investigation or other inquiry; and to identify the information requested; an attorney or other designated representative of any source, witness or subject described in paragraph (j) of the Privacy Act only to the extent that the information would be provided to that category of individual itself in the course of an investigation or other inquiry; by a Federal agency following a response to its subpoena or to a prosecution request that such record be released for the purpose of its introduction to a grand jury. Relevant information may be disclosed from this system to the news media and general public where there exists a legitimate public interest, e.g., to assist in the location of Federal fugitives, to provide notification of arrests, and where necessary for protection from imminent threat to life or property. Also see "Routine Uses" of Prefatory Statement published in the **Federal Register.**

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Hard copy, microfilm, microfiche, tape recordings, electronic media, and photographs.

RETRIEVABILITY:

The system is accessed by individual name, personal identifier, case number, badge number, and Social Security Account Number (for other than visitors), as well as by each "category of record in the system"; but the files may be grouped for the convenience of the user by type, country code, group name, subject, contract number, weapons serial number, or building pass number.

SAFEGUARDS:

All employees of the Department of State have undergone a thorough personnel security background investigation. Access to the Department of State building and its annexes is controlled by security guards and admission is limited to those individuals possessing a valid identification card or individuals under proper escort. Access to Annex 20 also has security access controls (code entrances) and/or security alarm systems. All records containing personal information are maintained in secured file cabinets or in restricted areas, access to which is limited to authorized personnel. Access to computerized files is password-protected and under the direct supervision of the system manager. The system manager has the capability of printing audit trails of access from the computer media, thereby permitting regular *ad hoc* monitoring of computer usage.

RETENTION AND DISPOSAL:

Retention of those records varies depending upon the specific kind of record involved. The records are retired or destroyed in accordance with published schedules of the Department of State and as approved by the National Archives and Records Administration. More specific information may be obtained by writing to the Director, Office of Information Programs and Services (A/RPS/IPS), SA–2, Department of State, Washington, DC 20522–6001.

SYSTEM MANAGER AND ADDRESS:

Principal Deputy Assistant Secretary for Diplomatic Security and Director for the Diplomatic Security Service; Department of State, SA–20, 23rd Floor, 1801 North Lynn Street, Washington, DC 20522–2008 for the Harry S. Truman Building, domestic annexes, field offices and missions; Security Officers at respective U.S. Embassies, Consulates, and missions overseas.

NOTIFICATION PROCEDURE:

Individuals who have reason to believe that the Bureau of Diplomatic Security may have security/investigative records pertaining to themselves should write to the Director; Office of Information Programs and Services; A/RPS/IPS, SA–2, Department of State, Washington, DC 20522–6001. The individual must specify that he/she wishes the Security Records to be checked. At a minimum, the individual must include: Name; date and place of birth; current mailing address and zip code; signature; and a brief description of the circumstances which may have caused the creation of the record.

RECORD ACCESS AND AMENDMENT PROCEDURES:

Individuals who wish to gain access to or amend records pertaining to themselves should write to the Director; Office of Information Programs and Services (address above).

RECORD SOURCE CATEGORIES:

These records contain information obtained from the individual; persons having knowledge of the individual; persons having knowledge of incidents or other matters of investigative interest to the Department; other U.S. law enforcement agencies and court systems; pertinent records of other Federal, State, or local agencies or foreign governments; pertinent records of private firms or organizations; the intelligence community; and other public sources. The records also contain information obtained from interviews, review of records, and other authorized investigative techniques.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

Records originated by another agency when that agency has determined that the record is exempt under 5 U.S.C. 552a(j). Also, records contained within this system of records are exempted from 5 U.S.C. 552a(c)(3) and (4), (d), (e)(1), (2), (3), and (e)(4)(G), (H), and (I), and (f) to the extent they meet the criteria of section (j)(2) of the Act. See 22 CFR 171.36.

[FR Doc. E6–11627 Filed 7–20–06; 8:45 am]
BILLING CODE 4710–24–P

DEPARTMENT OF STATE

[Public Notice 5472]

STATE–68 Office of the Coordinator for Reconstruction and Stabilization Records

Summary: Notice is hereby given that the Department of State proposes to create a new system of records, STATE–68, pursuant to the Provisions of the Privacy Act of 1974, as amended (5 U.S.C.(r)), and the Office of Management and Budget Circular No. A–130, Appendix I. The Department's report was filed with the Office of Management and Budget on June 1, 2006.

It is proposed that the new system will be named "Office of the Coordinator for Reconstruction and Stabilization Records." This system description is proposed in order to reflect more accurately the Office of the Coordinator for Reconstruction and Stabilization's recordkeeping system, activities and operations.

Any persons interested in commenting on this new system of records may do so by submitting comments in writing to Margaret P. Grafeld, Director; Office of Information Programs and Services; A/RPS/IPS; Department of State, SA–2; Washington, DC 20522–6001. This system of records will be effective 40 days from the date of publication, unless we receive comments that will result in a contrary determination.

This new system description, "Office of the Coordinator for Reconstruction and Stabilization Records, STATE–68" will read as set forth below.

Dated: May 31, 2006.

Frank Coulter,

Acting Assistant Secretary for the Bureau of Administration, Department of State.

STATE–68

SYSTEM NAME:

Office of the Coordinator for Reconstruction and Stabilization Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Department of State; SA–3; 2121 Virginia Avenue, NW.; Washington, DC 20520.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have been involved in reconstruction and stabilization activities as an effort to develop lessons learned from past experience; and, individuals who wish to volunteer for potential future overseas reconstruction and stabilization activities; either in a management function based in Washington, DC or in a foreign deployment providing direct support.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Pub. L. 108–447, Div B, Title IV, § 408, 118 Stat. 2904 (Consolidated Appropriations Act, 2005).

CATEGORIES OF RECORDS IN THE SYSTEM:

We will be collecting forms from individuals who are have expressed interest in deploying overseas or domestically in support of Reconstruction and Stabilization efforts of the U.S. Government. The individuals could be selected to participate in various response mechanisms that the office is developing, such as the Active Response Corps.

Additional forms will collect information from individuals who have served overseas in support of Reconstruction and Stabilization efforts as part of a lessons learned database. These individuals will not be expressing interest in redeploying but rather in sharing their experiences to assist in the U.S. Government effort to determine what did and did not work in past or current operations.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The information in this system will be used to help the office carry out its mandate to lead coordinate and institutionalize stabilization and reconstruction activities of the United States Government.

The records shall be compiled and used to develop lessons learned from experiences of individuals in reconstruction and stabilization activities, these individuals will not be expressing interest in redeploying but rather in sharing their experiences to assist in the U.S. Government effort to determine what did and did not work in past or current operations.

Additional uses will be to select individuals who have expressed an interest in deploying overseas or domestically in support of Reconstruction and Stabilization efforts of the U.S. Government. The individuals could be selected to participate in various response mechanisms that the office is developing, such as the Active Response Corps.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic media; hard copy.

RETRIEVABILITY:

Individual name, designated specialty in reconstruction and stabilization operations.

SAFEGUARDS:

All employees of the Department of State have undergone a thorough personnel security background investigation. Access to the Department of State building and the annexes is controlled by security guards, and admission is limited to those individuals possessing a valid identification card or individuals under proper escort. All records containing personal information are maintained in secured filing cabinets or in restricted areas, access to which is limited to authorized personnel. Access to electronic files is password-protected and under the direct supervision of the system manager. The system manager has the capability of printing audit trails of access from the computer media, thereby permitting regular and ad hoc monitoring of computer usage.

RETENTION AND DISPOSAL:

These records will be maintained with published record disposition schedules of the Department of State as approved by the National Archives and Records Administration. More specific information may be obtained by writing to the Director, Office of Information Programs and Services, A/RPS/IPS, SA–2, Department of State, Washington, DC 20522–8100.

SYSTEM MANAGER AND ADDRESS:

Office of the Coordinator for Reconstruction and Stabilization; Department of State; SA–3; 2121 Virginia Avenue, NW.; Washington, DC 20520.

NOTIFICATION PROCEDURE:

Individuals who have reason to believe that the Office of the Coordinator for Reconstruction and Stabilization might have records pertaining to them should write to the Director, Office of Information Programs and Services, A/RPS/IPS, SA–2, Department of State, Washington, DC 20522–8100. The individual must specify that he or she wishes the records of the Office of the Coordinator for Reconstruction and Stabilization to be checked. At a minimum, the individual should include: Name; date and place of birth; preferably his/her Social Security Number; current mailing address and zip code; signature; a brief description of the circumstances that caused the creation of the record (including the city and/or country and the approximate dates) which gives the individual cause to believe that the Office of the Coordinator for Reconstruction and Stabilization has records pertaining to him or her.

RECORD ACCESS AND AMENDMENT PROCEDURES:

Individuals who wish to gain access to or to amend records pertaining to them should write to the Director, Office of Information Programs and Services (address above).

RECORD SOURCE CATEGORIES:

These records contain information that is obtained from the individual who is the subject of the records.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

Pursuant to 5 U.S.C. 552a(k)(6) records in this system of records may be exempted from 5 U.S.C. 552a(c)(3).(d).(e)(l).(e)(4)(G). (H). and (I) and (f). L/LM will review at clearance per Brian Egan.

[FR Doc. E6–11632 Filed 7–20–06; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Preparation of an Environmental Impact Statement on Transit Improvements for the Gold Line Corridor

AGENCY: Federal Transit Administration (FTA), U.S. Department of Transportation.

ACTION: Notice of intent to Prepare an Environmental Impact Statement (EIS).

SUMMARY: The Federal Transit Administration (FTA) and the Denver Regional Transportation District (RTD), in cooperation with the U.S. Army Corps of Engineers (USACE) and the Colorado Department of Transportation (CDOT), will prepare an Environmental Impact Statement (EIS) to evaluate the impacts of rail transit improvements for the Gold Line Corridor which extends from downtown Denver, Colorado west to Ward Road in Wheat Ridge, Colorado. The EIS will be prepared in accordance with regulations implementing the National Environmental Policy Act (NEPA), as well as provisions of the recently enacted Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy of Users. The purpose of this Notice of Intent is to alert interested parties regarding the plan to prepare the EIS, to provide information on the nature of the proposed transit project, to invite participation in the EIS process, including comments on the scope of the EIS proposed in this notice, and to announce that public scoping meetings will be conducted.

DATES: Written comments on the scope of the EIS should be sent to Dave Hollis, RTD Project Manager, by September 25, 2006. Public scoping meetings will be held on August 22nd and 23rd from 5:30 p.m. to 8:15 p.m. at the locations indicated below.

An interagency scoping meeting will be scheduled after agencies with an interest in the proposed project have been identified.

ADDRESSES: Written comments on the scope of the EIS should be sent to Dave Hollis, Gold Line Corridor Project Manager, Denver Regional Transportation District (RTD), 1560 Broadway, Suite 700, Denver, CO 80202. Comments may also be offered at the public scoping meetings. The addresses for the public scoping meetings are as follows:

Tuesday, August 22, Arvada Center, 6901 Wadsworth Blvd., Arvada, CO 80003.

Wednesday, August 23, Highlands Masonic Center, 3550 Federal Blvd., Denver, CO 80211.

For more information for special assistance needs for the scoping meetings, please contact Dave Hollis at (303) 299–2404 at least 48 hours before the meeting. All meetings will be conducted in wheelchair accessible locations.

FOR FURTHER INFORMATION CONTACT: Mr. David Beckhouse, Community Planner, Federal Transit Administration, Region VIII, 12300 West Dakota Ave., Suite 310, Lakewood, CO 80228–2583, (720) 963–3306.

SUPPLEMENTARY INFORMATION:

The Proposed Project: The project extends 11 miles from Denver Union Station (DUS) in downtown Denver to Wheat Ridge. The project proposes stations at W. 38th Avenue, Pecos Street, Federal Boulevard, Sheridan Boulevard, Olde Town, Arvada Ridge, and Ward Road.

Purposes of and Need for the Proposed Project: The Gold Line area is forecast to be one of the fastest growing areas of the region over the next 20 years. Growth rates for both population and employment are forecast to increase significantly by 2030. Congestion along north I–25 and I–70 West is already severe, with forecasts indicating increasing severity and duration of congestion. In addition to increasing congestion, access through and from the corridor area to other areas in the metro region is difficult. Many roadways are not continuous, requiring circuitous travel. Existing transit service in the area is minimal and often requires a transfer in Downtown Denver for service to other areas. The project will provide a new rail transportation facility to improve local and regional mobility and accessibility for the west metropolitan area.

This transit project is included as part of RTD's FasTracks Program, a 12-year comprehensive plan for transit service and facilities in the Denver region. The FasTracks Plan is a $4.7 billion program that was endorsed by the voters of the Denver metropolitan area in 2004. The voters of the region approved an increase in the regional sales and use tax from 0.6% to 1.0% in order to provide for the expedited build out of the transit system. FasTracks includes a funding plan for 119 new miles of rail transit, 18 miles of bus rapid transit, 21,000 new spaces in park n Rides and significant improvements to the bus system. The FasTracks projects have been adopted in the current Denver area Regional Transportation Plan.

Alternatives: The NEPA scoping process will include an evaluation of the results of the MIS conducted by RTD between 1998 and 2000 as well as the Three Corridors Scoping Study that was completed in October 2005. The locally preferred alternative (LPA) of the MIS was LRT on the BNSF alignment (or Gold Line alignment) from DUS to Ward Road. These recommendations were approved by the Denver Regional Council of Governments and included in the fiscally constrained Regional Transportation Plan (RTP) and the MetroVision 2030 Master Plan.

FTA and RTD propose that the EIS evaluate the following alternatives:

The No-Action alternative is the option of implementing nothing more than the existing and committed road and transit improvements.

The Transportation System Management (TSM) alternative includes various transportation improvements beyond the existing and committed projects plus enhanced bus transit service in the Gold Line Corridor.

The MIS LPA will be evaluated as the proposed project. The EIS will also consider any additional reasonable alternatives identified during scoping that provide similar transportation benefits while reducing or avoiding adverse impacts.

The EIS Process and the Role of Participating Agencies and the Public: The purpose of the EIS process is to explore in a public setting potentially significant effects of implementing the proposed action and alternatives on the physical, human, and natural environment. Areas of investigation include, but are not limited to. land use, development potential, land acquisition and displacements, historic resources, visual and aesthetic qualities, air quality, noise and vibration, energy use, safety and security, and ecosystems, including threatened and endangered species. Measures to avoid, minimize, or mitigate any significant adverse impacts will be identified. Regulations implementing NEPA, as well as provisions of the recently enacted Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), call for public involvement in the EIS process. Section 6002 of SAFETEA–LU requires that FTA

and RTD do the following: (1) Extend an invitation to other Federal and non-Federal agencies and Indian tribes that may have an interest in the proposed project to become "participating agencies," (2) provide an opportunity for involvement by participating agencies and the public in helping to define the purpose and need for a proposed project, as well as the range of alternatives for consideration in the impact statement, and (3) establish a plan for coordinating public and agency participation in and comment on the environmental review process. An invitation to become a participating agency, with the scoping information packet appended, will be extended to other Federal and non-Federal agencies and Indian tribes that may have an interest in the proposed project. It is possible that we may not be able to identify all Federal and non-Federal agencies and Indian tribes that may have such an interest. Any Federal or non-Federal agency or Indian tribe interested in the proposed project that does not receive an invitation to become a participating agency should notify at the earliest opportunity the Project Manager identified above under **ADDRESSES**.

A comprehensive public involvement program will be developed and a public and agency involvement Coordination Plan will be created. The program will include outreach to local and county officials and community and civic groups; a public scoping process to define the issues of concern among all parties interested in the project; organizing periodic meetings with various local agencies, organizations and committees; a public hearing on release of the draft environmental impact statement (DEIS); and development and distribution of project newsletters.

The purposes of and need for the proposed project have been preliminarily identified in this notice. We invite the public and participating agencies to consider the preliminary statement of purposes of and need for the proposed project, as well as the alternatives proposed for consideration. Suggestions for modifications to the statement of purposes of and need for the proposed project and any other alternatives that meet the purposes of and need for the proposed project are welcomed and will be given serious consideration. Comments on potentially significant environmental impacts that may be associated with the proposed project and alternatives are also welcomed. There will be additional opportunities to participate in the scoping process at the public meetings announced in this notice.

In accordance with 23 CFR 771.105(a) and 771.133, FTA will comply with all Federal environmental laws, regulations, and executive orders applicable to the proposed project during the environmental review process to the maximum extent practicable. These requirements include, but are not limited to, the regulations of the Council on Environmental Quality and FTA implementing NEPA (40 CFR parts 1500–1508, and 23 CFR part 771), the project-level air quality conformity regulation of the U.S. Environmental Protection Agency (EPA) (40 CFR part 93), the section 404(b)(1) guidelines of EPA (40 CFR part 230), the regulation implementing section 106 of the National Historic Preservation Act (36 CFR part 800), the regulation implementing section 7 of the Endangered Species Act (50 CFR part 402), section 4(f) of the DOT Act (23 CFR 771.135), and Executive Orders 12898 on environmental justice, 11988 on floodplain management, and 11990 on wetlands.

In accordance with 36 CFR 800.8(c), RTD will utilize the NEPA/Section 106 merger process for documentation to comply with section 106. RTD will utilize the Memorandum of Agreement between the FTA, Region VIII and the U.S. Army Corps of Engineers (USACE), dated January, 2006 for documentation to comply with section 404 mandates.

In addition, RTD may seek Section 5309 New Starts funding for the project. As provided in the FTA New Starts regulation (49 CFR part 611), New Starts funding requires the submission of certain specific information to FTA to support a request to initiate preliminary engineering, which is normally done in conjunction with the NEPA process.

Issued on: July 13, 2006.

Lee O. Waddleton,

Regional Administrator, Region VIII, Federal Transit Administration.

[FR Doc. E6–11629 Filed 7–20–06; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket Nos. NHTSA–2003–15428 and NHTSA–2003–16401]

Decision That Nonconforming 2002 Through 2004 Smart Car Fortwo Coupe and Cabriolet (Including Trim Levels Passion, Puise and Pure) Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of decision by the National Highway Traffic Safety Administration that nonconforming 2002 through 2004 Smart Car Fortwo Coupe and Cabriolet (including trim levels Passion, Pulse and Pure) passenger cars are eligible for importation.

SUMMARY: This notice announces the decision by NHTSA that 2002 through 2004 Smart Car Fortwo Coupe and Cabriolet (including trim levels Passion, Pulse and Pure) passenger cars not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS) are eligible for importation into the United States because they have safety features that comply with, or are capable of being altered to comply with, all applicable FMVSS.

DATES: This decision was effective January 1, 2004. The agency notified the petitioners at that time that the subject vehicles are eligible for importation. This document provides public notice of the eligibility decision.

FOR FURTHER INFORMATION CONTACT: Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202–366–3151).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified as required under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Where there is no substantially similar U.S.-certified motor vehicle, 49 U.S.C. 30141(a)(1)(B) permits a nonconforming motor vehicle to be

admitted into the United States if its safety features comply with, or are capable of being altered to comply with, all applicable FMVSS based on destructive test data or such other evidence that NHTSA decides to be adequate.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

J.K. Technologies, LLC of Baltimore, Maryland ("JK") (Registered Importer 90–006) and G&K Automotive Conversion, Inc. of Santa Ana, California ("G&K") (Registered Importer 90–007) separately petitioned NHTSA to decide whether certain Smart Car Fortwo Coupe and Cabriolet passenger cars are eligible for importation into the United States. NHTSA published notice of the JK petition on June 20, 2003 (68 FR 37040) and of the G&K petition on November 3, 2003 (68 FR 62343), to afford an opportunity for public comment. The reader is referred to those notices for a thorough description of the petitions. After considering the two petitions, NHTSA decided to issue a single eligibility decision covering all vehicle model years and configurations that were the subject of those petitions.

Two substantive comments were received in response to the notice published on the JK petition. No comments were received in response to the notice on the G&K petition.

The comments and NHTSA's analysis are set forth below for each of the issues raised in the comments, as well as issues identified by NHTSA in its review of the two petitions.

Thomas Heidermann of Smart Automobile, Inc., through its counsel, Ginsburg & Hlywa, submitted a comment contending that JK had failed to demonstrate that the subject vehicles comply with, or are capable of being modified to comply with FMVSS Nos. 108 *Lamps, Reflective Devices, and Associated Equipment,* 206 *Door Locks and Door Retention Components,* 214 *Side Impact Protection,* and *301 Fuel System Integrity.* JK filed with the agency a request for confidentially under 49 CFR part 512, *Confidential Business Information,* seeking to protect from public disclosure most of the data, views and arguments that it had submitted as part of its petition. Consequently, test data and reports that were part of that submission were not originally posted to the public docket. After NHTSA's Office of Chief Counsel decided to deny confidentially to the test data and reports submitted by JK for FMVSS Nos. 108, 206, 214, and 301, as well as other standards, the materials were posted to the public docket under docket number NHTSA–2003–15428.

An anonymous commenter argued that confidentiality should not be granted to the test procedures and test results submitted by JK. As previously stated, those materials were not accorded confidentiality by the agency.

Each of the two petitions claimed that the subject vehicles were originally manufactured to conform to Standard Nos. 103 *Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 106 *Brake Hoses,* 109 *New Pneumatic Tires,* 116 *Brake Fluid,* 118 *Power Window Systems,* 124 *Accelerator Control Systems,* 202 *Head Restraints,* 205 *Glazing Materials,* 207 *Seating Systems,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Retention,* and 219 *Windshield Zone Intrusion.* NHTSA concluded that sufficient data, views, and arguments were submitted in the aggregate by the two petitioners to establish that the vehicles do conform to these standards as originally manufactured.

The two petitions did initially differ with regard to their claims that the subject vehicles could be modified to conform to the standards specified below. However, sufficient data, views, and arguments were ultimately submitted by the two petitioners to establish in the aggregate that the vehicles could be modified to conform to these standards. The differences between the two petitions, as well as NHTSA's analysis of their contents, are described below with regard to each standard for which alterations were identified as being required.

(1) FMVSS No. 101 Controls and Displays

Alterations identified in JK petition: (a) Inscription of the word "Brake" on the dash in place of the international ECE warning symbol; (b) replacement of the speedometer with one that reads in miles per hour. The petitioner stated that it has fabricated a new instrument cluster face for the vehicles, available only through J.K. Technologies, which will allow the vehicles to achieve compliance with the standard.

Alterations identified in G&K petition: (a) Inscription of the word "Brake" and a seat belt warning symbol on the dash; (b) modification of the speedometer to read in miles per hour. The petitioner stated that the controls and displays are visible and accessible to the driver while restrained by a lap and shoulder belt, that controls for the headlamps, the windshield defrosting and defogging system, and the windshield wiping system and panel are all identified, and that all required controls are illuminated.

NHTSA's Analysis

The modifications that JK and G&K identified as needed to conform the vehicles to the standard would not prelude the vehicles from being deemed eligible for importation. Conformity packages submitted for vehicles imported under the decision must demonstrate that the vehicle is equipped with components that allow it to achieve compliance with the standard. Any modification or replacement of components necessary to meet the requirements of the standard must be shown to bring the vehicle into compliance. Such proof must be submitted by an RI as part of any conformity package submitted for nonconforming 2002 through 2004 Smart Car Fortwo Coupe and Cabriolet passenger cars.

(2) FMVSS No. 102 Transmission Shift Lever Sequence, Starter Interlock, and Transmission Breaking Effect

Alterations identified in JK petition: Installation of a redesigned starter interlock assembly, available only through J.K. Technologies, which was designed to allow the vehicles to comply with Standard No. 114, will also achieve compliance with Standard No. 102. The petition did not describe how this assembly was redesigned.

Alterations identified in G&K petition: Modification of the shift lever markings, the shift pattern, the starter interlock, and the automatic transmission braking effect to achieve compliance with this standard. The petition did not describe these modifications, for which G&K claimed confidentiality.

NHTSA's Analysis

The modifications that JK and G&K identified as needed to conform the vehicles to the standard would not prelude the vehicles from being deemed eligible for importation. Conformity packages submitted for vehicles imported under the decision must demonstrate that the vehicle is equipped with components that allow it to achieve compliance with the standard. Any modification or replacement of components necessary to

meet the requirements of the standard must be shown to bring the vehicle into compliance. Such proof must be submitted by an RI as part of any conformity package submitted for nonconforming 2002 through 2004 Smart Car Fortwo Coupe and Cabriolet passenger cars.

(3) FMVSS No. 108 Lamps, Reflective Devices, and Associated Equipment

Alterations identified in JK petition: Modification of the headlamp and marker light systems to meet this standard. These modifications are not described in the petition.

Alterations identified in G&K petition: (a) Modification of the headlamp to meet the standard and (b) installation of side markers. The petition did not describe these modifications, for which G&K claimed confidentiality. In a letter to NHTSA dated March 21, 2005, G&K stated that the headlamps will be replaced with U.S.-model components that have been certified as meeting all applicable requirements of FMVSS No. 108. In a letter dated May 16, 2005, G&K stated that the turn signal lamps will also be replaced with U.S.-model components that have been certified as meeting all applicable requirements of the standard.

NHTSA's Analysis

The modifications that JK and G&K identified as needed to conform the vehicles to the standard would not prelude the vehicles from being deemed eligible for importation. Conformity packages submitted for vehicles imported under the decision must demonstrate that the vehicle is equipped with components that allow it to achieve compliance with the standard. Any modification or replacement of components necessary to meet the requirements of the standard must be shown to bring the vehicle into compliance. Such proof must be submitted by an RI as part of any conformity package submitted for nonconforming 2002 through 2004 Smart Car Fortwo Coupe and Cabriolet passenger cars.

(4) FMVSS No. 110 Tire Selection and Rims

Alterations identified in JK petition: Installation of a tire information placard as part of the certification label to be affixed to the vehicles upon the completion of required modifications to achieve conformity with applicable standards.

Alterations identified in G&K petition: Installation of a tire information placard.

NHTSA's Analysis NHTSA has determined that the installation of a tire information placard to meet the requirements of the standard would not prelude the vehicles from being deemed eligible for importation.

(5) FMVSS No. 111 Rearview Mirrors

Alterations identified in JK petition: Replacement of the passenger side rearview mirror with a mirror fabricated by, and available only through, J.K. Technologies, which will have the required warning statement on the mirror's face.

Alterations identified in G&K petition: Inscription of the required warning statement on the face of the passenger side rearview mirror.

NHTSA's Analysis

NHTSA has determined that the installation of a replacement passenger side mirror or the modification of the existing mirror to meet the requirements of the standard would not prelude the vehicles from being deemed eligible for importation.

(6) FMVSS No. 114 Theft Protection

Alterations identified in JK petition: Installation of a redesigned starter interlock assembly to meet this standard. The petition did not describe how the assembly was redesigned.

Alterations identified in G&K petition: Modification of the key locking system to meet this standard. The petition did not describe these modifications, for which G&K claimed confidentiality.

NHTSA's Analysis

The modifications that JK and G&K identified as needed to conform the vehicles to the standard would not prelude the vehicles from being deemed eligible for importation. Conformity packages submitted for vehicles imported under the decision must demonstrate that the vehicle is equipped with components that allow it to achieve compliance with the standard. Any modification or replacement of components necessary to meet the requirements of the standard must be shown to bring the vehicle into compliance. Such proof must be submitted by an RI as part of any conformity package submitted for nonconforming 2002 through 2004 Smart Car Fortwo Coupe and Cabriolet passenger cars.

(7) FMVSS No. 135 Passenger Car Brake Systems

JK petition: The vehicles conform to the standard as manufactured.

Alterations identified in G&K petition: Modification of the hydraulic brake system and the parking brake system through the installation of components available only from G&K. The petition did not describe these modifications, for which G&K claimed confidentiality. In a letter dated March 21, 2005, G&K stated that no modifications were made to the vehicle prior to its FMVSS No. 135 testing.

NHTSA's Analysis

NHTSA has concluded that the subject vehicles were shown to meet the requirements of the standard as originally manufactured.

(8) FMVSS No. 201 Occupant Protection in Interior Impact

Alterations identified in JK petition: Replacement of interior components with components fabricated by, and available only through, J.K. Technologies. JK claimed confidentiality with respect to these modifications.

Alterations identified in G&K petition: Replacement of interior components with components fabricated by, and available only through, G&K. The petition did not describe these components or their manner of installation. G&K claimed confidentiality with respect to these modifications.

NHTSA's Analysis

The modifications that JK and G&K identified as needed to conform the vehicles to the standard would not prelude the vehicles from being deemed eligible for importation. Conformity packages submitted for vehicles imported under the decision must demonstrate that the vehicle is equipped with components that allow it to achieve compliance with the standard. Any modification or replacement of components necessary to meet the requirements of the standard must be shown to bring the vehicle into compliance. Such proof must be submitted by an RI as part of any conformity package submitted for nonconforming 2002 through 2004 Smart Car Fortwo Coupe and Cabriolet passenger cars.

(9) FMVSS No. 204 Steering Control Rearward Displacement

Alterations identified in JK petition: Modification of the steering shaft to meet the standard. This modification is not described in the petition.

G&K petition: The vehicles must be modified to meet the standard. The petition did not describe these modifications, for which G&K claimed confidentiality. In a letter dated March 21, 2005, G&K stated that no

modifications were made to the vehicle prior to its FMVSS No. 204 testing.

NHTSA's Analysis

NHTSA concluded that the subject vehicles were shown to meet the requirements of the standard as originally manufactured.

(10) FMVSS No. 206 Door Locks and Door Retention Components

JK petition: The vehicle conforms to the standard as originally manufactured.

Alterations identified in G&K petition: Modification of the door locks and door retention components to meet the standard. The petition did not describe these modifications, for which G&K claimed confidentiality. In a letter dated March 21, 2005, G&K stated that no modifications were made to the vehicle prior to its FMVSS No. 206 testing.

NHTSA's Analysis

NHTSA concluded that the subject vehicles were shown to meet the requirements of the standard as originally manufactured.

(11) FMVSS No. 208 Occupant Crash Protection

Alterations identified in JK petition: The vehicles must be modified to meet this standard. These modifications were not described in the petition.

Alterations identified in G&K petition: The vehicles must be modified to meet this standard. The petition did not describe these modifications, for which G&K claimed confidentiality. In a letter dated March 21, 2005, G&K stated that the air bags were not removed or replaced prior to its FMVSS No. 208 testing.

NHTSA's Analysis

The modifications that JK and G&K identified as needed to conform the vehicles to the standard would not prelude the vehicles from being deemed eligible for importation. Conformity packages submitted for vehicles imported under the decision must demonstrate that the vehicle is equipped with components that allow it to achieve compliance with the standard. Any modification or replacement of components necessary to meet the requirements of the standard must be shown to bring the vehicle into compliance. Such proof must be submitted by an RI as part of any conformity package submitted for nonconforming 2002 through 2004 Smart Car Fortwo Coupe and Cabriolet passenger cars.

(12) FMVSS No. 209 Seat Belt Assemblies

Alterations identified in JK petition: Modification of the seat belt systems to accommodate a seat belt switch. This modification was not described in the petition.

Alterations identified in G&K petition: Modification of the seat belt systems to meet this standard. The petition did not describe the modification, for which G&K claimed confidentiality.

NHTSA's Analysis

The modifications that JK and G&K identified as needed to conform the vehicles to the standard would not prelude the vehicles from being deemed eligible for importation. Conformity packages submitted for vehicles imported under the decision must demonstrate that the vehicle is equipped with components that allow it to achieve compliance with the standard. Any modification or replacement of components necessary to meet the requirements of the standard must be shown to bring the vehicle into compliance. Such proof must be submitted by an RI as part of any conformity package submitted for nonconforming 2002 through 2004 Smart Car Fortwo Coupe and Cabriolet passenger cars.

(13) FMVSS No. 214 Side Impact Protection

Alterations identified in JK petition: Modification of the vehicles' A-pillars, B-pillars, and doors. These modifications are not described in the petition.

Alterations identified in G&K petition: Modification of the vehicles through the installation of components available only from G&K. The petition did not describe the modifications, for which G&K claimed confidentiality.

NHTSA's Analysis

The modifications that JK and G&K identified as needed to conform the vehicles to the standard would not prelude the vehicles from being deemed eligible for importation. Conformity packages submitted for vehicles imported under the decision must demonstrate that the vehicle is equipped with components that allow it to achieve compliance with the standard. Any modification or replacement of components necessary to meet the requirements of the standard must be shown to bring the vehicle into compliance. Such proof must be submitted by an RI as part of any conformity package submitted for nonconforming 2002 through 2004 Smart Car Fortwo Coupe and Cabriolet passenger cars.

(14) FMVSS No. 216 Roof Crush Resistance

JK petition: The vehicles conform to this standard as originally manufactured.

Alterations identified in G&K petition: The vehicles must be modified to meet this standard. The petition did not describe these modifications, for which G&K claimed confidentiality. In a letter dated March 21, 2005, G&K stated that no modifications were made to the vehicle prior to FMVSS No. 216 testing.

NHTSA's Analysis

NHTSA has concluded that the subject vehicles were shown to meet the requirements of the standard as originally manufactured.

(15) FMVSS No. 225 Child Restraint Anchorage Systems

JK petition: The petition did not identify any modifications required to conform the vehicles to the standard.

Alterations identified in G&K petition: Installation of a U.S.-model tether anchorage behind the passenger seat on coupe models is needed to achieve conformity.

NHTSA's Analysis

The modifications that G&K identified as needed to conform the vehicles to the standard would not prelude the vehicles from being deemed eligible for importation. Conformity packages submitted for vehicles imported under the decision must demonstrate that the vehicle is equipped with components that allow it to achieve compliance with the standard. Any modification or replacement of components necessary to meet the requirements of the standard must be shown to bring the vehicle into compliance. Such proof must be submitted by an RI as part of any conformity package submitted for nonconforming 2002 through 2004 Smart Car Fortwo Coupe and Cabriolet passenger cars.

(16) FMVSS No. 301 Fuel System Integrity

Alterations identified in JK petition: Modification of the vehicles' fuel system to meet this standard. JK stated that fuel spillage problems are controlled by the evaporative and ORVR systems, which have a rollover and check valve incorporated into their design and have been proven in testing.

Alterations identified in G&K petition: Modification of the vehicles' fuel system through the installation of components available only from G&K. The petition

did not describe these modifications, for which G&K claimed confidentiality.

NHTSA's Analysis

The modifications identified as needed to conform the vehicles to the standard would not prelude the vehicle from being deemed eligible for importation. Conformity packages submitted for vehicles imported under the decision must demonstrate that the vehicle is equipped with components that allow it to achieve compliance with the standard. Any modification or replacement of components necessary to meet the requirements of the standard must be shown to bring the vehicle into compliance. Such proof must be submitted by an RI as part of any conformity package submitted for nonconforming 2002 through 2004 Smart Car Fortwo Coupe and Cabriolet passenger cars.

(17) FMVSS No. 302 Flammability of Interior Materials

JK petition: The vehicles conform to the standard as originally manufactured.

Alterations identified in G&K petition: Interior materials and components covered by the standard must be treated with a product available only from G&K. G&K claimed confidentiality with respect to these modifications.

NHTSA's Analysis

The modifications that G&K identified as needed to conform the vehicles to the standard would not prelude the vehicles from being deemed eligible for importation. Conformity packages submitted for vehicles imported under the decision must demonstrate that the vehicle is equipped with components that allow it to achieve compliance with the standard. Any modification or replacement of components necessary to meet the requirements of the standard must be shown to bring the vehicle into compliance. Such proof must be submitted by an RI as part of any conformity package submitted for nonconforming 2002 through 2004 Smart Car Fortwo Coupe and Cabriolet passenger cars.

(10) 49 CFR Part 581 Bumper Standard

Alterations identified in JK petition: Modification of the bumper system to comply with the Bumper Standard found in 49 CFR part 581. The petition did not describe the modifications.

Alterations identified in G&K petition: Modification of the bumper system through installation of components available only from G&K. The petition did not describe the modifications.

NHTSA's Analysis

The modifications that G&K identified as needed to conform the vehicles to the standard would not prelude the vehicles from being deemed eligible for importation. The agency notes that Bumper Standard compliance issues are not directly relevant to an import eligibility decision, as such a decision is to be based on the capability of a non-U.S. certified vehicle to be altered to conform to the FMVSS, and the Bumper Standard is not an FMVSS. However, because a vehicle that is not originally manufactured to comply with the Bumper Standard must be modified to comply with the standard before it can be admitted permanently into the United States, conformance with the Bumper Standard must be shown in the conformity package submitted to NHTSA to allow release of the DOT conformance bond furnished at the time of vehicle importation.

Conclusion

In view of the above considerations, NHTSA decided to grant the petitions.

Vehicle Eligibility Number for Subject Vehicles

The importer of a vehicle admissible under any final decision must indicate on the form HS–7 accompanying entry the appropriate vehicle eligibility number indicating that the vehicle is eligible for entry. VCP–27 is the vehicle eligibility number assigned to nonconforming 2002 through 2004 Smart Car Fortwo Coupe and Cabriolet (including trim levels Passion, Pulse and Pure) passenger cars admissible under this notice of final decision.

Final Decision

Accordingly, on the basis of the foregoing, NHTSA decided that 2002 through 2004 Smart Car Fortwo Coupe and Cabriolet (including trim levels Passion, Pulse and Pure) passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because they have safety features that comply with, or are capable of being altered to comply with, all applicable Federal motor vehicle safety standards.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. E6–11634 Filed 7–20–06; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Notice and Request for Comments

ACTION: Notice and request for comments.

SUMMARY: The Surface Transportation Board (Board), as part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* (PRA), gives notice that the Board will seek from the Office of Management and Budget (OMB) an extension of approval for the currently approved collection of rail system diagram maps. The Board is seeking comments from rail carriers that have recently filed amended or new system diagram maps (or, in the case of small carriers, the alternative narrative description of rail system) concerning (1) whether the particular collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology when appropriate. Submitted comments will be summarized and included in the Board's request for OMB approval.

Description of Collection

Title: System Diagram Maps.

OMB Control Number: 2140–0003.

Form Number: None.

Type of Review: Extension without change.

Respondents: Common carrier freight railroads that are either new or reporting changes in the status of one or more of their rail lines.

Number of Respondents: 4.

Estimated Time per Response: 4.5 hours, based on average time reported in informal survey of respondents conducted in 2003.

Frequency of Response: 1.

Total Annual Burden Hours: 18 hours.

Total Annual "Non-Hour Burden" Cost: None have been identified.

Needs and Uses: Under 49 CFR 1152.10–1152.13, all railroads subject to the Board's jurisdiction are required to keep current system diagram maps on file, or alternatively in the case of a Class III carrier (a carrier with assets of not more than $20 million in 1991 dollars), to submit the same information in narrative form. The information

sought in this collection identifies all lines in a particular railroad's system, categorized to indicate the likelihood that service on a particular line will be abandoned and/or whether service on a line is currently provided under the financial assistance provisions of 49 U.S.C. 10904. Carriers are obligated to amend these maps as the need to change the category of any particular line arises. The Board uses this information to facilitate informed decision making, and this information, which is available to the public from the carrier by request, 49 CFR 1152.12(c)(3), may serve as notice to the shipping public of the carrier's intent to abandon or retain a line.

DATES: Persons wishing to comment on this information collection should submit comments by September 19, 2006.

ADDRESSES: Direct all comments to Marilyn Levitt, Surface Transportation Board, Room 614, 1925 K Street, NW., Washington, DC 20423 or *levittm@stb.dot.gov* or by fax at (202) 565–9001. When submitting comments, refer to the OMB number and title of the information collection.

FOR FURTHER INFORMATION CONTACT: Barbara G. Saddler, (202) 565–1656. Requests for a copy of the regulations pertaining to this information collection may be obtained by contacting Barbara G. Saddler at (202) 565–1656 or *saddlerb@stb.dot.gov*.

SUPPLEMENTARY INFORMATION: Under the PRA, a Federal agency conducting or sponsoring a collection of information must display a currently valid OMB control number. Collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Under section 3506(c)(2)(A) of the PRA, Federal agencies are required to provide a 60-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval.

Dated: July 21, 2006.

Vernon A. Williams,

Secretary.

[FR Doc. E6–11592 Filed 7–20–06; 8:45 am]

BILLING CODE 4915–01–P

Federal Register

Friday,
July 21, 2006

Part II

Department of the Interior

Minerals Management Service
30 CFR Parts 202, 206, 210, 217, and 218
Bureau of Land Management
43 CFR Parts 3200 and 3280

Royalty Management—Geothermal Resources; and Minerals Management—Oil and Gas Leasing; Proposed Rules

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Parts 202, 206, 210, 217, and 218

RIN 1010–AD32

Geothermal Valuation

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Proposed rule.

SUMMARY: The MMS is proposing new regulations implementing the provisions of the Energy Policy Act of 2005 (EPAct) governing the payment of royalty on geothermal resources produced from Federal leases and the payment of direct use fees in lieu of royalties. The EPAct provisions amend the Geothermal Steam Act of 1970 (GSA). The new regulations would amend the current MMS geothermal royalty valuation regulations and simplify the royalty calculations for geothermal resources for leases issued under the EPAct and leases whose terms are modified under the EPAct. The new regulations would also amend various related provisions in the MMS rules.

DATES: Comments must be submitted on or before September 19, 2006.

ADDRESSES: You may submit comments on the rulemaking by any of the following methods listed below. Please use the Regulation Identifier Number (RIN) 1010–AD32 in your message. See also Public Comment Procedure under Procedural Matters:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions on the Web site for submitting comments.
- E-mail: *mrm.comments@mms.gov*. Please include "Attn: RIN 1010–AD32" and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, call the contact person listed below.
- Regular U.S. Mail: Minerals Management Service, Minerals Revenue Management, Chief of Staff Office—Denver, P.O. Box 25165, MS 302B2, Denver, Colorado 80225–0165.
- Overnight mail, courier, or hand-delivery: Minerals Management Service, Minerals Revenue Management, Building 85, Room A–614, West 6th Ave. and Kipling Blvd., Denver Federal Center, Denver, Colorado 80225.

Information Collection Request (ICR) Comments: Submit written comments by either fax (202) 395–6566 or e-mail (*OIRA_Docket@omb.eop.gov*) directly to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for the Department of the Interior [OMB Control Number ICR 1010–NEW) as it relates to the proposed geothermal valuation rule].

Please also send a copy of your comments to MMS via e-mail at *mrm.comments@mms.gov*. Include the title of the information collection and the OMB control number in the "Attention" line of your comment. Also include your name and return address. If you do not receive a confirmation that we have received your e-mail, contact Sharron Gebhardt at (303) 231–3211.

You may also mail a copy of your comments to Sharron Gebhardt, Lead Regulatory Specialist, Minerals Management Service, Minerals Revenue Management, P.O. Box 25165, MS 302B2, Denver, Colorado 80225. If you use an overnight courier service or wish to hand-deliver your comments, our courier address is Building 85, Room A–614, Denver Federal Center, West 6th Ave. and Kipling Blvd., Denver, Colorado 80225.

FOR FURTHER INFORMATION CONTACT: Sharron Gebhardt, Lead Regulatory Specialist, Minerals Revenue Management (MRM), MMS, telephone (303) 231–3211, fax (303) 231–3781, or e-mail *sharron.gebhardt@mms.gov*. The principal authors of this rule are Sarah L. Inderbitzin of the Office of the Solicitor and Herb Black of MRM, MMS, Department of the Interior.

SUPPLEMENTARY INFORMATION:

I. Background

A. Pre-EPAct Statutory Provisions and Current Regulations

Under the GSA (30 U.S.C. 1001 *et seq.*) before its amendment by the EPAct (Pub. L. No. 109–58, 119 Stat. 594), geothermal leases were issued with a reserved royalty of not less than 10 percent and not more than 15 percent "of the amount or *value of steam*, or any other form of heat or energy derived from production under the lease and sold or utilized by the lessee * * *." 30 U.S.C. 1004(a) (emphasis added). The leases further provide for a royalty of not less than 5 percent "of the value of any byproduct derived from production under the lease * * *." 30 U.S.C. 1004(b). The GSA further grants the Secretary broad rulemaking authority. 30 U.S.C. 1023. The lease instruments also reserved to the Secretary the authority to establish the value of geothermal production or byproducts for royalty purposes. Under these provisions, the current rules for valuing geothermal resources for royalty purposes at 30 CFR 206.350–206.358 were promulgated in 1991.

Currently, there are 50 producing Federal geothermal leases in Utah, New Mexico, California, and Nevada. These leases comprise 15 electrical generation projects and 2 direct use projects (an onion drying plant and a project that uses geothermal heat to preheat boiler water). Royalty revenues from Federal geothermal leases totaled approximately $11,000,000 in 2004. Fifty percent of those revenues go to the states in which the leases are located (30 U.S.C. 191(a)).

The current royalty valuation methods for geothermal resources are grouped first by usage, *i.e.*, electrical generation, direct use, and byproducts. Within each usage category, valuation methods are grouped by the method of disposition of the resources, *i.e.*, arm's-length (unaffiliated) sales, non-arm's-length sales, and no sales.

In an earlier effort to streamline the MMS geothermal regulations, on October 28, 2004, MMS's Royalty Policy Committee (RPC) formed the Geothermal Valuation Subcommittee (Subcommittee) to address the MMS geothermal royalty valuation regulations in an effort to simplify the regulations and reduce administrative costs to the geothermal industry. The Subcommittee was comprised of members from one industry association, several geothermal producers, two of the major states affected, and MMS employees. A representative of the Bureau of Land Management (BLM) served as technical advisor to the Subcommittee. The RPC requested that the Subcommittee work together to develop more efficient royalty valuation methods that will ensure a fair return to the Federal Government as well as encourage geothermal development. The Subcommittee prepared a report and submitted it to the RPC, and on May 26, 2005, the RPC accepted the Subcommittee's recommendations.

B. The EPAct

On August 8, 2005, the President signed into law the EPAct, Pub. L. 109–58, 119 Stat. 595. Sections 221 through 237 of the EPAct, entitled the "John Rishel Geothermal Steam Act Amendments," amended the GSA, 30 U.S.C. 1001 *et seq.* (1970). Congress enacted the EPAct geothermal amendments to encourage geothermal production through regulatory streamlining and incentives. S. Rep. No. 78, 109th Cong., 1st Sess. (2005).

This proposed rule would implement the EPAct provisions. It also would incorporate most of the Subcommittee's concepts, with modifications necessary to comply with the EPAct. This proposed rule:

- For 30 CFR part 206, subpart H: (1) Explains the general royalty calculation and payment, direct use fee, and royalty valuation provisions of this subpart; (2) defines which leases the subpart applies to; (3) provides definitions of terms used in the subpart; (4) proposes some changes to conform to plain English writing; and (5) proposes changes necessary to implement provisions of the EPAct.
- For 30 CFR parts 202, 210, 217, and 218: (1) Proposes changes necessary to implement provisions of the EPAct; and (2) reflect the proposed amendments to 30 CFR part 206, subpart H.

II. Explanation of Proposed Amendments

Before reading the additional explanatory information below, please turn to the proposed rule language that we would codify in the Code of Federal Regulations (CFR) if this rule is finalized as written. The rule language immediately follows the "List of Subjects in 30 CFR parts 202, 206, 210, 217, and 218."

When you have read the rule thoroughly, please return to the preamble discussion below. The preamble contains additional information about the proposed rule, such as why we defined a term in a certain manner, why we chose a certain procedure, and how we interpret the law this rule implements.

A. Section-by-Section Analysis of 30 CFR Part 202—Royalties, Subpart H—Geothermal Resources

The MMS proposes to amend 30 CFR 202.351 and 202.353 in several respects. First, we rewrote those sections in plain English, added the term "fees" where applicable to reflect the fees in lieu of royalties that proposed 30 CFR 206.356(b) would prescribe. We also have referred to 30 CFR part 206, subpart H, where appropriate.

Second, paragraph 202.351(a) currently states that all royalties must be paid "in-value." In this context, the term "in-value" refers to payment in money, not to royalty valuation. Because the EPAct now allows lessees a credit against royalties owed on geothermal resources for delivery of electricity "in-kind" to states and counties that would receive a portion of royalty revenues, and to avoid confusion in situations where MMS will not be determining royalty value, we would revise the provision in paragraph (a) to read: "Except for the amount credited against royalties for in-kind deliveries of electricity to a state or county under 30 CFR 218.306, you must pay royalties and direct use fees in money."

Finally, we would add a new subparagraph 202.353(b)(3) which states that lessees may report the quantity of direct use resources in "Millions of pounds to the nearest million pounds of geothermal fluid produced if valuation is in terms of mass." Like the other quantity reporting requirements in this section, "to the nearest whole" means that if you produce 1,500,000.00 pounds of the geothermal resource, you would report the quantity as 2 million (2,000,000.00) pounds. Likewise, if you produce 1,499,000.00 pounds, you would report 1 million (1,000,000.00) pounds.

B. Section-by-Section Analysis of 30 CFR Part 206—Product Valuation, Subpart H—Geothermal Resources

What is the purpose of this subpart? (Proposed § 206.350)

Paragraph (a) of this section would explain what leases are subject to this subpart. This subpart would be applicable to all geothermal resources produced from Federal geothermal leases issued under the GSA, as amended by the EPAct. It also would explain that the purpose of this subpart is to prescribe how to calculate royalties and fees on geothermal production.

Paragraph (b) would explain that MMS may audit and adjust all royalty and fee payments.

Paragraph (c) would ensure that if the regulations in this subpart are inconsistent with a statute, settlement agreement, written agreement, or lease provision, then that provision, not the regulation, will govern to the extent of the inconsistency. This is particularly important in this proposed rulemaking to ensure that the provisions of the negotiated valuation agreements MMS and lessees entered into prior to this rulemaking remain unaffected by this rulemaking.

What definitions apply to this subpart? (Proposed § 206.351)

This section would explain the definitions applicable to this subpart. For purposes of discussion, this preamble will discuss only new or modified definitions, except modifications to existing language to use plain English that do not make substantive changes.

The MMS proposes to add a definition of the term *affiliate* and revise the definition of the term *arm's-length contract* to be identical to the June 2000 Federal crude oil valuation rule published March 15, 2000 (65 FR 14022), and the March 2005 Federal gas valuation rule published March 10, 2005 (70 FR 11869) (collectively "Federal oil and gas valuation rules"), and to conform the geothermal valuation rule with the D.C. Circuit's holding in *National Mining Association* v. *Department of the Interior,* 177 F.3d 1 (D.C. Cir. 1999). As in the Federal oil and gas valuation rules, MMS is proposing to define the term *affiliate* separately from the term *arm's length-contract.* We believe this clarifies and simplifies the definitions and should promote better understanding of both *arm's-length contract* and *affiliate.* For a full explanation of the reasons for this proposed change to the definitions, see the discussion in the preamble to the June 2000 final crude oil valuation rule at 65 FR 14039–14040.

The MMS also proposes to add definitions of *allowance* and *byproduct transportation allowance* to this subpart.

In the EPAct, Congress added a provision regarding the royalty rate applicable to those byproducts that are minerals specified in the Mineral Leasing Act of 1920, 30 U.S.C. 181. The EPAct provision was silent regarding other byproducts, which therefore are not affected. The proposed definition of *byproducts* includes both those that are minerals identified in 30 U.S.C. 181 and those that are not.

The proposed rule also would define three classes of leases, because the royalty calculation method a lessee must use depends on the type of lease. A *Class I lease* would mean (1) a lease BLM issued under the GSA before August 8, 2005, which the lessee does not elect to convert to a Class II lease (defined below) under BLM's proposed rule at 43 CFR 3212.25, or (2) a lease BLM issued in response to a lease application that was pending on August 8, 2005, which the lessee does not elect to convert to a Class II lease under BLM's proposed regulations at 43 CFR 3200.8. A *Class II lease* would mean a geothermal lease BLM issued on or after the effective date of the final BLM regulation under 43 CFR parts 3203, 3204, or 3205, except for a lease issued in response to an application that was pending on August 8, 2005, which the lessee elects not to convert to a Class II lease under 43 CFR 3200.8. A *Class III lease* would mean a Class I lease that the lessee converts to a Class II lease under 43 CFR 3212.25.

In the EPAct, Congress enacted the new definition of direct use discussed below. Part of that definition included the term *commercial production of electricity,* but did not define that term. Other sections of the EPAct (see the new 30 U.S.C. 1004(b), added by EPAct

§ 223(a), and new 30 U.S.C. 1003(f), added by EPAct § 223(b)) use the term *commercial generation of electricity.* The two terms appear from the statutory context to have the same meaning. Therefore, *commercial production or generation of electricity* would mean generation of electricity that is sold or is subject to sale, including the electricity that is required to convert geothermal energy into electrical energy for sale.

As a technical amendment, § 236(g) of the EPAct defined *direct use* to mean the use of geothermal resources from Class I, II, or III leases "for commercial, residential, agricultural, public facilities, or other energy needs, other than the commercial production of electricity." Thus, we are proposing to use that definition, but substituting the word "generation" for "production" for consistency and accuracy.

We propose to change *direct utilization facility* in the current rule to *direct use facility* to conform to the new definition of *direct use.*

The definition of *lease* would remain the same as in the existing rule.

Lessee (you) would mean any person to whom the United States issues a geothermal lease, and any person who has been assigned an obligation to make royalty, fee, or other payments required by the lease. This would include any person who has an interest in a geothermal lease as well as an operator or payor who has no interest in the lease but who has assumed the royalty, fee, or other payment responsibility.

The term *lessee* also would include any affiliate of the lessee that uses the geothermal resource to generate electricity, in a direct use process, or to recover byproducts, or any affiliate that sells or transports lease production. We added the lessee's affiliate to the definition to eliminate the need to have separate regulations for non-arm's-length sales or use of geothermal resources without sale.

We changed the definition of *marketable condition* to more closely conform to the definition contained in other subparts of part 206. Thus, *marketable condition* would mean lease products that are sufficiently free from impurities and otherwise in a condition that they will be accepted by a purchaser under a sales contract typical for the disposition of such lease products produced from the field or area.

Plant parasitic electricity would be defined to mean the amount of electricity used to run a power plant. This term has always been in the definition of *plant tailgate electricity.* Therefore, for clarity, we propose to define it in this rulemaking.

Public purpose would mean a program carried out by a state, tribal, or local government for the purpose of providing facilities or services for the benefit of the public in connection with, but not limited to, public health, safety, or welfare, other than the commercial generation of electricity. Use of lands or facilities for habitation, cultivation, trade, or manufacturing is permissible only when necessary for and integral to (i.e., an essential part of) the public purpose. This is the same definition the Department has already promulgated under 43 CFR 2740.0–5. As discussed further in our comments to new § 206.366 below, in the EPAct § 223(a), Congress authorized the Secretary to charge nominal fees for a state, tribal, or local government lessee's use of geothermal resources without sale for "public purposes." We added this definition because Congress did not define *public purpose.*

The Department did not define *public safety or welfare* in 43 CFR part 2740. Therefore, we propose to use the definition already used by the Federal Government in its Federal Property Management Regulations found at 41 CFR part 102–37, Appendix C. Those regulations state that *public safety* or *welfare* means a program carried out or promoted by a public agency for public purposes involving, directly or indirectly, protection, safety, and law enforcement activities, and the criminal justice system of a given political area. Public safety programs may include, but are not limited to, those carried out by:

(1) Public police departments;
(2) Sheriffs' offices;
(3) The courts;
(4) Penal and correctional institutions (including juvenile facilities);
(5) State and local civil defense organizations; and
(6) Fire departments and rescue squads (including volunteer fire departments and rescue squads supported in whole or in part with public funds).

How do I calculate the royalty due on geothermal resources used for commercial generation of electricity? (Proposed § 206.352)

This section would explain how you must calculate the royalty due on geothermal resources used to generate electricity.

Paragraph (a) would apply to Class I, II, and III leases where the lessee sold the geothermal resources at arm's length and the purchaser uses the resource to generate electricity. (The MMS presently knows of no such current situations, but we anticipate the possibility that some lessees may enter into such arrangements in the future.) The RPC recommended that in such instances, the lessee should pay a royalty based on a royalty rate in the lease multiplied by the gross proceeds the lessee derives from the sale of geothermal resources. The RPC recommended no change in royalty valuation under the current rules or in royalty rates for new or existing leases. The EPAct is silent regarding the situation where the lessee sells the *resource* to an unaffiliated purchaser that produces electricity, rather than producing the electricity itself. Therefore, we are proposing to accept the RPC recommendations to base royalties for existing (Class I), new (Class II), and converted or pending application (Class III) leases, on the gross proceeds from the sale of the geothermal resource to the arm's-length purchaser.

For non-arm's length-sales of geothermal resources used for electrical generation, the RPC recommended that MMS negotiate with each lessee to determine the value of the geothermal resources sold under non-arm's-length or no sales situations. Although lessees may still request such a methodology under § 206.364 of this subpart, we believe it is much simpler, and more consistent with the EPAct and the Federal oil and gas valuation rules, to base royalties on the gross proceeds from the affiliate's sale of the geothermal resource. As explained above, the gross proceeds accruing to the lessee would include the lessee's affiliate's arm's-length sale of the geothermal resource. This eliminates the necessity of examining "comparable arm's-length contracts" when the lessee transfers to its affiliate, and the affiliate then sells the resource at arm's length. It also eliminates the need for a geothermal netback procedure wherein the lessee would have the burden of determining the value of the geothermal resource based on the sales of electricity by an unrelated purchaser.

Paragraph (b) would explain how to value a geothermal resource for each class of lease in "no sales" situations, i.e, where you or your affiliate use the geothermal resource in your own power plant for the generation and sale of electricity. The RPC did not address this situation, so we kept the current rule language for Class I leases, with some modifications discussed below, and followed the EPAct for Class II and III leases.

Thus, under subparagraph (b)(1), for Class I leases, the royalty on geothermal resources produced would be

determined in accordance with the first applicable of the following paragraphs:

(1) The gross proceeds accruing from the arm's-length sale of the electricity less applicable deductions determined under §§ 206.353 and 206.354 times the royalty rate in the lease. This is essentially the old geothermal netback procedure. However, it is less burdensome because a lessee who generates and sells electricity will have all of the necessary information. Furthermore, as explained above, because an affiliate's arm's-length sale of electricity is the lessee's gross proceeds, there is no need to distinguish between arm's-length and non-arm's-length sales. Finally, this subparagraph also would explain that under no circumstances shall the deductions reduce the royalty value of the geothermal resource to zero; or

(2) A royalty determined by any other valuation method approved by MMS under § 206.364.

Subparagraph (2) would apply to Class II leases. In EPAct § 224(a)(1), Congress prescribed a royalty on electricity produced using geothermal resources, other than direct use of geothermal resources of:

(1) Not less than 1 percent and not more than 2.5 percent of the gross proceeds from the sale of electricity produced from such geothermal resources during the first 10 years of production under the lease; and

(2) Not less than 2 and not more than 5 percent of the gross proceeds from the sale of electricity produced from such geothermal resources during each year after such 10-year period.

Congress also specified that any regulation implementing EPAct § 224(a)(1) should seek:

(1) To provide lessees a simplified administrative system;

(2) to encourage new development; and

(3) to achieve the same level of royalty revenues over a 10-year period as the regulation in effect on the date of enactment of this subsection.

Therefore, for Class II leases, MMS is proposing a simple methodology where the royalty on geothermal resources produced would be your gross proceeds from the sale of electricity for the production month multiplied by the royalty rate BLM prescribed for your lease under proposed 43 CFR 3211.17, its regulation implementing § 224(a)(1) of the EPAct. Because the royalty rate BLM prescribes will take into account achieving the same level of royalty revenues over a 10-year period as the regulation in effect on the date of enactment of the EPAct, it will have taken into account any possible deductions that would have been available under the current regulations and should achieve the same level of royalty revenues over the next 10 years as the current regulations. Accordingly, this paragraph of the proposed regulation would not allow any deductions. In addition, because this proposal greatly simplifies the valuation methodology, it should encourage new development.

Subparagraph (3) would apply to Class III leases. For Class III leases, in EPAct § 224(e)(1)(b), Congress prescribed that royalties be computed on a percentage of the gross proceeds from the sale of electricity, at a royalty rate that is expected to yield total royalty payments equivalent to payments that would have been received for comparable production under the royalty rate in effect for the lease before the date of enactment of this subsection. Thus, we are proposing to require you to calculate the royalty on geothermal resources produced as your gross proceeds from the sale of electricity for the production month multiplied by the royalty rate BLM calculated for your lease under proposed 43 CFR 3211.17. The royalty rate BLM calculates will be expected to yield total royalty payments equivalent to payments that would have been received for comparable production under the royalty rate in effect for the lease before the date of enactment of the EPAct. Accordingly, that royalty rate will take into account any deductions you were taking prior to the EPAct's enactment. As a result, you would not be allowed to reduce your gross proceeds by any deductions under this subparagraph.

How do I determine transmission deductions? (Proposed § 206.353)

This section would explain how to determine your transmission deductions. We have streamlined and rewritten the current rule in plain English.

The MMS also proposes to amend § 206.353 in two other respects. First, just as we did in the Federal oil and gas valuation rules, we propose to eliminate the requirement that the lessee report its transmission deduction using a separate line entry on the Form MMS–2014. That requirement is no longer relevant because the Form MMS–2014 has been revised. While you still would report the transmission deduction in a discrete field, it would not be strictly on a separate line from associated sales transaction data. The proposal would revise the regulation accordingly.

Second, we also would delete the final paragraph (f) of § 206.353. That paragraph provided for a one-time refund of royalties based on the royalty value of actual dismantlement costs of a transmission line in excess of income value from salvage at the completion of dismantlement and salvage operations. This provision has never been used and is complicated administratively. Therefore, we propose to delete it. This would result in renumbering the section with the corresponding new paragraph (f).

How do I determine generating deductions? (Proposed § 206.354)

This section would explain that if you determine the value of your geothermal resource under § 206.352(b)(1)(i) of this subpart, you may deduct your reasonable actual costs incurred to generate electricity from the plant tailgate value of the electricity (usually the transmission-reduced value of the delivered electricity). We propose to rewrite the current rule in plain English form.

We also would delete the final paragraph (f) of § 206.354(f). That paragraph provided for a one-time refund of royalties based on the royalty value of actual dismantlement costs of a power plant in excess of income value from salvage at the completion of dismantlement and salvage operations. This provision has never been used and is complicated administratively. Therefore, we propose to delete it.

How do I calculate royalty due on geothermal resources I sell arm's length to a purchaser for direct use? (Proposed § 206.355)

This section would explain how to calculate royalty on geothermal resources if you sell geothermal resources produced from Class I, II, or III leases at arm's length to a purchaser for direct use. The EPAct did not address such transactions. Therefore, we are proposing that in such instances, the royalty on the geothermal resource would be the gross proceeds accruing to you from the sale of the geothermal resource to the arm's-length purchaser times the royalty rate in your lease or that BLM prescribes under proposed 43 CFR 3211.18.

We believe this valuation methodology would best meet Congress' goals that any regulation implementing EPAct § 224(a)(1) should: (1) provide lessees a simplified administrative system; (2) encourage new development; and (3) achieve the same level of royalty revenues over a 10-year period as the regulation in effect on the date of enactment of this subsection.

How do I calculate royalty due on geothermal resources I use for direct use purposes? (Proposed § 206.356).

This section would explain how a lessee must calculate royalty on a geothermal resource it uses itself for direct use purposes, i.e., that it does not sell. The Subcommittee recommended that for existing leases, MMS, in consultation with BLM, should develop and publish a royalty schedule every 3 years for lessees to use to determine the royalties due on direct use operations. The Subcommittee also recommended that the royalty schedule be based on the wellhead (inlet) temperature and an "assumed" fixed outlet temperature of 130 °F. In addition, the Subcommittee recommended that the lessee would meter wellhead (inlet) temperature and monthly production and use the published royalty schedule to determine monthly royalties due.

The Subcommittee used the following equation to develop a royalty schedule for determining royalty due as a function of temperature of the geothermal resource used for direct use: where:

$$R_{Tin} = \frac{\rho \times (T_{in} - T_{out})}{e} \times P_{prbc} \times F_{rr}$$

R_{Tin} = royalty due as a function of inlet temperature, $/10^6 gallons
ρ = water density at inlet temperature, lbms/gallon
T_{in} = measured inlet temperature, °F
T_{out} = established proxy outlet temperature 130 °F
e = boiler efficiency factor for coal (75 percent)
P_{prbc} = 3-year historical average of Powder River Basin coal ($/MMBtu)
F_{rr} = lease royalty rate.

However, in the EPAct, Congress did not change the royalty provisions for existing leases. Therefore, for Class I leases, we are proposing to keep the existing regulations with minor plain English modifications.

In § 223(a) of the EPAct, for Class II leases, and § 224(e), for Class III leases, Congress did direct the Secretary to:

Establish a schedule of fees, in lieu of royalties for geothermal resources, that a lessee or its affiliate—

(A) Uses for a purpose other than the commercial generation of electricity; and

(B) Does not sell.

Congress also stated that the schedule of fees:

(A) May be based on the quantity or thermal content, or both, of geothermal resources used;

(B) Shall ensure a fair return to the United States for use of the resource; and

(C) Shall encourage development of the resource.

Thus, in paragraph (b), for Class II and Class III leases, we are proposing that lessees calculate the fee for geothermal resources they use for direct use by multiplying the appropriate fee from the following schedule in subparagraph (b)(1) of this section by the number of gallons or pounds they produce from the direct use lease each month.

DIRECT USE FEE SCHEDULE

[Hot water]

If your average monthly inlet temperature (°F) is		Your fees are . . .	
At least . . .	But less than . . .	($/million gallons)	($/million pounds)
130	140	2.524	0.307
140	150	7.549	0.921
150	160	12.543	1.536
160	170	17.503	2.150
170	180	22.426	2.764
180	190	27.310	3.379
190	200	32.153	3.993
200	210	36.955	4.607
210	220	41.710	5.221
220	230	46.417	5.836
230	240	51.075	6.450
240	250	55.682	7.064
250	260	60.236	7.679
260	270	64.736	8.293
270	280	69.176	8.907
280	290	73.558	9.521
290	300	77.876	10.136
300	310	82.133	10.750
310	320	86.328	11.364
320	330	90.445	11.979
330	340	94.501	12.593
340	350	98.481	13.207
350	360	102.387	13.821

Under subparagraph (b)(1)(i), for direct use lease geothermal resources with an average monthly inlet temperature of 130 °F or less, you would have to pay only the lease rental.

This proposed fee schedule uses the methodology the Subcommittee recommended to develop the schedule of fees, but updated the schedule to reflect current Powder River Basin coal prices. The MMS, in consultation with BLM, also made two modifications to the formula the Subcommittee recommended. First, we expressed royalty due in dollars ($) per million ($10^6$) *gallons* and dollars ($) per million ($10^6$) *pounds* to correspond with BLM geothermal resource measurement requirements in 43 CFR part 3275. We also changed the boiler efficiency factor from 75 percent to 70 percent to correspond to MMS regulations at 30 CFR 206.355(c)(1)(ii). In addition, rather than updating the schedule every 3 years, MMS is retaining the flexibility to, in consultation with BLM, develop and publish a revised fee schedule in the **Federal Register** as needed.

In addition, as the Subcommittee report stated, BLM did a further study

of actual outlet temperatures at direct use facilities and found that 130 °F was more representative than the initial RPC estimate of 120 °F. Therefore, we are changing the assumed outlet temperature in the fee schedule to 130 °F.

We believe this proposal meets Congress' directives because it is based on the quantity and thermal content of the geothermal resource. In addition, we believe it will encourage development of geothermal resources because of the simplified valuation methodology and resultant administrative savings.

We also believe that it will ensure a "fair return" to the United States for the use of the resource. "A fair return is one which, under prudent and economical management, is just and reasonable to both the public and the utility." *Mississippi Power & Light Co.* v. *Mississippi Ex Rel. Moore*, 487 U.S. 354, 366 (1988) (quoting *Southern Bell Tel. & Tel. Co.* v. *Mississippi Public Service Comm'n*, 237 Miss. 157, 241, 113 So. 2d 622, 656 (1959); *Mississippi Public Service Comm'n* v. *Mississippi Power Co.*, 429 So. 2d 883 (Miss. 1983). In this instance, to determine fair value, the BLM representative of the Subcommittee performed an analysis to determine the feasibility of using binary electrical generation values as a basis for valuing direct use of Federal geothermal resources. The Subcommittee was attempting to find a fair royalty value for direct use facilities. Direct use facilities use lower temperature geothermal resources than most geothermal power plants. However, binary power plants use the lowest temperature geothermal resources of any geothermal power plants. Therefore, binary power plants value was selected to be the most comparable to direct use facilities' geothermal value.

The results of the Subcommittee's analysis concluded that the bottom of the binary value range was the lowest value when compared to various direct use valuation methods. In addition, the study showed that the binary valuation (approximately $0.28/MMBtu—$0.77/MMBtu) was comparable to alternative fuel valuation using Powder River Basin coal spot prices published by Energy Information Administration of the Department of Energy (approximately $0.30/MMBtu).

The Subcommittee then compared the value of Powder River coal spot prices to wood chips and natural gas prices for sample months from years 1997 through 2002. After further deliberations, the Subcommittee recommended that MMS use the 3-year historical average of published Powder River Basin coal spot prices to develop the fee schedule for direct use basically because of its continuity of value and public availability.

We welcome comments on the methodology used to develop the fee schedule and the use of published Powder River Basin coal spot prices to derive a "fair return" for the resource.

Paragraph (b)(3) would implement § 223(c) of the EPAct to allow retroactive application of the fee schedule to any existing (Class I) lease that converts to an EPAct (Class III) lease. This paragraph would explain that the schedule of fees established under paragraph (b)(1) will apply to any Class III lease with respect to any royalty payments previously paid, when the lease was a Class I lease, that were due and owing, and were paid, on or after July 16, 2003. If you use this provision and owe additional monies based on the fee schedule, you would have to pay the difference plus interest on that difference computed under 30 CFR 218.302. If you use this provision and overpaid royalties based on the fee schedule, you would be entitled to a refund or credit from MMS of 50 percent of the overpaid royalties. You would be restricted to a refund of 50 percent of the royalties because, under § 223(c) of the EPAct, MMS may not refund royalties paid to a state under 30 U.S.C. 1019 before the date of enactment of the EPAct. However, § 223(c) did not exempt states from refunds of late payment interest previously paid on overpaid royalties under 30 U.S.C. 191a. Therefore, you would be entitled to a refund or credit of any late payment interest that you previously paid on overpaid royalties.

How do I calculate royalty due on byproducts? (Proposed § 206.357)

Neither the Subcommittee nor the EPAct addressed valuation of byproducts. Therefore, MMS is retaining the current valuation methodology and applying it to byproducts produced from Class I, II, or III leases. The MMS made some modifications for plain English purposes. Also, in paragraph (a), like the gross proceeds provisions discussed above, the gross proceeds accruing to affiliate would be the gross proceeds accruing to the lessee where the affiliate makes the first arm's-length sale of the byproducts, less any applicable byproduct transportation allowances determined under §§ 206.358 and 206.359 of this subpart. The MMS is proposing to renumber the current byproduct transportation allowance regulations at 30 CFR 206.357 and 206.358 to new §§ 206.358 and 206.359.

What records must I keep to support my calculations of royalty or fees under this subpart? (Proposed § 206.360)

How will MMS determine whether my royalty value, gross proceeds, or fees are correct? (Proposed § 206.361)

What are my responsibilities to place production into marketable condition and to market production? (Proposed § 206.362)

When is an MMS audit, review, reconciliation, monitoring, or other like process considered final? (Proposed § 206.363)

Does MMS protect information I provide? (Proposed § 206.365)

The MMS is proposing amendments to the text of its recordkeeping, gross proceeds, marketable condition and marketing, audit, and confidentiality requirements and procedures to apply principles in the context of geothermal royalties and fees that are consistent with the Federal oil and gas royalty regulations. In addition, like those rules, rather than repeat the requirements or procedures in each applicable section of this rule, MMS is proposing to have these sections apply to this entire subpart. However, the substantive requirements remain unchanged.

How do I request a value or gross proceeds determination? (Proposed § 206.364)

To be consistent with the Federal oil and gas valuation rules, MMS is proposing to provide a procedure for valuation or gross proceeds determinations regarding geothermal resources produced from Class I leases and for byproducts produced from Class I, II, or III leases that is more than simply nonbinding guidance. The proposed rule would provide that you may request a value or gross proceeds determination from MMS. (Your request would have to identify all leases involved, the record title or operating rights owners, and the operators or payors for those leases, and explain all relevant facts.) The MMS could either:

(1) Issue a determination signed by the Assistant Secretary, Land and Minerals Management; or

(2) Issue a determination by MMS; or

(3) Decline to provide a determination.

A determination signed by the Assistant Secretary, Land and Minerals Management, would be binding on both you and MMS until the Assistant Secretary modifies or rescinds it. It also would be the final action of the Department and subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701–706.

In contrast, a determination MMS issued would be binding on MMS and delegated states, but not on you, with respect to the specific situation addressed in the determination, unless the MMS or the Assistant Secretary modifies or rescinds it.

A determination by MMS would not be an appealable decision or order under 30 CFR part 290, subpart B. However, if you received an order requiring you to pay royalty on the same basis as the determination, you could appeal that order under 30 CFR part 290, subpart B.

Further discussion of determinations can be found in the 2000 Federal oil valuation regulation published March 15, 2000 (65 FR 14022).

What is the nominal fee that a state, tribal, or local government lessee must pay for the use of geothermal resources? (Proposed § 206.366)

Section 223(a) of the EPAct directs the Secretary to charge "nominal fees" if a state, tribal, or local government lessee uses a geothermal resource without sale and for public purposes other than commercial generation of electricity. This section implements that provision and explains that a "nominal fee" means a slight or *de minimis* fee. The MMS is not publishing a schedule of fees for this section so that it has the flexibility to calculate appropriate nominal fees on a case-by-case basis.

C. Section-by-Section Analysis of 30 CFR Part 210—Forms and Reports, Subpart H—Geothermal Resources

We propose to delete § 210.352 because MMS no longer requires payor information forms.

D. Section-by-Section Analysis of 30 CFR Part 217—Audits and Inspections, Subpart H-Geothermal Resources

This subpart is currently reserved. Therefore, as part of this rulemaking, to be consistent with requirements for other mineral leases, MMS proposes to add new §§ 217.300 through 217.302.

Audit or Review of Records. (Proposed § 217.300)

This section would provide that the Secretary, or his/her authorized representative, shall initiate and conduct audits or reviews relating to the scope, nature, and extent of compliance by lessees, operators, revenue payors, and other persons with rental, royalty, fees, and other payment requirements on a Federal geothermal lease. Audits or reviews would also relate to compliance with applicable regulations and orders. All audits or reviews would be conducted in accordance with this notice and other requirements of 30 U.S.C. 1717.

Lease Account Reconciliations (Proposed § 217.301)

This section would provide that specific lease account reconciliations shall be performed with priority being given to reconciling those lease accounts specifically identified by a state as having significant potential for underpayment.

Definitions (Proposed § 217.302)

This section would provide that terms used in this subpart shall have the same meaning as in 30 U.S.C. 1702.

E. Section-by-Section Analysis of 30 CFR Part 218—Collection of Royalties, Rentals, Bonuses and Other Monies Due the Federal Government and Credits and Incentives Due Lessees, Subpart F—Geothermal Resources

In § 230 of the EPAct, Congress authorized lessees to credit annual rentals paid against royalties. To implement EPAct § 230, MMS proposes to add new sections 218.303 through 218.307 to this subpart.

May I credit rental towards royalty? (Proposed § 218.303)

Proposed section 218.303 would provide that if you pay your annual rental for your lease before the first day of the year for which the annual rental is owed and the annual rental you paid is less than or equal to the royalty you owe that year, then you could credit the annual rental that you paid toward the royalty due for that lease year at any time during that lease year. For example, if you paid $1,000 in rental for the 7th lease year and during that year you owe $50,000 in production royalty, then you could deduct the rental ($1,000) from the monthly royalty due for any month during the 7th lease year, resulting in a net production royalty payment of $49,000 for that year.

On the other hand, if the annual rental you paid is more than the royalty you owe that year, then you would not pay royalty during that lease year. For example, if you paid $1,000 in rental for the 7th lease year and during that year you owe $500 in production royalty, then you would not owe any production royalty. However, the rule would also provide that you may not apply any annual rental paid in excess of the royalty due for a particular lease year as a credit against royalties due for production in a future year.

May I credit rental towards direct use fees? (Proposed § 218.304)

This section would provide that you may not credit annual rental towards direct use fees you are required to pay that year under 30 CFR 206.356(b). Congress did not authorize crediting rentals against fees in the EPAct. Therefore, you would have to pay the direct use fees in addition to the annual rental due.

How do I pay advanced royalties I owe under 43 CFR 3212.15(a)? (Proposed § 218.305)

In § 232 of the EPAct, Congress mandated that if a lessee ceases production for any reason, the lessee must pay advanced royalties in lieu of production royalties to maintain the lease. Therefore, proposed section 218.305 would explain that if you must pay advanced royalties to retain your lease under BLM regulations at 43 CFR 3212.[MRM1]15(a), then you would have to pay an advanced royalty monthly equal to the average monthly royalty you paid under 30 CFR part 206, subpart H, for the last 3 years the lease was producing. If your lease has been producing for less than 3 years, then you would use the average monthly royalty payment for the entire period your lease has been producing continuously.

You would have to ensure that MMS receives your advanced royalty payment before the first day of each month for which production has ceased. You could credit any advanced royalty you pay against your future production royalties recouped after your lease resumes production. You could not reduce the amount of any production royalty paid for any year below zero.

For example, assume that you paid $12,000 in production royalties annually in 2004, 2005, and 2006, and you plan to cease production on January 1, 2007. Your advanced royalty would be $1,000 (($12,000 × 3) / 36) and would be due before January 1, 2007. Also, assume that you paid $12,000 ($1,000 × 12) in advanced royalty from January 1, 2007, through December 31, 2007, and resumed production January 1, 2008. Furthermore, assume that in January 2008, your production royalties due were $1,500. You could recoup $1,500 of the $12,000 as payment for the $1,500 in production royalties due. You also could continue to recoup the $10,500 balance of advanced royalties paid ($12,000 − $1,500) against future production royalties paid.

May I receive a credit against production royalties for in-kind deliveries of electricity I provide under contract to a state or county government? (Proposed § 218.306)

Section 224(a) of the EPAct authorizes MMS to provide lessees with credits against part of the royalty due for in-kind deliveries of electricity that lessees provide to states or counties under contracts the Secretary approves. Therefore, proposed § 218.306 in paragraph (a) would explain if you both deliver electricity in kind to a state or county and pay production royalties, then you may receive a credit against production royalties for electricity that you deliver in kind under contract to a state or county government. It also would explain that you may receive a credit only if three conditions are met. First, the state or county to which you provide electricity is a state or county that would receive a portion of your royalties under 30 U.S.C. 191 or 30 U.S.C 1019, except as otherwise provided under the Mineral Leasing Act for Acquired Lands, 30 U.S.C. 355, because your lease is located in that state or county. If your lease is located in more than one state or county, the revenues are paid to the respective states or counties based on each state's or county's proportionate share of the total acres in the lease. For example, assume you have a 1,000 acre lease. Also, assume that half of your lease is in Nevada and half is in California. If you provide electricity to California, you would be entitled to a credit only against the royalty in value due for the 500 acres located in California.

Second, MMS would have to approve in advance your contract with the state or county to which you are providing in-kind electricity.

Third, your contract would have to provide that you will use the wholesale value of the electricity for the area where your lease is located to establish the specific methodology to determine the amount of the credit.

Paragraph (b) would provide that the maximum credit you may take is equal to the portion of the royalty revenue that MMS would have paid to the state or county that is a party to the contract had you paid royalty in money on all the electricity you delivered to the state or county based on the wholesale value of the electricity. You would have to pay in money any royalty amount that is not offset by the credit allowed under this section, calculated based on the wholesale value of the electricity. For example, assume that you have a geothermal lease in New Mexico and that you delivered 10,000 megawatt-hours of electricity in a month to New Mexico under a contract MMS approved. Furthermore, assume that the wholesale value of megawatt-hours in the area where your lease is located is $30.00 per megawatt-hour that month. If you had paid royalties in money on the basis of that wholesale value, and further assuming that you have a Class I lease with a 10-percent royalty rate, you would have paid $30,000 to MMS. The MMS then would have paid 50 percent of that amount ($15,000) to the State of New Mexico. You would be entitled to a credit of $15,000 against the amount you would otherwise owe to MMS when royalty is calculated on that basis. You would have to pay the remaining $15,000 to MMS in money.

Paragraph (c) would explain that the electricity the state or county government receives from you would satisfy the Secretary's payment obligation to the state or county under 30 U.S.C. 191 or 30 U.S.C. 1019. Thus, using the same example, the 10,000 kilowatt hours you delivered to New Mexico would satisfy the Secretary's payment obligation to that state that month under 30 U.S.C. 191 and 30 U.S.C. 1019, and MMS would not pay any part of the $1,500 that you paid in money to the state.

How do I pay royalties due for my existing leases that qualify for near-term production incentives under 43 CFR part 3212? (Proposed § 218.307)

To implement § 224(c) of the EPAct, MMS proposes to add § 218.307. This section would explain that if you qualify for a production incentive under BLM regulations at 43 CFR part 3212 (§§ 3212.18 through 3212.24), then you would pay 50 percent of the amount of the total royalty that would otherwise be due under 30 CFR part 206, subpart H. For example, if you qualified for a production incentive and you owed $1,000 in royalties under 30 CFR part 206, subpart H, then you would pay $500 in royalties (50 percent of $1,000).

III. Procedural Matters

1. Public Comment Policy

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours and on our Web site at *http://www.mrm.mms.gov/Laws_R_D/FRNotices/FRHome.htm*. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comments. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

2. Summary Cost and Royalty Impact Data

Of the proposed changes to the geothermal valuation regulations outlined above, only a few will have a royalty impact on industry, States, or the Federal Government. This section addresses those changes and discusses the extent of their impacts. There are no "Costs and Benefits," under the meaning identified by OMB, as a result of the proposed rule. However, there are certain estimated royalty effects of the proposed rule to all potentially affected groups: industry, States and local governments, and the Federal Government. These are summarized below. There are no associated costs, to industry or to the Federal Government, of administering the proposed rule.

Of the proposed changes that have royalty cost impacts, three will result in royalty decreases for industry, States, and MMS. One will result in an increase to the counties with producing Federal geothermal leases. The net impact of the six changes will result in an expected overall royalty revenue decrease of $4,101,583 to the Federal Government, a corresponding increase to counties of $4,071,583, and a decrease of $30,000 in royalties to the States.

We have evaluated potential effects on federally recognized Indian tribes and have determined that the changes we are proposing for Federal leases would not apply to and currently would not have an impact on Indian leases. In addition, this proposed rule does not have tribal implications that impose substantial direct compliance costs on Indian tribal governments.

A. Industry

(1) *Royalty Impacts. (a) No Change in Royalties—Electrical Generation.* Because the EPAct mandates that the royalty revenues received by MMS should be the same as what would have been received under the valuation methods of the current regulations, there would be no revenue impact for electrical generation projects. Electrical generation lessees that remain under the current regulations would pay the same

royalties as they have been paying all along. Electrical generation lessees who modify their leases to the new regulation's percentage of gross proceeds method should pay the same level of royalties as they have paid under the current regulations. New lessees would have royalty rates determined by BLM that should result in the same level of royalties for 10 years as they would have paid under the current regulations.

(b) Net Decrease in Royalties—Direct Use—Estimated at $60,000. Current direct use lessees who do not sell the geothermal resources would have the option to convert their leases to the new fee schedule, which would result in a reduction of $60,000 per year from the current level of royalties, a 95-percent reduction. In addition, all new direct use lessees who do not sell the geothermal resources under the new regulations would use the same fee schedule, also paying about 95 percent less than they would have under the current regulations.

(2) Administrative Costs. The MMS has determined that there are no expected administrative cost changes.

B. State and Local Governments

(1) *Royalty Impacts—State Governments. (a) Net Decrease in Royalties—Direct Use—Estimated at $30,000.* The MMS estimates that States impacted by this rule would receive the same royalties as they do currently for electrical generation leases. However, because of the 95-percent decrease in revenue collected from direct use leases, States who receive a share of that revenue under 30 U.S.C. 191 would be impacted by the revenue decrease. It is unknown how this would affect the counties because the States distribute royalty revenues to their counties directly without MMS involvement. The new fee schedule would result in approximately 95-percent reduction in royalties paid to States from direct use projects. The MMS estimates the reduction to be $30,000 per year.

(2) Administrative Costs—State Governments. The MMS has determined that there are no expected administrative cost changes for State governments.

(3) Royalty Impacts—Local Governments. (a) Net Increase in Royalties—Estimated at $4,071,583. The EPAct mandates a new distribution of 25 percent of royalties to the counties. This 25 percent would cut the Federal share in half from 50 percent to 25 percent, and leaves the States' share as 50 percent. The counties would receive a new 25-percent distribution of total geothermal royalty revenue under the EPAct, which would increase their revenues by $4,071,583 per year from the Federal Government.

Prior to the EPAct, MMS distributed 50 percent of the geothermal royalties to the States and retained 50 percent for the Federal Government. The EPAct now mandates that MMS directly distribute 25 percent of geothermal royalties to the counties that contain producing geothermal Federal leases. This 25-percent county share is taken from the Federal share, cutting it in half, to 25 percent of the total geothermal royalties. The State distribution of 50 percent would remain unchanged under the EPAct.

(4) Administrative Costs—Local Governments. This rule would not impose any additional burden on local governments. The counties where geothermal facilities are located on Federal leases would receive a new distribution of 25 percent of the total geothermal royalties for the first time directly from the Federal Government, whereas in the past it was left up to the States to distribute geothermal royalty revenues to the counties. It is not known exactly how much geothermal royalty revenue is distributed to counties by the States, as it is up to each State to do this distribution and is not currently under MMS control.

C. Federal Government

The total combined royalty impact on the Federal Government would be a decrease of $4,101,583 ($4,071,583 for electrical generation and $30,000 for direct use).

(1) Royalty Impacts (a) Net Decrease in Royalties—Electrical Generation—Estimated at $4,071,583. The Federal Government would be impacted by a net overall decrease in royalties as a result of the proposed changes to the regulations governing the new distribution of 25 percent of total royalties to the counties and the new direct use fee schedule. The net impact on the Federal Government would be a decrease of approximately $4,071,583 for electrical generation.

(b) Net Decrease in Royalties—Direct Use—Estimated at $30,000. The Federal Government would also be impacted by the 95-percent decrease in revenues from direct use leases due to the proposed direct use fee schedule. The MMS estimates the reduction to be $30,000 per year.

(2) Administrative Costs—Federal Government. The MMS does not expect any administrative cost changes for the Federal Government.

D. Summary of Costs and Royalty Impacts to Industry, State and Local Governments, and the Federal Government

In the table below, a negative number means a reduction in payment or receipt of royalties or a reduction in costs. A positive number means an increase in payment or receipt of royalties or an increase in costs. The net expected change in royalty impact is the sum of the royalty increases and decreases. If no costs are represented for administrative or royalty impacts, then the increase, decrease and net values impacts are all zero.

SUMMARY OF EXPECTED COSTS AND ROYALTY IMPACTS

Description	Costs and royalty increases or royalty decreases	
	First year	Subsequent years
A. Industry		
Royalty Decrease from Direct Use Fee Schedule	−$60,000	−$60,000
Net Expected Change in Royalty (direct use fee) Payments from Industry	−60,000	−60,000
B. State and Local Governments		
State:		
Royalty Decrease to State Governments	−30,000	−30,000
Local Governments (counties):		

SUMMARY OF EXPECTED COSTS AND ROYALTY IMPACTS—Continued

Description	Costs and royalty increases or royalty decreases	
	First year	Subsequent years
Royalty Increase to counties	+4,071,583	4,071,583
Net Expected Change in Royalty Payments to State and Local Governments	+4,041,583	+4,041,583
C. Federal Government		
Royalty Decrease from 25 percent Royalty Disbursement to Counties	−4,071,583	−4,071,583
Royalty Decrease from New Direct Use Fee Schedule Implementation	−30,000	−30,000
Net Expected Change in Royalty Payments to Federal Government	−4,101,583	−4,101,583

3. Regulatory Planning and Review, Executive Order 12866

In accordance with the criteria in Executive Order 12866, this proposed rule is not a significant regulatory action. The Office of Management and Budget (OMB) makes the final determination under Executive Order 12866.

a. This proposed rule would not have an annual effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of Government.

b. This proposed rule would not create inconsistencies with other agencies' actions.

c. This proposed rule would not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

d. This proposed rule would not raise novel legal or policy issues. Under the criteria in Executive Order 12866, this proposed rule is not an economically significant regulatory action as it does not exceed the $100 million threshold.

4. Regulatory Flexibility Act

The Department of the Interior certifies that this proposed rule would not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

Your comments are important. The Small Business and Agricultural Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. You may comment to the Small Business Administration without fear of retaliation. Disciplinary action for retaliation by an MMS employee may include suspension or termination from employment with the Department of the Interior.

5. Small Business Regulatory Enforcement Act (SBREFA)

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule:

a. Would not have an annual effect on the economy of $100 million or more.

b. Would not cause a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions.

c. Would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

6. Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

a. This proposed rule would not "significantly or uniquely" affect small governments. Therefore, a Small Government Agency Plan is not required.

b. This proposed rule would not produce a Federal mandate of $100 million or greater in any year, i.e., it would not be a "significant regulatory action" under the Unfunded Mandates Reform Act. The analysis prepared for Executive Order 12866 meets the requirements of the Unfunded Mandates Reform Act.

7. Governmental Actions and Interference With Constitutionally Protected Property Rights (Takings), Executive Order 12630

In accordance with Executive Order 12630, this proposed rule does not have significant takings implications. A takings implication assessment is not required.

8. Federalism, Executive Order 13132

In accordance with Executive Order 13132, this proposed rule would not have federalism implications; hence, a federalism assessment is not required. It would not substantially and directly affect the relationship between the Federal and state governments. The management of Federal leases is the responsibility of the Secretary of the Interior. Royalties collected from Federal leases are shared with state governments on a percentage basis as prescribed by law. This proposed rule would not alter any lease management or royalty value sharing provisions. It would determine the value of production for royalty value computation purposes only. This proposed rule would not impose costs on states or localities.

9. Civil Justice Reform, Executive Order 12988

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this proposed rule would not unduly burden the judicial system and meets the exception requirements of §§ 3(a) and 3(b)(2) of the Order.

10. Paperwork Reduction Act of 1995 (PRA)

This proposed rule, RIN 1010–AD32, would contain new information collection requirements. The title of the new information collection request (ICR) is "30 CFR Parts 202, 206, 210, 217, and 218—Valuation of Geothermal Resources."

The intent of this proposed rulemaking is to change the methodology for geothermal royalty valuation and simplify these calculations for both direct use and electrical generation purposes. We have submitted an ICR to OMB for review and approval under § 3507(d) of the PRA. When this rule becomes effective, we will prepare the required OMB Forms and transfer the burden hours to

their respective primary collections. As part of our continuing effort to reduce paperwork and respondent burden, we will invite the public and other Federal agencies to comment on any aspect of the reporting burden through the information collection process.

Submit written comments by either fax (202) 395–6566 or e-mail (*OIRA_Docket@omb.eop.gov*) directly to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Department of the Interior [OMB Control Number ICR 1010-New, as it relates to the proposed geothermal valuation rule].

Also submit copies of written comments to Sharron L. Gebhardt, Lead Regulatory Specialist, Minerals Management Service, Minerals Revenue Management, P.O. Box 25165, MS 302B2, Denver, Colorado 80225. If you use an overnight courier service, our courier address is Building 85, Room A–614, Denver Federal Center, W. 6th Ave., and Kipling Blvd., Denver, Colorado 80225. You may also e-mail your comments to us at *mrm.comments@mms.gov*. Include the title of the information collection and the OMB control number in the "Attention" line of your comment. Also include your name and return address. If you do not receive a confirmation that we have received your e-mail, contact Sharron Gebhardt at (303) 231–3211.

The OMB has up to 60 days to approve or disapprove this collection of information but may respond after 30 days. Therefore, public comments should be submitted to OMB within 30 days in order to assure their maximum consideration. However, we will consider all comments received during the comment period for this notice of proposed rulemaking.

This ICR has a new collection of regulatory information for a total program change of 174 burden hours. The proposed rule uses Form-MMS 2014, which is covered in ICR 1010–0140 (expires October 31, 2006). See the following chart for burden hours by CFR citation:

BURDEN BREAKDOWN

30 CFR Parts 202, 206, 210, 217, and 218	Reporting and recordkeeping requirement	Hour burden	Average number of annual responses	Annual burden hours
Part 202—Royalties Subpart H—Geothermal Resources				
§ 202.353 Measurement standards for reporting and paying royalties.				
202.353	(a) For geothermal resources used to generate electricity, you must report the quantity on which royalty is due on Form MMS–2014 * * *. (b) For geothermal resources used in direct use processes, you must report the quantity on which royalty or fee is due on Form MMS–2014 * * *. (c) For byproducts, you must report the quantity on which royalty is due on Form MMS–2014 * * *. (d) For commercially demineralized water, you must report the quantity on which royalty is due on Form MMS–2014 * * *.	Burden covered under OMB Control Number 1010–0140 (expires October 31, 2006).		
	(e) You must maintain quality measurements for audit purposes.	The Office of Regulatory Affairs (ORA) determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
Part 206—Product Valuation Subpart H—Geothermal Resources				
§ 206.352 How do I calculate the royalty due on geothermal resources used for commercial generation of electricity?				
206.352;	(b)(1)(ii) A royalty determined by any other reasonable method approved by MMS under § 206.364 of this subpart.	1	1	1
§ 206.353 How do I determine transmission deductions?				
206.353	(c)(2)(i)(A) such purchase as necessary * * *.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions		
	(d)(9) Any other directly allocable and attributable operating expense which you can document, including * * *.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions		
	(e) Allowable maintenance expenses include: * * * (4) Other directly allocable and attributable maintenance expenses, which you can document.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
	(g) To compute costs associated with capital investment * * * the lessee may not later elect to change to the other alternative without MMS approval.	1	1	1

BURDEN BREAKDOWN—Continued

30 CFR Parts 202, 206, 210, 217, and 218	Reporting and recordkeeping requirement	Hour burden	Average number of annual responses	Annual burden hours
	(h) To compute depreciation you may elect * * * * you may not change methods without MMS approval.	1	1	1
	(l) * * * In conducting reviews and audits, MMS may require you to submit arm's-length transmission contracts, production agreements, operating agreements, and related documents.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
	(l) * * * Recordkeeping requirements are found at part 212 of this chapter.	Burden hours covered under OMB Control Number 1010–0140 (expires October 31, 2006).		
	(n) In conducting reviews and audits, MMS may require you to submit all data used to calculate the deduction. You must comply with any such requirements within the time MMS specifies.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
	(n) Recordkeeping requirements are found at part 212 of this chapter.	Burden hours covered under OMB Control Number 1010–0140 (expires October 31, 2006).		
	(o)(2) You must submit corrected Forms MMS–2014 to reflect adjustments to royalty payments in accordance with MMS instructions.	Burden hours covered under OMB Control Number 1010–0140 (expires October 31, 2006).		
	§ 206.354 How Do I Determine Generating Deductions?			
206.354	(b)(1)(ii) You must redetermine your generating costs annually * * * you may not later elect to use a different deduction period without MMS approval.	1	1	1
	(c)(2)(i)(A) The purchase is necessary * * *	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
	(d)(9) Any other directly allocable and attributable operating expense which you can document, including * * *.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
	(e) Allowable maintenance expenses include: * * * (4) Other directly allocable and attributable maintenance expenses, which you can document.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
	(g) * * * After a lessee has elected to use either method, the lessee may not later elect to change to the other alternative without MMS approval.	1	1	1
	(h) To compute depreciation, you may elect to use either a straight-line depreciation method based on the life of the geothermal project, usually the term of the electricity sales contract or other depreciation period acceptable to MMS, or a unit-of-production method. After you make an election, you may not change methods without MMS approval.	1	1	1
	(l)(1) * * * In conducting reviews and audits MMS may require you to submit arm's-length power plant contracts * * *.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
	(l)(1) * * * Recordkeeping requirements are found at part 212 of this chapter.	Burden hours covered under OMB Control Number 1010–0140 (expires October 31, 2006).		
	(l)(3) * * * The MMS may require you to submit all data used to calculate the deduction.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
	(l)(3) * * * Recordkeeping requirements are found at part 212 of this chapter.	Burden hours covered under OMB Control Number 1010–0140 (expires October 31, 2006).		
	(m)(2) You must submit corrected Forms-2014 to reflect adjustments to royalty payments in accordance with MMS instructions.	Burden hours covered under OMB Control Number 1010–0140 (expires October 31, 2006).		

BURDEN BREAKDOWN—Continued

30 CFR Parts 202, 206, 210, 217, and 218	Reporting and recordkeeping requirement	Hour burden	Average number of annual responses	Annual burden hours
§ 206.356 How do I calculate royalty due on geothermal resources I use for direct use purposes?				
206.356	(a)(1) The weighted average of the gross proceeds * * * In evaluating the acceptability of arm's-length contracts * * *.	1	1	1
	(a)(2) * * * The efficiency of the alternative energy source shall be * * * or proposed by the lessee and approved MMS.	48	2	96
	(a)(3) A royalty determined by * * * approved by MMS * * *.	1	1	1
	(b)(3) * * * you must provide MMS data showing the amount of geothermal production in pounds or gallons of geothermal fluid to input into the fee schedule * * *.	1	1	1
	(c) For geothermal resources other than hot water, MMS will determine fees on a case-by-case basis.	1	1	1
§ 206.357 How do I calculate royalty due on byproducts?				
206.357	(c) A value determined by any other reasonable valuation method approved by MMS..	1	1	1
§ 206.358 What are byproduct transportation allowances?				
206.358	(d) Reporting requirements. (1) Arm's-length contracts. (i) You must use a discrete field on Form MMS–2014 to notify MMS of a transportation allowance.	Burden hours covered under OMB Control Number 1010–0140 (expires October 31, 2006).		
	(d)(1)(ii) In conducting reviews and audits, MMS may require you to submit * * *.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
	(d)(1)(ii) Recordkeeping requirements are found at part 212 of this chapter.	Burden hours covered under OMB Control Number 1010–0140 (expires October 31, 2006).		
	(d)(2) Non-arm's-length or no contract. (i) You must use a discrete field on Form MMS–2014 to notify MMS of a transportation allowance.	Burden hours covered under OMB Control Number 1010–0140 (expires October 31, 2006).		
	(d)(2)(iii) In conducting reviews and audits, MMS may require you to submit * * *.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
	(d)(2)(iii) Recordkeeping requirements are found at part 212 of this chapter.	Burden hours covered under OMB Control Number 1010–0140 (expires October 31, 2006).		
	(e)(2) You must submit corrected Form MMS–2014 to reflect adjustments to royalty payments in accordance with MMS instructions.	Burden hours covered under OMB Control Number 1010–0140 (expires October 31, 2006).		
	(h) If MMS reviews or audits your royalty payments, you must make available to authorized MMS representatives or to other authorized persons all transportation contracts and all other information as may be necessary to support a byproduct transportation allowance.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions		
§ 206.359 How do I determine byproduct transportation allowances?				
206.359	(a)(2) * * * MMS will require you to determine the * * * MMS will notify you and give you an opportunity to provide written information justifying your transportation costs.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
	(c)(2)(i)(A) The purchase is necessary * * *	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
	(d)(9) Any other directly allocable and attributable operating expense which you can document, including * * *.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions		
	(e) Allowable maintenance expenses include:* * * (4) Other directly allocable and attributable maintenance expenses, which you can document.* * *.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions		

BURDEN BREAKDOWN—Continued

30 CFR Parts 202, 206, 210, 217, and 218	Reporting and recordkeeping requirement	Hour burden	Average number of annual responses	Annual burden hours
	(g) To compute costs * * * the lessee may not later elect to change to the other alternative without MMS approval.* * *.	1	1	1
	(h) To compute depreciation * * * After you make an election, you may not change methods without MMS approval..	1	1	1
§ 206.360 What records must I keep to support my calculations of royalty or fees under this subpart?				
206.360	* * * you must retain all data relevant * * *	Burden hours covered under OMB Control Number 1010–0140 (expires October 31, 2006).		
	Recordkeeping requirements are found in part 212 of this chapter..	Burden hours covered under OMB Control Number 1010–0140 (expires October 31, 2006).		
	You must be able to show: (1) How you calculated * * * (2) How you complied * * * (b) Upon request, you must submit all data to MMS..	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
§ 206.361 How will MMS determine whether my royalty, gross proceeds or fees are correct?				
206.361	(b) * * * MMS may require you to increase the gross proceeds to reflect * * * MMS may require you to use another valuation method * * * MMS will notify you to give you an opportunity to provide written information justifying your gross proceeds * * *.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
	(c) For arm's-length sales, you have the burden of demonstrating * * *.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
	(d) The MMS may require you to certify that the provisions in your sales contract include * * *.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		
	(f)(2) Contract revisions or amendments you make must be in writing and signed by all parties to the contract..	1	1	1
§ 206.364 How do I request a value or gross proceeds determination?				
206.364	(a) You may request a value determination from MMS. * * Your request must:. (1) Be in writing * * *	3	20	60
Part 210—Forms and Reports Subpart H—Geothermal Resources				
§ 210.352 Payor information forms.				
210.352	The Payor Information Form * * * (f) Abandonment of a lease. * * *.	The payor information form was discontinued through reengineering by 2001. This rule removes geothermal references to the form from the Code of Federal Regulations. There are no current burden hours.		
Part 217—Audits and Inspections Subpart G—Geothermal Resources				
§ 217.300 Audits or review of records.				
217.300	The Secretary, or his/her authorized representative shall initiate and conduct audits or reviews relating * * * Audits or reviews will also relate to compliance * * * All audits or reviews will be conducted in accordance with * * *.	The ORA determined that the audit process is not covered by the PRA because MMS staff asks non-standard questions to resolve exceptions.		

BURDEN BREAKDOWN—Continued

30 CFR Parts 202, 206, 210, 217, and 218	Reporting and recordkeeping requirement	Hour burden	Average number of annual responses	Annual burden hours
PART 218—Collection of royalties, rentals, bonuses and other monies due the Federal Government and Credits and Incentives Due Lessees				
Subpart F—Geothermal Resources				
§ 218.306 May I receive a credit against production royalties for in-kind deliveries of electricity I provide under contract to a state or county government?				
218.306	(a)(2) MMS approves in advance your contract * * *.	4	1	4
Burden Hour Total.			37	174

Public Comment Policy. The PRA (44 U.S.C. 3501 et seq.) provides that 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. Before submitting an ICR to OMB, PRA § 3506(c)(2)(A) requires each agency "* * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *." Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

The PRA also requires agencies to estimate the total annual reporting "non-hour cost" burden to respondents or recordkeepers resulting from the collection of information. If you have costs to generate, maintain, and disclose this information, you should comment and provide your total capital and startup cost components or annual operation, maintenance, and purchase of service components. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Capital and startup costs include, among other items, computers and software you purchase to prepare for collecting information; monitoring, sampling, and testing equipment; and record storage facilities. Generally, your estimates should not include equipment or services purchased: (i) Before October 1, 1995; (ii) to comply with requirements not associated with the information collection; (iii) for reasons other than to provide information or keep records for the Government; or (iv) as part of customary and usual business or private practices.

We will summarize written responses to this proposed information collection and address them in our final rule. We will provide a copy of the ICR to you without charge upon request, and the ICR will also be posted on our Web site at *www.mrm.mms.gov/Laws_R_D/FRNotices/FRInfColl.htm.*

We will post all comments in response to this proposed information collection on our Web site at *www.mrm.mms.gov/Laws_R_D/InfoColl/InfoColCom.htm.* We will also make copies of the comments available for public review, including names and addresses of respondents, during regular business hours at our offices in Lakewood, Colorado. Individual respondents may request that we withhold their home address from the public record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you request that we withhold your name and/or address, state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

11. National Environmental Policy Act (NEPA)

This proposed rule deals with financial matters and would have no direct effect on MMS decisions on environmental activities. Pursuant to 516 DM 2.3A (2), Section 1.10 of 516 DM 2, Appendix 1 excludes from documentation in an environmental assessment or impact statement "policies, directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature; or the environmental effects of which are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or case-by-case." Section 1.3 of the same appendix clarifies that royalties and audits are considered to be routine financial transactions that are subject to categorical exclusion from the NEPA process.

12. Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951) and Department Manual 512 DM 2, we have evaluated potential effects on federally recognized Indian tribes and have determined that the changes we are proposing for Federal leases do not apply to and would not have an impact on Indian leases.

13. Effects on the Nation's Energy Supply, Executive Order 13211

In accordance with Executive Order 13211, this regulation would not have a significant adverse effect on the Nation's energy supply, distribution, or use. The proposed changes primarily involve royalty valuation of geothermal production to simplify royalty

valuation, hence, any impact to the way industry does business should be positive, and as the EPAct directs, should encourage energy development and marketing. The proposed rule would not otherwise impact energy supply, distribution, or use.

14. Consultation and Coordination With Indian Tribal Governments, Executive Order 13175

In accordance with Executive Order 13175, we have evaluated this proposed rule and determined that it has no potential effects on federally recognized Indian tribes. This proposed rule does not have tribal implications that impose substantial direct compliance costs on Indian tribal governments.

15. Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (A "section" appears in bold type and is preceded by the symbol § and a numbered heading; for example, § 204.200 What is the purpose of this part?) (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? What else could we do to make the rule easier to understand? Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail the comments to this address: *Exsec@ios.doi.gov*.

List of Subjects in 30 CFR Parts 202, 206, 210, 217, and 218

Geothermal, valuation, royalty, Energy Policy Act of 2005, direct use, arm's length.

Dated: June 28, 2006.

R. M. "Johnnie" Burton,

Director, Minerals Management Service, Exercising the delegated authority of the Assistant Secretary of Land and Minerals Management.

For the reasons stated in the preamble, the Minerals Management Service proposes to amend 30 CFR parts 202, 206, 210, and 218 as set forth below:

PART 202—ROYALTIES

1. The authority for part 202 continues to read as follows:

Authority: 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*; 1701 *et seq.*; 31 U.S.C. 9701; 43 U.S.C. 1301 *et seq.*; 1331 *et seq.*, 1801 *et seq.*

Subpart H—Geothermal Resources

2. Revise § 202.351 to read as follows:

§ 202.351 Royalties on geothermal resources.

(a)(1) Royalties on geothermal resources, including byproducts, shall be at the royalty rate(s) specified in the lease, unless the Secretary of the Interior temporarily waives, suspends, or reduces that rate(s). Royalty value is determined under 30 CFR part 206, subpart H.

(2) Fees in lieu of royalties on geothermal resources are prescribed in 30 CFR part 206, subpart H.

(3) Except for the amount credited against royalties for in-kind deliveries of electricity to a state or county under 30 CFR 218.306, you must pay royalties and direct use fees in money.

(b)(1) Royalties or fees are due on all geothermal resources, except those specified in paragraph (b)(2) of this section, that are produced from a lease and that are sold or used by the lessee or are reasonably susceptible to sale or use by the lessee.

(2)(i) Geothermal resources that are unavoidably lost, as determined by the Bureau of Land Management (BLM), and geothermal resources that are reinjected prior to use on or off the lease, as approved by BLM, are not subject to royalty or direct use fees.

(ii) The Minerals Management Service (MMS) will allow free of royalty or fees a reasonable amount of geothermal energy necessary to generate electricity for internal power plant operations or to generate electricity returned to the lease for lease operations. If a power plant uses geothermal production from more than one lease, or uses unitized or communitized production, only that proportionate share of each lease's production (actual or allocated) necessary to operate the power plant may be used royalty free.

(iii) MMS will also allow royalty-free a reasonable amount of commercially demineralized water necessary for power plant operations or otherwise used on or for the benefit of the lease.

(3) Royalties on byproducts are due at the time the recovered byproduct is used, sold, or otherwise finally disposed of. Byproducts produced and added to stockpiles or inventory do not require payment of royalty until the byproducts are sold, utilized, or otherwise finally disposed of. The MMS may ask BLM to increase the lease bond to protect the lessor's interest when BLM determines that stockpiles or inventories become excessive.

(c) If BLM determines that geothermal resources (including byproducts) were avoidably lost or wasted from the lease, or that geothermal resources (including byproducts) were drained from the lease for which compensatory royalty (or compensatory fees in lieu of compensatory royalty) are due, the value of those geothermal resources, or the royalty or fees owed, shall be determined under 30 CFR part 206, subpart H.

(d) If a lessee receives insurance or other compensation for unavoidably lost geothermal resources (including byproducts), royalties at the rates specified in the lease (or fees in lieu of royalties) are due on the amount of, or as a result of, that compensation. This paragraph shall not apply to compensation through self-insurance.

3. Revise § 202.353 to read as follows:

§ 202.353 Measurement standards for reporting and paying royalties.

(a) For geothermal resources used to generate electricity, you must report the quantity on which royalty is due on Form MMS–2014 (Report of Sales and Royalty Remittance) as follows:

(1) For geothermal resources for which royalty is calculated under 30 CFR 206.352(a), (b)(2), and (b)(3), you must report quantities in:

(i) Kilowatt-hours to the nearest whole kilowatt-hour if the contract specifies payment in terms of generated electricity;

(ii) Thousands of pounds to the nearest whole thousand pounds if the contract for the geothermal resources specifies payment in terms of weight; or

(iii) Millions of Btu's to the nearest whole million Btu if the sales contract for the geothermal resources specifies payment in terms of heat or thermal energy.

(2) For geothermal resources for which royalty is calculated under 30 CFR 206.352(b)(1), you must report the quantities in kilowatt-hours to the nearest whole kilowatt-hour.

(b) For geothermal resources used in direct use processes, you must report the quantity on which royalty or fee is due on Form MMS–2014 in:

(1) Millions of Btu's to the nearest whole million Btu if valuation is in

terms of thermal energy used or displaced;

(2) Millions of gallons to the nearest million gallons of geothermal fluid produced if valuation is in terms of volume;

(3) Millions of pounds to the nearest million pounds of geothermal fluid produced if valuation is in terms of mass; or

(4) Any other measurement unit MMS approves for valuation and reporting purposes.

(c) For byproducts, you must report the quantity on which royalty is due on Form MMS–2014 consistent with MMS-established reporting standards.

(d) For commercially demineralized water, you must report the quantity on which royalty is due on Form MMS–2014 in hundreds of gallons to the nearest hundred gallon.

(e) You need not report the quality of geothermal resources, including byproducts, to MMS. You must maintain quality measurements for audit purposes. Quality measurements include, but are not limited to:

(1) Temperatures and chemical analyses for fluid geothermal resources; and

(2) Chemical analyses, weight percent, or other purity measurements for byproducts.

PART 206—PRODUCT VALUATION

4. The authority for part 206 continues to read as follows:

Authority: 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*; 1701 *et seq.*; 31 U.S.C. 9701; 43 U.S.C. 1301 *et seq.*; 1331 *et seq.*, 1801 *et seq.*

5–6. Revise subpart H to read as follows:

Subpart H—Geothermal Resources

Sec.

Subpart H—Geothermal Resources

§ 206.350 What is the purpose of this subpart?

(a) This subpart applies to all geothermal resources produced from Federal geothermal leases issued pursuant to the Geothermal Steam Act of 1970 (GSA), as amended by the Energy Policy Act of 2005 (EPAct) (30 U.S.C. 1001 *et seq.*). The purposes of this subpart are to prescribe how to calculate royalties and fees for geothermal production.

(b) MMS may audit and adjust all royalty and fee payments.

(c) If the regulations in this subpart are inconsistent with:

(1) A Federal statute;

(2) A settlement agreement between the United States and a lessee resulting from administrative or judicial litigation;

(3) A written agreement between the lessee and the MMS Director or Assistant Secretary, Land and Minerals Management of the Department of the Interior, establishing a method to determine the royalty from any lease that MMS expects at least would approximate the value or royalty established under this subpart, including a value or gross proceeds determination under § 206.364 of this subpart; or

(4) An express provision of a geothermal lease subject to this subpart, then the statute, settlement agreement, written agreement, or lease provision will govern to the extent of the inconsistency.

§ 206.351 What definitions apply to this subpart?

Affiliate means a person who controls, is controlled by, or is under common control with another person. For purposes of this subpart:

(1) Ownership or common ownership of more than 50 percent of the voting securities, or instruments of ownership, or other forms of ownership, of another person constitutes control. Ownership of less than 10 percent constitutes a presumption of noncontrol that MMS may rebut.

(2) If there is ownership or common ownership of 10 through 50 percent of the voting securities or instruments of ownership, or other forms of ownership of another person, MMS will consider the following factors in determining whether there is control under the circumstances of a particular case:

(i) The extent to which there are common officers or directors;

(ii) With respect to the voting securities, or instruments of ownership, or other forms of ownership: the percentage of ownership or common ownership, the relative percentage of ownership or common ownership compared to the percentage(s) of ownership by other persons, whether a person is the greatest single owner, or whether there is an opposing voting bloc of greater ownership;

(iii) Operation of a lease, plant, pipeline, or other facility;

(iv) The extent of participation by other owners in operations and day-to-day management of a lease, plant, pipeline, or other facility; and

(v) Other evidence of power to exercise control over or common control with another person.

(3) Regardless of any percentage of ownership or common ownership, relatives, either by blood or marriage, are affiliates.

Allowance means a deduction in determining value for royalty purposes.

Arm's-length contract means a contract or agreement between independent persons who are not affiliates and who have opposing economic interests regarding that contract. To be considered arm's length for any production month, a contract must satisfy this definition for that month, as well as when the contract was executed.

Audit means a review, conducted in accordance with generally accepted accounting and auditing standards, of royalty or fee payment compliance activities of lessees or other interest holders who pay royalties, fees, rents, or bonuses on Federal geothermal leases.

Byproduct (or mineral) means products or minerals (exclusive of oil, hydrocarbon gas, and helium), found in solution or in association with geothermal steam, that no person would extract and produce by themselves because they are worth less than 75 percent of the value of the geothermal steam or because extraction and production would be too difficult.

Byproduct recovery facility means a facility where byproducts are placed in marketable condition.

Byproduct transportation allowance means an allowance for the reasonable, actual costs of moving byproducts to a point of sale or delivery off the lease, unit area, or communitized area, or away from a byproduct recovery facility. The byproduct transportation allowance does not include gathering costs. You must report a byproduct transportation allowance as a separate discrete field on the Form MMS–2014.

Class I lease means:

(1) A lease that BLM issued under the GSA before August 8, 2005, for which the lessee does not elect to convert to a Class II lease under 43 CFR 3212.25; or

(2) A lease issued in response to an application that was pending on August 8, 2005, for which the lessee does not elect to convert to a Class II lease under 43 CFR 3200.8.

Class II lease means a geothermal lease that BLM issued on or after [effective date of final BLM regulation] under 43 CFR subparts 3203, 3204, or 3205, except for a lease issued in response to an application that was pending on August 8, 2005, which the lessee elects not to convert to a Class II lease under 43 CFR 3200.8.

Class III lease means a Class I lease that the lessee converts to a Class II lease under 43 CFR 3212.25.

Commercial production or generation of electricity means generation of electricity that is sold or is subject to sale, including the electricity or energy that is required to convert geothermal energy into electrical energy for sale.

Contract means any oral or written agreement, including amendments or revisions thereto, between two or more persons and enforceable by law that with due consideration creates an obligation.

Deduction means a subtraction the lessee uses to determine the value of geothermal resources produced from a Class I lease that the lessee uses to generate electricity.

Delivered electricity means the amount of electricity in kilowatt-hours delivered to the purchaser.

Direct use means the utilization of geothermal resources for commercial, residential, agricultural, public facilities, or other energy needs, other than the commercial generation of electricity.

Direct use facility means a facility that uses the heat or other energy of the geothermal resource for direct use purposes.

Electrical facility means a power plant or other facility that uses a geothermal resource to generate electricity.

Field means the land surface vertically projected over a subsurface geothermal reservoir encompassing at least the outermost boundaries of all geothermal accumulations known to be within that reservoir. Geothermal fields are usually given names and their official boundaries are often designated by regulatory agencies in the respective states in which the fields are located.

Gathering means the efficient movement of lease production from the wellhead to the point of utilization.

Generating deduction means a deduction for the lessee's reasonable, actual costs of generating plant tailgate electricity.

Geothermal resources mean:

(1) All products of geothermal processes, including indigenous steam, hot water, and hot brines;

(2) Steam and other gases, hot water, and hot brines resulting from water, gas, or other fluids artificially introduced into geothermal formations;

(3) Heat or other associated energy found in geothermal formations; and

(4) Any byproducts.

Gross proceeds (for royalty payment purposes) means the total monies and other consideration accruing to a geothermal lessee for the sale of electricity or of the geothermal resource. Gross proceeds includes, but is not limited to:

(1) Payments to the lessee for certain services such as effluent injection, field operation and maintenance, drilling or workover of wells, or field gathering to the extent that the lessee is obligated to perform such functions at no cost to the Federal Government;

(2) Reimbursements for production taxes and other taxes. Tax reimbursements are part of gross proceeds accruing to a lessee even though the Federal royalty interest may be exempt from taxation; and

(3) Any monies and other consideration, including the forms of consideration identified in this paragraph, to which a lessee is contractually or legally entitled but which it does not seek to collect through reasonable efforts.

Lease means a geothermal lease issued under the authority of the GSA, unless the context indicates otherwise.

Lessee (you) means any person to whom the United States issues a geothermal lease, and any person who has been assigned an obligation to make royalty, fee, or other payments required by the lease. This includes any person who has an interest in a geothermal lease as well as an operator or payor who has no interest in the lease but who has assumed the royalty, fee, or other payment responsibility. This also includes any affiliate of the lessee that uses the geothermal resource to generate electricity, in a direct use process, or to recover byproducts, or any affiliate that sells or transports lease production.

Marketable condition means lease products that are sufficiently free from impurities and otherwise in a condition that they will be accepted by a purchaser under a sales contract typical for the disposition from the field or area of such lease products.

Person means any individual, firm, corporation, association, partnership, consortium, or joint venture (when established as a separate entity).

Plant parasitic electricity means electricity used to run a power plant.

Plant tailgate electricity means the amount of electricity in kilowatt-hours generated by a power plant exclusive of plant parasitic electricity, but inclusive of any electricity generated by the power plant and returned to the lease for lease operations. Plant tailgate electricity should be measured at, or calculated for, the high voltage side of the transformer in the plant switchyard.

Point of utilization means the power plant or direct use facility in which the geothermal resource is utilized.

Public purpose means a program carried out by a state, tribal, or local government for the purpose of providing facilities or services for the benefit of the public in connection with, but not limited to, public health, safety or welfare, other than the commercial generation of electricity. Use of lands or facilities for habitation, cultivation, trade or manufacturing is permissible only when necessary for and integral to (*i.e.*, an essential part of) the public purpose.

Public safety or welfare means a program carried out or promoted by a public agency for public purposes involving, directly or indirectly, protection, safety, and law enforcement activities, and the criminal justice system of a given political area. Public safety or welfare may include, but are not limited to, those carried out by:

(1) Public police departments;

(2) Sheriffs' offices;

(3) The courts;

(4) Penal and correctional institutions (including juvenile facilities);

(5) State and local civil defense organizations; and

(6) Fire departments and rescue squads (including volunteer fire departments and rescue squads supported in whole or in part with public funds).

Reasonable alternative fuel means a conventional fuel (such as coal, oil, gas, or wood) that would normally be used

as a source of heat in direct-use operations.

Secretary means the Secretary of the Department of the Interior or any person duly authorized to exercise the powers vested in that office.

Transmission deduction means a deduction for the lessee's reasonable actual costs incurred to wheel or transmit the electricity from the lessee's power plant to the purchaser's delivery point.

Wheeling means the transmission of electricity from a power plant to the point of delivery.

§ 206.352 How do I calculate the royalty due on geothermal resources used for commercial generation of electricity?

(a) If you sold geothermal resources produced from Class I, II, and III leases at arm's length that the purchaser uses to generate electricity, then the royalty on the geothermal resources is the gross proceeds accruing to you from the sale of the geothermal resource to the arm's-length purchaser times the royalty rate in your lease or that BLM prescribes or calculates under 43 CFR 3211.17. See § 206.361 for additional provisions applicable to determining gross proceeds under arm's-length sales.

(b) If you use the geothermal resource in your own power plant for the generation and sale of electricity:

(1) For Class I leases, you must determine the royalty on geothermal resources produced in accordance with the first applicable of the following paragraphs:

(i) The gross proceeds accruing to you for the arm's-length sale of the electricity less applicable deductions determined under § 206.353 and § 206.354 of this part times the royalty rate in your lease. See § 206.361 for additional provisions applicable to determining gross proceeds under arm's-length sales. Under no circumstances shall the deductions reduce the royalty of the geothermal resource to zero; or

(ii) A royalty determined by any other reasonable method approved by MMS under § 206.364 of this subpart.

(2) For Class II leases, the royalty on geothermal resources produced is your gross proceeds from the sale of electricity for the production month multiplied by the royalty rate BLM prescribed for your lease under 43 CFR 3211.17. See § 206.361 for additional provisions applicable to determining gross proceeds under arm's-length sales. You may not reduce gross proceeds by any deductions.

(3) For Class III leases, the royalty on geothermal resources produced is your gross proceeds from the sale of electricity for the production month multiplied by the royalty rate BLM calculated for your lease under 43 CFR 3211.17. See § 206.361 for additional provisions applicable to determining gross proceeds under arm's-length sales. You may not reduce gross proceeds by any deductions.

§ 206.353 How do I determine transmission deductions?

(a) If you determine the value of your geothermal resources under § 206.352(b)(1)(i) of this subpart, you may subtract a transmission deduction from the gross proceeds you received for the sale of electricity to determine the plant tailgate value of the electricity.

(1) The transmission deduction consists of either or both of two components:

(i) Transmission line costs as determined under paragraph (b) of this section; and

(ii) Wheeling costs if the electricity is transmitted across a third-party's transmission line under an arm's-length wheeling agreement.

(2) You may deduct the actual costs you (including your affiliate(s)) incur for transmitting electricity under your arm's-length wheeling contract.

(b) To determine your transmission-line cost, you must follow the requirements of paragraphs (b)(1) and (b)(2) of this section.

(1) Base transmission-line costs on your actual costs associated with the construction and operation of a transmission line for the purpose of transmitting electricity attributable and allocable to your power plant utilizing Federal geothermal resources.

(i) You must determine the monthly transmission line cost component of the transmission deduction by multiplying the annual transmission-line cost rate (in dollars per kilowatt-hour) by the amount of electricity delivered for the reporting month.

(ii) You must redetermine the transmission line cost rate annually at the beginning of the same month of the year in which the transmission line was placed into service, the same month of the year in which the power plant was placed into service; or at your option, at a time concurrent with the beginning of your annual corporate accounting period. However, the period you select must coincide with the same period you chose for the generating deduction under § 206.354(b)(1). After you choose a deduction period, you may not later elect to use a different deduction period without MMS approval.

(2) Base your transmission-line costs on your actual costs for transmission during the reporting period, including:

(i) Operating and maintenance expenses under paragraphs (d) and (e) of this section;

(ii) Overhead under paragraph (f) of this section; and either

(iii) Depreciation under paragraphs (g) and (h) of this section; and a return on undepreciated capital investment under paragraphs (g) and (i) of this section or

(iv) A return on the capital investment in the transmission line under paragraphs (g) and (j) of this section.

(c)(1) Allowable capital costs under paragraph (b) of this section are generally those for depreciable fixed assets (including costs of delivery and installation of capital equipment) which are an integral part of the transmission line.

(2)(i) You may include a return on capital you invested in the purchase of real estate for transmission facilities if:

(A) Such purchase is necessary; and

(B) The surface is not part of the Federal lease.

(ii) The rate of return shall be the same rate determined under paragraph (k) of this section.

(d) Allowable operating expenses include:

(1) Operations supervision and engineering;

(2) Operations labor;

(3) Fuel;

(4) Utilities;

(5) Materials;

(6) Ad valorem property taxes;

(7) Rent;

(8) Supplies; and

(9) Any other directly allocable and attributable operating or maintenance expense which you can document.

(e) Allowable maintenance expenses include:

(1) Maintenance of the transmission line;

(2) Maintenance of equipment;

(3) Maintenance labor; and

(4) Other directly allocable and attributable maintenance expenses, which you can document.

(f) Overhead directly attributable and allocable to the operation and maintenance of the transmission line is an allowable expense. State and Federal income taxes and severance taxes and other fees, including royalties, are not allowable expenses.

(g) To compute costs associated with capital investment, a lessee may use either depreciation with a return on undepreciated capital investment, or a return on capital investment in the transmission line. After a lessee has elected to use either method, the lessee may not later elect to change to the other alternative without MMS approval.

(h) To compute depreciation, you may elect to use either a straight-line

depreciation method based on the life of equipment or on the life of the reserves which the transmission line services, or a return on capital investment method. After you make an election, you may not change methods without MMS approval. With or without a change in ownership, you may depreciate a transmission line only once.

(i) To calculate a return on undepreciated capital investment, multiply the remaining undepreciated capital balance as of the beginning of the period for which you are calculating the transmission deduction by the rate of return provided in paragraph (k) of this section.

(j) To compute a return on capital investment in the transmission line, multiply the allowable capital investment in the transmission line by the rate of return determined pursuant to paragraph (k) of this section. There is no allowance for depreciation.

(k) The rate of return must be 2.0 times the industrial rate associated with Standard & Poor's BBB rating. The BBB rate must be the monthly average rate as published in Standard & Poor's Bond Guide for the first month for which the allowance is applicable. Redetermine the rate at the beginning of each subsequent calendar year.

(l) Calculate the deduction for transmission costs based on your cost of transmitting electricity through each individual transmission line. In conducting reviews and audits, MMS may require you to submit arm's-length transmission contracts, production agreements, operating agreements, and related documents. You must comply with any such requirements within the time MMS specifies. Recordkeeping requirements are found at part 212 of this chapter.

(m) For new transmission facilities or arrangements, base your initial deduction on estimates of allowable electricity transmission costs for the applicable period. Use the most recently available operations data for the transmission line or, if such data are not available, use estimates based on data for similar transmission lines. Paragraph (o) of this section will apply when you amend your report based on your actual costs.

(n) In conducting reviews and audits, MMS may require you to submit all data used to calculate the deduction. You must comply with any such requirements within the time MMS specifies. Recordkeeping requirements are found at part 212 of this chapter.

(o) If your actual transmission deduction differs from your estimate under § 206.352(a)(1), you must submit corrected Forms MMS–2014 according to MMS instructions. You then must make payments or may receive a refund or credit as shown in the following table:

If your actual transmission deduction is . . .	Then . . .
(1) Less than the amount you estimated and used to calculate royalties under § 206.352(a)(1) during the reporting period.	you must pay: (i) Additional royalties retroactive to the first month of the reporting period; and (ii) Interest computed under 30 CFR 218.302.
(2) Greater than the amount you estimated and used to calculate royalties under § 206.352(a)(1).	you are entitled to a refund or credit without interest.

(p) Under no circumstances shall the transmission deduction plus the generating deduction reduce the royalty value of the geothermal resource to zero.

§ 206.354 How do I determine generating deductions?

(a) If you determine the value of your geothermal resources under § 206.352(b)(1)(i) of this subpart, you may take a generating deduction. If you take a generating deduction, you must deduct your reasonable actual costs incurred to generate electricity from the plant tailgate value of the electricity (usually the transmission-reduced value of the delivered electricity). You may deduct the actual costs you incur for generating electricity under your arm's-length power plant contract.

(b)(1) You must base your generating costs deduction on your actual annual costs associated with the construction and operation of a geothermal power plant.

(i) You must determine your monthly generating deduction by multiplying the annual generating cost rate (in dollars per kilowatt-hour) by the amount of plant tailgate electricity measured (or computed) for the reporting month. The generating cost rate is determined from the annual amount of your plant tailgate electricity.

(ii) You must redetermine your generating cost rate annually at the beginning of the same month of the year in which the power plant was placed into service or, at your option, at a time concurrent with the beginning of your annual corporate accounting period. However, the period you select must coincide with the same period chosen for the transmission deduction under § 206.353(b)(1). After you choose a deduction period, you may not later elect to use a different deduction period without MMS approval.

(2) Base your generating costs on your actual power plant costs during the reporting period, including:

(i) Operating and maintenance expenses under paragraphs (d) and (e) of this section;

(ii) Overhead under paragraph (f) of this section; and either

(iii) Depreciation under paragraphs (g) and (h) of this section and a return on undepreciated capital investment under paragraph (g) and (i) of this section; or

(iv) a return on capital investment in the power plant under paragraphs (g) and (j) of this section.

(c)(1) Allowable capital costs under paragraph (b) of this section are generally those for depreciable fixed assets (including costs of delivery and installation of capital equipment) which are an integral part of the power plant or are required by the design specifications of the power conversion cycle.

(2)(i) You may include a return on capital you invested in the purchase of real estate for a power plant site if:

(A)The purchase is necessary; and,

(B) The surface is not part of the Federal lease.

(ii) The rate of return shall be the same rate determined under paragraph (k) of this section.

(3) You may not deduct the costs of gathering systems and other production-related facilities.

(d) Allowable operating expenses include:

(1) Operations supervision and engineering;

(2) Operations labor;

(3) Auxiliary fuel and/or utilities used to operate the power plant during down time;

(4) Utilities;

(5) Materials;

(6) Ad valorem property taxes;

(7) Rent;

(8) Supplies; and

(9) Any other directly allocable and attributable operating expense.

(e) Allowable maintenance expenses include:

(1) Maintenance of the power plant;

(2) Maintenance of equipment;

(3) Maintenance labor; and

(4) Other directly allocable and attributable maintenance expenses.

(f) Overhead directly attributable and allocable to the operation and maintenance of the power plant is an allowable expense. State and Federal income taxes and severance taxes and other fees, including royalties, are not allowable expenses.

(g) To compute costs associated with capital investment, a lessee may use either depreciation with a return on undepreciated capital investment, or a return on capital investment in the power plant. After a lessee has elected to use either method, the lessee may not later elect to change to the other alternative without MMS approval.

(h) To compute depreciation, you may elect to use either a straight-line depreciation method based on the life of the geothermal project, usually the term of the electricity sales contract or other depreciation period acceptable to MMS, or a unit-of-production method. After you make an election, you may not change methods without MMS approval. You may not depreciate equipment below a reasonable salvage value. With or without a change in ownership, you may depreciate a power plant only once.

(i) To calculate a return on undepreciated capital investment, multiply the remaining undepreciated capital balance as of the beginning of the period for which you are calculating the generating deduction allowance by the rate of return provided in paragraph (k) of this section.

(j) To compute a return on capital investment in the power plant, multiply the allowable capital investment in the power plant by the rate of return determined pursuant to paragraph (k) of this section. There is no allowance for depreciation.

(k) The rate of return must be 2.0 times the industrial rate associated with Standard & Poor's BBB rating. The BBB rate must be the monthly average rate as published in Standard & Poor's Bond Guide for the first month for which the allowance is applicable. You must redetermine the rate at the beginning of each subsequent calendar year.

(l) Calculate the deduction for generating costs based on your cost of generating electricity through each individual power plant.

(1) In conducting reviews and audits, MMS may require you to submit arm's-length power plant contracts, production agreements, operating agreements, and related documents. You must comply with any such requirements within the time MMS specifies. Recordkeeping requirements are found at part 212 of this chapter.

(2) For new power plants or arrangements, base your initial deduction on estimates of allowable electricity generation costs for the applicable period. Use the most recently available operations data for the power plant or, if such data are not available, use estimates based on data for similar power plants. Paragraph (m) of this section will apply when you amend your report based on your actual costs.

(3) In conducting reviews and audits, MMS may require you to submit all data used to calculate the deduction. You must comply with any such requirements within the time MMS specifies. Recordkeeping requirements are found at part 212 of this chapter.

(m) If your actual generating deduction at the end of the annual reporting period is different from your estimated payment, you must submit corrected Forms MMS–2014 to reflect adjustments to royalty payments in accordance with MMS instructions. You then must make payments or may receive a refund or credit as shown in the following table:

If your actual generating deduction is . . .	Then . . .
(1) Less than the amount you estimated and used to calculate royalties under § 206.352(a)(1) during the reporting period.	you must pay: (i) Additional royalties retroactive to the first month of the reporting period; and (ii) Interest computed under 30 CFR 218.302.
(2) Greater than the amount you estimated and used to calculate royalties under § 206.352(a)(1).	you are entitled to a refund or credit without interest.

(n) Under no circumstances shall the transmission deduction plus the generating deduction reduce the royalty value of the geothermal resource to zero.

§ 206.355 How do I calculate royalty due on geothermal resources I sell arm's-length to a purchaser for direct use?

If you sell geothermal resources produced from Class I, II, or III leases at arm's-length to a purchaser for direct use, then the royalty on the geothermal resource is the gross proceeds accruing to you from the sale of the geothermal resource to the arm's-length purchaser times the royalty rate in your lease or that BLM prescribes under 43 CFR 3211.18. See § 206.361 for additional provisions applicable to determining gross proceeds under arm's-length sales.

§ 206.356 How do I calculate royalty due on geothermal resources I use for direct use purposes?

If you use the geothermal resource for direct use:

(a) For Class I leases, you must determine the royalty due on geothermal resources in accordance with the first applicable of the following three paragraphs.

(1) The weighted average of the gross proceeds established in arm's-length contracts for the purchase of significant quantities of geothermal resources to operate the lessee's same direct-use facility times the royalty rate in your lease. In evaluating the acceptability of arm's-length contracts, the following factors shall be considered: Time of execution, duration, terms, volume, quality of resource, and such other factors as may be appropriate to reflect the value of the resource.

(2) The equivalent value of the least expensive, reasonable alternative energy source (fuel) times the royalty rate in your lease. The equivalent value of the least expensive, reasonable alternative energy source shall be based on the amount of thermal energy that would otherwise be used by the direct use facility in place of the geothermal resource. That amount of thermal energy (in Btu's) displaced by the geothermal resource shall be determined by the equation:

$$\text{thermal energy displaced} = \frac{(h_{in} - h_{out}) \times \text{density} \times 0.1133681 \times \text{volume}}{\text{efficiency factor}}$$

Where h_{in} is the enthalpy in Btu's/lb at the direct use facility inlet (based on measured inlet temperature), h_{out} is the enthalpy in Btu's/lb at the facility outlet (based on measured outlet temperature), density is in lbs/cu ft based on inlet temperature, the factor 0.133681 (cu ft/gal) converts gallons to cubic feet, and volume is the quantity of geothermal fluid in gallons produced at the wellhead or measured at an approved point. The efficiency of the alternative energy source shall be 0.7 for coal and 0.8 for oil, natural gas, and other fuels derived from oil and natural gas, or an efficiency factor proposed by the lessee and approved by MMS. The methods of measuring resource parameters (temperature, volume, etc.) and the frequency of computing and accumulating the amount of thermal energy displaced shall be determined and approved by BLM.

(3) A royalty determined by any other reasonable method approved by MMS or the Assistant Secretary, Land and Minerals Management of the Department of the Interior, under § 206.364 of this part.

(b) For hot water produced from Class II and Class III leases, you must multiply the appropriate fee from the schedule in subparagraph (b)(1) of this section by the number of gallons or pounds you produce from the direct use lease each month.

(1) You must use the following fee schedule to calculate fees due under this section:

DIRECT USE FEE SCHEDULE

[Hot water]

If your average monthly inlet temperature (°F) is		Your fees are . . .	
At least . . .	But less than . . .	($/million gallons)	($/million pounds)
130	140	2.524	0.307
140	150	7.549	0.921
150	160	12.543	1.536
160	170	17.503	2.150
170	180	22.426	2.764
180	190	27.310	3.379
190	200	32.153	3.993
200	210	36.955	4.607
210	220	41.710	5.221
220	230	46.417	5.836
230	240	51.075	6.450
240	250	55.682	7.064
250	260	60.236	7.679
260	270	64.736	8.293
270	280	69.176	8.907
280	290	73.558	9.521
290	300	77.876	10.136
300	310	82.133	10.750
310	320	86.328	11.364
320	330	90.445	11.979
330	340	94.501	12.593
340	350	98.481	13.207
350	360	102.387	13.821

(i) For direct use geothermal resources with an average monthly inlet temperature of 130 °F or less, you must only pay the lease rental.

(ii) The MMS, in consultation with BLM, will develop and publish a revised fee schedule in the **Federal Register**, as needed.

(iii) The MMS, in consultation with BLM, will calculate revised fees schedules using the following formulas:

For reporting on a volume basis:

$$R_V = \rho \times (T_{in} - T_{out}) \times P_{prbc} \times F_{rr} \times \frac{1}{e}$$

For reporting on a mass basis:

$$R_m = (T_{in} - T_{out}) \times P_{prbc} \times F_{rr} \times \frac{1}{e}$$

Where:

R_V = Royalty due as a function produced volume in the fee schedule, expressed as dollars ($) per million ($10^6$) gallons;

R_m = Royalty due as a function of produced mass in the fee schedule, expressed as dollars ($) per million ($10^6$) pounds;

ρ = Water density at inlet temperature expressed as lbs per gallon;

T_{in} = Measured inlet temperature in °F (as required by BLM under 43 CFR part 3275);

T_{out} = Established assumed outlet temperature of 130 °F;

e = Boiler Efficiency Factor for coal of 70%;

P_{prbc} = The three year historical average of Powder River Basin spot coal prices, as published by the Energy Information Administration, in dollars ($) per MMBtu;

F_{rr} = The assumed Lease Royalty Rate of 10%

(2) The fee that you report is subject to monitoring, review, and audit.

(3) The schedule of fees established under this paragraph will apply to any Class III lease with respect to any royalty payments previously made when the lease was a Class I lease that were due and owing, and were paid, on or after July 16, 2003. To use this provision, you must provide MMS data

showing the amount of geothermal production in pounds or gallons of geothermal fluid to input into the fee schedule (see 43 CFR part 3276).

(i) If the royalties you previously paid are less than the fees due under this section, then you must pay the difference. You must pay interest on that difference computed under 30 CFR 218.302.

(ii) If the royalties you previously paid are more than the fees due under this section, then you are entitled to a refund or credit from MMS of fifty percent of the overpaid royalties. You are also entitled to a refund or credit of any interest that you paid on the overpaid royalties.

(c) For geothermal resources other than hot water, MMS will determine fees on a case-by-case basis.

§ 206.357 How do I calculate royalty due on byproducts?

If you sell byproducts, then you must determine the royalty due on the byproducts produced from Class I, II, or III leases in accordance with the first applicable of the following paragraphs:

(a) The gross proceeds accruing to you for the arm's-length sale of the byproducts, less any applicable byproduct transportation allowances determined under §§ 206.357 and 206.358 times the royalty rate in your lease or that BLM prescribes under 43 CFR 3211.19. See § 206.361 for additional provisions applicable to determining gross proceeds;

(b) Other relevant matters including, but not limited to, published or publicly available spot-market prices, or information submitted by the lessee concerning circumstances unique to a particular lease operation or the saleability of certain byproducts; or

(c) A value determined by any other reasonable valuation method approved by MMS.

§ 206.358 What are byproduct transportation allowances?

(a) When you determine the value of byproducts at a point off the geothermal lease, unit, or participating area, you are allowed a deduction in determining value, for royalty purposes, for your reasonable, actual costs incurred to:

(1) Transport the byproducts from a Federal lease, unit, or participating area to a sales point or point of delivery that is off the lease, unit, or participating area; or

(2) Transport the byproducts from a Federal lease, unit, or participating area, or from a geothermal use facility to a byproduct recovery facility when that byproduct recovery facility is off the lease, unit, or participating area and, if applicable, from the recovery facility to a sales point or point of delivery off the lease, unit, or participating area.

(b) Costs for transporting geothermal fluids from the lease to the geothermal use facility, whether on or off the lease, shall not be included in the byproduct transportation allowance.

(c)(1) When you transport byproducts from a lease, unit, participating area, or geothermal use facility to a byproduct recovery facility, you are not required to allocate transportation costs between the quantity of marketable byproducts and the rejected waste material. The byproduct transportation allowance is authorized for the total production that is transported. You must express byproduct transportation allowances as a cost per unit of marketable byproducts transported.

(2) For byproducts that are extracted on the lease, unit, participating area, or at the geothermal use facility, the byproduct transportation allowance is authorized for the total byproduct that is transported to a point of sale off the lease, unit, or participating area. You must express byproduct transportation allowances as a cost per unit of byproduct transported.

(3) Transportation costs shall be authorized as allowances only when the transported byproduct is sold, delivered, or otherwise utilized by the lessee and royalties are reported and paid.

(d) *Reporting requirements*—(1) *Arm's-length contracts.* (i) You must use a discrete field on Form MMS–2014 to notify MMS of a transportation allowance.

(ii) In conducting reviews and audits, MMS may require you to submit arm's-length transportation contracts, production agreements, operating agreements, and related documents. You must comply with any such requirements within the time MMS specifies. Recordkeeping requirements are found at part 212 of this chapter.

(2) *Non-arm's-length or no contract.* (i) You must use a discrete field on Form MMS–2014 to notify MMS of a transportation allowance.

(ii) For new transportation facilities or arrangements, base your initial deduction on estimates of allowable byproduct transportation costs for the applicable period. Use the most recently available operations data for the transportation system or, if such data are not available, use estimates based on data for similar transportation systems. Paragraph (e) of this section will apply when you amend your report based on your actual costs.

(iii) In conducting reviews and audits, MMS may require you to submit all data used to calculate the deduction. You must comply with any such requirements within the time MMS specifies. Recordkeeping requirements are found at part 212 of this chapter.

(e)(1) If the actual transmission deduction you determined at the end of the annual reporting period is:

(i) Less than the amount you estimated and used to calculate royalties under § 206.356(a) during the reporting period, then you must pay additional royalties retroactive to the first month of the reporting period, plus interest computed under 30 CFR 218.302; or

(ii) Greater than the amount you estimated and used to calculate royalties under § 206.356(a) you are entitled to a refund or credit without interest.

(2) You must submit corrected Forms MMS–2014 to reflect adjustments to royalty payments in accordance with MMS instructions.

(f) Byproduct transportation allowances are subject to monitoring, review, and audit. If, after a review and/or audit, MMS determines that you have improperly determined a byproduct transportation allowance authorized by this section, then:

(1) You must pay any additional royalties plus interest determined in accordance with 30 CFR 218.302; or

(2) You are entitled to a refund or credit without interest.

(g) If you commingled byproducts produced from Federal and non-Federal leases for transportation, you may not disproportionately allocate transportation costs to Federal lease production.

(h) If MMS reviews or audits your royalty payments, you must make available to authorized MMS representatives or to other authorized persons all transportation contracts and all other information as may be necessary to support a byproduct transportation allowance.

§ 206.359 How do I determine byproduct transportation allowances?

(a) For transportation costs you incur under an arm's-length contract, the transportation allowance shall be the reasonable, actual costs you incurred for transporting the byproducts under that contract, subject to monitoring, review, audit, and possible future adjustments. You may deduct costs incurred under an arm's-length transportation contract without prior MMS approval.

(1) In conducting reviews and audits, MMS will examine whether the contract reflects more than the consideration actually transferred either directly or indirectly from you to the transporter for the transportation. If the contract reflects more than the total

consideration you paid, MMS may require you to determine the byproduct transportation allowance under paragraph (b) of this section.

(2) If MMS determines that the consideration you paid under an arm's-length byproduct transportation contract does not reflect the reasonable value of the transportation because of misconduct by or between the contracting parties, or because you otherwise have breached your duty to the lessor to market the production for the mutual benefit of the lessee and the lessor, MMS will require you to determine the byproduct transportation allowance under paragraph (b) of this section. When MMS determines that the value of the transportation may be unreasonable, MMS will notify you and give you an opportunity to provide written information justifying your transportation costs.

(3) Where your payments for transportation under an arm's-length contract are not established on a dollars-per-unit basis, you must convert whatever consideration you paid to a dollar value equivalent for the purposes of this section.

(b) For transportation costs you incur; *i.e.*, where you perform transportation services for yourself, you must base the byproduct transportation allowance on your reasonable actual costs.

(1) All byproduct transportation allowances deducted under this paragraph are subject to monitoring, review, audit, and possible future adjustment. You may deduct transportation costs incurred under this paragraph without prior MMS approval.

(2) You must base the byproduct transportation allowance on your reasonable actual costs for transportation during the reporting period, including:

(i) Operating and maintenance expenses under paragraphs (d) and (e) of this section;

(ii) Overhead under paragraph (f) of this section; and either

(iii) Depreciation under paragraphs (g) and (h) of this section and a return on undepreciated capital investment under paragraphs (g) and (i) of this section; or

(iv) a return on capital investment in the transportation system under paragraphs (g) and (j) of this section.

(c)(1) Allowable capital costs under paragraph (b) of this section are generally those for depreciable fixed assets (including costs of delivery and installation of capital equipment) which are an integral part of the transportation system.

(2)(i) You may include a return on capital you invested in the purchase of real estate to locate the byproduct transportation facilities if:

(A) The purchase is necessary; and

(B) The surface is not part of a Federal lease.

(ii) The rate of return shall be the same rate determined in paragraph (k) of this section.

(3) You may not deduct the costs of gathering systems and other production-related facilities.

(d) Allowable operating expenses include:

(1) Operations supervision and engineering;

(2) Operations labor;

(3) Fuel;

(4) Utilities;

(5) Materials;

(6) Ad valorem property taxes;

(7) Rent;

(8) Supplies; and

(9) Any other directly allocable and attributable operating expense which you can document.

(e) Allowable maintenance expenses include:

(1) Maintenance of the transportation system;

(2) Maintenance of equipment;

(3) Maintenance labor; and

(4) Other directly allocable and attributable maintenance expenses which you can document.

(f) Overhead directly attributable and allocable to the operation and maintenance of the transportation system is an allowable expense. State and Federal income taxes and severance taxes and other fees, including royalties, are not allowable expenses.

(g) To compute costs associated with capital investment, a lessee may use either paragraphs (h) and (i) or paragraph (j) of this section. After a lessee has elected to use either method for a transportation system, the lessee may not later elect to change to the other alternative without MMS approval.

(h) To compute depreciation, you may elect to use either a straight-line depreciation method based on the life of the transportation system, the life of the reserves which the transmission system services, or a unit-of-production method. After you make an election, you may not change methods without MMS approval. You may not depreciate equipment below a reasonable salvage value. With or without a change in ownership, you may depreciate a transportation system only once.

(i) To calculate a return on undepreciated capital investment, multiply the remaining undepreciated capital balance as of the beginning of the period for which you are calculating the transportation allowance by the rate of return provided in paragraph (k) of this section.

(j) To compute a return on capital investment in the transportation system, the allowed cost shall be the amount equal to the allowable capital investment in the transportation system multiplied by the rate of return determined pursuant to paragraph (k) of this section. There is no allowance for depreciation.

(k) The rate of return must be the industrial rate associated with Standard & Poor's BBB rating. The BBB rate must be the monthly average rate as published in Standard & Poor's Bond Guide for the first month for which the allowance is applicable. You must redetermine the rate at the beginning of each subsequent calendar year.

(l) Other transportation cost determinations. Use this section when calculating transportation costs to establish value using a netback procedure or any other procedure that requires deduction of transportation costs.

§ 206.360 What records must I keep to support my calculations of royalty or fees under this subpart?

If you determine royalties or fees for your geothermal resource under this subpart, you must retain all data relevant to the determination of the royalty value or the fee you paid. Recordkeeping requirements are found at part 212 of this chapter.

(a) You must be able to show:

(1) How you calculated the royalty value or fee you reported, including all allowable deductions; and

(2) How you complied with this subpart.

(b) Upon request, you must submit all data to MMS.

§ 206.361 How will MMS determine whether my royalty value, gross proceeds, or fees are correct?

(a)(1) The royalties or fees that you report are subject to monitoring, review and audit. The MMS may review and audit your data, and MMS will direct you to use a different measure of royalty value, gross proceeds or fee, whichever is applicable, if it determines that the reported value, gross proceeds, or fee is inconsistent with the requirements of this subpart.

(2) If MMS directs you to use a different royalty value, measure of gross proceeds, or fee under paragraph (a)(1) of this section, then the following table applies:

If the royalty or fee you paid . . .	Then . . .
(i) Is less than the royalty or fee based upon the royalty value or fee established by MMS.	you must pay the difference plus interest on that difference computed under 30 CFR 218.302.
(ii) Is more than the royalty or fee owed based upon the royalty value, gross proceeds, or fee established by MMS.	you are entitled to a refund or credit without interest.

(b) When the provisions in this subpart refer to gross proceeds either for the sale of electricity or the sale of a geothermal resource, in conducting reviews and audits MMS will examine whether your sales contract reflects the total consideration actually transferred, either directly or indirectly, from the buyer to you for the geothermal resource or electricity. If MMS determines that a contract does not reflect the total consideration, or the gross proceeds accruing to you under a contract do not reflect reasonable consideration because of misconduct by or between the contracting parties, or because you otherwise have breached your duty to the lessor to market the production for the mutual benefit of the lessee and the lessor, MMS may require you to increase the gross proceeds to reflect any additional consideration. Alternatively, for Class I leases, MMS may require you to use another valuation method in the regulations applicable to dispositions other than under an arm's-length contract. The MMS will notify you to give you an opportunity to provide written information justifying your gross proceeds.

(c) For arm's-length sales, you have the burden of demonstrating that your contract is arm's length.

(d) The MMS may require you to certify that the provisions in your sales contract include all of the consideration the buyer paid you, either directly or indirectly, for the electricity or geothermal resource.

(e) Notwithstanding any other provision of this subpart, under no circumstances shall the value of production for royalty purposes under a Class I lease where the geothermal resources are sold before use be less than the gross proceeds accruing to you.

(f) Gross proceeds for the sale of electricity or for the sale of the geothermal resource shall be based on the highest price a prudent lessee can receive through legally enforceable claims under its contract.

(1) Absent contract revision or amendment, if you fail to take proper or timely action to receive prices or benefits to which you are entitled, you must pay royalty based upon that obtainable price or benefit.

(2) Contract revisions or amendments you make must be in writing and signed by all parties to the contract.

(3) If you make timely application for a price increase or benefit allowed under your contract, but the purchaser refuses and you take reasonable measures, which are documented, to force purchaser compliance, you will owe no additional royalties unless or until you receive additional monies or consideration resulting from the price increase. This paragraph (f)(3) shall not be construed to permit you to avoid its royalty payment obligation in situations where a purchaser fails to pay, in whole or in part or timely, for a quantity of geothermal resources or electricity.

§ 206.362 What are my responsibilities to place production into marketable condition and to market production?

You must place geothermal resources and byproducts in marketable condition and market the geothermal resources or byproducts for the mutual benefit of the lessee and the lessor at no cost to the Federal Government. If you use gross proceeds under an arm's-length contract in determining royalty, you must increase those gross proceeds to the extent that the purchaser, or any other person, provides certain services that the seller normally would be responsible to perform to place the geothermal resources or byproducts in marketable condition or to market the geothermal resources or byproducts.

§ 206.363 When is an MMS audit, review, reconciliation, monitoring, or other like process considered final?

Notwithstanding any provision in these regulations to the contrary, no audit, review, reconciliation, monitoring, or other like process that results in a redetermination by MMS of royalty or fees due under this subpart is considered final or binding as against the Federal Government or its beneficiaries until MMS formally closes the audit period in writing.

§ 206.364 How do I request a value or gross proceeds determination?

(a) You may request a value determination from MMS regarding any geothermal resources produced from a Class I lease or for byproducts produced from a Class I, II, or III lease. You may also request a gross proceeds determination for a Class II or III lease. Your request must:

(1) Be in writing;

(2) Identify specifically all leases involved, the record title or operating rights owners of those leases, and the designees for those leases;

(3) Completely explain all relevant facts. You must inform MMS of any changes to relevant facts that occur before we respond to your request;

(4) Include copies of all relevant documents;

(5) Provide your analysis of the issue(s), including citations to all relevant precedents (including adverse precedents); and

(6) Suggest your proposed gross proceeds calculation method.

(b) The MMS will reply to requests expeditiously. MMS may either:

(1) Issue a determination signed by the Assistant Secretary, Land and Minerals Management; or

(2) Issue a determination by MMS; or

(3) Inform you in writing that MMS will not provide a determination. Situations in which MMS typically will not provide any determination include, but are not limited to:

(i) Requests for guidance on hypothetical situations; and

(ii) Matters that are the subject of pending litigation or administrative appeals.

(c)(1) A determination signed by the Assistant Secretary, Land and Minerals Management, is binding on both you and MMS until the Assistant Secretary modifies or rescinds it.

(2) After the Assistant Secretary issues a determination, you must make any adjustments in royalty payments that follow from the determination and, if you owe additional royalties, pay late payment interest under 30 CFR 218.302.

(3) A determination signed by the Assistant Secretary is the final action of the Department and is subject to judicial review under 5 U.S.C. 701–706.

(d) A determination issued by MMS is binding on MMS and delegated States, but not on you, with respect to the specific situation addressed in the determination unless the MMS (for MMS-issued determinations) or the Assistant Secretary modifies or rescinds it.

(1) A determination by MMS is not an appealable decision or order under 30 CFR part 290 subpart B.

(2) If you receive an order requiring you to pay royalty on the same basis as the determination, you may appeal that order under 30 CFR part 290 subpart B.

(e) In making a determination, MMS or the Assistant Secretary may use any of the applicable criteria in this subpart.

(f) A change in an applicable statute or regulation on which any determination is based takes precedence over the determination, regardless of whether the MMS or the Assistant Secretary modifies or rescinds the determination.

(g) The MMS or the Assistant Secretary generally will not retroactively modify or rescind a determination issued under paragraph (d) of this section, unless:

(1) There was a misstatement or omission of material facts; or

(2) The facts subsequently developed are materially different from the facts on which the guidance was based.

(h) The MMS may make requests and replies under this section available to the public, subject to the confidentiality requirements under § 206.365.

§ 206.365 Does MMS protect information I provide?

Certain information you submit to MMS regarding royalties or fees on geothermal resources or byproducts, including deductions and allowances, may be exempt from disclosure. To the extent applicable laws and regulations permit, MMS will keep confidential any data you submit that is privileged, confidential, or otherwise exempt from disclosure. All requests for information must be submitted under the Freedom of Information Act regulations of the Department of the Interior at 43 CFR part 2.

§ 206.366 What is the nominal fee that a state, tribal, or local government lessee must pay for the use of geothermal resources?

If a state, tribal, or local government lessee uses a geothermal resource without sale and for public purposes—other than commercial generation of electricity—the state, tribal, or local government lessee must pay a nominal fee. A nominal fee means a slight or *de minimis* fee. MMS will determine the fee on a case-by-case basis.

PART 210—FORMS AND REPORTS

7. The authority for part 210 continues to read as follows:

Authority: 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396, 2107; 30 U.S.C. 189, 190, 359, 1023, 1751(a); 31 U.S.C. 3716, 9701; 43 U.S.C. 1334, 1801 *et seq.*; and 44 U.S.C. 3506(a).

Subpart H—Geothermal Resources

§ 210.352 [Removed]

8. Remove § 210.352.

PART 218—COLLECTION OF ROYALTIES, RENTALS, BONUSES AND OTHER MONIES DUE THE FEDERAL GOVERNMENT

9. The authority for part 218 continues to read as follows:

Authority: 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*; 1701 *et seq.*; 31 U.S.C. 3335; 43 U.S.C. 1301 *et seq.*; 1331 *et seq.*, and 1801 *et seq.*

10–11. Add §§ 218.303, 218.304, 218.305, 218.306, and 218.307 to subpart F to read as follows:

§ 218.303 May I credit rental towards royalty?

(a) If you pay your annual rental for your lease before the first day of the year for which the annual rental is owed, the provisions in the following table apply.

If the annual rental you paid is . . .	Then . . .
(1) Less than or equal to the royalty you are required to pay that year	you may credit the annual rental that you paid toward the royalty due for that lease year at any time during that lease year.
(2) More than the royalty you are required to pay that year	(i) You will not pay royalty during that lease year; and (ii) You may not apply any annual rental paid in excess of the royalty due for a particular lease year as a credit against royalties due for production in a future year.

(b) If portions of your lease are located both within and outside of a participating area, you may only credit the rental you paid for the portion of the lease within the participating area on a per-acre basis.

§ 218.304 May I credit rental towards direct use fees?

You may not credit annual rental toward direct use fees you are required to pay that year under 30 CFR 206.356(b). You must pay the direct use fees in addition to the annual rental due.

§ 218.305 How do I pay advanced royalties I owe under BLM regulations?

If you are required to pay advanced royalties under 43 CFR 3212.15(a) to retain your lease:

(a) You must pay an advanced royalty monthly equal to the average monthly royalty you paid under 30 CFR part 206, subpart H for the last 3 years the lease was producing. If your lease has been producing for less than 3 years, then use the average monthly royalty payment for the entire period your lease has been producing continuously;

(b) MMS must receive your advanced royalty payment prior to the first day of each month for which production has ceased;

(c) You may credit any advanced royalty you pay against your future production royalties recouped after your lease resumes production. You may not reduce the amount of any production royalty paid for any year below zero.

§ 218.306 May I receive a credit against production royalties for in-kind deliveries of electricity I provide under contract to a state or county government?

(a) You may receive a credit against production royalties for in-kind deliveries of electricity you provide under contract to a state or county government if:

(1) The state or county to which you provide electricity would receive a portion of the royalties you paid in money for the lease under 30 U.S.C. 191 or 30 U.S.C. 1019, except as otherwise provided under the Mineral Leasing Act for Acquired Lands, 30 U.S.C. 355, because your lease is located in that state or county. If your lease is located in more than one state or county, the revenues are paid to the respective states or counties based on their proportionate shares of the total acres in the lease;

(2) MMS approves in advance your contract with the state or county to which you are providing in-kind electricity; and

(3) Your contract provides that you will use the wholesale value of the electricity for the area where your lease is located to establish the specific methodology to determine the amount of the credit; and

(b) The maximum credit you may take under this section is equal to the portion of the royalty revenue that MMS would have paid to the state or county that is

a party to the contract had you paid royalty in money on all of the electricity you delivered to the state or county based on the wholesale value of the electricity. You must pay in money any royalty amount that is not offset by the credit allowed under this section, calculated based on the wholesale value of the electricity.

(c) The electricity the state or county government receives from you satisfies the Secretary's payment obligation to the state or county under 30 U.S.C. 191 or 30 U.S.C. 1019.

§ 218.307 How do I pay royalties due for my existing leases that qualify for near-term production incentives under BLM regulations?

If you qualify for a production incentive under BLM regulations at 43 CFR part 3212, your royalty due on the production BLM determines to be qualified for a production incentive is 50 percent of the amount of the total royalty that would otherwise be due under 30 CFR part 206, subpart H.

[FR Doc. 06–6219 Filed 7–20–06; 8:45 am]
BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Parts 3200 and 3280

[W0–310 9131 PP]

RIN 1004–AD86

Geothermal Resource Leasing and Geothermal Resources Unit Agreements

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise the Bureau of Land Management's existing geothermal resources leasing and unit agreement regulations to implement the Energy Policy Act of 2005. The proposed rule would restructure existing regulations concerning the general geothermal leasing process and would revise existing regulations on royalties and readjustment of lease terms, conditions, and rentals. The rule would also revise existing regulations on lease duration and work commitment requirements, annual rental and credit of rental towards royalty, unit and communitization agreements, and acreage limitations. Additional revisions required by the Energy Policy Act include various technical corrections. Other proposed changes in sections unaffected by changes in the statute would clarify existing procedures, improve grammatical construction, conform the regulations to new administrative regulatory standards, and correct existing errors.

DATES: Send your comments to reach the Bureau of Land Management (BLM) on or before September 19, 2006. The BLM will not necessarily consider any comments received after the above date during its decision on the proposed rule.

ADDRESSES: Mail: Director (630), Bureau of Land Management, Eastern States Office, 7450 Boston Boulevard, Springfield, VA 22153.

Hand Delivery: 1620 L Street, NW., Suite 401, Washington, DC 20036.

E-mail: *comments_washington@BLM.gov.*

Federal eRulemaking Portal: *http://www.regulations.gov.*

Send comments on the information collections in the proposal to: Interior Desk Officer (1004–AD86), Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), (202) 395–6566 (facsimile); e-mail: *oira_docket@omb.eop.gov.* Please also send a copy to BLM.

FOR FURTHER INFORMATION CONTACT: Kermit Witherbee at (202) 452–0385 or Ian Senio at (202) 452–5049. Persons who use a telecommunications device for the deaf (TDD) may contact these persons through the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How Do I File Comments?

You may submit your comments by any one of several methods:

- You may mail your comments to: Director (630), Bureau of Land Management, Eastern States Office, 7450 Boston Boulevard, Springfield, Virginia 22153, Attention: RIN 1004–D86.
- You may deliver comments to 1620 L Street, NW., Suite 401, Washington, DC 20036.
- You may comment directly via the internet by accessing our automated commenting system located at *www.blm.gov/nhp/news/regulatory/index.htm* and following the instructions there.
- You may e-mail your comment to: *comments_washington@blm.gov.* (Include "Attn: AD86" in the subject line).

Please make your comments on the proposed rule as specific as possible, confine them to issues pertinent to the proposed rule, and explain the reason for any changes you recommend. Where possible, your comments should reference the specific section or paragraph of the proposal that you are addressing.

The Department of the Interior may not necessarily consider or include in the Administrative Record for the final rule comments that we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

B. May I Review Comments Others Submit?

Our practice is to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that we withhold their names and or home addresses, but if you wish us to consider withholding this information, you must state this prominently at the beginning of your comments. In addition, you must present a rationale for withholding this information. This rationale must demonstrate that disclosure "would constitute an unwarranted invasion of privacy." Unsupported assertions will not meet this burden. In the absence of exceptional, documentable circumstances, this information will be released.

We will always make submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

II. Background

The Bureau of Land Management (BLM) is proposing these new regulations to implement the Energy Policy Act of 2005 (P.L. 109–58), which became law on August 8, 2005. Sections 221 through 236 of this Act address geothermal development and substantially amend the Geothermal Steam Act of 1970. The Geothermal Steam Act of 1970, as amended, 30 U.S.C. 1001—1028, provides the authority for BLM to allow for the exploration, development, and utilization of geothermal resources on BLM-managed public lands, as well as geothermal resources on lands managed by other surface management agencies, such as the United States Forest Service.

One of the more significant changes in the Energy Policy Act of 2005 is the general requirement, with a few exceptions, for geothermal resources to be offered through a competitive leasing process. Lands not successfully sold in

the competitive process can be leased noncompetitively.

The Energy Policy Act also made significant changes in the way royalties are assessed on Federal leases. These changes were similar to, and in some cases identical to, recommendations in a 2005 report from the Geothermal Valuation Subcommittee (Subcommittee) of the Minerals Management Service's (MMS) Royalty Policy Committee (RPC). The RPC, established under the Federal Advisory Committee Act, makes recommendations on issues related to royalties on Federal resources and typically consists of representatives from Federal and State governments and industries paying royalties for the development of Federal resources. The Subcommittee was formed to address MMS's geothermal royalty valuation regulations in an effort to simplify the language and reduce administrative costs to the geothermal industry. The Subcommittee was composed of members from one industry association, several geothermal producers, two of the major states affected, and MMS staff. A BLM representative served as technical advisor to the Subcommittee. The Subcommittee's goal was to develop more efficient royalty valuation methods that would ensure a fair return to the Federal Government as well as to encourage geothermal development. The Energy Policy Act requires that for new leases in non-arm's length transactions or no-sale situations the royalty on electricity produced from geothermal resources be based on the gross proceeds from the sale of electricity, rather than on the "net back" system that was used prior to the Energy Policy Act. Lessees who use geothermal resources directly will pay fees according to a fee schedule that would be established by MMS. Under the new law, existing lessees have the opportunity to convert the royalty provisions in their leases to those of the Energy Policy Act. MMS is publishing proposed new regulations to implement the changes in the Energy Policy Act simultaneously with BLM's proposed rule. BLM and MMS have worked together to coordinate their proposed rules.

References to MMS rules appear throughout BLM's proposed rules because BLM and MMS share responsibility with regard to the geothermal leasing program. BLM holds lease sales, issues geothermal leases and generally administers the leases. BLM establishes the terms of the leases, including royalty rates, and enforces the lease terms. MMS is responsible for collecting rents (other than the first year's rent) and royalties, and for enforcing the royalty obligations. The proposed MMS rules contain provisions that carry out its responsibilities. Appropriate cross-references are contained both in the BLM and MMS regulations.

Other changes made by the Energy Policy Act include restructured lease terms (length of time a lease is in effect) and lease term extensions, and provisions for leases for exclusive direct use of geothermal resources, without sale, that may be issued noncompetitively. The Act also increased the maximum acreage of an individual lease and gave the Secretary of the Interior greater authority to require lessees to commit to unit agreements to conserve geothermal resources.

Most of the proposed changes in the regulations of this part would implement the new provisions of the Energy Policy Act. Other proposed changes in sections unaffected by changes in the statute would clarify existing procedures, improve grammatical construction, conform the regulations to new administrative or regulatory standards, and correct existing errors. Substantive changes unrelated to the change in statute are discussed under each subpart of this preamble.

III. Discussion of the Proposed Rule

Subpart 3200—Geothermal Resources Leasing

In subpart 3200, we propose changes to the definitions section and propose to add three sections to the end of the subpart.

Definitions

Section 3200.1 contains definitions of terms used throughout parts 3200 and 3280. The proposed rule would remove the definitions of terms and concepts that would no longer be used under the proposal (or were not used previously). Definitions proposed to be removed include "additional term," "cooperative agreement," "extended term," and "pay instead of produce in commercial quantities."

Proposed new definitions include "initial extension" and "additional extension." These two definitions reflect terms that are used in proposed subpart 3207, and implement concepts enacted in 30 U.S.C. 1005(a). The portion of the preamble discussing subpart 3207 addresses these changes.

Other definitions added include "direct use" and "direct use leases." The proposed definition of the term "direct use" is taken from the definition at 30 U.S.C. 1001(g). The proposed definition would state that "direct use means utilization of geothermal resources for commercial, residential, agricultural, public facilities, or other energy needs other than the commercial production or generation of electricity." The word "generation" is used in addition to the statutory word "production" to be consistent with the usage in 30 U.S.C. 1003(f), which also addresses direct use.

The proposed definition of the term "direct use lease" would be "a lease issued in an area BLM designates as available exclusively for direct use of geothermal resources, without sale, for purposes other than commercial generation of electricity." This definition is intended to describe the geothermal leases that would be issued under proposed subpart 3205, which would implement 30 U.S.C. 1003(f).

The term "geothermal exploration permit" would be clarified to explain that a BLM authorization to conduct exploration activities would occur under a Notice of Intent to Conduct Geothermal Resource Exploration Operations, a specific BLM Form.

The term "gross proceeds," used in the royalty context, would be defined through a cross-reference to the applicable MMS definition.

The term "commercial production or generation of electricity" would be defined to mean generation of electricity that is sold or is subject to sale, including the electricity or energy that is required to convert geothermal energy into electrical energy for sale. This term is needed in determining whether geothermal resource production is subject to royalties or direct use fees, as referenced in 30 U.S.C. 1004(b). The statute does not expressly address whether the electricity required to convert geothermal energy into electrical energy for sale (the parasitic load) should be considered as a component of the generation of electricity or should be considered as a direct use. BLM believes it is more appropriate to consider this as part of the electrical generation process both: (1) To encourage the production of geothermal resources (by not imposing a fee for a necessary cost of electricity generation); and (2) Because measurement of such usage would be difficult and expensive and the amount of moneys generated through the collection of fees would be quite small relative to the measurement effort.

The term "commercial production" would mean production of geothermal resources when the economic benefits from the production are greater than the cost of production. This proposed

definition would implement a term used in 30 U.S.C. 1004(f)(1), related to advanced royalties (see proposed § 3212.15). The term is also used for the purpose of qualifying for a drilling extension at proposed § 3207.14.

The term "geothermal steam and associated geothermal resources" would be slightly modified to follow the statutory definition at 30 U.S.C. 1001.

Types of Leases

Proposed § 3200.6 would provide general information explaining that under the proposed rule BLM would issue two types of geothermal leases. The first category would be leases that may be used for any type of geothermal use, such as commercial generation of electricity or direct use of the resource. Such leases would be competitively issued under subpart 3203 or noncompetitively issued under subpart 3204. The second category, a new category required by the Energy Policy Act of 2005 (30 U.S.C. 1003(f)), would be those that could only be used for direct use without sale, i.e., direct use leases issued under proposed subpart 3205.

Transition Rules

The Energy Policy Act of 2005 at 30 U.S.C. 1005(d), directed that the Secretary by regulation establish transition rules for leases issued before August 8, 2005. Little guidance was provided in that section except for requiring that the transition rules include provision for two-year extensions for leases nearing the end of their terms on August 8, 2005, under certain circumstances.

Proposed §§ 3200.7 and 3200.8 would contain transition rules, addressing how the revised regulations would apply to: (1) Leases in effect on August 8, 2005, the enactment date of the Energy Policy Act of 2005; and (2) Leases issued after August 8, 2005, but based on lease applications pending on August 8, 2005.

Proposed § 3200.7 would address the regulatory status of geothermal leases in effect on August 8, 2005. Existing Federal leases generally provide that they are subject to existing BLM rules, and also to future BLM regulatory changes. This makes sense because the agency continually makes changes to its regulatory programs, and lessees have no legitimate expectations as a general matter to remain forever subject to regulations in effect on the day their leases were issued. Accordingly, proposed § 3200.7 would make leases in effect on August 8, 2005, generally subject to the revised parts 3200 and 3280.

There are certain provisions of geothermal leases for which existing lessees did have reasonable expectations would not be changed, and on which they may have based their planned and existing operations. Therefore, the proposed rule, at § 3200.7(a)(1), attempts to capture such expectations by proposing an exception to the general rule. The exception would provide that leases in effect on August 8, 2005, would be subject to the regulations in effect on August 8, 2005, with regard to regulatory provisions relating to royalties, minimum royalties, rentals, primary term and lease extensions, diligence and annual work requirements, and renewals.

Proposed § 3200.7(a)(2) would allow the lessee of a lease in effect on August 8, 2005, to elect to be subject to all of the regulations in part 3200 and part 3280, without regard to the exceptions in paragraph (a)(1). The lessee would have to make such an election no later than 18 months after a final rule becomes effective. The election derives from 30 U.S.C. 1003(d)(2) that allows a similar election to lessees whose lease applications were pending on August 8, 2005. BLM believes that leases in effect on August 8, 2005, should be treated as least as favorably as those lessees who only had an application pending on that date. Thus, BLM is proposing that an election be allowable. The proposed rule would make it clear that although a general election would be allowed, changes relating to royalty terms could only occur under the royalty conversion rules of proposed § 3212.25, discussed in the next paragraph and later in this preamble.

Proposed § 3200.7(b) would clarify that two other features of the Energy Policy Act of 2005 apply to leases in effect on August 8, 2005: Royalty conversion (section 224(e) of the Energy Policy Act) and production incentives (section 224(c) and (d) of the Energy Policy Act). The proposal would clarify that the lessee of a lease in effect on August 8, 2005, may: (1) Choose to convert lease terms relating to royalties under subpart 3212; or (2) If it does not convert lease terms relating to royalties, apply for a production incentive under subpart 3212 (if eligible under that subpart). Royalty conversion and production incentives are addressed later in this preamble.

Proposed § 3200.7(c) would implement the two-year extension authorized in the statute. Under the proposal, the lessee of a lease in effect on August 8, 2005, could apply to extend a lease that was within two years of the end of its term on August 8, 2005, for up to two years, to allow achievement of production under the lease or to allow the lease to be included in a producing unit.

Proposed § 3200.8 would implement 30 U.S.C. 1003(d)(2), relating to the status of geothermal lease applications pending on August 8, 2005, and the status of leases issued pursuant to such applications. That section of the Energy Policy Act of 2005 provides that pending lease applications and leases issued pursuant to those applications are subject to "this section as in effect on the day before" August 8, 2005 (30 U.S.C. 1003(d)(2)).

Although 30 U.S.C. 1003(d)(2) uses the term "this section," BLM interprets it to mean the entire Geothermal Steam Act, as in effect on the day before August 8, 2005. Because § 1003 of the Act addresses the leasing process, interpreting the phrase "this section" to mean only § 1003 would allow pending lease applications to be processed noncompetitively, but would make the provision meaningless with regard to subsequently issued leases. Accordingly, BLM construes 30 U.S.C. 1003(d)(2) more broadly to allow leases issued pursuant to applications pending on August 8, 2005, to be subject to the regulations in effect before that date, to the same extent as leases in effect on August 8, 2005. In other words, leases issued pursuant to applications pending on August 8, 2005, would be subject to the revised parts 3200 and 3280, except that such leases would be subject to the regulations in effect on August 8, 2005, with regard to regulatory provisions relating to royalties, minimum royalties, rentals, primary term and lease extensions, diligence and annual work requirements, and renewals. As provided in the statute, the proposal would allow lessees to elect to be subject to the revised rules in their entirety.

Subpart 3201—Available Lands

Existing subpart 3201 addresses which lands are available for geothermal leasing and which lands are not available for geothermal leasing. The proposed subpart would be substantively unchanged from the existing subpart. Changes have been proposed to clarify terminology, and improve grammar and readability.

Subpart 3202—Lessee Qualifications

Existing subpart 3202 addresses who may hold geothermal leases, qualifications to hold a geothermal lease, whether other persons are allowed to act on an applicant's behalf, and what happens if an applicant for a lease dies. The proposed subpart would be substantively unchanged from the

existing subpart. Changes have been proposed to clarify terminology, and improve grammar and readability. There are several places in existing regulations that the term "offer" is used incorrectly. This proposed rule would replace the term "offer" with the term "application" to make it clear that "applications" are filed by the public and "offers" are made by BLM.

Subpart 3203—Competitive Leasing

Subpart 3203 would explain the process for competitive leasing under the Energy Policy Act amendments to the Geothermal Steam Act. The new provisions at 30 U.S.C.1003 require competitive leasing to the highest responsible qualified bidder except as otherwise specifically provided in the Act. This new statutory scheme differs from the previous one, which provided for competitive bidding only for lands within a known geothermal resource area or lands from terminated, expired, or relinquished leases, or at BLM's discretion when there was public interest.

Proposed § 3203.5 explains the three stages of the competitive leasing process. It would also summarize the four specific circumstances in which leases would be issued on a non-competitive basis that are addressed in detail at Subparts 3204 and 3205.

Proposed § 3203.10 would describe the process for nominating lands for competitive sale. It would implement the new statutory provision, at 30 U.S.C. 1006, that a lease may not exceed 5,120 acres unless the area to be leased includes an irregular subdivision. The previous statutory restriction was 2,560 acres. This section would also explain how a nominator must describe the lands nominated. These land description provisions were previously found at § 3204.11. The only change from those provisions would be a clarification that lands surveyed under the public land rectangular survey system should be described to the nearest aliquot part. This section would also make clear that a nominator may submit more than one nomination, as long as each nomination satisfies the acreage and land description requirements and includes the required filing fee, and that BLM may reconfigure lands to be included in each parcel offered for sale.

Proposed § 3203.11 would implement the new statutory provision, at 30 U.S.C. 1003(e), that BLM may offer parcels as a block at a competitive sale when it is reasonable to expect that a geothermal resource that can be produced as one unit underlies those parcels.

Proposed § 3203.12 would provide for a filing fee for nominations of lands of $100 per nomination plus 10 cents per acre of lands nominated. BLM is authorized to charge reasonable filing fees under § 304(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1734(a). While the general Federal policy is to charge a processing fee that recovers the agency's reasonable processing costs (see OMB Circular No. A–25; 330 D.M. 1.3A; Solicitor's M-Opinion No. M–36987), BLM does not have cost data at this point regarding its cost for processing nominations. We are therefore proposing a nominal filing fee, which is not intended to reimburse the government for its processing costs, but instead to limit filings to serious applicants. See Solicitor's M-Opinion No. M–36987, "BLM's Authority To Recover Costs of Minerals Document Processing," at n.6. In the final rule, we would move the amount of the fee from this section to the fee schedule at § 3000.12, cross-reference § 3000.12, and make a conforming change to § 3000.12. We will collect data on the costs of processing these nominations and expect to propose to charge a processing fee to cover agency costs in the future.

Proposed § 3203.13 would implement the new statutory requirement at 30 U.S.C. 1003(b) to hold a competitive lease sale at least once every 2 years in States where nominations are pending. This section would also allow for a sale to include lands in more than one State. Current regulations at § 3205.13 state that BLM will not accept bids which do not meet or exceed the fair market value as determined before the sale using generally acceptable appraisal methods. We have not included the requirement in this rule because we have concluded that the competitive bidding process itself is a reflection of the fair market value of the lease. Moreover, eliminating this bidding floor may encourage more competitive bidding, which both serves the Energy Policy Act policy of encouraging development of geothermal resources and is economically beneficial to the United States to the extent leases are issued competitively. This is because noncompetitive leases issued at a later date would be issued without any bonus bid (see discussion of proposed § 3204.11, below) and would have lower rates of rental (see discussion of proposed § 3211.11, below).

Proposed §§ 3203.14 and 3203.15 would describe how BLM will notify the public of competitive lease sales, the types of information BLM will include in a notice of sale, and how BLM will conduct the sale. These sections differ in some respects from sections in the current regulations at subpart 3205 that addressed competitive leasing under the former statutory scheme. Unlike the current regulations, the proposed sections would not restrict the competitive sale process to sealed bids, but would be flexible enough to allow other competitive sale formats, such as oral auctions. We anticipate that most sales would be conducted through an oral auction.

In order to protect the bidding process, we propose to add at § 3203.15(c) a standard auction requirement that a bid may not be withdrawn and that a bid constitutes a legally binding commitment. This is current BLM practice both in the geothermal and oil and gas leasing programs.

Proposed § 3203.17 would provide information related to the payment obligations of a successful bidder. Because the proposed competitive sale process would no longer be restricted to sealed bids, a bidder would not have to submit any payments unless at the end of the sale it was the high bidder. This section would provide that a successful bidder must pay twenty percent of the bid, the total first year's rental, and the processing fee by close of business on the day of the sale or such other time as BLM may specify. While the general expectation would be that these payments be made on the day of the sale, we propose to allow BLM to specify another time for payments to be made if circumstances so require, for example, the following business day. We also propose to add personal checks to the list of financial instruments that may be used to make it easier for the successful bidder to make payments immediately after the sale. Proposed § 3203.17(c), like current § 3205.16, would require that the balance of the bid be submitted within 15 calendar days after the sale.

Proposed § 3203.18 would cross-reference proposed subpart 3204, which would implement the statutory provision at 30 U.S.C. 1003(c) providing for the noncompetitive offering of parcels that did not receive bids in a competitive lease sale.

Subpart 3204—Noncompetitive Leasing Other Than Direct Use Leases

Proposed subpart 3204 would describe when and how BLM will issue noncompetitive geothermal leases. The most common method of obtaining noncompetitive leases under this subpart would be to apply for parcels of land that did not receive bids in a competitive sale. This subpart would not address noncompetitive leases for lands available exclusively for direct

use of geothermal resources, which would be addressed at proposed subpart 3205.

Proposed § 3204.5 would describe the four types of lands available for noncompetitive leasing: (1) Parcels of land that did not receive bids in a competitive sale; (2) Lands available exclusively for direct use, addressed at proposed subpart 3205; (3) Lands subject to mining claims, addressed at proposed subpart 3204.12, and (4) Lands for which a lease application was pending on August 8, 2005, if the applicant so chooses.

Proposed § 3204.10 would require an applicant for a noncompetitive lease to submit a processing fee and advance rent. The advance rent would be refunded if the application were rejected or withdrawn. These provisions are substantively the same as current § 3204.12.

Proposed § 3204.11 would implement the statutory requirement at 30 U.S.C. 1003(c) that lands for which no bid was received in a competitive lease sale would be available for noncompetitive leasing for two years following the date of the competitive sale. The proposed sections would explain the procedures for this type of noncompetitive leasing, which are similar to the procedures for acquiring a noncompetitive oil and gas lease for lands that were not sold at a competitive lease sale. See 43 CFR 3110.2 and 3110.5–1. The section would provide that for the first 30 days following the competitive sale, applications would be accepted only for parcels as configured in the sale notice. As in the oil and gas regulations, this provision is for efficiency of administration. In the month following a sale, BLM processes both leases that sold at the lease sale and those for which noncompetitive applications are received after the sale; adding the burden of reconfiguring parcels during that period would slow down the process for other leases. Proposed § 3204.11 would also provide that all applications received for a particular parcel on the first business day after the competitive sale would be considered as simultaneously filed, and BLM would select one at random to receive a lease offer. As in the oil and gas regulations, this is intended to provide all interested parties an equal opportunity to apply during the first 24 hours after the lease sale.

BLM would not require a person to submit a bid for a noncompetitive lease to reflect fair market value because no bid had been received at the competitive lease sale. Moreover, it would be difficult for BLM to determine what an appropriate bid should be in that situation, and allowing leases to be obtained without a bid should encourage additional geothermal exploration and development.

Proposed § 3204.12 would implement the statutory provision at 30 U.S.C. 1003(b)(3) that allows a mining claimant with an approved plan of operations to apply for a noncompetitive geothermal lease.

Proposed § 3204.13 would implement a portion of the statutory provision at 30 U.S.C. § 1003(d)(2) that allows lease applications pending on August 8, 2005 to be processed under then-existing policies and procedures unless the applicant elects for the lease to be subject to the new leasing procedures.

Proposed § 3204.14, governing the amendment of noncompetitive lease applications, would provide that an applicant may amend an application at any time before BLM issues a lease if the amended application meets the requirements in this subpart and as long as the amendment does not add lands not included in the original application. To add lands, an applicant would have to file a new application. (The withdrawal of lands from noncompetitive lease applications would be covered by proposed § 3204.15, discussed below.) Section 3204.18 of the current regulations does not prohibit amendments that add lands, but provides that BLM will determine priority based on the date it receives the amended lease application rather than on the date of the original application. Current § 3204.18 does not differentiate between amendments that add lands and those that do not. We decided that adding lands to an application was equivalent to submitting a new application, thus requiring a change in the priority. We therefore propose to require that a new application be filed in cases of proposed amendments when an applicant wants to add lands to an already submitted application. Because amendments other than adding lands do not require BLM to revise the priority date, we do not propose to require a new application for such amendments.

Proposed § 3204.15 would provide that for 30 days after a competitive lease sale, BLM would not accept partial withdrawals of noncompetitive lease applications and would only accept withdrawals of entire noncompetitive lease applications. After 30 days, partial as well as whole withdrawals would be allowed at any time before BLM issues the lease. This would be a change from current § 3204.17, which does not contain the restriction in the first 30 days. This proposed provision is parallel to the provision at proposed § 3204.11 restricting noncompetitive applications for reconfigured lease parcels for the first 30 days following a competitive sale. If an applicant applied for a parcel as configured in the sale notice, then immediately applied to withdraw the application with respect to only a portion of the parcel, the result would be the same as applying for a reconfigured parcel. Allowing this would thus defeat the provision in proposed § 3204.11. Proposed § 3204.15 would also provide that if a partial withdrawal results in failure to meet the minimum acreage required for a lease in proposed § 3206.12, BLM will reject the lease application. This provision is in § 3204.17 of the current regulations.

Subpart 3205—Direct Use Leasing

The Energy Policy Act provides the authority for BLM to issue leases solely for the direct use of geothermal resources under certain conditions. Subpart 3205 would be a new subpart added to describe these conditions and the process for applying for a direct use lease. This subpart would implement the provisions of 30 U.S.C. 1003(f).

Proposed § 3205.6 would address the conditions under which BLM would issue a direct use lease to an applicant. "Direct use lease" as used in this subpart has a specific meaning, and is defined at proposed § 3200.1 as "a lease issued in an area BLM designates as available exclusively for direct use of geothermal resources, without sale, for purposes other than commercial generation of electricity." Regular geothermal leases also permit direct use of the geothermal resource, which the lessee may choose not to sell, but that circumstance would not convert a regular geothermal lease into a direct use lease. A regular geothermal lessee may choose to sell the resource for direct use or may choose to use the resource for the commercial generation of electricity, choices that a direct use lessee does not have.

Proposed § 3205.6 would explain that a direct use lease may be issued only for lands that BLM has determined are appropriate for exclusive direct use, without sale, for purposes other than commercial generation of electricity. BLM would make the determination of whether the lands are appropriate for direct use leasing on a case-by-case basis at the time of application. The advantage of a direct use lease would be that it could be issued noncompetitively to the first qualified applicant if BLM determined that there was no competitive interest in the geothermal resources on the land to be leased. BLM would make this determination after publishing a notice of proposed leasing

and receiving no nominations to include the land in a competitive lease sale (as required by 30 U.S.C. § 1003(f)). Proposed § 3205.6 would also provide that the acreage covered by a direct use lease application could not exceed the quantity of acreage that is reasonably necessary for the proposed use, as required at 30 U.S.C. 1003(g).

Proposed § 3205.7 would specifically address the acreage restrictions applicable to a direct use lease as provided by 30 U.S.C. 1003(g) (not greater than reasonably necessary for the proposed use) and 30 U.S.C. 1006 (not more than 5,120 acres for any geothermal lease, except in the case of an irregular subdivision).

Proposed § 3205.10 would explain the procedures for applying for a direct use lease and the types of information to be submitted with an application. The information that is submitted is used by BLM to determine if the requested acreage is necessary for the intended operation as described in § 3205.7. This section would also require the submission of a nonrefundable processing fee for noncompetitive lease applications, as required by § 3204.12 of the current regulations.

Proposed § 3205.12 would address direct use lease applications for lands managed by an agency other than BLM, explaining that BLM would forward a copy of such an application to the other agency. If that agency consented to leasing and recommended that the lands were appropriate for a direct use lease, BLM would consider that consent and recommendation in determining whether to issue the lease. This section would require that BLM obtain the consent of the surface management agency before issuing a direct use lease.

Proposed §§ 3205.13 and 3205.14 would allow an applicant for a direct use lease to withdraw its application at any time or amend its application, without adding new lands, prior to lease issuance. To add new lands, an applicant would have to file a new application (see proposed § 3204.14).

Proposed § 3205.15 discusses how BLM will inform an applicant of its decision to approve or deny a direct use lease application.

Subpart 3206—Lease Issuance

Subpart 3206 in both the current and proposed regulations addresses lease issuance in general.

Proposed § 3206.10 is nearly identical to current § 3206.10, with the addition of a provision notifying applicants that all payments must be made before BLM will issue a lease. This addition reflects current BLM practice.

Proposed § 3206.11, which implements 30 U.S.C. 1026, is unchanged from current regulations except for changing the words "will not significantly impact" at the beginning of paragraph (b), to "will not have a significant adverse impact on," which more closely tracks the language of 30 U.S.C. 1026(c).

Proposed § 3206.12 would address minimum and maximum lease sizes, which are addressed in the current regulations at § 3204.14. The maximum lease size would be increased from 2,560 acres to 5,120 acres, as provided at 30 U.S.C. 1006.

Proposed § 3206.13 would address the maximum acreage that one lessee may hold, which is addressed in the current regulations at § 3206.12. The proposed section is identical to the first sentence of current § 3206.12 and implements 30 U.S.C. 1006, which sets the limit at 51,200 acres in any one State. The remainder of § 3206.12 of the current regulations would be deleted because the Energy Policy Act amendments deleted those provisions in the statute.

Proposed § 3206.14 would explain how BLM computes acreage holdings. This proposed section is identical to current § 3206.13, except for minor editorial changes.

Proposed § 3206.15, explaining how BLM would charge acreage holdings if the United States owns only a fractional interest in the geothermal resources, is identical to current § 3206.14, except for minor editorial changes.

Proposed § 3206.16 would explain that acreage is not chargeable against the acreage limitations if it is included in any approved unit agreement or development or drilling contract. These exclusions would implement 30 U.S.C. 1017(d) and (g)(2) and are addressed at § 3206.15 in the current regulations. Reference in current regulations to cooperative agreements was deleted because they are no longer mentioned in this part.

Proposed § 3206.17, which would address what BLM does if a lessee's holdings exceed the maximum acreage limits set in proposed § 3206.13, is identical to § 3206.16 of the current regulations.

Proposed § 3206.18, which would address when BLM issues a lease, is identical to § 3206.18 of the current regulations, except for a minor editorial change.

Subpart 3207—Lease Terms and Extensions

Subpart 3207 would explain the new scheme of lease terms and extensions provided at 30 U.S.C. 1005.

Proposed § 3207.5 would summarize the new lease terms (length of time a lease is in effect) and lease term extensions, which include: (1) A ten-year primary term and two five-year extensions of the primary term; (2) A five-year drilling extension; (3) A production extension of up to 35 years; and (4) A renewal term of up to 55 years.

Proposed §§ 3207.10, 3207.11, and 3207.12 would address the primary term of a lease and explain the requirements for obtaining and continuing extensions of the primary term. The statute, at 30 U.S.C. 1005(b), includes a provision that "for each year after the 10th year of the lease" lessees must "satisfy minimum work requirements prescribed by the Secretary that apply to the lease for that year." This section can be read as providing that the Secretary may require that a lessee complete certain work requirements in 1 year of the lease that apply to the following year of the lease, in terms of informing the Secretary's decision whether the lease may continue into that following year. Under this interpretation, a work requirement applicable to the 12th lease year would require that work be performed by the end of the 11th year, and a requirement applicable to the 11th lease year would require that work be performed by the end of the 10th year.

Even under an interpretation that 30 U.S.C. 1005(b) requires only that work be performed in the 11th lease year and thereafter, BLM must give effect to the statutory mandate at 30 U.S.C. 1005(a)(1) that the primary term at the beginning of a lease is ten years. BLM cannot wait until the end of the 11th lease year to determine whether to grant the initial five-year extension because that would provide lessees with a de facto primary term of 11 years, in contravention of the statutory mandate. Because the general rule-making authority granted to the Secretary at 30 U.S.C. 1023 allows the Secretary to prescribe rules appropriate to carry out the provisions of the Act, BLM has authority to prescribe work requirements that must be completed by the end of the 10th lease year, in order to give effect to the statutory ten-year primary term and provide a basis for deciding whether BLM will grant the initial 5-year extension.

Thus, § 3207.11 would provide requirements that a lessee must meet within the 10-year primary term for a lessee to be eligible for the initial 5-year extension of the primary term. BLM formulated its list of potential types of work that could be performed to meet the work requirements based on the statutory provision, at 30 U.S.C.

1005(b)(2). The provisions require that the work should establish a geothermal potential or, if that potential has been established, should confirm the existence of producible geothermal resources. The amount of work that must be performed is quantified as a minimum dollar expenditure per acre, as it is in the current regulations (see current §§ 3210.13 (diligent exploration requirements) and 3208.14 (significant expenditures)).

For the work requirements that must be completed by the end of the tenth year of the lease, we propose at § 3207.11(a) a $40 per acre expenditure over the ten-year period of the primary term of the lease, which is the same expenditure that is required at § 3210.13 of the current regulations for diligent exploration during the primary term. For work requirements for each year of the initial five-year extension, we propose at § 3207.12(a) an annual dollar expenditure of $15 per acre, which is the same as required at § 3208.14 of the current regulations for significant expenditures during a first lease extension. For work requirements for each year of the additional five-year extension, we propose at § 3207.12(c) an annual dollar expenditure of $25 per acre. We determined that the dollar expenditure for work requirements should increase enough during an additional extension to motivate a lessee to put a lease into production if it is not already producing in commercial quantities by the end of the 15th year. As the annual expenditure requirement would increase $11 per acre after the 10th lease year (from $40 over a 10-year period, or an average of $4 per acre per year, to $15 per acre per year), we are proposing that the expenditure requirement increase by a nearly equivalent amount—$10 per acre—after the 15th lease year (from $15 to $25 per acre per year). We believe this level of increase will serve the purpose of encouraging diligent development of the resource.

We are also proposing an automatic inflation adjustment for the minimum work requirements and for monetary payments in lieu of the work performance. We would include a provision in §§ 3207.11 and 3207.12 to adjust the dollar amount of the requirements automatically every three calendar years. The adjustment would be based on the Implicit Price Deflator for Gross Domestic Product that is published annually by the U.S. Department of Commerce. Because the work requirements would simply be based on a mathematical formula, we would make these adjustments in succeeding final rules without notice and comment. This is the procedure that BLM used in its cost recovery rule published on October 7, 2005 (70 FR 58872).

Proposed §§ 3207.11(b) and 3207.12(d) would allow a lessee to make minimum annual payments instead of performing the work requirements, as provided in the statute at 30 U.S.C. 1005(c). These sections would provide that a lessee may make a payment equivalent to the required work expenditure, such that the total of the payment and the value of the work performed equals the dollar value of the expenditure that would otherwise be required. As provided in the statute, these sections would also allow BLM to limit the number of years that it would accept such payments, if it determined that payments in lieu of work requirements would impair achievement of diligent development of the geothermal resource. We concluded that such impairment determinations were more appropriately made on a case-by-case basis and therefore we did not include in the rule a specific limit on the number of years that BLM will accept such payments.

The proposed rule would take a different approach than the approach contained in the existing rules regarding the amount of payments that would be allowable in lieu of work performance. Existing §§ 3210.15 and 3208.13 allow for a lessee to make payments in lieu of performing work requirements, but the payment amounts are substantially less than the value of the work otherwise necessary to be performed. The current rules thus appear to create a disincentive to the performance of work. BLM would reject the existing scheme in the proposal, and not allow payments in a lesser amount than the value of the required work. As stated above, if a lessee were to choose to make payments instead of performing work, the proposed rule would require a lessee to make minimum annual payments in amounts equivalent to the required work expenditure, such that the total of the payment and the value of the work performed equals the dollar value of the expenditure that would otherwise be required. By eliminating the disincentive to perform work, the proposal would further the statutory purpose of encouraging the development of geothermal resources.

Proposed §§ 3207.11(b) and 3207.12(d) would also provide that a lessee is exempt from work requirements if it submits documentation to BLM showing that it has produced or utilized geothermal resources in commercial quantities. This would implement 30 U.S.C. 1005(f), which provides that minimum work requirements do not apply after the date on which the geothermal resource is utilized in commercial quantities.

Proposed §§ 3207.11(c) and (e), and 3207.12(f) and (g) would provide timeframes for a lessee to submit information to BLM showing that it has met the work requirements or paid or produced in lieu thereof, explain the type of information that must be submitted, and explain BLM's approval process.

Proposed § 3207.12(e) would provide that if a lessee expends an amount greater than the dollar expenditure required in that year on suitable development activities, the lessee may apply any excess payment to any subsequent year within that same 5-year extension period. This is similar to § 3208.14(a) of the current regulations.

Proposed § 3207.13 would exempt from the work requirements a lessee whose lease overlies a mining claim when: (1) The mining claim has a plan of operations approved by the appropriate Federal land management agency; and (2) Development of the geothermal resource would interfere with the mining operations. This would implement 30 U.S.C. 1005(e).

Proposed §§ 3207.14 and 3207.15 would implement the 5-year drilling and 35-year production extensions provided for in the statute at 30 U.S.C. 1005(g). The previous version of the statute contained not only these extensions (at former 30 U.S.C.1005(c)), but also a separate 40-year production extension (at former 30 U.S.C. 1005(a)). Because the 2005 statutory amendments eliminated the 40-year production extension, we examined more carefully the language of the 5-year drilling and 35-year production extension provision, to determine its applicability. We concluded that the language in the statute supports applying the 5-year drilling and 35-year production extensions to regular leases, as well as to leases under cooperative or unit agreements.

The statute provides for a drilling extension only if a lessee is engaged in qualifying drilling operations at the time the primary term ends. (See 30 U.S.C. 1005(g).) Under the new statutory and regulatory scheme, if the lessee has submitted information showing that it has met the applicable requirements (work activities or payment or production in lieu thereof), the primary term would be extended each year past the 10th year and would end only at the end of the 20th year. If, however, the lessee fails to submit information showing that it has met the applicable requirements during any extension year

after the 10th lease year, the lease would terminate at the end of that year. (See discussion of proposed §§ 3207.11 and 3207.12, above.) Thus, proposed § 3207.14 would allow the drilling extension only if: (1) A lessee was drilling over the end of the 20th lease year (when the primary term would end due to lease expiration); or (2) A lessee had failed to submit information showing that it had met the requirements for an extension of the primary term and was drilling over the end of a year subsequent to the 10th year (in which case the primary term would terminate due to a failure to comply with requirements). The proposed section would further specify that to qualify for the drilling extension, the lessee must be drilling a well for the purposes of commercial production to a target that BLM determines is adequate, based on the local geology and type of proposed development. The proposed section would also provide, as does the statute, that the lease would expire if, at the end of the five-year drilling extension, the lessee did not qualify for a production extension (*i.e.*, if the lessee was not producing or utilizing the geothermal resource in commercial quantities—see discussion of proposed § 3207.15, below).

Proposed § 3207.15 would provide a production extension of up to 35 years for a lease that is: (1) Actually producing geothermal resources in commercial quantities; or (2) Has a well capable of producing geothermal resources in commercial quantities and the lessee is making diligent efforts to utilize the resource. This would reflect the definition at 30 U.S.C. 1005(h) of "produced or utilized in commercial quantities." Although that term would be defined at § 3200.1, we also propose to include the definition in this section for the reader's convenience. The section would also indicate what types of information a lessee must provide to BLM for it to determine whether to grant a production extension. A lessee with a BLM-approved utilization plan allowing for seasonal operation would be eligible for the production extension as long as it was producing or utilizing the geothermal resource in commercial quantities during the periods that the utilization plan provided for operations.

Proposed § 3207.16 would implement the lease renewal provision at 30 U.S.C. 1005(g). The statute provides for renewal "for a second term." We have interpreted "second term" to mean a period equal to the length of the primary term including the initial and additional extensions (a total of 20 years) plus the length of the production extension (up to 35 years) for a total renewal period of up to 55 years. This section would also specify that the renewal term continues only so long as the lessee is producing or utilizing geothermal resources in commercial quantities. The term "produced or utilized in commercial quantities" is defined in proposed § 3200.1.

Proposed § 3207.17 would provide that leases committed to a unit agreement that would expire before the unit term would expire may be extended to match the term of the unit if unit development has been diligently pursued. Paragraph (a) of this section is virtually identical to the current regulation at § 3208.10(a)(4), with a slight change in wording to remove any implication that the holder of the expiring lease must be the one to have diligently pursued unit development.

Proposed § 3207.18 would implement 30 U.S.C. 1017(f)(3) and provide that a lease that is eliminated from a unit is eligible for a drilling extension or a production extension if it meets the requirements for such extensions.

Subpart 3208—Extending the Primary Lease Term

Existing subpart 3208 would be removed because under this proposed rule the subject of extensions of lease terms would be addressed in proposed subpart 3207.

Subpart 3209—Conversion of Lease Producing Byproducts

Existing subpart 3209 would be removed because the lease conversions that subpart covers are no longer allowable under the Energy Policy Act of 2005.

Subpart 3210—Additional Lease Information

Proposed §§ 3210.10 and 3210.11 on lease segregation would remain substantively unchanged from the existing sections.

Proposed § 3210.12 would reference new lease size limits and the processing fee for lease consolidations. In other respects, it would be substantively unchanged from the existing section.

Existing §§ 3210.13, 3210.14, 3210.15, and 3210.16, all of which pertain to diligent exploration requirements, would be removed. These provisions would be addressed by the sections related to work requirements in proposed subpart 3207. Despite their removal, their substantive terms would continue to be applicable to leases existing on August 8, 2005 and leases issued after August 8, 2005 in response to applications pending on that date, unless the lessees elect to be subject to the new regulatory requirements that would be adopted in this rulemaking.

Proposed § 3210.13 on leasing or locating minerals on a geothermal lease would remain substantively unchanged from existing § 3210.17.

Proposed § 3210.14, pertaining to readjustment of the terms and conditions of geothermal leases, would replace existing §§ 3210.18, 3210.19, and 3210.20 that relate to the same topic. It would implement 30 U.S.C. 1007, as revised by the Energy Policy Act of 2005. Proposed § 3210.14(a) on readjustment of lease terms and conditions would replace existing §§ 3210.18 and 3210.19(a). With one exception, proposed paragraph 3210.14(a) would be substantively unchanged from existing § 3210.18. Existing § 3210.18 provides that once BLM and the other agency reach agreement, BLM will readjust the terms of the lease. The existing rule does not state, as the statute requires at 30 U.S.C. 1007(c), that the other agency must approve the readjustment. Proposed § 3210.14(a)(2) would clarify that the other agency must approve the proposed readjustment. "Approval" is the term used in 30 U.S.C. 1007(c).

Proposed § 3210.14(b) would replace existing § 3210.20(a). The existing 22.5 percent royalty cap for readjusted leases would be removed because that cap is no longer in the statute.

Proposed §§ 3210.14(c), (d), and (e) would implement the procedures of 30 U.S.C. 1007(b), and are somewhat different than the procedures in existing rules at 43 CFR 3210.19 and 3210.20. Under existing §§ 3210.19(a) and 3210.20(b), BLM notifies lessees in writing of proposed readjustments and provides the lessee 30 days to object in writing to the new terms. The existing rules provide further that if a lessee does not object, the proposed new terms will become part of an existing lease and that if a lessee does object, BLM will issue an appealable final decision on the new terms and conditions. The existing rules, however, do not expressly mention certain concepts contained in the statute that are described below.

Under the proposal BLM would give a lessee a written proposal to adjust the rentals, royalties, or other terms and conditions of its lease. The lessee would have 30 days after receiving the proposal to file with BLM an objection in writing to the proposed new terms and conditions. If the lessee does not object in writing or relinquish its lease, it would conclusively be deemed to have agreed to the proposed new terms and conditions. This concept, implied but not expressly stated in the existing

rules, is taken directly from the statute. BLM would then issue a written decision under proposed § 3210.14(d), setting the date that the new terms and conditions become effective as part of the lease. This decision would be in full force and effect under its own terms, and under proposed § 3210.14(d), the lessee would not be authorized to appeal the BLM decision to the Department's Office of Hearings and Appeals.

Proposed paragraph (e) establishes procedures for the situations where a lessee files a timely objection to the proposed readjustment and is intended to implement a portion of 30 U.S.C. 1007(b) that is not addressed in existing regulations. Under proposed paragraph (e)(1), if a lessee files a timely objection in writing, BLM could issue a written decision making the readjusted rental and royalty terms effective no sooner than 90 days after receiving the objections, unless BLM reaches an agreement with the lessee as to the readjusted terms of the lease that makes such terms effective sooner.

Under proposed § 3210.14(e)(2), if BLM does not reach an agreement with the lessee by 60 days after receiving the lessee's objections, then either the lessee or BLM may terminate the lease, upon giving the other party 30 days' notice in writing. This provision is contained in 30 U.S.C. 1007(b), but does not appear in the current regulations. The proposed rule would clarify that a lease termination under proposed paragraph (e)(2) would not affect a lessee's obligations that accrued under the lease when it was in effect, including those specified in § 3200.4.

Unlike a BLM decision under proposed § 3210.14(d), a lessee could appeal a BLM readjustment decision under proposed § 3210.14(e)(1). Proposed § 3210.15 would address such appeals. It would provide that if a lessee appeals BLM's decision under § 3210.14(e)(2) to readjust lease terms and conditions, or rental or royalty rate, the decision would be effective during the appeal. If the lessee wins its appeal and BLM would have to change its decision, the lessee would receive a refund or credit for any overpaid rents or royalties.

In summary, BLM would provide a lessee 30 days to object to a proposed readjustment decision. If the lessee objects, BLM could issue a written decision making the readjusted rental and royalty terms effective no sooner than 90 days after receiving the objection. A lessee would have 30 days to appeal that decision under Office of Hearings and Appeals regulations. In addition to the appeal process, BLM and the lessee could attempt to negotiate an agreement within 60 days after receiving the objection. If an agreement is reached, the appeal would be withdrawn. If an agreement is not reached, either the lessee or BLM could terminate the lease, even if an appeal would be pending.

Proposed §§ 3210.16 and 3210.17, relating to drainage of geothermal resources, would be substantively unchanged from existing §§ 3210.22 and 3210.23.

Subpart 3211 Filing and Processing Fees, Rent, Direct Use Fees, and Royalties

Existing § 3211.10 establishes filing fees, rent, and minimum royalties for geothermal leases. In the proposed rule, existing § 3211.10 would be split into several new sections because of the changes to lease rental rates, royalty rates, and minimum royalty requirements in the Energy Policy Act of 2005. Proposed § 3211.10 would only address processing and filing fees. Rather than listing the various fees for lease nomination, lease filing, and subsequent lease transactions, proposed § 3211.10 would reference existing 43 CFR 3000.12, which sets fees for all mineral applications and transactions. BLM expects to update § 3000.12 from time to time to reflect actual costs associated with these activities. If the specific fees were included in this part, the geothermal regulations would have to be changed every time fees were revised.

Proposed § 3211.11 would establish rental rates for geothermal leases. The new lease rental rates would be taken directly from 30 U.S.C. 1004(a)(3)(A) and (B). The rental rates in the Energy Policy Act of 2005 have changed significantly from the rental rates in the existing regulations. While the rental for noncompetitive leases remains at $1 per acre per year for the first 10 years, the rental for competitive leasing has increased from $2 per acre per year to $3 per acre per year from years 2 through 10. Starting with the eleventh year, the rental rate for all leases increases to $5 per acre per year. Proposed § 3211.11(d) would carry forward the current provision regarding fractional mineral interests that currently is contained in § 3211.13. The references to minimum royalties in the existing rule would be removed because the Geothermal Steam Act as revised by the Energy Policy Act no longer provides for minimum royalties.

Proposed § 3211.12 is virtually the same as existing § 3211.12. The Energy Policy Act of 2005 did not make any changes to whom the rent is paid for the first year and subsequent years.

Proposed § 3211.13 addresses when rental payments are due and would replace existing § 3211.11. The rule would provide that rent is always due in advance. MMS must receive annual rental payments by the anniversary date of each lease year. If less than a full year remains on a lease, a lessee must still pay a full year's rent by the anniversary date of the lease. The payment of rent in advance is required by 30 U.S.C. 1004(a)(3). As this was also required in the original Steam Act of 1970, there are no substantial changes to this portion of the provision. The reference in existing § 3211.11 to the automatic termination of leases by operation of law would not be included in the new section because the statute has changed in this regard. Lease termination for non-payment of rental is addressed in § 3214.14 of this proposed rule and is discussed later in this preamble.

Proposed § 3211.14 would require that a lessee must always pay rental, whether the lease is in a unit or outside of a unit, whether the lease is in production or not, and whether royalties or direct use fees apply to production from the lease. This would be a substantial change from existing §§ 3211.14 and 3211.15. Under the current regulations, based on Section 5(d) of the Geothermal Steam Act (30 U.S.C. 1004(d) in effect prior to the Energy Policy Act of 2005), rent was not required once the lease went into production or was deemed to have a well capable of production. Under the earlier statute, the lessee paid a royalty on production, or a minimum royalty of $2 per acre per year, whichever was greater "in lieu" of rent. The Energy Policy Act of 2005 does not contain the "in lieu" language, and also eliminated the requirement of a minimum royalty. The statute now requires rent to be paid as long as the lease is in effect (but does allow a credit against royalties, as discussed below). There are no provisions in the Energy Policy Act of 2005 to waive or alter the rental requirement for leases committed to a unit or pooling agreement and there are no distinctions, other than the rental rate, for leases obtained competitively or noncompetitively, or used for direct use or commercial electrical generation.

Existing § 3211.17 would be removed because, as mentioned above, minimum royalties would no longer apply to new leases.

It should be noted that, even if BLM were to finalize these proposed rules, under proposed § 3200.7(a) the rental and minimum royalty schemes of the existing regulations would continue to

apply to leases in effect on August 8, 2005, unless the lessees elect under proposed § 3200.7(a)(2) to have the new regulatory provisions apply to them. This also applies to leases issued after August 8, 2005, in response to applications pending on that date.

Proposed § 3211.15, together with applicable MMS regulations, would implement 30 U.S.C. 1004(e), which requires that the advance rental payments be credited towards royalty due on production in that lease year. The rule would provide that a lessee may credit rental towards royalty under MMS proposed regulations at 30 CFR 218.303. Under the statute the rental credit against royalty is allowed only for rent paid before the first day of the year for which the rental is owed. In other words, no credit would be allowable for rent paid after the lease anniversary date, even if the lease were not terminated. Thus, although lessees would be allowed to maintain their leases by paying rent plus a late fee within 45 days of the lease anniversary date, they could not credit such late rental payments against royalties.

Also, there are no provisions in the Energy Policy Act of 2005 to carry over rental paid in excess of royalty from one lease year as a credit against royalty for production in another year. Because rental is always due on a lease, the rental payment effectively becomes the equivalent of a minimum royalty payment that was required prior to the Energy Policy Act of 2005.

Proposed § 3211.16 would provide that rental paid could not be credited against fees owed for direct use of geothermal resources. This would also appear in proposed MMS proposed regulations at 30 CFR 218.304. The Energy Policy Act of 2005 (30 U.S.C. 1004(e)), allows only the "crediting of rental towards *royalty*" (emphasis added). Rentals cannot be credited towards the payment of direct use fees because a clear distinction exists between "royalties" and "fees" in the Energy Policy Act of 2005. Under 30 U.S.C. 1004(b), the provision that establishes direct use fees, direct use fees are paid "in lieu of royalties" for direct use of geothermal resources that a lessee uses for a purpose other than the commercial generation of electricity and does not sell. Thus, such fee payments would not constitute royalty payments. Under the proposed rule, lessees would pay direct use fees in addition to rental.

Proposed § 3211.17 would establish royalty rates on geothermal resources produced from or attributable to a geothermal lease that are used in the commercial generation of electricity from or attributable to a geothermal lease. The Energy Policy Act of 2005 (30 U.S.C. 1004(a)(1)(A) and (B)) provides for a royalty on the sale of electricity produced from geothermal resources ranging from 1 percent to 2.5 percent of gross proceeds for the first 10 years of production, and from 2 percent to 5 percent of gross proceeds thereafter. BLM interprets this section of the Energy Policy Act to apply to situations in which the lessee does not sell the geothermal resource produced from its lease or engages in a non-arm's-length transaction. Although the statute establishes an allowable royalty range, the statute contemplates under 30 U.S.C. 1004(c) that actual royalty rates would be established by regulation. Under proposed § 3211.17(a)(1)(i), BLM would establish one royalty rate, 1.75 percent, that would apply to geothermal leases in the first 10 years of a lease, and a second royalty rate, 3.5 percent, that would apply in subsequent years with respect to geothermal resources that a lessee or its affiliate uses to generate electricity that it sells. Proposed § 3211.17(a)(1)(iii) would reiterate the language in the Energy Policy Act of 2005 that the percentages in paragraphs (i) and (ii) must be applied to the gross proceeds from the sale of electricity, as opposed to the gross proceeds from the sale of the geothermal resource, and would specify that gross proceeds must be determined in accordance with applicable proposed MMS rules.

Proposed § 3211.17(a) would apply to leases issued on or after August 8, 2005, except for those leases issued in response to lease applications that were pending on August 8, 2005 that would be subject to the BLM regulations in effect on that date. Under proposed § 3200.8(b), lessees of leases issued in response to lease applications that were pending on August 8, 2005, could elect to have the new royalty rates apply to such leases.

The methodology prescribed in 30 U.S.C. 1004(a)(1)(A) and (B) represents a significant change from the way royalty is currently determined. For leases issued before August 8, 2005 (and for leases issued in response to applications that were pending on August 8, 2005, that are subject to existing BLM rules), a royalty rate from 10 percent to 15 percent of the value of the geothermal resource is in effect. Historically, arms-length sales of geothermal resources from a lessee to a third party utility were common and the arms-length transaction established the value of the resource. For most situations where there was no sale of geothermal resource (as is the case for virtually all existing leases), the value of the geothermal resource was artificially derived using the "netback" method developed by MMS, a method that in practice has been cumbersome for both MMS and the lessees, and often resulted in almost no royalty being paid. For example, lessees at The Geysers geothermal field informed MMS that the netback method was unworkable and negotiated with MMS to adopt a simpler "percent of gross proceeds" method instead.

The Energy Policy Act of 2005 simplifies the way in which royalty is valued by basing royalties on a percentage of gross proceeds derived from the sale of electricity. Section 1004(c) of the Act requires that the royalty rate provide a simplified administrative system, encourage new development, and be revenue neutral for a period of 10 years when compared to the valuation methods currently in place. The change to a "percent of gross proceeds" method for all new leases would accomplish the first two mandates of the Energy Policy Act of 2005. Such a method would be easier for BLM, MMS, and industry to administer than the current scheme, and this should help encourage development.

In establishing the proposed royalty rates, BLM has relied upon the rates recommended by the MMS Royalty Policy Committee (RPC) Geothermal Valuation Subcommittee. Both the RPC and the Geothermal Subcommittee were chartered under the Federal Advisory Committee Act, and included representatives from the geothermal industry, State and local government, and the public at large. The rates recommended by the Subcommittee were 1.75 percent for the first 10 years, and 3.5 percent thereafter. The 3.5 percent royalty rate was based on the national average amount of royalty that is currently paid from producing Federal geothermal leases. In 2003 and 2004, the average royalty rate, expressed as a percent of gross proceeds, was 3.64 percent and 3.94 percent, respectively.

According to the Geothermal Valuation Subcommittee Report (May, 2005, page 10), "Under the netback method, historically during the beginning years of an electrical generation project (between 1–10 years), lessees pay a very low percentage of the gross proceeds from the sale of electricity and in later years of the project (after 10 years), the percentage increases * * *. The recommended proposal [1.75 percent and 3.5 percent] attempts to replicate this historical trend under the netback method over the long term." Although the RPC recommendation is not based on a

detailed study, it was intended to achieve revenue neutrality for both the initial 10 years, and subsequent years. Because the royalty rate range established in the statute for the time period beyond the first 10 years is double that of the first 10 year period, BLM believes the intent of Congress was to require a higher royalty rate in subsequent years to account for projected higher electrical prices and fewer capital expenditures.

BLM also expects to conduct a study that would project royalty received from existing projects using the existing valuation methods, over the next 10 years. A percent of gross proceeds that would generate an equivalent amount royalty would then be determined. BLM anticipates that the study we are contracting could refine the proposed rates, but would not change them substantially. While there is no specific guidance in the Energy Policy Act of 2005 regarding revenue neutrality past the next 10 years, the study may also address royalties under the existing methods from 10 years to 40 years.

The Energy Policy Act of 2005, as codified at 30 U.S.C. 1004(a)(1)(A) requires a royalty of 1 percent to 2.5 percent of gross proceeds from the sale of electricity "during the first 10 years of production under the lease." BLM is interpreting this language to mean that the 10-year period to which the 1.75 percent royalty rate applies would start during the month for which commercial operation is first achieved, and would continue for 120 consecutive months, unless a suspension of operations and production was granted under 3212.

Proposed § 3211.17(a)(2) would set the royalty rate for the arms-length sale of resources at 10 percent of gross proceeds from that sale. The Energy Policy Act of 2005 is silent regarding the situation where the lessee sells the resource to an unaffiliated purchaser that produces electricity, rather than the electricity itself. To address these situations, BLM is using the recommendations found in the Geothermal Valuation Subcommittee Report (May, 2005, page 9) which states that "[t]he lessee shall pay a royalty on the geothermal resources sold under arm's-length conditions to a plant that generates electricity based on a royalty rate in the lease multiplied by the gross proceeds the lessee derives from the sale of the geothermal resources." The Geothermal Steam Act, prior to the amendments of the Energy Policy Act of 2005, required a royalty rate of 10 to 15 percent, and current BLM practice is to issue all leases with a royalty rate of 10 percent. Section 2 of the standard lease terms listed on BLM form 3200–24, "Offer to Lease and Lease for Geothermal Resources," sets the royalty rate at 10 percent. The ten percent royalty rate in this proposed paragraph would be adopted from the current practice, and is one that the Subcommittee Report characterized as "[n]o change in royalty valuation."

While the 10 percent royalty rate in the case of an arms-length sale of resources for the commercial generation of electricity could appear to require higher payments by a lessee than the 1.75 and 3.5 percent that would be required for "no-sales" situations in paragraph (a)(1), the actual amount of royalty paid would be roughly equivalent. This is because the 10 percent rate would apply to the gross proceeds from the sale of the geothermal resource, whereas the 1.75 and 3.5 percent rates for electrical generation would apply to the gross proceeds from the sale of electricity. The electricity generated represents a refined product with a much higher value than the heat resource entering a power plant. Therefore, 1.75 and 3.5 percent of a high-value product would be roughly equivalent to 10 percent of a lower value product. Because the proposed 10 percent royalty on the gross proceeds from an arms-length sale of resource required by § 3211.17(a)(2) is the same as the royalty that would be required under existing lease terms, this paragraph would be revenue neutral.

As discussed earlier, the royalty rates for geothermal leases in effect on August 8, 2005 would continue under the existing terms of such leases, unless a lessee converted to the royalty terms of the new statute under proposed § 3212.25. Eligibility for and procedures for such conversions are discussed later in this preamble in the discussion of Proposed subpart 3212. When such conversions do occur, proposed § 3211.17(b) would establish the royalty rates for different conversion situations.

Conversion of the royalty terms of existing geothermal leases is governed by section 224(e) of the Energy Policy Act of 2005. That section does not make the royalty rate ranges stated in 30 U.S.C. 1004(a)(1) applicable to existing leases that are converting to new royalty terms. Instead, the royalty conversion language in § 224(e)(1)(B) of the Energy Policy Act of 2005 requires that except for leases where the geothermal resource is used for a direct use to which a fee schedule applies, royalties are to be computed on a percentage of the gross proceeds from the sale of electricity. Under the statute the royalty rate is to be set at the percent of gross proceeds to "yield total royalty payments equivalent to payments that would have been received from comparable production under the royalty rate in effect for the lease before the date of enactment * * *." Thus, under proposed § 3211.17(b)(1), BLM would seek to determine a percentage of gross proceeds from the sale of electricity that would result in the same amount of royalty to be paid as the current valuation method. The determination of such a royalty rate would be done on a case-by-case basis, and would be based on the information submitted by the applicant.

As required by § 224(e)(1)(B) of the Energy Policy Act of 2005, proposed § 3211.17(b)(1) would apply to converted leases that produce geothermal resources that are used to generate electricity that is sold, regardless of whether the geothermal resource is sold in an arm's-length transaction to the generator of electricity or the lessee or its affiliate generates the electricity. In a situation where a lessee engages in an arm's-length sale of the geothermal resource to the generator of the electricity that is sold, BLM would not approve the conversion unless BLM had adequate assurance that the lessee will have access in the future to the amount of gross proceeds from the sale of the electricity so that the royalty could be determined. BLM understands that no existing lessee currently engages in arms-length sales of geothermal resources to commercial generators of electricity, but that could change in the future.

In addition, § 3211.17(b) would establish the royalty rate for leases that elect to convert to the royalty terms of the Energy Policy Act of 2005, but have never produced geothermal resources. For these cases, BLM would have no data on which to determine a royalty rate that would be revenue neutral. Therefore, BLM would assign the royalty rates in proposed § 3211.17(a) (1.75 percent for the first 10 years and 3.5 percent thereafter). Because the royalty rates in proposed § 3211.17 were derived to be revenue neutral, this would meet the intent of section 224(e)(1)(B) of the Energy Policy Act of 2005.

Proposed § 3211.17(b)(2) would reiterate language in section 224(e)(1) of the Energy Policy Act of 2005, requiring the gross proceeds established for leases that are converting royalty terms, to be based on gross proceeds from the sale of electricity, and not on gross proceeds from the sale of geothermal resources, and would make it clear that the determination of gross proceeds would occur under proposed MMS regulations at 30 CFR part 206, subpart H.

Proposed § 3211.17(c) would be included to address royalty rates for existing leases and leases issued from applications pending on August 8, 2005, that choose not to convert to the royalty terms of the Energy Policy Act of 2005. The royalty rates for these leases have already been established in existing leases and the lease form. This paragraph would not establish new requirements, but would be included for completeness and convenience of the reader.

Proposed § 3211.18 would implement 30 U.S.C. 1004(b) and section 224(e)(1)(A) of the Energy Policy Act and would address the royalty rates for the direct use of production from or attributable to a geothermal lease.

Proposed § 3211.18(a) would establish the royalty rates for new leases (other than leases issued in response to applications that were pending on that date for which the lessee elects to be subject to royalty regulations in effect on that date) and for existing leases whose royalty terms are modified under proposed § 3212.25. Paragraph (a)(1) would provide that a royalty rate does not apply to the direct use of geothermal resource production that a lessee or its affiliate does not sell. Instead, a lessee would pay direct use fees according to a schedule published by the MMS. (See the MMS proposed regulations at 30 CFR 206.356 for the schedule.) The direct use fee schedule would apply to traditional direct uses such as greenhouse heating, space heating, and industrial heating applications, as well as to non-commercial generation of electricity as described under proposed § 3211.18(c), below.

Under proposed § 3211.18(a)(2), a lessee who produces a geothermal resource and sells it at arm's-length to a purchaser who uses it for direct use purposes would be required to pay a royalty of ten percent. The rule would provide further that the ten percent royalty rate would be applied to the gross proceeds derived from the arm's-length sale under applicable proposed MMS regulations at 30 CFR part 206, subpart H. Proposed § 3211.18(a)(2) would maintain the current royalty rate of 10 percent set in existing 43 CFR 3211.10.

The Energy Policy Act of 2005 does not address situations where a lessee sells geothermal resources in an arm's-length sale to a purchaser who utilizes such resources for direct use purposes. Under 30 U.S.C. 1004(b)(1)(B), the required schedule of fees applies only to those situations where the lessee "does not sell" geothermal resources. Because the royalty provisions in § 1004(a)(1) of the Act specifically refer to electrical generation, they do not cover sale for direct use, either. To the extent that a gap exists in the statute, we would fill that gap with respect to new leases under the rulemaking authority of 30 U.S.C. 1023.

Similarly, a gap exists under the royalty conversion provisions of § 224(e)(1) of the Energy Policy Act of 2005. Section 224(e)(1)(A) establishes the royalties for converted leases that meet the requirements of 30 U.S.C. 1004(b), i.e., leases whose geothermal resources are used for direct use purposes where no sale of the geothermal resources occurs. Section 224(e)(1)(B) establishes the royalties for converted leases that involve the sale of electricity (royalties are to be based upon a percentage of gross proceeds from the sale of electricity). Neither subparagraph establishes the royalty rate for converted leases where a lessee sells geothermal resources in an arm's-length sale to a purchaser who utilizes such resources for direct use purposes. Thus under proposed § 3211.18(a)(2), we would fill that gap with respect to converted leases under the rulemaking authority of 30 U.S.C. 1023.

While the 10 percent royalty rate in the case of an arm's-length sale of direct use resources could appear to require higher payments by a lessee than the 1.75 percent to 3.5 percent required for electrical generation under proposed § 3211.17, the actual amount of royalty paid would be roughly equivalent. This is because the 10 percent rate for direct use applies to the value of the resource and the 1.75 percent and 3.5 percent rates for electrical generation applies to the gross proceeds from the sale of electricity. The electricity generated represents a refined product with a much higher value than the heat resource being sold for direct use. Therefore, 1.75 percent and 3.5 percent of a high-value product is roughly equivalent to 10 percent of a lower value product.

The new statute, at 30 U.S.C. 1004(b)(3), requires that if a State, tribal, or local government is the lessee and uses geothermal resources without sale and for public purposes other than commercial generation of electricity, the Secretary must charge only a nominal fee for use of the resource. Proposed § 3211.18(a)(3) would address this provision of the statute by referencing proposed MMS rules that would implement this provision (see proposed 30 CFR 206.366). The fee that MMS sets would be paid in addition to the rental due on the lease.

Proposed § 3211.18(b) would be included to clarify that for leases issued before August 8, 2005, that do not convert the royalty terms of their lease, and for leases issued from applications pending on August 8, 2005, where the lessee elects not to convert, the royalty rate is established in the lease form and those leases will continue to use existing royalty rates. This paragraph would not establish new requirements, but would be included for completeness and convenience of the reader.

Proposed § 3211.18(c) would be added to clarify BLM's interpretation of how to address non-commercial generation of electricity. If a lessee generates electricity that is used solely for the operation of a direct use facility and does not sell the electricity, this would be considered a direct use subject to the direct use fee schedule.

The new statute, 30 U.S.C. 1004(b)(1), restricts the use of the direct use fee schedule to situations where the resource is used "for a purpose other than the commercial generation of electricity." As discussed earlier, the statute requires a royalty based on a percent of gross proceeds for commercial generation of electricity (§§ 1004(a)(A) and (B)). However, the statute does not expressly address non-commercial generation of electricity, such as electricity generated to run fans, pumps, lights, automatic valves, and instrumentation in direct use facilities. If electricity is not sold, there would be no gross proceeds upon which to base a royalty. BLM does not believe the intent of the Energy Policy Act of 2005 is to allow the use of Federal geothermal resources to generate non-commercial electricity without compensation. Therefore, as a permissible interpretation of the statute, BLM construes the non-commercial generation of electricity to be a direct use of the resource subject to the direct use fee schedule.

Proposed § 3211.19(a) would implement 30 U.S.C. 1004(a)(2) by setting the proposed royalty rate on byproducts listed in the first section of the Mineral Leasing Act (MLA), 30 U.S.C. 181 (*e.g.*, coal, phosphate, oil and gas, oil shale, sodium, sulfur, and potash) to be the same as the royalty rates in the Mineral Leasing Act and implementing regulations. The list of byproducts that would be included as examples in the proposed rule is not the complete list of minerals covered under the MLA because certain minerals, such as oil shale, would be physically impossible to produce as a byproduct.

In its amendments to 30 U.S.C. 1004, the Energy Policy Act of 2005 removed the language of previous 30 U.S.C. 1004(b) that established royalties of up to 5 percent for byproducts that are not listed in the Mineral Leasing Act, such

as gold, silver, zinc, etc. The removal of such text appears to create a gap in the statute. It is not clear whether Congress intended to establish such royalties at zero, or to leave it to the Secretary to set an appropriate royalty rate for such byproducts. Given the general policy established under section 102(a)(9) of the Federal Land Management and Policy Act, 43 U.S.C. 1701(a)(9), to receive fair market value for the use of the public lands and their resources, BLM believes it appropriate, and proposes in § 3211.19(b), to set a royalty rate of 5 percent of the gross proceeds from the sale of such byproduct. under the rulemaking authority of 30 U.S.C. 1023. The proposal would maintain the current royalty rate of 5 percent for such byproducts under 43 CFR 3211.10. BLM solicits comments on whether this rate is fair and based upon an acceptable interpretation of the statute.

Proposed § 3211.20 would provide that a lessee could credit advance royalty toward royalty due under proposed MMS regulations at 30 CFR 218.305(c). This provision, and the proposed MMS rule, would implement 30 U.S.C. 1004(f)(2) that allows for crediting advanced royalty payments towards royalty due on production.

Subpart 3212—Lease Suspensions and Royalty Rate Reductions

Proposed § 3212.10 would address the difference between a suspension of operations and production and a suspension of operations. Under proposed § 3212.10(a) a suspension of operations and production is a temporary relief from production obligations which a lessee may request from BLM.

The proposal would remove the basis listed in the current rule referring to economic conditions making it unjustifiable to continue operations. BLM believes that a lessee should not be able to hold a lease indefinitely merely because it is uneconomic to conduct operations. This would not promote the development and recovery of geothermal resources. In circumstances where geothermal operations would become economic, the new statute provides that a lessee that is subject to the new regulations could cease production and hold its lease through the payment of advanced royalty. (See proposed § 3212.15(a).) Under the statute, the payment of advanced royalties is limited to 10 years. Proposed § 3212.10(b) would explain that a suspension of operations is when BLM, on its own initiative, orders a lessee to temporarily stop production in the interest of conservation. The proposed regulatory text would more closely follow the statute at 30 U.S.C. 1010 than the existing regulation.

Proposed § 3212.11 would remain substantively unchanged except that the proposed rule would clarify that unit obligations could be separately suspended under proposed subpart 3287.

Proposed § 3212.12 would be similar to the existing section except that paragraph (b) would clarify that a lessee could not unilaterally terminate a suspension that BLM ordered. The reference to minimum royalties would also be removed.

Proposed § 3212.13 would be substantively similar to the existing rule except that during a suspension of operations, BLM could suspend lease or royalty obligations if BLM determined that a lessee would be denied all beneficial use of its lease during the period of the suspension.

Proposed § 3212.14 would remove the existing reference to minimum royalties and substitute the word "terminate" for the existing word "cancel," because the remedy referred to should be a termination, not a cancellation.

Proposed § 3212.15 would address whether a lease can remain in full force and effect if a lessee ceases production and BLM does not grant a suspension. Proposed § 3212.15 would implement 30 U.S.C. 1004(f)(1) and (3). The intent of this proposed section is to allow temporary cessations of production, lasting more than a month, without lease termination and without a lessee having to apply for a suspension of operations and production.

Under this proposed rule BLM would not allow production stoppages of less than one full calendar month to be considered a cessation of production. BLM added this limitation for several reasons:

(1) Routine maintenance, such as plant overhauls, is an inherent part of producing a geothermal resource. While overhauls and other maintenance can last more than a month, most maintenance operations only require plant shut down for a period of days or weeks. Because maintenance is an inherent part of producing a geothermal resource, performing maintenance is still considered to be "production."

(2) From an administrative standpoint, tracking shutdowns lasting less than a month would be expensive and cumbersome. The reports that BLM receives are all based on calendar months. If a lease was shut down for an entire calendar month, the reports required by subpart 3270 would indicate zero production and this would flag BLM to consider implementing this section of the regulations. However, if a lease produced for part of a month, the reports would indicate some quantity of production. The only way BLM could determine if the lease was not producing for part of a month would be a physical inspection of the lease and a review of the metering records to determine when the lease was shut-in.

(3) If a lease produces for any portion of a month, royalty would be due. As long as a lessee is diligently producing from its lease, there is no need to collect a royalty on actual production for a portion of a month and an advance royalty for cessation of production for the remainder of the month. Proposed § 3212.15 would only apply if a lease is shut in for more than a calendar month.

Proposed § 3212.15 contains separate paragraphs, each of which would describe a set of circumstances under which a cessation of production could occur without lease termination. Proposed § 3212.15(a) would implement 30 U.S.C. 1004(f)(1) that allows the payment of advanced royalty in lieu of production. Under the proposed rule, once commercial production is achieved, a lessee would be allowed a total of 10 years with no production, without lease termination or having to apply for a suspension of operations, if the lessee continued to pay advanced royalty under proposed MMS regulations at 30 CFR 218.305. BLM has interpreted 30 U.S.C. 1004(f)(1) to allow a total of 120 months (10 years), whether consecutive or not. The benefits in paragraph (a) would not be available to leases subject to existing royalty provisions, *i.e.*, leases in effect before August 8, 2005, and leases issued after August 7, 2005 in response to applications pending on August 8, 2005, unless lessees of such leases elect to convert their royalty provisions under proposed §§ 3212.25 or 3200.8(b).

Because the statutory language is specific to leases on which royalty was previously paid, proposed § 3212.15(a) would not apply to direct use operations where the resource is not sold, because such users pay fees instead of royalties. Therefore, a lessee using the geothermal resource for seasonal operations in a greenhouse, for example, could not pay advanced royalties during the months of the year when no production occurs to maintain its lease in effect. However, if BLM approved the seasonal operations as part of the lessee's utilization plan, it would not be considered a cessation of production. If seasonal operations were not approved, the lessee would need a lease suspension to maintain the lease in effect.

For proposed § 3212.15(a), "commercial production" would be different from "produced or utilized in

commercial quantities," because this section is not intended to apply to leases that have a well capable of production; it is only intended to apply to leases that are in actual production or are receiving allocated production through some type of agreement.

Proposed § 3212.15(b) specifies other circumstances that would allow leases to remain in full force and effect without having to pay advanced royalties if production ceases. This section would include situations when BLM: (1) Requires or causes the cessation of production; or (2) Determines that the cessation of production is required or otherwise caused by the Secretary of the Air Force, Army, or Navy; by a State or a political subdivision of a State; or by a force majeure. This section would implement 30 U.S.C. 1004(f)(3).

Proposed § 3212.15(c) would exempt lessees from having to pay advanced royalties during extended outages due to maintenance activities that are necessary to maintain operations. For this paragraph to apply, the maintenance would be required to last more than one calendar month and would require prior BLM approval. To approve such a request, the lessee would have to demonstrate to BLM's satisfaction that the cessation was part of required maintenance. The basis for this provision is that maintenance required to maintain operations is a production activity, not a cessation of operations. Required maintenance activities under this paragraph could include overhauling a power plant, re-drilling or re-working wells that are critical to plant operation, or repairing and improving gathering systems or transmission lines that necessitate the discontinuation of production.

Proposed § 3212.16 would replace existing § 3212.15 and provide the standards for reduction, suspension, or waiver of rental or royalties. It would be similar to the existing section but would more closely follow the statutory provision at 30 U.S.C. 1012.

Paragraph (b) would make clear that BLM would not approve a royalty reduction, suspension, or waiver unless all royalty interest owners other than the United States accept a similar reduction, suspension, or waiver. This provision is in existing regulations at § 3212.16(b).

Proposed § 3212.17 would specify the information that must be included with a request for a royalty or rental rate reduction, suspension, or waiver. It would include the information currently in § 3212.16, but clarify that all of the information must be submitted.

The Energy Policy Act of 2005 (at section 224(c) and (d)) establishes production incentives for new facilities and qualified expansion projects that are put into commercial operation by August 8, 2011. The incentives are in the form of a four-year, 50 percent reduction in royalty from what otherwise would be due. Proposed §§ 3212.18 through 3212.24, and proposed MMS regulations at 30 CFR 218.307, would implement these statutory provisions.

If a project is defined as a "new facility," all of the production from that facility is subject to the 50 percent reduction in royalty that would otherwise be due. If a project is defined as a "qualified expansion project," only the additional electricity generated as a result of the project is subject to the reduced royalty. Qualifying a project as a "new facility" would generally be more difficult and would typically result in more capital expenditure than an expansion project. Although a "qualified expansion project" may be easier to achieve, strict monthly production targets would be established that the project must meet in order to qualify.

Proposed § 3212.18 would provide a general description of the requirements for obtaining a production incentive. The production incentives would only be available for those leases that were issued before August 8, 2005, and that do not convert their royalty provisions under proposed § 3212.25. Because section 224(c) of the Energy Policy Act specifically refers to reductions in royalty, BLM has interpreted this to mean that the incentives are intended only for the commercial generation of electricity and not for direct use projects.

Proposed § 3212.19 would require lessees seeking a production incentive to submit a written request for a production incentive describing a project that may qualify as a new facility or qualified expansion project. Because each type of project offers specific benefits and restrictions for the lessee, the request would need to identify whether a lessee is requesting that the project be considered a new facility or a qualified expansion project, and to provide sufficient supporting information. In order to qualify for incentives under this paragraph, BLM must receive the request before August 7, 2011. Although the statute does not prescribe an application process, one clearly is needed. Because each project qualifying for a production incentive is unique, BLM would need sufficient information to determine the type of production incentive the applicant should receive (new facility or qualified expansion project). This determination would dictate the information that would need to be submitted and the requirements that the lessee would need to satisfy to receive the reduction in royalty.

BLM does not anticipate developing a specific application form; instead, the application could be in the form of a letter. The letter would provide a description of the project and whether the applicant prefers the project to be considered a new facility or a qualified expansion project. If the applicant is requesting the project to be considered as a new facility, the letter should include sufficient technical justification to support the general criteria set forth in § 3212.22. If the applicant is requesting the project to be considered as a qualified expansion project, the letter should describe the anticipated amount of capital expenditure per § 3212.21(a) and the estimated increase in net generation resulting from the project per § 3212.21(b). The letter should include sufficient technical detail to support these estimates.

Proposed § 3212.20 would describe how BLM would review a request for a production incentive. Under the proposal, BLM would review incentive requests on a case-by-case basis to determine whether a proposed project meets the criteria for a qualified expansion project under proposed § 3212.21 or a new facility under proposed § 3212.22 (see the discussions below of the criteria for qualified expansion projects and new facilities). If the request does not meet the criteria for the type of project the lessee requests, BLM would determine whether it meets the criteria for the other type of production incentive project.

Under proposed § 3212.20(b), if BLM determined that a lessee has a qualified expansion project, BLM would, as part of its approval, provide the lessee with a schedule of monthly target net generation amounts. These amounts would quantify the required 10 percent increase in net generation over the projected net generation without the project. The schedule would be specific to the facility or facilities that are affected by the project and would cover the 48-month time period during which the production incentive may apply. The lessee would receive the production incentive only for those months in which its net generation met the monthly target. BLM believes that averaging of production should not be allowed (see the preamble discussion of § 3212.23).

Proposed § 3212.21 would specify the criteria necessary to establish a qualified

expansion project for the purpose of obtaining a production incentive. Because one goal of the Energy Policy Act of 2005 is to encourage new projects that would increase the amount of electricity generated from geothermal resources, BLM would not approve projects for this incentive that do not involve significant capital expenditure. Specifically, BLM is concerned that a production incentive could be abused if a lessee simply opened production valves to achieve the required increase in generation. Examples of activities involving substantial capital expenditure could include: (1) The drilling of additional wells; (2) Retrofitting existing wells and collection systems to increase production rates; (3) Retrofitting turbines or power plant components to increase efficiency; (4) Adding additional generation capacity to existing plants; and (5) Enhanced recovery projects such as augmented injection. Projects that are not associated with substantial capital expenditure, such as opening production valves or operating existing equipment at higher rates, would not be considered to be qualified expansion projects.

While the Energy Policy Act of 2005 specifically refers to "expansion of the facility" in relation to qualified expansion projects, BLM has broadly interpreted this to mean the expansion of any portion of a geothermal project that would result in increased generation. This includes not only expansion to the power plant, but also projects in the well field, such as additional drilling, workovers, and enhanced geothermal projects such as augmented injection or acid and fracture stimulation.

In addition, the project would need to have the potential to increase the net generation by more than 10 percent over the projected generation without the project, using data from the previous 5 years. If 5 years of data were not available, it would not be considered to be a qualified expansion project. Under section 224(d) of the Energy Policy Act of 2005, a qualified expansion project must increase "production" by at least 10 percent over the production in the previous 5 years, taking into consideration production trends that occurred in those 5 years. BLM interpreted this provision to mean that if 5 years of data were not available, the project could not be classified as a qualified expansion project. In addition, BLM interprets the term "production" to mean "net generation," because this would meet the intent of the statute to increase the amount of useable electricity from geothermal resources.

If a lessee were to satisfy the criteria for a qualified expansion project, BLM would perform a reservoir analysis of the 5 years of data that is submitted and, from that analysis, would develop a monthly schedule of target net generation amounts that would have to be met in order to qualify for a reduced royalty for that month. The lessee could perform its own reservoir analysis and develop a schedule of target generation amounts. However, BLM would review the analysis and could modify the schedule. Because the production incentive is only in effect for four years, the schedule would cover the 48-month period for which the production incentive may be applied.

Proposed § 3212.22 would identify criteria for determining whether a project qualified as a "new facility." Because BLM does not have a formal definition for "facility" and because of the high degree of variation in projects, each application would be considered on a case-by-case basis based on the factors described in the rule. Listed factors in favor of concluding that a project qualifies as a new facility would include: (1) The project requires a new site license or facility construction permit if it is on Federal lands; (2) The project requires a new Commercial Use Permit; (3) The project includes at least one new turbine-generator unit; (4) The project involves a new sales contract; (5) The project involves a new or substantially larger footprint; or (6) The project is not contiguous to an existing project. Generally, a new facility would not be: (1) Authorized only with a Geothermal Drilling Permit; (2) Constructed entirely within the footprint of an existing facility; or (3) Involve only well field projects such as drilling new wells, increasing injection, and enhanced recovery projects.

If BLM determines that a proposed project could be approved either as a "new facility" or as "qualified expansion project," BLM would approve the application under the category requested by the applicant. If a project would not qualify as a "new facility" BLM would automatically review it, with no action necessary on the applicant's part, to see if it would qualify as a "qualified expansion project."

Proposed § 3212.23 would describe how production incentives would apply to qualified expansion projects. The Energy Policy Act of 2005, at section 224(d), requires a production incentive to be granted if a qualified expansion project resulted in a 10 percent increase in production. However, that section of the Act is silent on how long the 10 percent increase would have to be maintained. BLM is concerned that a project could meet or exceed the target increase for a short period, yet obtain the production incentive for the entire allowable four year period. BLM believes the intent of the production incentive is to encourage projects that would result in a sustainable increase in production. Therefore, proposed § 3212.23 authorizes a reduced royalty only for those months where the qualified expansion project is meeting or exceeding the BLM-established net generation targets.

The Energy Policy Act of 2005, at section 224(c)(1)(b), requires the production incentive be applied to "qualified expansion geothermal energy," which is further defined in section 224(d)(1) of the Energy Policy Act as being a "production" increase as a result of the expansion of the facility. BLM has interpreted this to mean that the reduced royalty only applies to the increase in net generation resulting from a qualified expansion project. To define the increase in net generation, proposed § 3212.23 would include an equation that uses the target generation amounts defined in proposed § 3212.20 as a basis. The denominator of the equation (1.1) converts the target generation amount to the baseline generation amount which represents the amount of electricity that would have been generated without the qualified expansion project.

To simplify the administration and tracking of the production incentives, the production incentive would take effect on the first day of the month following the commencement of commercial operation of the project, but only for those months where the net generation targets are met. The amount of the production incentive for qualified expansion projects would be established by the proposed MMS regulations.

Under Proposed § 3212.24, for projects that qualify as "new facilities," the royalty on all the net generation from the facility would be reduced by 50 percent for the 48-month period following the commencement of commercial operation, regardless of the amount of electricity generated. To simplify the administration and tracking of the production incentives, the production incentive would take effect on the first day of the month following the commencement of commercial operation of the project. The amount of the production incentive for new facilities would be established by the proposed MMS regulations.

Proposed § 3212.25(a) would implement Section 224(e) of the Energy Policy Act of 2005, that allows lessees of geothermal leases issued before

August 8, 2005, to request that BLM modify their leases to convert the terms of their leases relating to the payment of royalties to the royalty and direct use fee terms in the Energy Policy Act of 2005. Proposed § 3212.25(a) would also provide that, if BLM modified the royalty terms of a lease, the new royalties and direct use fees would apply to all production from or allocated to that lease. Proposed § 3212.25(b) would reference proposed §§ 3211.17 and 3211.18 and applicable MMS rules for the specific royalty rates and direct use fees that would apply to a modified lease.

In implementing section 224(e) of the Energy Policy Act of 2005, BLM construes the statute to mean that the only royalty term of the lease that would be converted is the royalty rate on production from or allocated to the lease. Other lease and statutory terms exist, such as "minimum royalty" (existing § 3211.10) and "advanced royalty" during cessation of production (proposed § 3212.15), that BLM proposes not be converted.

For example, under the proposed rule, if the lessee of a lease issued prior to August 8, 2005, elected to convert the royalty terms of the lease under proposed § 3212.25, the lessee would be subject to the new royalty rate on gross proceeds for the commercial generation of electricity and direct use fee schedule for direct use operations. The lessee would, however, continue to be subject to the existing minimum royalty terms of their lease and not be required to pay rental once commercial production begins. In addition, the lessee would not be subject to paying advanced royalty if it ceased production for more than a calendar month.

This interpretation is based upon possible complications that could occur if some, but not all, of the other provisions changed. For example, under the Geothermal Steam Act, prior to the amendments made by the Energy Policy Act of 2005, rental on a lease was only due until the lease begins actual production or is deemed to have a well capable of production. At that point, the greater of actual royalty on production or minimum royalty is due every month. If BLM were to include the minimum royalty terms in the conversion under proposed § 3212.25, lessees electing to convert the royalty terms of their lease would no longer pay minimum royalty because there is no minimum royalty provision in the Energy Policy Act of 2005. But, once a lease had a well deemed capable of production, the rental commitments of the existing lease terms would end; therefore, unless the rental provisions of the new statute applied, the lessee would not pay rental or minimum royalty. BLM does not believe it was the intent of the Energy Policy Act of 2005 to allow lessees to hold a lease without making some type of payment. The Energy Policy Act of 2005 does not include provisions to change the rental terms of existing leases; only the royalty terms.

In addition, if lessees do not convert the requirement for minimum royalty payment under existing § 3211.10, requiring the payment of advanced royalties when production ceases for more than a calendar month would be burdensome and redundant. In cases where a lessee does not produce for a calendar month, the existing minimum royalty provisions require that minimum royalty be paid. BLM believes that Congress did not intend for more than one payment to be made if production ceases.

BLM believes that its proposal would be the simplest to administer. Requiring existing lessees who convert the royalty terms of their leases to eliminate minimum royalties without establishing new rental obligations and to pay advanced royalties in lieu of minimum royalties if production ceases, would be confusing and difficult to administer, and is not what Congress intended when it allowed existing lessees to convert royalty rates. Conversion of royalty rates only appears to be a straightforward way to implement the statute without imposing unnecessary complications. BLM is soliciting comments on this interpretation.

Section 224(e) of the Energy Policy Act of 2005 requires any lessee wishing to convert the royalty rate terms of its lease to apply to BLM. Proposed § 3212.26 would establish an application process and would require certain types of information to be submitted together with the application. For electrical generation, the lessee must submit enough information to allow BLM to determine how much royalty the lessee would have paid under the netback method, if that is the current method the lessee is using. As mentioned earlier, in situations where a lessee or its affiliate is selling geothermal resources at arm's length before those resources are used to generate electricity, the lessee would be required to document in its application that it has access to the purchaser's gross proceeds derived from the sale of the electricity. From the information contained in the application, BLM would calculate a new royalty rate that would result in the same amount of royalty.

Proposed § 3212.26(c) would state that BLM must receive an application to convert no later than 18 months following the effective date of the applicable final rule. For direct use operations, the applicable final rule is 30 CFR 206 (direct use fee schedule) and for the commercial generation of electricity, the applicable final rule is 43 CFR 3200 (lease royalty rates). This section would implement section 224(e)(2) of the Energy Policy Act of 2005. If both the MMS and BLM final rules were made effective on the same day, then all applications would have to be received by the same day, and the text of the final rule could be simplified.

Proposed § 3212.27 would implement section 224(e)(3) and (4) of the Energy Policy Act of 2005, and would also require BLM to consult with MMS in implementing the royalty conversion provision. BLM would also review an application to ensure that the lessee has suitable meters necessary to determine the royalty due under the modified lease terms.

Subpart 3213—Relinquishment, Termination, and Cancellation

Proposed §§ 3213.10 and 3213.11 relating to lease relinquishment would contain minor changes from the existing sections.

Proposed § 3213.12 relating to the minimum size of a remaining lease following a partial relinquishment would be amended to create an exception for direct use leases. The exception would be necessary because, under 30 U.S.C. 1003(g)(1), the size of direct use leases could easily be less than 640 acres.

Proposed § 3213.13 would contain some editorial changes. For the most part, it would be substantively unchanged from the existing regulation, although it would clarify that surface and other resources would need to be reclaimed as well as restored.

Proposed § 3213.14 would implement 30 U.S.C. 1004(g) regarding the termination of a lease for failure to pay rentals on time. This proposal would represent a substantial change from the procedures currently in place under existing §§ 3213.14 through 3213.20, which are based on statutory language that was removed by the Energy Policy Act of 2005. Under existing § 3213.14 (which implemented former 30 U.S.C. 1004(c)), failure to pay the full rental amount by the anniversary date of the lease results in automatic termination of the lease by operation of law. No grace period is provided for late payment. Existing § 3213.15 (which implemented a proviso in former 30 U.S.C. 1004(c)) provides that a lease will not terminate if MMS receives a timely rental payment that is deficient by a nominal amount.

Under the existing rule, MMS notifies the lessee of the nominal deficiency and provides a date by which a further payment must be paid. If the payment is not made in the time allowed, BLM terminates the lease as of the anniversary date of the lease. Existing §§ 3213.17, 3213.18, 3213.19, and 3213.20 contain a process for petitioning for lease reinstatement if a lease is terminated for failure to pay rent on time. The lessee has 30 days from receiving a termination notice to petition for lease reinstatement and must demonstrate that the failure to pay rent on time was justifiable or was not due to a lack of diligence. These regulatory provisions are also based on former 30 U.S.C. 1004(c). The Energy Policy Act of 2005 removed the provisions of 30 U.S.C. 1004(c) relating to lease termination, replacing them with the provisions of current 30 U.S.C. 1004(g), described below. The new statute contains no express process to petition for lease reinstatement.

Under the revised statute at 30 U.S.C. 1004(g)(1), a 45-day grace period beginning on the date of the failure to pay the rental (the lease anniversary date) is provided for a lessee to pay its rent in full before BLM will terminate a lease. The Secretary must terminate any lease with respect to which rental is not paid in full on the expiration of the 45-day period beginning on the date of the failure to pay the rental. Unlike the former statute, the new statute contains no exception for timely rental payments that are deficient by a nominal amount. The section provides further, at 30 U.S.C. 1004(g)(3), that a lease that would have otherwise terminated upon expiration of the 45-day period, will not terminate if the lessee pays to the Secretary, before the end of that period, the amount of rental due plus a late fee equal to 10 percent of the amount due. Proposed § 3213.14(a) would implement this statutory provision. This provision would also make clear that if MMS does not receive a lessee's rental plus the late fee by the end of the 45-day period described above, BLM will terminate the lease.

Under 30 U.S.C. 1004(g)(2), the Secretary is required to "promptly" notify a lessee that has not paid rental required under the lease that the lease will be terminated at the end of the 45-day period referred to in 30 U.S.C. 1004(g)(1). MMS will provide this notification. The legislative intent of this paragraph appears to be that the Secretary should put a lessee on notice that it has a grace period to pay rental before its lease would be terminated for failure to pay. From a logistical standpoint, however, this legislative intent may be frustrated. For instance, it may take MMS a considerable amount of time to notify lessees that the lease anniversary date has passed and that MMS has not received the rental payment when it was due. If, for example, it were to take MMS 30 days to provide the required notification, a lessee would only have 15 days notice to pay within the 45-day timeframe required by paragraph (1) of the Act. As a further example, it is possible in certain circumstances that the MMS notification would not occur until after the expiration of the 45-day period, and after the BLM lease termination.

BLM is concerned that the practical difficulties with providing a lessee with adequate notice could lead to the unintended consequence of having leases terminate without the lessees being provided adequate notice to pay their overdue rental. Such an outcome would seem to be inconsistent with the requirement that the Secretary "promptly" notify the lessee of the unpaid rental. Proposed § 3213.14(b) would address this situation and provide a remedy that BLM believes would be consistent with Congressional intent. The proposed rule would ensure that lessees have at least 30 days notice to pay overdue rental in full. It would provide that if a lessee receives MMS notification of the non-payment of rental less than 30 days before the end of the 45-day period, the lessee will have a full 30 days from receipt of the notice to pay its rental in full. If MMS received the rent plus the 10 percent late fee within 30 days after the lessee received the notification, BLM would either not terminate the lease for non-payment of rental or would reinstate a lease that was terminated under proposed § 3213.14(a). In other words, every lessee would have no less than 30 days notice to either avoid a lease termination or to have its lease reinstated if it were terminated at the end of the 45-day period.

The statutory basis for proposed § 3213.14(b) is as follows: The statute does not expressly address the situation where, in practice, the "prompt" notification would compress the actual notice to a lessee to less than 30 days. The proposed rule would more fully implement the Congressional intent of providing adequate notice to a lessee. Moreover, under 30 U.S.C. 1023, the Secretary may prescribe regulations that it may deem appropriate to carry out the provisions of the Act, and may include, without limitation, rules to prevent waste, conserve geothermal resources, and protect the public interest. Proposed § 3213.14(b) would further all of these goals, and also implement congressional intent to provide a fair grace period to a lessee who fails to pay rent on time. Although not directly applicable, this proposal would be consistent with the intent of 30 U.S.C. 1011 that a lease not be terminated for any violation unless the lessee has 30 days notice to correct the violation.

Proposed § 3213.15 would carry forward the text of existing § 3213.16. Existing §§ 3213.15, 3213.17, 3213.18, 3213.19, and 3213.20 would be removed because they do not reflect the current statute.

Existing §§ 3213.21 and 3213.22, relating to lease expiration, would be removed because these matters would be covered in proposed subpart 3207, relating to terms and extensions of leases.

Proposed §§ 3213.16, 3213.17, 3213.18, and 3213.19 would clarify the provisions and terminology of existing §§ 3213.23, 3213.24, and 3213.25, relating to lease cancellation and termination. Lease cancellation would mean undoing the lease as if it never existed.

This would be covered by proposed § 3213.16 and limited to situations when BLM issued a lease in error.

In other circumstances, the existing rules use the term "cancel" when the appropriate term should be "terminate." Thus, proposed § 3213.17 would describe situations where BLM could terminate (not cancel) a lease as of a particular date. Conforming changes would be made to other provisions of the proposed regulations by replacement of the word "cancellation" with the word "termination." The rule would also clarify that it does not apply to non-payment of rent which, as explained above, would be covered by proposed § 3213.14. In response to a request by MMS, BLM would clarify in proposed § 3213.17 that among the bases for lease termination would be the nonpayment of royalties and fees under 30 CFR 206 and 218. This is not new in substance, but a reminder to lessees of the possible consequences of not making correct payments to MMS.

Proposed § 3213.19 would address circumstances where BLM notifies a lessee that its lease is being terminated because of a violation. It would clarify the procedures of existing § 3213.25 by specifying that a hearing may be requested in the context of the appeal of a proposed lease termination. It also would follow the statutory text of 30 U.S.C. 1011 in that a lessee could avoid lease termination by diligently proceeding to correct a violation, and that it is insufficient to make a good faith attempt to correct the violation without actually correcting it.

Subpart 3214—Personal and Surety Bonds and Subpart 3215—Bond Release, Termination, and Cancellation

Both proposed and existing subparts 3214 and 3215 address bonding of geothermal operations. Most sections of the proposed subparts would be substantively unchanged from their existing counterparts. Changes have been proposed to clarify terminology, and improve grammar and readability. The proposed substantive changes are discussed.

In proposed § 3214.14(b), we propose that the bond may be increased to reclaim the surface and other resources. The existing rule does not expressly include "other resources."

In proposed § 3214.18, the title would be clarified to match the content of the section. Proposed § 3214.18(b) would clarify that reclamation responsibilities extend to resources other than the surface, and proposed § 3214.18(d) would expressly mention royalties as well as rents.

Proposed § 3215.13 would be reorganized for clarity. It would also clarify that even after bond termination, a surety and any other bond provider remains responsible for obligations that accrued during the period of liability while a bond was in effect.

Subpart 3216—Transfers

Existing subpart 3216 addresses geothermal lease transfers. The proposed subpart would almost entirely be substantively unchanged from the existing subpart. Changes have been proposed to clarify terminology, and improve grammar and readability. Proposed section § 3216.14 would be changed to indicate that the filing fees for transfers are now found in § 3000.12 of the chapter.

Proposed § 3216.19 would recognize that direct use leases have different size constraints than regular geothermal leases. Thus, the proposed section relating to the size of allowable lease transfers would contain an exception for direct use leases.

Subpart 3217—Cooperative Agreements

Existing subpart 3217 addresses cooperative agreements. The proposed subpart would have few substantive changes from the existing subpart. Changes have been proposed to clarify terminology, and improve grammar and readability.

Subpart 3217 describes two types of cooperative agreements, unit and communitization agreements, and addresses the requirements of Federal lessees who join with others to conserve the geothermal resource under communitization agreements. The Energy Policy Act of 2005, at 30 U.S.C. 1017(e) specifically authorizes the pooling of land under communitization agreements in order to develop geothermal resources where operators cannot successfully develop tracts independently. BLM cannot approve these agreements unless BLM determines them to be in the public interest.

Proposed § 3217.10, describing unit agreements, would be revised to more closely follow the statutory language at 30 U.S.C. 1017(a). The term "cooperative plan" would be removed from the existing § 3217.10 because the agency does not require approval of a cooperative plan and does not use that term in a regulatory context.

Sections 3217.11 through 3217.13 are substantively unchanged from existing regulations.

The term "operating contracts" would be removed from proposed §§ 3217.14 and 3217.15, leaving the statutory terms "drilling contract" and "development contract," both of which appear in 30 U.S.C. 1017(g). BLM uses the terms "drilling contract" and "development contract" interchangeably to describe the agreement parties use to cooperatively explore under a communitization agreement. Proposed § 3217.14(b) would include reference to regional exploration, which typically describes the scope of drilling or development contracts. This section has also been revised to make it clear that drilling or development contracts are limited to exploration activities. Proposed § 3217.14(c) would be added to acknowledge current BLM practice of coordinating the review of a proposed drilling or development contract with the appropriate State agencies. Section 3217.14(d) would be changed to more accurately reflect a provision of the Energy Policy Act that requires BLM to determine that approval of a drilling or development contract best serves or is necessary for the conservation of natural resources, public convenience or necessity, or the interests of the United States.

Subpart 3250—Exploration Operations—General; Subpart 3251—Exploration Operations: Getting BLM Approval; Subpart 3252—Conducting Exploration Operations; Subpart 3253—Reports: Exploration Operations; Subpart 3254—Inspection, Enforcement, and Noncompliance for Exploration Operations; Subpart 3255—Confidential, Proprietary Information; and Subpart 3256—Exploration Operations Relief and Appeals

Subparts 3250 through 3256 contain provisions regulating geothermal exploration of Federal lands. Proposed changes to these subparts would clarify existing terminology and procedures and make the subparts more readable.

Several changes are proposed throughout these subparts to clarify that an approved Notice of Intent to Conduct Geothermal Resource Exploration Operations would be equivalent to a permit. In most cases the terms "Notice of Intent" or "Notice of Intent to Conduct Geothermal Resource Exploration Operations" would be substituted for the terms "exploration permit" or "permit."

Proposed § 3250.10 is substantively unchanged from existing regulations.

Proposed § 3250.11, addressing the general question related to where exploration can occur, would be moved from existing § 3251.11 of the subpart addressing exploration approval. This would necessitate the renumbering of subpart 3251.

Proposed §§ 3250.12 and 3250.13 are substantively unchanged from existing regulations. The content of proposed new § 3250.14 would be taken from existing § 3250.11. This proposed reorganization would provide a more logical sequence of general questions related to the regulation of exploration operations.

There would be no substantive changes to §§ 3251.10–15. As mentioned previously, the content of existing § 3251.11 would be moved to proposed § 3250.11 and the remaining sections would be renumbered to correspond to proposed §§ 3251.10–14.

Proposed § 3251.15(b) would revise existing § 3251.16(b) to ensure that bond release could not occur unless operators not only have reclaimed the land surface, but also, if necessary, resolved other environmental, cultural, scenic, or recreational issues. Reclamation includes resolving the impacts of geothermal exploration activities on resource values in addition to reclamation of the land.

There are no substantive changes proposed in subparts 3252 through 3256.

Subpart 3260—Geothermal Drilling Operations—General; Subpart 3261—Drilling Operations: Getting a Permit; Subpart 3262—Conducting Drilling Operations; Subpart 3263—Well Abandonment; Subpart 3264—Reports-Drilling Operations; Subpart 3265–Inspection, Enforcement, and Noncompliance for Drilling Operations; Subpart 3266—Confidential, Proprietary Information; and Subpart 3267—Geothermal Drilling Operations Relief and Appeals

Subparts 3260 through 3267 establish permitting and operations procedures for drilling and testing geothermal wells as well as producing or injecting geothermal resources. These subparts also address other types of geothermal well operations. No substantive changes are proposed to these subparts. Changes have been proposed to clarify terminology, and improve grammar and readability.

Subpart 3270—Utilization of Geothermal Resources—General; Subpart 3271—Utilization Operations: Getting a Permit; Subpart 3272—Utilization Plan and Facility Construction Permit; Subpart 3273—How to Apply for a Site License; Subpart 3274—Applying for and Obtaining a Commercial Use Permit; Subpart 3275—Conducting Utilization Operations; Subpart 3276—Reports: Utilization Operations; Subpart 3277—Inspections, Enforcement, and Noncompliance; Subpart 3278—Confidential, Proprietary Information; and Subpart 3279—Utilization Relief and Appeals

The regulations in subparts 3270 through 3279 address the permitting and operating requirements for the utilization of geothermal resources. Except as referenced below, no other substantive changes are proposed to these subparts. Changes have been proposed to clarify terminology, and improve grammar and readability.

Proposed § 3275.14 would be amended in one respect. The current requirement to measure the temperature out of a facility (current § 3275.14(c)(3)) would be removed because this information would no longer be needed for the valuation of direct use operations using the MMS fee schedules. For "no-sales" situations, leases issued under the Energy Policy Act and leases converting to the new royalty terms under §§ 3212.25 or 3200.8 would no longer have to calculate the amount of heat displaced by the geothermal resource. Instead, they would use a direct use fee schedule that is based only on inlet temperature and the monthly volume or mass produced. In developing the direct use fee schedule, MMS assumed a fixed outlet temperature of 130 °F, which greatly simplifies the metering system and the calculations.

For situations involving the arms-length sale of geothermal resources to a direct use facility and for leases issued under the previous royalty terms which do not convert to the new royalty terms, both of which BLM believes will be relatively rare, proposed § 3275.14(d) would give BLM the authority to require outlet temperature recorders on a case-by-case basis, if needed.

Proposed § 3276.14 would eliminate the requirements of existing § 3276.14(a) to report a daily breakdown of flow, average temperature in, and average temperature out. The information requirements in existing sections § 3276.14(d) and (e) would also be eliminated. The purpose of the data was to allow the calculation and verification of thermal energy displaced, which is the basis of valuation in the existing MMS regulations. For leases issued under the Energy Policy Act and for existing leases that convert to the new royalty terms of the Energy Policy Act under §§ 3212.25 or 3200.8, direct use operations would now be valued using the MMS fee schedule which determines fees due as a function of inlet temperature and monthly volume or mass produced. Therefore, collection of the data would no longer be necessary.

For situations where the resource is sold under an arm's length contract for use in a direct use facility and for leases issued with the previous royalty terms that do not convert to the royalty terms of the Energy Policy Act, the daily breakdown of flow, average temperature in, and average temperature out may still be required. However, BLM believes these situations will be relatively rare and can be handled on a case by case basis under § 3276.14(d).

Part 3280—Geothermal Resources Unit Agreements

This proposed rule would revise existing part 3280 to implement the Energy Policy Act of 2005 relating to unit agreements, specifically 30 U.S.C. 1017. Additionally, the regulations in part 3280 have not been updated since the 1970s, other than to add the unit review requirement mandated by a 1988 amendment to the Geothermal Steam Act. Therefore, other additions to the proposed rule would be included to provide needed procedural requirements related to unit agreement administration. These changes and additions are intended to clarify BLM's expanded authority regarding unitization as provided under the Energy Policy Act of 2005, the unit operator's application and operational requirements, and to identify how BLM would review an application and make necessary unit agreement administration decisions, given the manner in which geothermal resources are developed. Changes would include provisions specifying that BLM could require: (1) The formation of a unit agreement; (2) Existing Federal leases to commit to a unit agreement; (3) New leases to contain a provision requiring the lessee to agree to commit to a unit agreement if BLM so requires; (4) A modification of the rate of resource exploration or development within a unit; and (5) Establishing that a majority interest of owners in a lease has the authority to commit the lease to a unit agreement. Other changes in this proposal do not change existing procedure or practice, but clarify and articulate unit agreement requirements. These provisions include: (1) Setting out the application procedures for unit area designations and the unit agreements, in the order each step typically occurs; (2) Identifying BLM's procedures for reviewing applications and making final decisions regarding unit area designations, unit agreements, and participating areas; (3) Explaining BLM procedures for administering a unit agreement once it is in effect; (4) Specifying how a unit operator could receive BLM approval to modify unit terms, especially those related to unit contraction; and (5) Establishing minimum initial and continuing unit development requirements and conditions for terminating the unit agreement. In effect, the proposed provisions would standardize existing practices, assure consistent BLM procedures, and would inform the public as to how BLM handles unit agreements.

Subpart 3280—Geothermal Resources Unit Agreements: General

Proposed § 3280.1 would explain that the purpose and scope of part 3280 is to provide holders of Federal and non-Federal geothermal leases and owners of non-Federal mineral interests the opportunity to unite under a Federal geothermal unit agreement to explore for and develop geothermal resources in a manner meeting the public interest.

The existing authority, § 3280.0–3, would be removed as unnecessary. The authority citation for the part follows the Table of Contents for part 3280, and the discussion of functions within the Interior Department is covered by the Department of the Interior Departmental Manual and delegations to BLM.

Proposed § 3280.2 would include definitions from existing § 3280.0–5, with certain revisions. Unnecessary definitions of terms such as "agreement" and "cooperative agreement" would be removed. Several definitions would be added, including definitions for the terms "unit contraction provision," "plan of development," "public interest," "reasonably proven to produce" and "unit well."

BLM's policy regarding the formation of units that is set forth in existing § 3280.0–2 would be revised and included in proposed § 3280.3. The new section would set forth the policy contained in 30 U.S.C. 1017(a) that for the purpose of more properly conserving the natural resources of any geothermal reservoir, field, or like area, or any part thereof (whether or not any part of the geothermal reservoir, field, or like area, is subject to any unit agreement), lessees thereof and their representatives could unite with each other, or jointly or separately with others, in collectively adopting and operating under a unit agreement for the reservoir, field, or like area, or any part thereof, including direct use resources, if determined and certified by BLM to be necessary or advisable in the public interest.

Proposed § 3280.4 would address BLM's authority to require the formation of a unit agreement and BLM's authority to require leases to be committed to a unit agreement and would implement 30 U.S.C. 1017(a)(3) and (b). Proposed § 3280.4(a) would provide that BLM could initiate the formation of a unit agreement, or require an existing Federal lease to commit to a unit agreement, if it was in the public interest. This implements a statutory provision and does not require the consent of a lessee. Modification of lease terms to facilitate creation and operation of the unit does require lessee consent, however (30 U.S.C. 1017(a)(4) and proposed § 3280.5). Proposed § 3280.4(b) would state that BLM could require that leases becoming effective on or after August 8, 2005, contain a provision stating that BLM could require commitment of the lease to a unit agreement. Under this provision BLM could also prescribe the unit agreement to which such lease would be required to commit in order to protect the rights of all parties in interest, including the United States. This provision implements 30 U.S.C. 1017(b)(2).

As mentioned above, proposed § 3280.5 would provide that BLM could, with the consent of the lessees involved, establish, alter, change, or revoke rates of operations (including drilling, operations, production, and other requirements) of the leases and make conditions with respect to the leases, with the consent of the lessees, in connection with the creation and operation of any such unit agreement as the BLM could consider necessary or advisable to secure the protection of the public interest. This would implement 30 U.S.C. 1017(a)(4)(A). The proposal would also provide that if leases to be included in a unit have unlike lease terms, the leases will not be required to be modified to be in the same unit. This would implement 30 U.S.C. 1017(a)(4)(B).

Proposed § 3280.6 would provide that BLM could require a unit agreement that applies to lands owned by the United States to contain a provision under which BLM or an entity designated in the unit agreement could alter or modify, from time to time, the rate of resource exploration, development, or production quantity or rate under the unit agreement. This proposed section would implement 30 U.S.C. 1017(c).

Proposed § 3280.7 would clarify that BLM cannot require lands which are not under Federal administration.

Subpart 3281—Application, Review, and Approval of a Unit Agreement

Proposed subpart 3281 would reorganize the application, review, and decision procedures for unit area designation and the unit agreement into a sequential, step-by-step, description. The proposed regulations would describe in detail the steps to follow and the information a prospective unit operator would have to submit, as well as the process BLM would follow to make application decisions. The first step would be for BLM to make a designation of the proposed unit area.

Proposed § 3281.1 would make clear that before a unit agreement is effective, BLM must designate the unit area and approve the unit agreement.

Proposed § 3281.2 would provide a list of information that the unit operator must submit before BLM can make a unit area designation. The prospective unit operator would be required to submit a geologic report, a map of the proposed unit area, a list of leases and tracts located in the proposed unit area and any other information BLM requires.

Proposed § 3281.3 would provide more detail on the types of geologic information the unit operator should provide to document that the proposed unit area is geologically contiguous and suitable for exploration, development, and production of the resource.

Proposed § 3281.4 would make it clear that proposed unit areas are not required to be of a specific size or shape, but the size could require the drilling of more than one unit well to meet minimum initial unit obligations.

Proposed § 3281.5 would explain how BLM would resolve unit applications that contain overlapping areas. If separate unit applications overlap, BLM could: (1) Approve the unit application designation which best meets public interest requirements; (2) Designate a different unit area; or (3) Require revision of the applications. BLM would not approve any proposed unit agreement if it included lands committed to another unit agreement already in effect.

Proposed § 3281.6 would describe how BLM would determine whether to approve unit designation and how BLM will notify operators of the decision. Among other considerations, BLM would determine if the geologic basis for the unit area is sound for the development of the unit area, which is the principal factor in deciding whether the unit area would be designated.

Under the proposal, if BLM approves a unit area designation, the prospective unit operator would initiate the steps required for unit agreement approval. Proposed § 3281.7 describes the information a unit operator must submit to BLM for unit agreement approval.

Consistent with existing regulations at § 3281.3, the prospective unit operator would be required to provide an opportunity for all owners of mineral rights and lease interests to join the unit under proposed § 3281.8 and then supply BLM with documentation of the commitment status of each lease or tract as required by proposed § 3281.9. Documentation would include a signed joinder agreement or evidence the interest owners were offered an opportunity to join the unit. Under 30 U.S.C. 1017(a)(2) and § 3281.9(b), a majority interest of owners in a lease could commit the lease to a unit agreement.

Proposed § 3281.10 explains that BLM would review the commitment status documentation to insure that the prospective unit operator will have sufficient control of the unit area to conduct resource development in the public interest.

Proposed § 3281.11 would address the required qualifications of a prospective unit operator. The qualification requirements for unit operators have not changed. This is consistent with existing § 3282.1.

Proposed § 3281.12 would explain that owners of mineral rights and lease interest committed to the unit are the

parties who nominate a unit operator; however, BLM must determine if the nominee meets the qualifications before the unit operator is designated.

Proposed § 3281.13 would address the formats or models for unit agreements. This section would allow a unit applicant the flexibility to create a unit agreement that best matches the specific development scenario or energy market conditions in an area. The prospective unit operator could use the model unit agreement proposed in § 3286.1, the model with variances noted, or another format that meets the requirements outlined in the next two proposed regulatory sections. While existing regulations at § 3281.1 allow for variances from a model unit agreement, the proposed regulations clearly describe the information that needs to be in a unit agreement should the applicant choose not to use the model agreement.

Proposed § 3281.14 is new to these regulations. The addition of § 3281.14 does not change existing procedures related to the required provisions in a unit agreement. Existing regulations required the unit applicant to determine the minimum requirements of a unit agreement by following the model agreement. Listing the minimum requirements and terms for unit agreement should assist applicants in determining what terms and conditions are required in a unit agreement.

Proposed § 3281.15 would list the minimum initial unit obligation information that the unit agreement must contain. To meet the minimum initial unit obligation, the unit operator would have to diligently drill and complete at least one unit well. The information required by this section will be used to ensure that the well would be: (1) Located on a tract committed to the agreement; (2) Drilled to the depth or geologic formation specified in the unit agreement, unless commercial resources are found at a shallower depth; and (3) Completed within the time frame specified in the unit agreement. Depending on the size of the unit, BLM could require the drilling of more than one unit well to meet the minimum initial unit obligation. Since the unit well, by definition, would have to be designed to produce or utilize resources in commercial quantities, the completion of a narrow diameter well could satisfy the initial obligation only if the well is capable of production in commercial quantities. BLM would make this determination on a case-by-case basis. Other exploration operations, such as drilling temperature gradient wells, could also be used to satisfy part of the minimum initial unit obligation.

Proposed § 3281.16 would clarify existing practice to submit Plans of Development for the unit at the time of unit designation, and for future activities not addressed in an existing Plan of Development. Plans of Development must be submitted to BLM for future unit activities until after a producible unit well is completed.

Proposed § 3281.17 would describe the information that a unit operator must include in a Plan of Development. While the scope and types of activities described in the Plan of Development may vary, a Plan of Development must include the completion of at least one unit well.

Proposed § 3281.18 would make it clear that BLM will not designate a unit area until the Plan of Development ensures that unit activities will meet the public interest requirements.

Proposed § 3281.19 would discuss BLM's response to a proposed unit agreement. In all instances, BLM's review of a proposed unit agreement must conclude that approval of the unit complies with these regulations and is in the public interest. This section of the proposed rule also requires BLM to coordinate the review of a proposed unit agreement with appropriate State and other Federal surface management agencies. This is consistent with current practice. Under this section BLM would provide the applicant with written notification of unit rejection or approval.

Proposed § 3281.20 would establish the effective date of an agreement as the first day of the month following BLM approval. The unit operator would have the option of requesting the effective date be the first day of the month in which BLM approved the agreement, or a more appropriate date if agreed to by BLM.

Subpart 3282—Participating Area

Proposed subpart 3282 would define several procedural requirements regarding participating areas.

Section 3282.1 of the proposed rule would define a participating area as those portions of the unit area BLM determines: (1) Are reasonably proven to produce in commercial quantities; or (2) Support production in commercial quantities such as through pressure support from injection wells.

Proposed § 3282.2 would explain that commercial operations cannot begin without BLM approval of a participating area. This is necessary to ensure proper allocation of production and royalties within the unit.

Proposed § 3282.3 would specify that a unit operator would have to propose a participating area the earlier of 30 days before starting commercial operation, or 60 days after BLM determined a well is produced or utilized in commercial quantities.

Proposed § 3282.4 would describe the general information (*e.g.*, maps showing all tracts and lease information) that the unit operator must submit to BLM when applying for a participating area.

Proposed § 3282.5 would describe the technical information (*e.g.*, interpretations of well performance and geology documenting the tracts contributing to production) that the unit operator must submit to BLM when applying for a participating area.

Proposed § 3282.6 would specify the circumstances requiring a unit operator to apply to revise a participating area boundary. This proposed section would also allow unit operators to request a delay in modifying participating area boundaries when active drilling is not complete.

Information on the establishment of an effective date for new or revised participating areas would be in proposed § 3282.7. Provisions in this section would provide flexibility in establishing the effective date, provided the date is not earlier than the effective date of the unit agreement.

Proposed § 3282.8 would outline the following as the three reasons BLM would reject revision of a participating area: (1) If the unit operator does not supply the required information; (2) If the information does not support approval; or (3) If the proposed revision reduces the size of the participating area because of resource depletion in a certain area. The third reason is included as a matter of equity because a lessee should not lose the benefit of unitization if its resources are utilized before other resources in the participating area. To provide otherwise would serve as a disincentive to having a lease's resources developed early in the life of a participating area.

Proposed § 3282.9 would provide that production be allocated equally to all lands in a participating area which are committed to the unit agreement. For instance, if you owned or controlled full interest in 100 acres within a participating area of 1000 acres, you would be allocated 10 percent of the production from the participating area.

Proposed § 3282.10 would specify that unleased Federal lands, which are available for leasing and located within the participating area, would receive a proportionate allocation of production for royalty purposes. The unit operator would pay royalty to the United States on these lands. This section further provides that if BLM is not allowed to lease the unleased Federal lands in the

participating area because of restrictions based on planning decisions or other statutory requirements, the lands will not receive an allocation of production (see § 3201.11).

Proposed § 3282.11 would explain that BLM may determine that a participating area could continue where only intermittent production is occurring, provided such a determination is in the public interest. The regulations describe direct use facilities that only utilize geothermal resources during winter months as an example of intermittent production that BLM would consider in the public interest.

Proposed § 3282.12 would provide that a participating area would terminate when the unit operator either permanently stops commercial operations, or 60 days after receiving notification from BLM that operations are not being conducted in accordance with the unit agreement, participating area approval, or the public interest. If the unit operator can demonstrate that BLM's reason for termination is in error or the situation warranting the termination has been rectified, BLM may decide to not terminate the participating area.

Subpart 3283—Modifications to the Unit Agreement

Proposed subpart 3283 would establish how modifications to a unit agreement could be proposed and approved. This proposed rule would add new provisions to specify the conditions under which a unit operator could request an extension of the unit contraction date and/or a partial contraction of the unit area. Providing this flexibility for unit administration decisions by BLM is necessary since a unit operator could have spent substantial amounts of money discovering commercial resources which can not be immediately developed due to conditions beyond the operator's control. An inability to place portions of a unit into production could subject leases to termination where either commercial resources could have been found or monitoring or injection wells not directly involved in production are located. This would reduce the incentive for additional exploration and development in the unit area, which is contrary to public interest objectives.

Proposed § 3283.1 would provide that a unit operator could request a modification of the unit agreements after all unit interests have agreed to the change in the agreement. After review, BLM will notify the unit operator of BLM's decision and effective date of approval, if applicable.

Proposed § 3283.2 would discuss circumstances under which the unit operator could request BLM to revise contraction provisions of a unit agreement. Contraction provisions of a unit agreement describe how lands will be removed from the unit agreement as exploration and development activities determine which lands are not capable of producing geothermal resources in commercial quantities. Under this section, an operator could also propose an extension of the unit contraction date and/or a partial contraction of the unit area. This section outlines both the information the operator must provide and information the operator should provide to BLM in support of a request to revise contraction provisions of the unit area. BLM would approve the request if we determine that revision was in the public interest. BLM may also add conditions to the approval such as requiring an annual renewal or setting the timing and conditions for when phased contractions or termination of the revision could occur.

Proposed § 3283.4 would address adding or removing lands from an agreement when BLM determines, based on information submitted by the unit operator, that new or additional geologic information modifies the basis for the unit boundary. Once BLM notifies the unit operator of approval of the revision to the unit, the unit operator must notify all interest owners in the unit area revision.

Proposed § 3283.5 would implement 30 U.S.C. 1017(f) that requires review of unit agreements at 5 year intervals to eliminate any lands in the unit area not necessary for unit operations.

Proposed § 3283.6 would describe the purpose of the periodic review, the basis for eliminating lands from the unit, and the consequences of elimination on leased lands.

Proposed § 3283.7 would provide that unit operators may be changed only with BLM's written approval.

Proposed § 3283.8 would describe the requirements of the new operator. The new operator must meet the qualification requirements, submit evidence of adequate bonding for Federal lands, and provide written acceptance of the unit terms and conditions to BLM.

Proposed § 3283.9 would provide that the change of unit operator is effective when BLM approves the new operator in writing.

Proposed § 3283.10 would explain that the previous unit operator would remain responsible for all duties and responsibilities until BLM approved the new unit operator. This section also makes it clear that previous unit operators remain responsible for liabilities and obligations that accrued before a new unit operator was approved.

Proposed § 3283.11 would acknowledge that a unit agreement does not modify stipulations in Federal leases. While certain lease provisions, such as lease term, annual work requirements, and royalty provisions are altered by commitment of lands to a unit, lease stipulations, such as those designed to protect the environment or other resources, are not superseded by the terms of a unit agreement.

Proposed § 3283.12 would stipulate that persons acquiring Federal interests in a unit agreement are bound by the terms and conditions of the unit agreement.

Subpart 3284—Unit Operations

Proposed subpart 3284 would discuss unit operations, unit operator responsibilities for those operations, and how BLM would administer operational situations.

Proposed § 3284.1 would acknowledge current practice that all phases of unit operations would be required to comply with the terms and conditions of the unit agreement and operational standards and orders identified in the exploration (subpart 3250), drilling (subpart 3260), and production and utilization (subpart 3270) subparts of this rule.

Responsibilities of the unit operator would be described in proposed § 3284.2. In general, the unit operator has primary responsibility to diligently explore and drill for, and to produce and inject, unitized geothermal resources. A separate entity could own and operate utilization facilities located within the unit area, but only the unit operator would be authorized to produce and inject unitized resources and supply geothermal resources to any utilization facilities, regardless of whether the location of such facilities is within the unit. Other working interests would not be authorized to conduct any drilling activities under subpart 3260 on leases committed to a unit agreement without BLM approval. The unit operator works with BLM and MMS to make unit changes and must ensure all monies owed to the Federal government for geothermal activities are paid.

Proposed § 3284.3 would discuss what happens to the unit agreement and leases committed to the agreement if the minimum initial unit obligations were not met and how unit operations could affect extension of lease terms. If the initial unit well obligations were not

met or the unit operator relinquished the agreement before meeting the initial unit obligations, the agreement would be voided as if it was never in effect, and any lease segregations become invalid and any extensions issued would be retroactively voided to the date the unit became effective.

Proposed § 3284.4 would address actions necessary to maintain a unit agreement after a unit well has been completed. If a unit well is determined by BLM to be producible, the unit operator must submit a proposed participating area application and if no additional wells are drilled, the unit area will contract to conform to the participating area. If a unit well will not produce or utilize geothermal resources in commercial quantities, the unit operator would have to continue drilling unit wells within the time specified in the agreement until unit well is completed which BLM determines produces or utilizes geothermal resources in commercial quantities. Failure to meet this obligation to drill subsequent wells would result in the unit terminating at that time.

Proposed § 3284.5 would explain how commitment of lands to a unit agreement affects lease terms. Lease extensions granted based on commitment to the agreement would remain in force while the unit is in effect. Under proposed § 3207.17, a lease could receive an extension if it was committed to a unit agreement and would expire prior to the unit term expiring. If the unit operator has diligently pursued unit development, a lease could receive an extension to match the term of the unit.

Proposed § 3284.6 would address drilling by working interest owners other than the unit operator. BLM may approve drilling outside the participating area only when BLM determines the unit operator is not diligently developing the resource and drilling is in the public interest. Should a working interest owner complete a well which would produce or utilize in commercial quantities, the unit operator must apply to include the well in the participating area and operate the well.

Proposed § 3284.7 would allow a lessee or operator to conduct operations on an uncommitted Federal lease located within a unit if BLM determined that it was in the public interest and would not unnecessarily affect unit operations.

Proposed § 3284.8 would establish that a unit can only have one operator. Given the nature of most geothermal resources, multiple unit operators would likely violate the purpose of the unit agreement that all of the resources within the unit be developed as if they were part of one operation. If multiple operators were allowed, then they could separately develop the resource, the resource would not necessarily be conserved, and the public interest would not be served. In effect, the purpose of having a unit would be defeated.

Proposed § 3284.9 would allow BLM to set or modify the rate of production or injection within the unit area to ensure protection of Federal resources.

Proposed § 3284.10 would articulate the unit operator's responsibility to prevent drainage of the unit area and ensure compensation (royalties) for drainage of geothermal resources from unitized land by wells not subject to the unit agreement.

Proposed § 3284.11 would explain that development and production from the unit, regardless of location within the unit, fulfills the diligent development requirements for all leases within the unit.

Proposed § 3284.12 would require unit operators to notify BLM within 30 days of a change in the commitment status of any lease or tract within the unit, regardless of ownership.

Subpart 3285—Unit Termination

Unit agreement termination is discussed in proposed subpart 3285.

Proposed § 3285.1 would provide that BLM may terminate a unit agreement if the unit operator does not comply with any term or condition of the unit agreement.

Proposed § 3285.2 would allow a unit operator to request BLM approval of a voluntary unit agreement termination after the initial unit obligation well is completed and before starting commercial operations. This could occur when the appropriate percentage of working interest owners, as specified in the unit operating agreement, agree to the termination. If commercial operations are occurring, the unit would remain in effect until all commercial operations cease.

Subpart 3286—Model Unit Agreement

Subpart 3286 provides a model unit agreement. Applicants for unit agreements are not required to use this model (see proposed § 3281.13).

This rule proposes several revisions to Articles IV and XI of the model unit agreement. In these Articles, the existing model refers to a Plan of Operation. The term Plan of Development would be used in the proposed model to replace the Plan of Operation. This change is proposed to clarify overall permit application requirements since a Plan of Operation is part of the well drilling and testing application (§§ 3261.11 and 3261.12), and is not related to the review of a unit agreement. The requirements of the Plan of Development would not be substantially changed from those of the existing Plan of Operation.

Article IV of the existing unit model requires the unit to contract to the participating area if no more than 4 months could elapse between the establishment of the participating area and completing the drilling of an exploratory well outside of the participating area. This time frame is proposed to be expanded to 6 months before contraction would occur to provide the unit operator with greater flexibility when attempting to obtain drilling equipment.

We are proposing several modifications to existing Article XI. A unit operator is currently required to initiate drilling an exploratory well within six months of the effective date of the unit agreement. This rule would modify this requirement to allow the unit operator to conduct exploration operations as well as drilling a well to meet unit diligent development requirements. A unit operator would have to complete at least one unit exploration well prior to the end of the term of the unit agreement or the unit would be voided and leases would not receive any benefit of unit commitment. Article XI of the existing model agreement specifies that BLM could only grant a single extension of drilling obligations of no longer than four months. We are proposing to modify the model so that BLM could grant multiple extensions of time frames that meet public interest requirements. This greater flexibility in unit administration is needed to cover a wide variety of development issues facing unit operators that are beyond their control. Language in Articles 11.5 and 11.7 referring to the "actual production of unitized substances" would be changed to "completing a well capable of producing or utilizing unitized substances in commercial quantities." This change would allow the minimum initial unit obligation to be met either through the timely completion of a producible unit well or the initiation of actual production of unitized resources.

We are also proposing editorial revisions to the model agreement. For instance, references to the "Director" are changed to the "Authorized Officer," the person within BLM with the authority to make final decisions.

We are proposing to delete the following sections in this part because the BLM does not require submission of

information in these formats and the information contained in these sections is found elsewhere in the proposed rule: § 3286.1–1 Model Exhibit "A"; § 3286.1–2 Model Exhibit "B"; § 3286.2 Model unit bond; § 3286.3 Model designation of successor operator; and § 3286.4 Model change of operator by assignment.

Subpart 3287—Relief and Appeals

This subpart addresses situations where unit operators seek relief from the obligations of the unit agreement and wish to appeal a BLM decision under this part.

Proposed § 3287.1 would allow a unit operator to request a suspension of any or all obligations under the unit agreement.

Proposed § 3287.2 would list the circumstances that may warrant the granting of a suspension of unit obligations. Typically they are situations beyond the unit operator's control, such as accidents, labor strikes or Acts of God. Under this provision, BLM could decide to not grant a suspension of unit obligations, especially the minimum initial obligation, when lengthy or indefinite periods of time are involved. For example, BLM might not approve a suspension of minimum initial drilling obligations due to a unit operator's inability to obtain an electrical sales contract or when poor economics affect the electrical generation market, limiting the opportunity to obtain viable sales contracts.

Proposed § 3287.3 would describe how a suspension of unit obligations would affect the terms of the unit agreement. This section explains that BLM has the discretion to toll certain provisions of the unit agreement while allowing others to remain in effect. BLM will specify the terms of the suspension. The unit operator is obligated to notify all interests in the agreement of changes in unit agreement obligations effected by the suspension.

Proposed § 3287.4 would allow a unit operator to appeal decisions BLM makes regarding unit agreement administration or operations.

IV. Procedural Matters

Executive Order 12866, Regulatory Planning and Review

Executive Order 12866, the Unfunded Mandates Reform Act (UMRA), and the Small Business and Regulatory Flexibility Act (SBRFA) require agencies to undertake an analysis of the benefits and costs associated with the regulatory action.

The proposed regulations are intended to implement provisions of the Energy Policy Act related to geothermal leasing. Those provisions in the Act are primarily intended to promote the exploration and development of geothermal resources on Federal lands.

The annual effect on the economy of the regulatory changes is less than $100 million and they will not 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. The regulatory changes in the nomination and leasing process, royalty system, and diligence requirements are the only provisions in the proposed rule with potential economic impacts. However, the royalty provisions are intended to be revenue neutral and should not have any economic impact. The nomination filing fee added in section 3203.12 is $100 per nomination for competitive sale, plus 10 cents for each acre of land nominated. This fee will have some negative financial impact on lessees. However, BLM is authorized to charge reasonable filing fees under Section 304(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1734(a). While our general policy is to charge a processing fee that recovers the agency's reasonable processing costs, BLM does not have data on our cost of processing nominations. In 2004, BLM issued 29 competitive and noncompetitive geothermal leases, covering 45,706 acres. With the proposed fees, the cost of acquiring those leases would have been increased by $2,900 due to the fixed nomination fee, and $4,570.60 due to the per acre fee, or an average of a little over $250 per lease. This nominal filing fee is not intended to reimburse the government for its processing costs, but instead to limit filings to serious applicants. We do not expect the fee to lead to any reduction in the number of serious applicants. Therefore, we do not anticipate any measurable reduction in economic activity due to the proposed regulations, and certainly nothing approaching $100 million annually.

The payment-in-lieu-of-expenditure provision would increase the cost of holding future non-producing Federal geothermal leases beyond the 15th year. However, since these leases are neither producing nor being actively developed, we do not expect any measurable reduction in economic activity to occur as a result of the proposed rule.

This rule will not create inconsistencies or otherwise interfere with an action taken or planned by another agency. This rule does not change the relationships of the geothermal program with other agencies' actions, and we coordinated closely with the Minerals Management Service in preparing this proposed rule. These relationships are included in agreements and memoranda of understanding that would not change with this rule.

This rule does not materially affect the budgetary impact of entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are simple and easy to understand. We invite your comments on how to make these proposed regulations easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed regulations clearly stated? (2) Do the proposed regulations contain technical language or jargon that interferes with their clarity? (3) Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? (4) Would the regulations be easier to understand if they were divided into more (but shorter) sections? (A "section" appears in bold type and is preceded by the symbol "§" and a numbered heading, for example "§ 3251.10 Do I need a permit before I start my exploration operations?" (5) Is the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the proposed regulations? How could this description be more helpful in making the proposed regulations easier to understand?

Please send any comments you have on the clarity of the regulations to the address specified in the **ADDRESSES** section.

National Environmental Policy Act

BLM has prepared an environmental assessment (EA) and has found that the proposed rule would not constitute a major Federal action significantly affecting the quality of the human environment under Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). The proposed rule has no direct effect on BLM environmental activities and decisions. It deals primarily with changes in the leasing procedures and royalty provisions of the existing regulations. The rule would not change operational standards to cause impacts on the ground. Therefore, an environmental impact statement is not required. BLM has placed the EA and the Finding of No Significant Impact (FONSI) on file in the administrative

record at the address specified in the **ADDRESSES** section. BLM invites the public to review these documents and suggests that anyone wishing to submit comments in response to the EA and FONSI do so in accordance with the Public Comment Procedures section, above.

Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. 601–612, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities.

Entities that will be directly affected by this Geothermal Resource Leasing rule will include most, if not all, firms involved in the exploration and development of geothermal resources on Federal lands. Such operators are a subset of entities involved in the domestic geothermal industry.

The U.S. Census Bureau does not identify the geothermal industry as a discrete industrial classification. Instead, firms involved in exploration and development of geothermal resources are included within other categories. For example, geothermal drilling is grouped with water well drilling; firms involved in the distribution of steam are included with steam and air-conditioning suppliers; and firms generating electricity from geothermal resources are grouped in an Other Electric Power Generation category. As a result, there is no practical way to use the U.S. Census Data to calculate the number of entities involved in the domestic geothermal industry.

As of September 30, 2004, there were 259 noncompetitive leases covering 364,506 acres in Arizona, California, Idaho, Nevada, Oregon, and Utah. Almost 300,000 of those acres are located in Nevada. There were also 140 competitive leases covering 186,683 acres in California, Nevada, New Mexico, Oregon and Utah. Approximately 170,000 of those leased acres are located in California and Nevada.

Although this rule will only affect entities involved in the exploration and development of energy and mineral resources from land administered by BLM, there is no practical way to determine which of these firms will operate on Federal lands in the future. The extent to which any firm is actually affected by this rule depends on whether it operates on Federal lands.

For firms involved in the geothermal industry, small entities are defined by the SBA as individuals, limited partnerships, or small companies considered at "arm's length" from the control of any parent companies, with fewer than 500 employees.

U.S. Census data on firms by number of employees is not available. However, based on interviews of BLM specialists involved in geothermal leasing activity and several industry representatives, and reviews of company reports, there appears to be only one known firm currently operating on Federal lands with more than 500 employees. That firm, Calpine Corporation, operates The Geysers in northern California, and is a major power company that owns, leases, and operates natural gas-fired and geothermal power plants.

Based on available information, the preponderance of firms involved in geothermal resource exploration and development on Federal lands are small entities as defined by SBA. Therefore, it is reasonable to conclude that this rule will affect a "substantial number of small entities."

The regulatory changes in the nomination and leasing process, royalty system, and diligence requirements are the only provisions in the proposed rule with potential economic impacts. However, the royalty provisions are intended to be revenue neutral and should not have any economic impact. The nomination filing fee in section 3203.12 is $100 per nomination, plus 10 cents for each acre of land nominated for competitive sale. This fee will have a negative financial impact on lessees, including small entities.

BLM is authorized to charge reasonable filing fees under Section 304(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1734(a). While our general policy is to charge a processing fee that recovers the agency's reasonable processing cost, BLM does not have data on our cost of processing nominations. In 2004, BLM issued 29 competitive and noncompetitive geothermal leases, covering 45,706 acres. With the proposed fees, the cost of acquiring those leases would have been increased by $2,900 due to the fixed nomination fee, and $4,570.60 due to the per acre fee, or an average of about $250 per lease. This nominal filing fee is not intended to reimburse the government for its processing costs, but instead to limit filings to serious applicants. We do not expect the fee to lead to any reduction in the number of serious applicants. Therefore, we do not anticipate any measurable reduction in economic activity due to the proposed regulations.

The annual effect on the economy of the regulatory changes is less than $100 million, as shown earlier in this section, and will not 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. This rule will not create inconsistencies or otherwise interfere with an action taken or planned by another agency, also as discussed earlier. This rule does not change the relationships of the geothermal program with other agencies' actions. These relationships are included in agreements and memoranda of understanding that would not change with this rule. In addition, this rule does not materially affect the budgetary impacts of entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

Therefore, BLM has determined under the RFA that this proposed rule would not have a significant economic impact on a substantial number of small entities. The determination and findings discussed herein are supported by a Threshold Analysis prepared under the RFA. BLM has place the Threshold Analysis on file in the administrative record at the address specified in the **ADDRESSES** section.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This proposed rule is not a "major rule" as defined at 5 U.S.C. 804(2). That is, it would not have an annual effect on the economy of $100 million or more; it would not result in major cost or price increases for consumers, industries, government agencies, or regions; and it would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. See the discussion under Executive Order 12866, above.

Unfunded Mandates Reform Act

This proposed rule does not impose an unfunded mandate on state, local, or Tribal governments or the private sector, in the aggregate, of $100 million or more per year; nor does this proposed rule has a significant or unique effect on state, local, or Tribal governments. The rule would impose no requirements on any of these entities. We have already shown, in the previous paragraphs of this section of the preamble, that the change proposed in this rule would not

have effects approaching $100 million per year on the private sector. Therefore, BLM is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*).

Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights (Takings)

The proposed rule is not a government action capable of interfering with constitutionally protected property rights. A takings implication assessment is not required, since the proposed rule does not authorize any specific activities that would result in any effects on private property. Therefore, the Department of the Interior has determined that the rule would not cause a taking of private property or require further discussion of takings implications under this Executive Order.

Executive Order 13132, Federalism

The proposed rule would not have federalism implications. The rule 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 levels of government. It would not apply to states or local governments or state or local governmental entities. The management of Federal geothermal leases is the responsibility of the Secretary of the Interior. The proposed rule would not alter any lease management or revenue sharing provisions with the states, nor does it impose any costs to the states. Therefore a federalism assessment is not required.

Executive Order 12988, Civil Justice Reform

Under Executive Order 12988, we have determined that this proposed rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have found that this rule may include policies that have tribal implications. The proposed rule would make changes in the Federal geothermal leasing and management program, which does not apply on Indian Tribal lands. At present, there are no geothermal leases or agreements on Tribal or allotted Indian lands. If the Bureau of Indian Affairs should ever issue any leases or agreements, BLM would then likely be responsible for the approval of any such proposed operations on all Indian (except Osage) geothermal leases and agreements. In light of this possibility, and because Tribal interests could be implicated in geothermal leasing on Federal lands, BLM has begun consultation on the proposed revisions to the geothermal regulations and will continue to consult with Tribes during the comment period on the proposed rule.

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

In accordance with Executive Order 13211, BLM has determined that the proposed rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The proposed changes could result in an increase in geothermal leasing and development, but any potential increases are only speculative. If geothermal leasing and development did increase, that would likely have a positive effect on energy supply.

Executive Order 13352—Facilitation of Cooperative Conservation

In accordance with Executive Order 13352, BLM has determined that this proposed rule would not impede facilitating cooperative conservation; would take appropriate account of and considers the interests of persons with ownership or other legally recognized interests in land or other natural resources; properly accommodates local participation in the Federal decision-making process; and provide that the programs, projects, and activities are consistent with protecting public health and safety. The proposed changes are essentially administrative in nature and would have a bearing on conservation issues.

Paperwork Reduction Act of 1995 (PRA)

This proposed rule contains a collection of information that has been submitted to OMB for review and approval under section 3507(d) of the PRA. As part of our continuing effort to reduce paperwork and respondent burdens, BLM invites the public and other Federal agencies to comment on any aspect of the reporting and recordkeeping burden. If you wish to comment on the information collection aspects of this proposed rule, you may send your comment directly to OMB and a copy to BLM (see the **ADDRESSES** section of this notice). You may obtain a copy of the supporting statement for the new collection of information by contacting the Bureau's Information Collection Clearance Officer Contact at (202) 452–5033.

The PRA provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information and assigns a control number, you are not required to respond. OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 to 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to BLM on the proposed regulations.

The title of the collection of information for the rule is "43 CFR Parts 3200 and 3280, Geothermal Resource Leasing and Geothermal Resources Unit Agreements." We estimate the respondents to include 79 geothermal lessees who may apply for lease conversions and lease extensions (50 lease conversions and 29 lease extensions). Responses to this collection are required to obtain a benefit.

The collection of information required by the current parts 43 CFR 3200 and 3280 regulations is approved under OMB Control Numbers 1004–0074 (expiration 9/30/06) and 1004–0132 (expiration 3/31/07). The proposed rule imposes changes to the information collection burden hours (see table below). This rulemaking will make an estimated increase of 2,040 new burden hours. The hour burden and responses remain the same for those collections, and therefore, those numbers are not included in the total reporting burden of this rulemaking.

43 CFR proposed section	Reporting requirement	Hour burden	Annual number of responses	Annual burden hours
3200.7(a)(2)	Notify BLM of request to convert the existing lease or determine whether lessee qualifies for a two-year extension of its term.	1	79	79
3203.10	Submit nominations for geothermal lease sale and required fees from section 3203.12..	3.5	300	1,050
3203.12	Submit the required fees (see section 3203.10)	15 min.	300	75
3205.10	Submit application for a direct use lease	10	10	100
3212.10	Submit application for production incentive	16	20	320
3212.26	Submit application to convert royalty terms of leases issued before August 8, 2005 to the terms of the Energy Policy Act of 2005.			
	(a) Leases with existing electrical generation projects	4	31	124
	(b) Leases with existing direct use operations	1	2	2
	(c) Leases without electrical generations or direct use operations.	1	50	50
3276.14	Submit monthly report for direct use facilities	12 (1 hour each month).	20	240
Total			812	2,040

The BLM specifically solicits comments on the following questions:

(a) Is the proposed collection of information necessary and useful for BLM to properly perform its functions?

(b) Are the estimates of the burden hours of the proposed collection reasonable?

(c) Do you have any suggestions that would enhance the quality, clarity, or usefulness of the information to be collected?

(d) Is there a way to minimize the information collection burden on those who are to respond, including the use of appropriate automated electronic, mechanical, or other forms of information technology?

Authors

The principal authors of this proposed rule are Rich Hoops—BLM Nevada State Office, Richard Estabrook—BLM Ukiah Field Office, Cheryl Seath—BLM Bishop Field Office, Sean Hagerty—BLM California State Office, and assisted by Brenda Aird of the Assistant Secretary's Office, Kermit Witherbee—National Geothermal Program Manager, BLM's Division of Regulatory Affairs, and the Office of the Solicitor.

List of Subjects

43 CFR Part 3200

Geothermal energy, Government contracts, Mineral royalties, Public lands—mineral resources, Reporting and recordkeeping requirements, Surety bonds, Water resources.

43 CFR Part 3280

Geothermal energy, Government contracts, Public lands—mineral resources, Reporting and recordkeeping requirements, Surety bonds.

Accordingly, for the reasons stated in the preamble and under the authorities stated below, BLM proposes to amend 43 CFR parts 3200 and 3280 as follows:

R.M. "Johnnie" Burton,

Director, Minerals Management Service, Exercising the Delegated Authority of the Assistant Secretary, Land and Minerals Management.

1. Revise part 3200 to read as follows:

PART 3200—GEOTHERMAL RESOURCE LEASING

Subpart 3200—Geothermal Resource Leasing

Sec.

Subpart 3201—Available Lands

Subpart 3202—Lessee Qualifications

Subpart 3203—Competitive Leasing

Subpart 3204—Noncompetitive Leasing Other Than Direct Use Leases

Subpart 3205—Direct Use Leasing

Authority: 30 U.S.C. 1001–1028; 43 U.S.C. 1701 *et seq.*; and Pub. L. 109–58.

Subpart 3200—Geothermal Resource Leasing

§ 3200.1 Definitions.

For purposes of this part and part 3280 of this chapter:

Acquired lands means lands or mineral estates that the United States obtained by deed through purchase, gift, condemnation or other legal process.

Act means the Geothermal Steam Act of 1970, as amended (30 U.S.C. 1001 *et seq.*).

Additional extension means the period of years added to the primary term of a lease beyond the first 10 years and subsequent 5-year initial extension of a geothermal lease. The additional extension may not exceed 5 years.

Byproducts are minerals (exclusive of oil, hydrocarbon gas, and helium), found in solution or in association with geothermal steam, that no person would extract and produce by themselves because they are worth less than 75 percent of the value of the geothermal steam or because extraction and production would be too difficult.

Casual use means activities that ordinarily lead to no significant disturbance of Federal lands, resources, or improvements.

Commercial operation means delivering Federal geothermal resources, or electricity or other benefits derived from those resources, for sale. This term also includes delivering resources to the

utilization point, if you are utilizing Federal geothermal resources for your own benefit and not selling energy to another entity.

Commercial production means production of geothermal resources when the economic benefits from the production are greater than the cost of production.

Commercial production or generation of electricity means generation of electricity that is sold or is subject to sale, including the electricity or energy that is required to convert geothermal energy into electrical energy for sale.

Commercial quantities means either:

(1) For production from a lease, a sufficient volume (in terms of flow and temperature) of the resource to provide a reasonable return after you meet all costs of production; or

(2) For production from a unit, a sufficient volume (in terms of flow and temperature) of the resource to provide a reasonable return after you meet all costs of drilling and production.

Commercial use permit means BLM authorization for commercially operating a utilization facility and/or utilizing Federal geothermal resources.

Development or drilling contract means a BLM-approved agreement between one or more lessees and one or more entities that makes resource exploration more efficient and protects the public interest.

Direct use means utilization of geothermal resources for commercial, residential, agricultural, public facilities, or other energy needs other than the commercial production or generation of electricity. Direct use may occur under either a regular geothermal lease or a direct use lease.

Direct use lease means a lease issued in an area BLM designates as available exclusively for direct use of geothermal resources, without sale, for purposes other than commercial generation of electricity.

Exploration operations means any activity relating to the search for evidence of geothermal resources, where you are physically present on the land and your activities may cause damage to those lands. Exploration operations include, but are not limited to, geophysical operations, drilling temperature gradient wells, drilling holes used for explosive charges for seismic exploration, core drilling or any other drilling method, provided the well is not used for geothermal resource production. It also includes related construction of roads and trails, and cross-country transit by vehicles over public land. Exploration operations do not include the direct testing of geothermal resources or the production or utilization of geothermal resources.

Facility construction permit means BLM permission to build and test a utilization facility.

Facility operator means the person receiving BLM authorization to site, construct, test, and/or operate a utilization facility. A facility operator may be a lessee, a unit operator, or a third party.

Geothermal drilling permit means BLM written permission to drill for and test Federal geothermal resources.

Geothermal exploration permit means BLM written permission to conduct only geothermal exploration operations and associated surface disturbance activities under an approved Notice of Intent to Conduct Geothermal Resource Exploration Operations, and includes any necessary conditions BLM imposes.

Geothermal resources operational order means a formal, numbered order, issued by BLM, that implements or enforces the regulations in this part.

Geothermal steam and associated geothermal resources means:

(1) All products of geothermal processes, including indigenous steam, hot water, and hot brines;

(2) Steam and other gases, hot water, and hot brines resulting from water, gas, or other fluids artificially introduced into geothermal formations;

(3) Heat or other associated energy found in geothermal formations; and

(4) Any byproducts.

Gross proceeds means gross proceeds as defined by the Minerals Management Service at 30 CFR 206.351.

Initial extension means a period of years, no longer than 5 years, added to the primary term of a geothermal lease beyond the first 10 years of the lease, provided certain lease obligations are met.

Interest means ownership in a lease of all or a portion of the record title or operating rights.

Known geothermal resource area (KGRA) means an area where BLM determines that persons knowledgeable in geothermal development would spend money to develop geothermal resources.

Lessee means a person holding record title interest in a geothermal lease issued by BLM.

MMS means the Minerals Management Service of the Department of the Interior.

Notice to Lessees (NTL) means a written notice issued by BLM that implements the regulations in this part, part 3280 of this chapter, or geothermal resource operational orders, and provides more specific instructions on geothermal issues within a state, district or field office. Notices to Lessees may be obtained by contacting the BLM State Office that issued the NTL.

Operating rights (working interest) means any interest held in a lease with the right to explore for, develop, and produce leased substances.

Operating rights owner means a person who holds operating rights in a lease. A lessee is an operating rights owner if the lessee did not transfer all of its operating rights. An operator may or may not own operating rights.

Operations plan, or plan of operations means a plan which fully describes the location of proposed drill pad, access roads and other facilities related to the drilling and testing of Federal geothermal resources, and includes measures for environmental and other resources protection and mitigation.

Operator means any person who has taken responsibility in writing for the operations conducted on leased lands.

Person means an individual, firm, corporation, association, partnership, trust, municipality, consortium, or joint venture.

Primary term means the first 10 years of a lease, not including any periods of suspension.

Produced or utilized in commercial quantities means the completion of a well that:

(1) Produces geothermal resources in commercial quantities; or

(2) Is capable of producing geothermal resources in commercial quantities so long as BLM determines that diligent efforts are being made toward the utilization of the geothermal resource.

Public lands means the same as defined in 43 U.S.C. 1702(e).

Record title means legal ownership of a geothermal lease established in BLM's records.

Relinquishment means the lessee's voluntary action to end the lease in whole or in part.

Secretary means the Secretary of the Interior or the Secretary's delegate.

Site license means BLM's written authorization to site a utilization facility on leased Federal lands.

Stipulation means additional conditions BLM attaches to a lease or permit.

Sublease means the lessee's conveyance of its interests in a lease to an operating rights owner. A sublessee is responsible for complying with all terms, conditions, and stipulations of the lease.

Subsequent well operations are those operations done to a well after it has been drilled. Examples of subsequent well operations include: Cleaning the well out, surveying it, performing well tests, chemical stimulation, running a

liner or another casing string, repairing existing casing, or converting the well from a producer to an injector or vice versa.

Sundry notice is your written request to perform work not covered by another type of permit, or to change operations in your previously approved permit.

Surface management agency means any Federal agency, other than BLM, that is responsible for managing the surface overlying Federally-owned minerals.

Temperature gradient well means a well authorized under a geothermal exploration permit drilled in order to obtain information on the change in temperature over the depth of the well.

Transfer means any conveyance of an interest in a lease by assignment, sublease, or otherwise.

Unit agreement means an agreement to explore for, produce and utilize separately-owned interests in geothermal resources as a single consolidated unit. A unit agreement defines how costs and benefits will be allocated among the holders of interest in the unit area.

Unit area means all tracts committed to an approved unit agreement.

Unit operator means the person who has stated in writing to BLM that the interest owners of the committed leases have designated it as operator of the unit area.

Unitized substances means geothermal resources recovered from lands committed to a unit agreement.

Utilization Plan or plan of utilization means a plan which fully describes the utilization facility, including measures for environmental protection and mitigation.

Waste means:

(1) Physical waste, including refuse; or

(2) Improper use or unnecessary dissipation of geothermal resources through inefficient drilling, production, transmission, or utilization.

§ 3200.3 Changes in agency duties.

There are many leases and agreements currently in effect, and that will remain in effect, involving Federal geothermal resources leases that specifically refer to the United States Geological Survey, USGS, Minerals Management Service, MMS, or Conservation Division. These leases and agreements may also specifically refer to various officers such as Supervisor, Conservation Manager, Deputy Conservation Manager, Minerals Manager, and Deputy Minerals Manager. Those references must now be read to mean either the Bureau of Land Management or the Minerals Management Service, as appropriate. In addition, many leases and agreements specifically refer to 30 CFR part 270 or a specific section of that part. Effective December 3, 1982, references in such leases and agreements to 30 CFR part 270 should be read as references to this part 3200, which is the successor regulation to 30 CFR part 270.

§ 3200.4 What requirements must I comply with when taking any actions or conducting any operations under this part?

When you are taking any actions or conducting any operations under this part, you must comply with:

(a) The Act and the regulations of this part;

(b) Geothermal resource operational orders;

(c) Notices to lessees;

(d) Lease terms and stipulations;

(e) Approved plans and permits;

(f) Conditions of approval;

(g) Verbal orders from BLM that will be confirmed in writing;

(h) Other instructions from BLM; and

(i) Any other applicable laws and regulations.

§ 3200.5 What are my rights of appeal?

(a) If you are adversely affected by a BLM decision under this part, you may appeal that decision under parts 4 and 1840 of this title.

(b) All BLM decisions or approvals under this part are immediately effective and remain in effect while appeals are pending unless a stay is granted in accordance with § 4.21(b) of this title.

§ 3200.6 What types of geothermal leases will BLM issue?

BLM will issue two types of geothermal leases:

(a) Geothermal leases (competitively issued under subpart 3203 of this part or noncompetitively issued under subpart 3204 of this part) which may be used for any type of geothermal use, such as commercial generation of electricity or direct use of the resource.

(b) Direct use leases (issued under subpart 3205 of this part).

§ 3200.7 What regulations apply to geothermal leases in effect on August 8, 2005?

(a) *General applicability.* (1) Leases in effect on August 8, 2005, are subject to this part and part 3280 of this chapter, except that such leases are subject to the BLM regulations in effect on August 8, 2005, with regard to regulatory provisions relating to royalties, minimum royalties, rentals, primary term and lease extensions, diligence and annual work requirements, and renewals.

(2) The lessee of a lease in effect on August 8, 2005, may elect to be subject to all of the regulations in this part and part 3280 of this chapter, without regard to the exceptions in paragraph (a)(1) of this section. Such an election must occur no later than 18 months after [Effective Date of Final Rule]. Any such election as it pertains to lease terms relating to royalties must be made under the royalty conversion provisions of subpart 3212 of this part.

(b) *Royalty conversion and production incentives.* The lessee of a lease in effect on August 8, 2005, may:

(1) Choose to convert lease terms relating to royalties under subpart 3212 of this part; or

(2) If it does not convert lease terms relating to royalties, apply for a production incentive under subpart 3212 of this part (if eligible under that subpart).

(c) *Two year extension.* The lessee of a lease in effect on August 8, 2005, may apply to extend a lease that was within two years of the end of its term on August 8, 2005, for up to two years to allow achievement of production under the lease or to allow the lease to be included in a producing unit.

§ 3200.8 What regulations apply to leases issued in response to applications pending on August 8, 2005?

(a) Any leases issued in response to applications that were pending on August 8, 2005, are subject to this part and part 3280, except that such leases are subject to the BLM regulations in effect on August 8, 2005, with regard to regulatory provisions relating to royalties, minimum royalties, rentals, primary term and lease extensions, diligence and annual work requirements, and renewals.

(b)(1) The lessee of a lease issued pursuant to an application that was pending on August 8, 2005, may elect to be subject to all of the regulations in this part and part 3280, without regard to the exceptions in paragraph (a) of this section.

(2) For leases issued after August 8, 2005, and before [Effective Date of Final Rule], an election under paragraph (b)(1) of this section must occur no later than 18 months after [Effective Date of Final Rule].

(3) For leases issued on or after [Effective Date of Final Rule], the lease applicant must make its election under paragraph (b)(1) of this section and notify BLM before the lease is issued.

Subpart 3201—Available Lands

§ 3201.10 What lands are available for geothermal leasing?

(a) BLM may issue leases on:

(1) Lands administered by the Department of the Interior, including public, withdrawn and acquired lands;

(2) Lands administered by the Department of Agriculture with its concurrence;

(3) Lands conveyed by the United States where the geothermal resources were reserved to the United States; and

(4) Lands subject to Section 24 of the Federal Power Act, as amended (16 U.S.C. 818), with the concurrence of the Secretary of Energy.

(b) If your activities under your lease or permit might adversely affect a significant thermal feature of a National Park System unit, BLM will include stipulations to protect this thermal feature in your lease or permit. These stipulations will be added, if necessary, when your lease or permit is issued, extended, renewed or modified.

§ 3201.11 What lands are not available for geothermal leasing?

BLM will not issue leases for:

(a) Lands where the Secretary has determined that issuing the lease would cause unnecessary or undue degradation of public lands and resources;

(b) Lands contained within a unit of the National Park System, or otherwise administered by the National Park Service;

(c) Lands within a National Recreation Area;

(d) Lands where the Secretary determines after notice and comment that geothermal operations, including exploration, development or utilization of lands, are reasonably likely to result in a significant adverse effect on a significant thermal feature within a unit of the National Park System;

(e) Fish hatcheries or wildlife management areas administered by the Secretary;

(f) Indian trust or restricted lands within or outside the boundaries of Indian reservations;

(g) The Island Park Geothermal Area; and

(h) Lands where Section 43 of the Mineral Leasing Act (30 U.S.C. 226–3) prohibits geothermal leasing, including:

(1) Wilderness areas or wilderness study areas administered by BLM or other surface management agencies;

(2) Lands designated by Congress as wilderness study areas, except where the statute designating the study area specifically allows leasing to continue; and

(3) Lands within areas allocated for wilderness or further planning in Executive Communication 1504, Ninety-Sixth Congress (House Document 96–119), unless such lands are allocated to uses other than wilderness by a land and resource management plan or are released to uses other than wilderness by an Act of Congress.

Subpart 3202—Lessee Qualifications

§ 3202.10 Who may hold a geothermal lease?

You may hold a geothermal lease if you are:

(a) A United States citizen who is at least 18 years old;

(b) An association of United States citizens, including a partnership;

(c) A corporation organized under the laws of the United States, any state or the District of Columbia; or

(d) A domestic governmental unit.

§ 3202.11 Must I prove I am qualified to hold a lease when filing an application to lease?

You do not need to submit proof that you are qualified to hold a lease under § 3202.10 at the time you submit an application to lease, but BLM may ask you in writing for information about your qualifications at any time. You must submit the additional information to BLM within 30 days after you receive the request.

§ 3202.12 Are other persons allowed to act on my behalf to file an application to lease?

Another person may act on your behalf to file an application to lease. The person acting for you must be qualified to hold a lease under § 3202.10, and must do the following:

(a) Sign the application;

(b) State his or her title;

(c) Identify you as the person he or she is acting for; and

(d) Provide written proof of his or her qualifications and authority to take such action, if BLM requests it.

§ 3202.13 What happens if the applicant dies before the lease is issued?

If the applicant dies before the lease is issued, BLM will issue the lease to either the administrator or executor of the estate or the heirs. If the heirs are minors, BLM will issue the lease to either a legal guardian or trustee, provided that the legal guardian or trustee is qualified to hold a lease under § 3202.10.

Subpart 3203—Competitive Leasing

§ 3203.5 What is the general process for obtaining a geothermal lease?

(a) The competitive geothermal leasing process consists of the following steps:

(1) Entities interested in geothermal development nominate lands by submitting to BLM descriptions of lands they seek to be included in a lease sale.

(2) BLM provides notice of the parcels to be offered, and the time, location, and process for participating in the lease sale.

(3) BLM holds the lease sale and issues leases to the successful bidder.

(b) BLM will issue geothermal leases to the highest responsible qualified bidder after a competitive leasing process, except for situations covered by subparts 3204 and 3205 of this part, which include:

(1) Lease applications pending on August 8, 2005;

(2) Lands for which no bid was received in a competitive lease sale;

(3) Direct use lease applications for which no competitive interest exists; and

(4) Lands subject to mining claims.

§ 3203.10 How do I request lands for competitive sale?

(a) A qualified company or individual must nominate lands for competitive sale by submitting an applicable BLM nomination form.

(b) A nomination is a description of lands that you seek to be included in one lease. Each nomination may not exceed 5,120 acres, unless the area to be leased includes an irregular subdivision. Your nomination must provide a description of the lands nominated by legal land description.

(1) For lands surveyed under the public land rectangular survey system, describe the lands to the nearest aliquot part within the legal subdivision, section, township, and range;

(2) For unsurveyed lands, describe the lands by metes and bounds, giving courses and distances, and tie this information to an official corner of the public land surveys, or to a prominent topographic feature;

(3) For approved protracted surveys, include an entire section, township, and range. Do not divide protracted sections into aliquot parts;

(4) For unsurveyed lands in Louisiana and Alaska that have water boundaries, discuss the description with BLM before submission; and

(5) For fractional interest lands, identify the United States mineral ownership by percentage.

(c) You may submit more than one nomination, as long as each nomination separately satisfies the requirements of paragraph (b) of this section and includes the filing fee specified in § 3203.12.

(d) BLM may reconfigure lands to be included in each parcel offered for sale.

§ 3203.11 How do I request that nominations be offered as a block for competitive sale?

(a) As part of your nomination, you may request that lands be offered as a block at competitive sale by:

(1) Specifying that the lands requested will be associated with a project or unit: and

(2) Including information to support your request.

(b) BLM may offer parcels as a block only if information is available to BLM indicating that a geothermal resource that could be produced as one unit can reasonably be expected to underlie such parcels. BLM may request that you provide additional information.

§ 3203.12 What fees must I pay to nominate lands?

Submit with your nomination a filing fee for nominations of lands of $100 per nomination plus 10 cents per acre of lands nominated, as found in the fee schedule in § 3000.12 of this chapter.

§ 3203.13 How often will BLM hold a competitive lease sale?

BLM will hold a competitive lease sale at least once every 2 years for lands available for leasing in a state that has nominations pending. A sale may include lands in more than one state.

§ 3203.14 How will BLM provide notice of a competitive lease sale?

(a) The lands available for competitive lease sale under this subpart will be described in a Notice of Competitive Geothermal Lease Sale, which will include:

(1) The lease sale format and procedures;

(2) The time, date, and place of the lease sale; and

(3) Stipulations applicable to each parcel.

(b) At least 45 days before conducting a competitive lease sale, BLM will post the Notice in the BLM office having jurisdiction over the lands to be offered, and make it available for posting to surface managing agencies having jurisdiction over any of the included lands.

(c) BLM may take other measures of notification for the competitive sale such as:

(1) Issuing news releases;

(2) Notifying interested parties of the lease sale;

(3) Publishing notice in the newspaper; or

(4) Posting the list of parcels on the Internet.

§ 3203.15 How does BLM conduct a competitive lease sale?

(a) BLM will offer parcels for competitive bidding as specified in the sale notice.

(b) The winning bid will be the highest bid by a qualified bidder.

(c) You may not withdraw a bid. Your bid constitutes a legally binding commitment by you.

(d) BLM will reject all bids and re-offer a parcel if:

(1) BLM determines that the high bidder is not qualified; or

(2) The high bidder fails to make all payments required under § 3203.17.

§ 3203.17 How must I make payments if I am the successful bidder?

(a) You must make payments by personal check, cashier's check, certified check, bank draft, or money order payable to the "Department of the Interior—Bureau of Land Management" or by other means deemed acceptable by BLM.

(b) By the close of official business hours on the day of the sale or such other time as BLM may specify, you must submit for each parcel:

(1) Twenty percent of the bid;

(2) The total amount of the first year's rental; and

(3) The processing fee for competitive lease applications found in the fee schedule in § 3000.12 of this chapter.

(c) Within 15 calendar days after the last day of the sale, you must submit the balance of the bid to the BLM office conducting the sale.

(d) If you fail to make all payments required under this section, or fail to meet the qualifications in § 3202.10, BLM will revoke acceptance of your bid and keep all money that has been submitted.

§ 3203.18 What happens to parcels that receive no bids at a competitive lease sale?

Lands offered at a competitive lease sale that receive no bids will be available for leasing in accordance with subpart 3204 of this part.

Subpart 3204—Noncompetitive Leasing Other Than Direct Use Leases

§ 3204.5 How can I obtain a noncompetitive lease?

(a) Lands offered at a competitive lease sale that receive no bids will be available for noncompetitive leasing for a 2-year period beginning the first business day following the sale.

(b) You may obtain a noncompetitive lease for lands available exclusively for direct use of geothermal resources, under subpart 3205 of this part.

(c) The holder of a mining claim may obtain a noncompetitive lease for lands subject to the mining claim, under § 3204.12.

(d) If your lease application was pending on August 8, 2005, you may obtain a noncompetitive lease under the leasing process in effect on that date, unless you notify BLM in writing that you elect for the lease application to be subject to the leasing process specified in this subpart. If you elect for your lease application to be subject to the leasing process in this subpart, your application will be considered a nomination for future competitive sale offerings for the lands in your application.

§ 3204.10 What payment must I submit with my noncompetitive lease application?

Submit the processing fee for noncompetitive lease applications found in the fee schedule in § 3000.12 of this chapter for each lease application, and an advance rent in the amount of $1 per acre (or fraction of an acre). BLM will refund the advance rent if we reject the lease application or if you withdraw the lease application before BLM accepts it. If the advance rental payment you send is less than 90 percent of the correct amount, BLM will reject the lease application.

§ 3204.11 How may I acquire a noncompetitive lease for lands that were not sold at a competitive lease sale?

(a) For a two-year period following a competitive lease sale, you may file a noncompetitive lease application for lands on which no bids were received, on a form available from BLM. Submit 2 executed copies of the applicable form to BLM. At least one form must have an original signature. We will accept only exact copies of the form on one 2-sided page.

(1) For 30 days after the competitive geothermal lease sale, noncompetitive applications will be accepted only for parcels as configured in the Notice of Competitive Geothermal Lease Sale.

(2) Subsequent to the 30-day period specified in paragraph (a)(1) of this section, you may file a noncompetitive application for any available lands covered by the competitive lease sale.

(b)(1) All applications for a particular parcel under this section will be considered simultaneously filed if received in the proper BLM office any time during the first business day following the competitive lease sale. You may submit only one application per parcel. An application will not be available for public inspection the day it is filed. BLM will randomly select an application among those accepted on the first business day to receive a lease offer.

(2) Subsequent to the first business day following the competitive lease sale, the first qualified applicant to submit an application will be offered the lease. If BLM receives simultaneous applications as to date and time for overlapping lands, BLM will randomly select one to receive a lease offer.

§ 3204.12 How may I acquire a noncompetitive lease for lands subject to a mining claim?

If you hold a mining claim for which you have a current approved plan of operations, you may file a noncompetitive lease application for lands within the mining claim, on a form available from BLM. Submit two (2) executed copies of the applicable form to BLM, together with documentation of mining claim ownership and the current approved plan of operations for the mine. At least one form must have an original signature. We will accept only exact copies of the form on one two-sided page.

§ 3204.13 How will BLM process noncompetitive lease applications pending on August 8, 2005?

Noncompetitive lease applications pending on August 8, 2005, will be processed under policies and procedures existing on that date unless the applicant notifies BLM in writing that it elects for the lease application to be subject to the leasing process specified in this subpart, in which case the application will be considered a nomination for future competitive sale offerings for the lands in the application.

§ 3204.14 May I amend my application for a noncompetitive lease?

You may amend your application for a noncompetitive lease at any time before we issue the lease, provided your amended application meets the requirements in this subpart and does not add lands not included in the original application. To add lands, you must file a new application.

§ 3204.15 May I withdraw my application for a noncompetitive lease?

During the 30-day period after the competitive lease sale, BLM will only accept a withdrawal of the entire application. Following that 30-day period, you may withdraw your noncompetitive lease application in whole or in part at any time before BLM issues the lease. If a partial withdrawal causes your lease application to contain less than the minimum acreage required under § 3206.12, BLM will reject the application.

Subpart 3205—Direct Use Leasing

§ 3205.6 When will BLM issue a direct use lease to an applicant?

BLM may issue a direct use lease to an applicant if the following conditions are satisfied:

(a) The lands included in the lease application are open for geothermal leasing;

(b) BLM determines that the lands are appropriate for exclusive direct use operations, without sale, for purposes other than commercial generation of electricity;

(c) The acreage covered by the lease application is not greater than the quantity of acreage that is reasonably necessary for the proposed use;

(d) BLM has published a notice of the land proposed for a direct use lease for 90 days before issuing the lease;

(e) During the 90-day period beginning on the date of publication, BLM did not receive any nomination to include the lands in the next competitive lease sale following that period for which the lands would be eligible;

(f) BLM determines there is no competitive interest in the resource; and

(g) The applicant is the first qualified applicant.

§ 3205.7 How much acreage should I apply for in a direct use lease?

You should apply for only the amount of acreage that is necessary for your intended operation. A direct use lease may not cover more than the quantity of acreage that BLM determines is reasonably necessary for the proposed use. In no case may a direct use lease exceed 5,120 acres, unless the area to be leased includes an irregular subdivision.

§ 3205.10 How do I obtain a direct use lease?

(a) You may file an application for a direct use lease for any lands on which BLM manages the geothermal resources, on a form available from BLM. You may not sell the geothermal resource and you may not use it to commercially generate electricity.

(b) In your application, you must also provide information that will allow BLM to determine how much acreage is reasonably necessary for your proposed use, including:

(1) A description of all anticipated structures, facilities, wells, and pipelines including their size, location, function, and associated surface disturbance;

(2) A description of the utilization process;

(3) A description and analysis of anticipated reservoir production, injection, and characteristics to the extent required by BLM; and

(4) Any additional information or data that we may require.

(c) Submit with your application the processing fee for noncompetitive lease applications found in the fee schedule in § 3000.12 of this chapter for each direct use lease application.

§ 3205.12 How will BLM respond to direct use lease applications on lands managed by another agency?

BLM will respond to a direct use lease application on lands managed by another surface management agency by forwarding the application to that agency for its review. If that agency consents to lease issuance and recommends that the lands are appropriate for direct use operations, without sale, for purposes other than commercial generation of electricity, BLM will consider that consent and recommendation in determining whether to issue the lease. BLM may not issue a lease without the consent of the surface management agency.

§ 3205.13 May I withdraw my application for a direct use lease?

You may withdraw your application for a direct use lease any time before issuance of a lease.

§ 3205.14 May I amend my application for a direct use lease?

You may amend your application for a direct use lease at any time before we issue the lease, provided your amended application meets the requirements in this subpart and does not add lands. To add lands, you must file a new application.

§ 3205.15 How will I know whether my direct use lease will be issued?

(a) If BLM decides to issue you a direct use lease, it will do so in accordance with this subpart and subpart 3206.

(b) If BLM decides to deny your application for a direct use lease, it will advise you of its decision in writing.

Subpart 3206—Lease Issuance

§ 3206.10 What must I do for BLM to issue a lease?

Before BLM issues any lease, you must:

(a) Accept all lease stipulations;

(b) Make all required payments to BLM;

(c) Sign a unit joinder or waiver, if applicable; and

(d) Comply with the maximum limit on acreage holdings (see §§ 3206.12 and 3206.16).

§ 3206.11 What must BLM do before issuing a lease?

For all leases, BLM must:

(a) Determine that the land is available; and

(b) Determine that your lease development will not have a significant adverse impact on any significant thermal feature within any of the following units of the National Park System:

(1) Mount Rainier National Park;

(2) Crater Lake National Park;

(3) Yellowstone National Park;

(4) John D. Rockefeller, Jr. Memorial Parkway;

(5) Bering Land Bridge National Preserve;

(6) Gates of the Arctic National Park and Preserve;

(7) Katmai National Park;

(8) Aniakchak National Monument and Preserve;

(9) Wrangell-St. Elias National Park and Preserve;

(10) Lake Clark National Park and Preserve;

(11) Hot Springs National Park;

(12) Big Bend National Park (including that portion of the Rio Grande National Wild Scenic River within the boundaries of Big Bend National Park);

(13) Lassen Volcanic National Park;

(14) Hawaii Volcanoes National Park;

(15) Haleakala National Park;

(16) Lake Mead National Recreation Area; and

(17) Any other significant thermal features within National Park System Units that the Secretary may add to the list of these features, in accordance with 30 U.S.C.1026(a)(3).

§ 3206.12 What are the minimum and maximum lease sizes?

Other than for direct use leases (the size for which is addressed in § 3205.7), the smallest lease we will issue is 640 acres, or all lands available for leasing in the section, whichever is less. The largest lease we will issue is 5,120 acres, unless the area to be leased includes an irregular subdivision. A lease must embrace a reasonably compact area.

§ 3206.13 What is the maximum acreage I may hold?

You may not directly or indirectly hold more than 51,200 acres in any one state.

§ 3206.14 How does BLM compute acreage holdings?

BLM computes acreage holdings as follows:

(a) If you own an undivided lease interest, your acreage holdings include the total lease acreage;

(b) If you own stock in a corporation or a beneficial interest in an association which holds a geothermal lease, your acreage holdings will include your proportionate part of the corporation's or association's share of the total lease acreage. This paragraph applies only if you own more than 10 percent of the corporate stock or beneficial interest of the association; and

(c) If you own a lease interest, you will be charged with the proportionate share of the total lease acreage based on your share of the lease ownership. You will not be charged twice for the same acreage where you own both record title and operating rights for the lease. For example, if you own 50 percent record title interest in a 640 acre lease and 25 percent operating rights, you are charged with 320 acres.

§ 3206.15 How will BLM charge acreage holdings if the United States owns only a fractional interest in the geothermal resources in a lease?

Where the United States owns only a fractional interest in the geothermal resources of the lands in a lease, BLM will only charge you with the part owned by the United States as acreage holdings. For example, if you own 100 percent of record title in a 100 acre lease, and the United States owns 50 percent of the mineral estate, you are charged with 50 acres.

§ 3206.16 Is there any acreage which is not chargeable?

BLM does not count leased acreage included in any approved unit agreement, drilling contract, or development contract as part of your total state acreage holdings.

§ 3206.17 What will BLM do if my holdings exceed the maximum acreage limits?

BLM will notify you in writing if your acreage holdings exceed the limit in § 3206.13. You have 90 days from the date you receive the notice to reduce your holdings to within the limit. If you do not comply, BLM will cancel your leases, beginning with the lease most recently issued, until your holdings are within the limit.

§ 3206.18 When will BLM issue my lease?

BLM issues your lease the day we sign it. Your lease goes into effect the first day of the next month after the issuance date.

Subpart 3207—Lease Terms and Extensions

§ 3207.5 What terms (time periods) apply to my lease?

Your lease may include a number of different time periods. Not every time period applies to every lease. These periods include:

(a) A primary term consisting of:

(1) Ten years;

(2) An initial extension of the primary term for up to 5 years;

(3) An additional extension of the primary term for up to 5 years;

(b) A drilling extension of 5 years under § 3207.14;

(c) A production extension of up to 35 years; and

(d) A renewal period of up to 55 years.

§ 3207.10 What is the primary term of my lease?

(a) Leases have a primary term of 10 years.

(b) BLM will extend the primary term for 5 years if:

(1) By the end of the 10th year of the primary term in paragraph (a), you have satisfied the requirements in § 3207.11; and

(2) At the end of each year after the 10th year of the lease, you have satisfied the requirements in §§ 3207.12(a) or (d) for that year.

(c) BLM will extend the primary term for 5 additional years if:

(1) You satisfied the requirements of §§ 3207.12(b) or (d); and

(2) At the end of each year of the second 5-year extension you satisfy the requirements in § 3207.12(c) or (d) for that year.

(d) If you do not satisfy the annual requirements during the initial or additional extension of your primary term, your lease terminates or expires.

§ 3207.11 What work am I required to perform during the first 10 years of my lease for BLM to grant the initial extension of the primary term of my lease?

(a) By the end of the 10th year, you must expend a minimum of $40 per acre in development activities that provide additional geologic or reservoir information, such as:

(1) Geologic investigation and analysis;

(2) Drilling temperature gradient wells;

(3) Core drilling;

(4) Geochemical or geophysical surveys;

(5) Drilling production or injection wells;

(6) Reservoir testing; or

(7) Other activities approved by BLM.

(b) In lieu of the work requirement in paragraph (a) of this section, you may:

(1) Make a payment to BLM equivalent to the required work expenditure such that the total of the payment and the value of the work you perform equals $40 per acre (or fraction thereof) of land included in your lease; or

(2) Submit documentation to BLM that you have produced or utilized geothermal resources in commercial quantities.

(c) Prior to the end of the 10th year of the primary term, you must submit detailed information to BLM demonstrating that you have complied with paragraph (a) or (b) of this section. Describe the activities by type, location, date(s) conducted, and the dollar amount spent on those operations. Include all geologic information obtained from your activities in your report. Submit additional information that BLM requires to determine compliance within the timeframe that we specify. We must approve the type of work done and the expenditures claimed in your report before we can credit them toward your requirements.

(d) If you do not perform development activities, make payments, or document production or utilization as required by this section, your lease will expire at the end of the 10-year primary term.

(e) If you complied with paragraph (c) of this section, but BLM has not determined by the end of the 10th year whether you have complied with the requirements of paragraph (a) or (b) of this section, upon request we will suspend your lease effective immediately before its expiration in order to determine your compliance. If we determine that you have complied, we will lift the suspension and grant the first 5-year extension of the primary term effective on the first day of the month following our determination of compliance. If we determine that you have not complied, we will terminate the suspension and your lease will expire upon the date of the termination of the suspension.

(f) Every three calendar years the dollar amount of the work requirements and the amount to be paid in lieu of such work required by this section will automatically be updated. The update will be based on the change in the Implicit Price Deflator-Gross Domestic Product for those three years.

§ 3207.12 What work am I required to perform each year for BLM to continue the initial and additional extensions of the primary term of my lease?

(a) To continue the initial extension of the primary term of your lease, in each of lease years 11, 12, 13, and 14, you must expend a minimum of $15 per acre (or fraction thereof) per year in development activities that establish a geothermal potential or confirm the existence of producible geothermal resources. Such activities include, but are not limited to:

(1) Geologic investigation and analysis;

(2) Drilling temperature gradient wells;

(3) Core drilling;

(4) Geochemical or geophysical surveys;

(5) Drilling production or injection wells;

(6) Reservoir testing; or

(7) Other activities approved by BLM.

(b) For BLM to grant the additional extension of the primary term of your lease, in year 15 you must expend a minimum of $15 per acre (or fraction thereof) per year in development activities that provide additional geologic or reservoir information, such as those described in paragraph (a) of this section.

(c) To continue the additional extension of the primary term of your lease, in each of lease years 16, 17, 18, and 19, you must expend a minimum of $25 per acre (or fraction thereof) per year in development activities that provide additional geologic or reservoir information, such as those described in paragraph (a) of this section.

(d) In lieu of the work requirements in paragraphs (a), (b), and (c) of this section, you may:

(1) Submit documentation to BLM that you have produced or utilized geothermal resources in commercial quantities; or

(2) Make a payment to BLM equivalent to the required annual work expenditure such that the total of the payment and the value of the work you perform equals $15 or $25 per acre per year of land included in your lease, as applicable. BLM may limit the number of years that it will accept such payments if it determines that further payments in lieu of the work requirements would impair achievement of diligent development of the geothermal resources.

(e) Under paragraph (a) or paragraph (b) of this section, if you expend an amount greater than the amount specified, you may apply any payment in excess of the specified amount to any subsequent year within the applicable 5-year extension of the primary term. An excess payment during the first 5-year extension period may not be applied to any year within the second 5-year extension period.

(f) You must submit information to BLM showing that you have complied with the applicable requirements in this section no later than:

(1) 60 days after the end of years 11, 12, 13, and 14;

(2) 60 days before the end of year 15;

(3) 60 days after the end of years 16, 17, 18, and 19.

(g) In your submission, describe your activities by type, location, date(s) conducted, and the dollar amount spent on those operations. Include all geologic information obtained from your activities in your report. We must approve the type of work done and the expenditures claimed in your report before we can credit them toward your requirements. We will notify you if you have not met the requirements.

(h) If you do not comply with the requirements of this section in any year of a 5-year extension of the primary term, BLM will terminate your lease at the end of that year unless you qualify for a drilling extension under § 3207.13.

(i) Every three calendar years the dollar amount of the work requirements and the amount to be paid in lieu of such work required by this section will automatically be updated. The update will be based on the change in the Implicit Price Deflator-Gross Domestic Product for those three years.

§ 3207.13 Must I comply with BLM requirements when my lease overlies a mining claim?

(a) BLM will exempt you from complying with the requirements of §§ 3207.11 and 3207.12 when you demonstrate to BLM that:

(1) The mining claim has a plan of operations approved by the appropriate Federal land management agency; and

(2) Your development of the geothermal resource on the lease would interfere with the mining operations.

(b) The exemption provided under paragraph (a) of this section expires upon termination of the mining operations.

§ 3207.14 How do I qualify for a drilling extension?

(a) BLM will extend your lease for 5 years under a drilling extension if at the end of the 10th year or any subsequent year of the initial or additional extension of the primary term you:

(1) Have not met the requirements that you must satisfy for BLM to grant or to continue the initial or additional extensions of your primary lease term under § 3207.12, or your lease is in its 20th year;

(2) Commenced drilling a well before the end of such year for the purposes of testing or producing a geothermal reservoir; and

(3) Are diligently drilling to a target that BLM determines is adequate, based on the local geology and type of development you propose.

(b) The drilling extension is effective on the first day following the expiration or termination of the primary term.

(c) At the end of your drilling extension, your lease will expire unless

you qualify for a production extension under § 3207.15.

§ 3207.15 How do I qualify for a production extension?

(a) BLM will grant a production extension of up to 35 years if you are producing or utilizing geothermal resources in commercial quantities.

(b) Before granting a production extension, BLM must determine that you:

(1) Have a well that is actually producing geothermal resources in commercial quantities; or

(2)(i) Have completed a well that is capable of producing geothermal resources in commercial quantities; and

(ii) Are making diligent efforts toward utilization of the resource.

(c) To qualify for a production extension under paragraph (b)(2) of this section, unless BLM specifies otherwise you must demonstrate on an annual basis that you are making diligent efforts toward utilization of the resource.

(d) BLM will make the determinations required under paragraphs (b)(1) and (b)(2)(i) of this section based on the information you provide under subparts 3264 and 3276 and any other information that BLM may require you to submit.

(e) For BLM to make the determination required under paragraph (b)(2)(ii) of this section, you must provide BLM with information, such as:

(1) Actions you have taken to identify and define the geothermal resource on your lease;

(2) Actions you have taken to negotiate marketing arrangements, sales contracts, drilling agreements, or financing for electrical generation and transmission projects;

(3) Current economic factors and conditions that would affect the decision of a prudent operator to produce or utilize geothermal resources in commercial quantities on your lease; and

(4) Other actions you have taken, such as obtaining permits, conducting environmental studies, and meeting permit requirements.

(f) Your production extension will begin on the first day of the month following the end of the primary term (including the initial and additional extensions) or the drilling extension.

(g) Your production extension will continue for up to 35 years as long as the geothermal resource is being produced or utilized in commercial quantities. If you fail to produce or utilize geothermal resources in commercial quantities, BLM will terminate your lease unless you meet the conditions set forth in § 3213.19.

§ 3207.16 When may my lease be renewed?

You have a preferential right to renew your lease for a second term of up to 55 years, under such terms and conditions as BLM deems appropriate, if at the end of the production extension, you are producing or utilizing geothermal resources in commercial quantities and the lands are not needed for any other purpose. The renewal term will continue as long as you produce or utilize geothermal resources in commercial quantities and satisfy other terms and conditions BLM imposes.

§ 3207.17 How is the term of my lease affected by commitment to a unit?

(a) If your lease is committed to a unit agreement and its term would expire before the unit term would, BLM may extend your lease to match the term of the unit. We will do this if unit development has been diligently pursued while your lease is committed to the unit.

(b) To extend the term of a lease committed to a unit, the unit operator must send BLM a request for lease extension at least 60 days before the lease expires showing that unit development has been diligently pursued. BLM may request additional information.

(c) Within 30 days after receiving your extension request, BLM will notify the unit operator whether we approve.

§ 3207.18 Can my lease be extended if it is eliminated from a unit?

If your lease is eliminated from a unit under § 3283.6, it is eligible for a drilling extension or a production extension if it meets the requirements for such extensions.

Subpart 3210—Additional Lease Information

§ 3210.10 When does lease segregation occur?

(a) Lease segregation occurs when:

(1) A portion of a lease is committed to a unit agreement while other portions are not committed; or

(2) Only a portion of a lease remains in a participating area when the unit contracts. The portion of the lease outside the participating area would be eliminated from the unit agreement and segregated as of the effective date of the unit contraction.

(b) BLM will assign the original lease serial number to the portion within the plan or agreement. BLM will give the lease portion outside the plan or agreement a new serial number, and the same lease terms as the original lease.

§ 3210.11 Does a lease segregated from an agreement or plan receive any benefits from unitization of the committed portion of the original lease?

The new segregated lease stands alone and does not receive any of the benefits provided to the portion committed to the unit. We will not give you an extension for the eliminated portion of the lease based on status of the lands committed to the unit, including production in commercial quantities or the existence of a producible well.

§ 3210.12 May I consolidate leases?

BLM may approve your consolidation of two or more adjacent leases that have the same ownership and same lease terms, including expiration dates, if the combined leases do not exceed the size limitations in § 3206.12. We may consolidate leases that have different stipulations if all other lease terms are the same. You must include the processing fee for lease consolidations found in the fee schedule in § 3000.12 of this chapter with your request to consolidate leases.

§ 3210.13 Can anyone lease or locate other minerals on the same lands as my geothermal lease?

Yes. Anyone may lease or locate other minerals on the same lands as your geothermal lease. The United States reserves the ownership of and the right to extract helium, oil, and hydrocarbon gas from all geothermal steam and associated geothermal resources. In addition, BLM allows mineral leasing or location on the same lands that are leased for geothermal resources, provided that operations under the mineral leasing or mining laws do not unreasonably interfere with or endanger your geothermal operations.

§ 3210.14 May BLM readjust the terms and conditions in my lease?

(a)(1) Except for rentals and royalties (readjustments of which are addressed in paragraph (b)) of this section, BLM may readjust the terms and conditions of your lease 10 years after you begin production of geothermal resources from your lease, and at not less than 10-year intervals thereafter, under the procedures of paragraphs (c), (d), and (e) of this section.

(2) If another Federal agency manages the lands' surface, we will ask that agency to review the related terms and conditions and propose any readjustments. Once BLM and the surface managing agency reach agreement and the surface managing agency approves the proposed readjustment, we will follow the procedures in paragraphs (c), (d), and (e) of this section.

(b) BLM may readjust your lease rentals and royalties at not less than 20-year intervals beginning 35 years after we determine that your lease is producing geothermal resources in commercial quantities. BLM will not increase your rentals or royalties by more than 50 percent over the rental or royalties you paid before the readjustment.

(c) BLM will give you a written proposal to adjust the rentals, royalties, or other terms and conditions of your lease. You will have 30 days after you receive the proposal to file with BLM an objection in writing to the proposed new terms and conditions.

(d) If you do not object in writing or relinquish your lease, you will conclusively be deemed to have agreed to the proposed new terms and conditions. BLM will issue a written decision setting the date that the new terms and conditions become effective as part of your lease. This decision will be in full force and effect under its own terms, and you are not authorized to appeal the BLM decision to the Office of Hearings and Appeals.

(e)(1) If you file a timely objection in writing, BLM may issue a written decision making the readjusted rental and royalty terms effective no sooner than 90 days after we receive your objections, unless we reach an agreement with you as to the readjusted terms of your lease that makes such terms effective sooner.

(2) If BLM does not reach an agreement with you by 60 days after we receive your objections, then either the lessee or BLM may terminate your lease, upon giving the other party 30 days' notice in writing. A termination under this paragraph does not affect your obligations that accrued under the lease when it was in effect, including those specified in § 3200.4.

§ 3210.15 What if I appeal BLM's decision to readjust my lease terms?

If you appeal our decision under § 3210.14(e)(1) to readjust your lease terms and conditions, or rental or royalty rate, the decision is effective during the appeal. If you win your appeal and we must change our decision, you will receive a refund or credit for any overpaid rents or royalties.

§ 3210.16 How must I prevent drainage of geothermal resources from my lease?

You must prevent the drainage of geothermal resources from your lease by diligently drilling and producing wells that protect the Federal geothermal resource from loss caused by production from other properties.

§ 3210.17 What will BLM do if I do not protect my lease from drainage?

BLM will determine the amount of geothermal resources drained from your lease. MMS will bill you for a compensatory royalty based on our findings. This royalty will equal the amount you would have paid for producing those resources. All interest owners in a lease are jointly and severally liable for drainage protection and any compensatory royalties.

Subpart 3211—Filing and Processing Fees, Rent, Direct Use Fees, and Royalties

§ 3211.10 What are the processing and filing fees for leases?

(a) Processing or filing fees are required for the following actions:

(1) Nomination of lands for competitive leasing;

(2) Competitive lease application;

(3) Noncompetitive lease application (including application for direct use leases);

(4) Assignment and transfer of record title or operating right;

(5) Name change, corporate merger or transfer to heir/devisee;

(6) Lease consolidation; and

(7) Lease reinstatement.

(b) The amounts of these fees can be found in § 3000.12 of this chapter.

§ 3211.11 What are the annual lease rental rates?

(a) BLM calculates annual rent based on the amount of acreage covered by your lease. To determine lease acreage for this section, round up any partial acreage up to the next whole acre. For example, the annual rent on a 2,456.39 acre lease is calculated based on 2,457 acres.

(b) If you obtained your lease through a competitive lease sale, then your annual rent is $2 per acre for the first year, and $3 per acre for the second through tenth year.

(c) If you obtained your lease noncompetitively, then your annual rent is $1 per acre for the first 10 years.

(d) After the tenth year, your annual rent will be $5 per acre, regardless of whether you obtained your lease through a competitive lease sale or noncompetitively.

(e) For leases in which the United States owns only a fractional interest in the geothermal resources, BLM will prorate the rents established in paragraphs (a), (b), and (c) of this section, based on the fractional interest owned by the United States. For example, if the United States owns 50 percent of the geothermal resources in a 640 acre lease, you pay rent based on 320 acres.

§ 3211.12 How and where do I pay my rent?

(a) *First year.* Pay BLM the first year's rent in advance. You may use a personal check, cashier's check, or money order made payable to the Department of the Interior—Bureau of Land Management. You may also make payments by credit card or electronic funds transfer with our prior approval.

(b) *Subsequent years.* For all subsequent years, make your rental payments to MMS. See MMS regulations at 30 CFR part 218.

§ 3211.13 When is my annual rental payment due?

Your rent is always due in advance. MMS must receive your annual rental payment by the anniversary date of the lease each year. See the MMS regulations at 30 CFR part 218, which explain when MMS considers a payment as received. If less than a full year remains on a lease, you must still pay a full year's rent by the anniversary date of the lease. For example, the rent on a 2,000-acre lease for the 11th year, would be $10,000 ($5 per acre), due prior to the 10th anniversary of the lease.

§ 3211.14 Will I always pay rent on my lease?

You must always pay rental, whether you are in a unit or outside of a unit, whether your lease is in production or not, and whether royalties or direct use fees apply to your production.

§ 3211.15 How do I credit rent towards royalty?

You may credit rental towards royalty under MMS regulations at 30 CFR 218.303.

§ 3211.16 Can I credit rent towards direct use fees?

No. You may not credit rental towards direct use fees. See MMS regulations at 30 CFR 218.304.

§ 3211.17 What is the royalty rate on geothermal resources produced from or attributable to my lease that are used for commercial generation of electricity?

(a) For leases issued after August 8, 2005 (other than leases issued in response to applications that were pending on that date for which the lessee elects to be subject to royalty regulations in effect on that date), the royalty rate is the rate prescribed in this paragraph.

(1) If you or your affiliate sell(s) electricity generated by use of geothermal resources produced from or attributed to your lease, then:

(i) For the first 10 years of production, the royalty rate is 1.75 percent;

(ii) After the first 10 years of production, the royalty rate is 3.5 percent; and

(iii) You must apply the rate established under this paragraph to the gross proceeds derived from the sale of electricity under applicable MMS rules at 30 CFR part 206 subpart H.

(2) If you or your affiliate sell(s) geothermal resources produced from or attributed to your lease at arm's length to a purchaser who uses those resources to generate electricity, then the royalty rate is 10 percent. You must apply that rate to the gross proceeds derived from the arm's-length sale of the geothermal resources under applicable MMS rules at 30 CFR part 206 subpart H.

(b) For leases issued before August 8, 2005, whose royalty terms are modified to the terms prescribed in the Energy Policy Act of 2005 under § 3212.25, BLM will establish the royalty rate.

(1) BLM will seek to establish a rate that it expects will yield total royalty payments equivalent to those that would have been paid under the royalty rate in effect for the lease before August 5, 2005. That rate is not limited to the range of rates specified in 30 U.S.C. 1004(a)(1). If you have not previously produced geothermal resources under your lease for the commercial generation of electricity, BLM will establish a royalty rate equal to that set forth in paragraph (a)(1) of this section.

(2) You must apply the rate that BLM establishes to the gross proceeds derived from the sale of electricity under applicable MMS rules at 30 CFR part 206 subpart H.

(c) For leases issued before August 8, 2005, whose royalty terms are not modified to the terms prescribed in the Energy Policy Act of 2005 under § 3212.25, and for leases issued in response to applications pending on that date for which the lessee elects to be subject to the royalty regulations in effect on that date, the royalty rate is the rate prescribed in the lease instrument.

§ 3211.18 What is the royalty rate on geothermal resources produced from or attributable to my lease that are used directly for purposes other than commercial generation of electricity?

(a) For leases issued after August 8, 2005 (other than leases issued in response to applications that were pending on that date for which the lessee elects to be subject to royalty regulations in effect on that date), and for leases issued before August 8, 2005, whose royalty terms are modified to the terms prescribed in the Energy Policy Act of 2005 under § 3212.25:

(1) If you or your affiliate use(s) the geothermal resources directly and do(es) not sell those resources at arm's length, no royalty rate applies. Instead, you must pay direct use fees according to a schedule published by MMS under MMS regulations at 30 CFR 206.356.

(2) If you or your affiliate sell(s) the geothermal resources at arm's length to a purchaser who uses the resources for purposes other than commercial generation of electricity, your royalty rate is 10 percent. You must apply that royalty rate to the gross proceeds derived from the arm's-length sale under applicable MMS regulations at 30 CFR part 206 subpart H.

(3) If you are a lessee and you are a State, tribal, or local government, no royalty rate applies. Instead you must pay a nominal fee established under MMS rules at 30 CFR 206.366.

(b) For leases issued before August 8, 2005, whose royalty terms are not modified to the terms prescribed in the Energy Policy Act of 2005 under § 3212.25, and for leases issued in response to applications pending on that date for which the lessee elects to be subject to the royalty regulations in effect on that date, the royalty rate is the rate prescribed in the lease instrument.

(c) For purposes of this section, direct use of geothermal resources includes generation of electricity that is not sold commercially and that is used solely for the operation of a facility unrelated to commercial electrical generation.

§ 3211.19 What is the royalty rate on byproducts derived from geothermal resources produced from or attributable to my lease?

(a) For byproducts derived from geothermal resource production that are identified in section 1 of the Mineral Leasing Act (MLA), as amended (30 U.S.C. 181) (e.g., oil, gas, phosphate, sodium, and potash), the royalty rate is the royalty rate that is prescribed in the MLA or in the regulations implementing the MLA for production of that mineral under a lease issued under the MLA. For example, if you produce sodium as a byproduct, the royalty on that sodium would be 2 percent, which would be applied to the gross value of the product under applicable MMS rules (30 U.S.C. 262).

(b) For a byproduct that is not specified in 30 U.S.C. 181, the royalty rate is 5 percent. You must apply that rate to the value of that byproduct established under applicable MMS rules at 30 CFR part 206 subpart H.

§ 3211.20 How do I credit advanced royalty towards royalty?

You may credit advanced royalty toward royalty under MMS regulations at 30 CFR 218.305(c).

Subpart 3212—Lease Suspensions and Royalty Rate Reductions

§ 3212.10 What is the difference between a suspension of operations and production and a suspension of operations?

(a) A suspension of operations and production is a temporary relief from production obligations which you may request from BLM. Under this paragraph you must cease all operations on your lease.

(b) A suspension of operations is when BLM orders you, to stop production temporarily in the interest of conservation.

§ 3212.11 How do I obtain a suspension of operations or operations and production on my lease?

(a) If you are the operator, you may request in writing that BLM suspend your operations and production for a producing lease. Your request must fully describe why you need the suspension. BLM will determine if your suspension is justified and, if so, will approve it.

(b) BLM may suspend your operations on any lease in the interest of conservation.

(c) A suspension under this section may include leases committed to an approved unit agreement. If leases committed to a unit are suspended, the unit operator must continue to satisfy unit terms and obligations, unless BLM also suspends unit terms and obligations, in whole or in part, under subpart 3287 of this part.

§ 3212.12 How long does a suspension of operations or operations and production last?

(a) BLM will state in your suspension notice how long your suspension of operations or operations and production is effective.

(b) During a suspension, you may ask BLM in writing to terminate your suspension. You may not unilaterally terminate a suspension that BLM ordered. A suspension of operations and production that we approved upon your request will automatically terminate when you begin or resume authorized production or drilling operations.

(c) If we receive information showing that you must resume operations to protect the interests of the United States, we will terminate your suspension and order you to resume production.

(d) If a suspension terminates, you must resume paying rents and royalty (see § 3212.14).

§ 3212.13 How does a suspension affect my lease term and obligations?

(a) If BLM approves a suspension of operations and production:

(1) Your lease term is extended by the length of time the suspension is in effect; and

(2) You are not required to drill, produce geothermal resources, or pay rents or royalties during the suspension. We will suspend your obligation to pay lease rents or royalties beginning the first day of the month following the date the suspension is effective.

(b) If BLM orders you to suspend your operations;

(1) Your lease term is extended by the length of time the suspension is in effect; and

(2) Your lease rental or royalty obligations are not suspended, unless BLM determines that you will be denied all beneficial use of your lease during the period of the suspension.

§ 3212.14 What happens when the suspension ends?

When the suspension ends, you must resume rental and royalty payments that were suspended, beginning on the first day of the lease month after BLM terminates the suspension. You must pay the full rental amount due on or before the next lease anniversary date. If you do not make the rental payments on time, BLM will refund your balance and terminate the lease.

§ 3212.15 Can my lease remain in full force and effect if I cease production and I do not have a suspension?

In the absence of a suspension approved or ordered under § 3212.11, if you cease production for more than one calendar month on a lease that is subject to royalties and that has achieved commercial production (through actual or allocated production), your lease will remain in full force and effect only if the circumstances described in paragraph (a), (b), or (c) apply:

(a) If, during the period in which production is ceased, you continue to pay a monthly advanced royalty under MMS regulations at 30 CFR 218.305. This option is available only for an aggregate of 10 years (120 months, whether consecutive or not).

(b) The Secretary:

(1) Requires or causes the cessation of production; or

(2) Determines that the cessation in production is required or otherwise caused by:

(i) The Secretary of the Air Force, Army, or Navy;

(ii) A State or a political subdivision of a State; or

(iii) Force majeure.

(c) The discontinuance of production is caused by the performance of maintenance necessary to maintain operations. Such maintenance is considered a production activity, not a cessation of production. Such maintenance may include activities such as: Overhauling your power plant, re-drilling or re-working wells that are critical to plant operation, or repairing and improving gathering systems or transmission lines that necessitate the discontinuation of production. You must obtain BLM approval by submitting a Geothermal Sundry Notice in advance if the activity will require more than one calendar month to be classified as maintenance under this paragraph.

§ 3212.16 Can I apply to BLM to reduce, suspend, or waive the royalty or rental of my lease?

(a) You may apply for a suspension, reduction or waiver of your rent or royalty for any lease or portion thereof. BLM may grant your request in the interest of conservation and to encourage the greatest ultimate recovery of geothermal resources, if we determine that:

(1) Granting the request is necessary to promote development; or

(2) You cannot successfully operate the lease under its current terms.

(b) BLM will not approve a royalty reduction, suspension or waiver unless all royalty interest owners other than the United States accept a similar reduction, suspension, or waiver.

§ 3212.17 What information must I submit when I request that BLM suspend, reduce, or waive my royalty or rental?

(a) Your request for suspension, reduction or waiver of the royalty or rental must include all information BLM needs to determine if the lease can be operated under its current terms, including:

(1) The type of reduction you seek;

(2) The serial number of your lease;

(3) The names and addresses of the lessee and operator;

(4) The location and status of wells;

(5) A summary of monthly production from your lease; and

(6) A detailed statement of expenses and costs.

(b) If you are applying for a royalty reduction, suspension or waiver, you must also provide to BLM a list of names of royalty interest owners other than the United States, the amounts of royalties or payments out of production paid to them, and every effort you have made to reduce these payments.

§ 3212.18 What are the production incentives for leases?

You will receive a production incentive in the form of a temporary 50 percent reduction in your royalties under MMS regulations at 30 CFR 218.307 if:

(a) Your lease was in effect prior to August 8, 2005;

(b) You do not convert the royalty rates of your lease under § 3212.25;

(c) By August 7, 2011, production from or allocated to your lease is utilized for commercial production in a:

(1) New facility (see § 3212.22); or

(2) Qualified expansion project (see § 3212.21); and

(d) The production from your lease is used for the commercial generation of electricity.

§ 3212.19 How do I apply for a production incentive?

Submit to BLM a written request for a production incentive describing a project that may qualify as a new facility or qualified expansion project. Identify whether you are requesting that the project be considered as a new facility (see § 3212.22) or as a qualified expansion project (see § 3212.21) and explain why your project qualifies under these regulations. The request must be received no later than August 7, 2011.

§ 3212.20 How will BLM review my request for a production incentive?

(a) BLM will review your request on a case-by-case basis to determine whether your project meets the criteria for a qualified expansion project under § 3212.21 or a new facility under § 3212.22. If it does not meet the criteria for the type of project you requested, we will determine whether it meets the criteria for the other type of production incentive project.

(b) If BLM determines that you have a qualified expansion project, we will, as part of our approval, provide you with a schedule of monthly target net generation amounts. These amounts will quantify the required 10 percent increase in net generation over the projected net generation without the project. The schedule will be specific to the facility or facilities that are affected by the project and will cover the 48-month time period during which your production incentive may apply.

(c) If BLM determines that you have met the criteria for a new facility, we will provide you with written notification of this determination.

§ 3212.21 What criteria establish a qualified expansion project for the purpose of obtaining a production incentive?

A qualified expansion project must meet the following criteria:

(a) It must involve substantial capital expenditure. Examples include the drilling of additional wells, retrofitting existing wells and collection systems to

increase production rates, retrofitting turbines or power plant components to increase efficiency, adding additional generation capacity to existing plants, and enhanced recovery projects such as augmented injection. Projects that are not associated with substantial capital expenditure, such as opening production valves and operating existing equipment at higher rates, do not qualify as expansion projects.

(b) The project must have the potential to increase the net generation by more than 10 percent over the projected generation without the project, using data from the previous 5 years. If 5 years of data are not available, it is not a qualified expansion project.

§ 3212.22 What criteria establish a new facility for the purpose of obtaining a production incentive?

(a) Criteria for determining whether a project is a new facility for the purpose of obtaining a production incentive include:

(1) The project requires a new site license or facility construction permit if it is on Federal lands;

(2) The project requires a new Commercial Use Permit;

(3) The project includes at least one new turbine-generator unit;

(4) The project involves a new sales contract;

(5) The project involves a new site or substantially larger footprint; and

(6) The project is not contiguous to an existing project.

(b) Generally, a new facility will not:

(1) Be permitted only with a Geothermal Drilling Permit;

(2) Be constructed entirely within the footprint of an existing facility; or

(3) Involve only well-field projects such as drilling new wells, increasing injection, and enhanced recovery projects.

§ 3212.23 How will the production incentive apply to a qualified expansion project?

(a) The production incentive will begin on the first day of the month following the commencement of commercial operation of the qualified expansion project. The incentive will be in effect for up to 48 consecutive months, applicable only to those months in which the actual generation from the facility or facilities affected by the project meets or exceeds the target generation established by BLM. The amount of the production incentive is established in MMS regulations at 30 CFR 218.307.

(b) The production incentive will apply only to the increase in net generation. The increase in generation for any month in which the production incentive is in effect will be determined as follows:

$$\Delta G_i = G_{a,i} - \frac{G_{t,i}}{1.1}$$

Where:

i is a month for which a production incentive is in effect;

ΔG_i is the increase in generation for month i;

$G_{a,i}$ is the actual generation in month i;

$G_{t,i}$ is the target generation in month i, as provided in § 3212.19(b).

§ 3212.24 How will the production incentive apply to a new facility?

(a) If BLM determines that your project qualifies as a new facility, the production incentive will begin on the first day of the month following the commencement of commercial operations at that facility, and will be in effect for 48 consecutive months.

(b) The amount of the production incentive is established in MMS regulations at 30 CFR 218.307.

§ 3212.25 Can I convert the royalty terms of a lease in effect before August 8, 2005, to the terms of the Geothermal Steam Act, as amended by the Energy Policy Act of 2005?

(a) If your lease was in effect before August 8, 2005, you may submit to BLM a request to modify the royalty terms of your lease to the applicable royalty or direct use fee terms prescribed in the Geothermal Steam Act as amended by the Energy Policy Act of 2005. If your request to modify is granted, the new royalty rate or direct use fees will apply to all geothermal resources produced from your lease.

(b)(1) The royalty rate for leases whose terms are modified and production from which is used for commercial generation of electricity is prescribed in § 3211.17(b).

(2) The direct use fees or royalty rate for leases whose terms are modified and production from which is used directly for purposes other than commercial generation of electricity is prescribed in § 3211.18(a) and MMS regulations at 30 CFR 206.356.

§ 3212.26 How do I submit a request to modify the royalty terms of my lease to the applicable terms prescribed in the Energy Policy Act of 2005?

(a) You must submit a written request to BLM that contains the serial numbers of the leases whose terms you wish to modify and:

(1) For direct use operations, any other information that BLM may require; or

(2) For commercial electrical generation operations, for each month during the 10-year period preceding the date of your request (or from when electrical generation operations began if less than 10 years before the date of your request):

(i) The gross proceeds received by you or your affiliate from the sale of electricity;

(ii) The amount of royalty paid;

(iii) The amount of generating and transmission deductions subtracted from the gross proceeds to derive the royalty value if you are using the geothermal netback procedure under MMS regulations to calculate royalty value;

(iv) If you are or your affiliate is selling the geothermal resources at arm's length before those resources are used to generate electricity, documentation that you have access to the purchaser's gross proceeds derived from the sale of the electricity; and

(v) Any other information that BLM may require.

(c) BLM must receive your request no later than:

(1) For leases whose geothermal resource production is used directly for purposes other than commercial generation of electricity, 18 months after the effective date of the schedule of fees established by MMS under 30 CFR 206.356(b); or

(2) For leases whose geothermal resource production is used for commercial generation of electricity, [DATE 18 MONTHS AFTER THE EFFECTIVE DATE OF THE FINAL RULE].

§ 3212.27 How will BLM or MMS review my request to modify the lease royalty terms?

After you submit your request to modify the royalty terms under § 3212.25, BLM will:

(a) Review your application, and if BLM determines that:

(1) Your application is complete and contains all necessary information, we will notify you of the date on which your request was received; or

(2) Your request is not complete or does not contain all necessary information, we will notify you of the additional information that is required;

(b) Analyze the data you submitted to establish a royalty rate if the geothermal resources are used for commercial electrical generation;

(c) Consult with MMS and any State or local governments that may be affected by the change in royalty terms; and

(d) Within 180 days from the day on which we determine a complete request when all necessary information was

received, we will send you a decision letter notifying you whether we approve the modification to the lease terms.

Subpart 3213—Relinquishment, Termination, and Cancellation

§ 3213.10 Who may relinquish a lease?

Only the record title owner may relinquish a lease in full or in part. If there is more than one record title owner for a lease, all record title owners must sign the relinquishment.

§ 3213.11 What must I do to relinquish a lease?

Send BLM a written request that includes the serial number of each lease you are relinquishing. If you are relinquishing the entire lease, no legal description of the land is required. If you are relinquishing part of the lease, you must describe the lands relinquished. BLM may request additional information if necessary.

§ 3213.12 May BLM accept a partial relinquishment if it will reduce my lease to less than 640 acres?

Except for direct use leases, lands remaining in your lease must contain at least 640 acres, or all of your leased lands must be in one section, whichever is less. Otherwise, we will not accept your partial relinquishment. BLM will only allow an exception if it will further development of the resource. The size of direct use leases is addressed in § 3205.07.

§ 3213.13 When does my relinquishment take effect?

(a) If BLM determines your relinquishment request meets the requirements of §§ 3213.11 and 3213.12, your relinquishment is effective the day we receive it.

(b) Notwithstanding the relinquishment, you and your surety continue to be responsible for:

(1) Paying all rents and royalties due before the relinquishment was effective;

(2) Plugging and abandoning all wells on the relinquished land;

(3) Restoring and reclaiming the surface and other resources; and

(4) Complying with § 3200.4.

§ 3213.14 Will BLM terminate my lease if I do not pay my rent on time?

(a) If MMS does not receive your second and subsequent year's rental payment in full by the lease anniversary date, MMS will notify you that the rent payment is overdue.

You have 45 days from the anniversary date to pay the rent plus a 10 percent late fee. If MMS does not receive your rental plus the late fee by the end of the 45-day period, BLM will terminate your lease.

(b) If you receive notification from MMS under paragraph (a) of this section more than 15 days after the lease anniversary date, BLM will reinstate a lease that was terminated under paragraph (a) of this section if MMS receives the rent plus a 10 percent late fee within 30 days after you receive the notification.

§ 3213.15 How will BLM notify me if it terminates my lease?

BLM will send you a notice of the termination by certified mail, return receipt requested.

§ 3213.16 May BLM cancel my lease?

(a) BLM may cancel your lease if it was issued in error.

(b) If BLM cancels your lease because it was issued in error, the cancellation is effective when you receive it.

§ 3213.17 May BLM terminate my lease for reasons other than non-payment of rentals?

BLM may terminate your lease for reasons other than non-payment of rentals, after giving you 30-days written notice, if we determine that you violated the requirements of § 3200.4, including, but not limited to the nonpayment of royalties and fees under 30 CFR parts 206 and 218.

§ 3213.18 When is a termination effective?

If BLM terminates your lease because we determined that you violated the requirements of § 3200.4, the termination takes effect 30 days from the date you receive notice of our determination.

§ 3213.19 What can I do if BLM notifies me that my lease is being terminated because of a violation of the law, regulations, or lease terms?

(a) You can prevent termination of your lease if, within 30 days after receipt of our notice:

(1) You correct the violation; or

(2) You show us that you cannot correct the violation during the 30-day period and that you are making a good faith attempt to correct the violation as quickly as possible, and thereafter you diligently proceed to correct the violation.

(b)(1) You may appeal the lease termination. You have 30 days after receipt of our notice to file an appeal (see parts 4 and 1840 of this title). We will stay the termination of your lease while your appeal is pending.

(2) You are entitled to a hearing on the violation or the proposed lease termination if you request the hearing when you file the appeal. The period for correction of the violation will be extended to 30 days after the decision on appeal is made if the decision concludes that a violation exists.

Subpart 3214—Personal and Surety Bonds

§ 3214.10 Who must post a geothermal bond?

(a) The lessee or operator must post a bond with BLM before exploration, drilling or utilization operations begin.

(b) Before we approve a lease transfer or recognize a new designated operator, the lessee or operator must file a new bond or a rider to the existing bond, unless all previous operations on the land have already been reclaimed.

§ 3214.11 Who must my bond cover?

Your bond must cover all record title owners, operating rights owners, operators, and any person who conducts operations on your lease.

§ 3214.12 What activities must my bond cover?

Your bond must cover:

(a) Any activities related to exploration, drilling, utilization, or associated operations on a Federal lease;

(b) Reclamation of the surface and other resources;

(c) Royalty payments; and

(d) Compliance with the requirements of § 3200.4.

§ 3214.13 What is the minimum dollar amount required for a bond?

The minimum bond amount varies depending on the type of activity you are proposing and whether your bond will cover individual, statewide, or nationwide activities. The minimum dollar amounts and bonding options for each type of activity are found in the following regulations:

(a) Exploration operations—see § 3251.15;

(b) Drilling operations—see § 3261.18; and

(c) Utilization operations—see §§ 3271.12 and 3273.19.

§ 3214.14 May BLM increase the bond amount above the minimum?

(a) BLM may increase the bond amount above the minimums referenced in § 3214.13 when:

(1) We determine that the operator has a history of noncompliance;

(2) We previously had to make a claim against a surety because any one person who is covered by the new bond failed to plug and abandon a well and reclaim the surface in a timely manner;

(3) MMS has notified BLM that a person covered by the bond owes uncollected royalties; or

(4) We determine that the bond amount will not cover the estimated reclamation cost.

(b) We may increase bond amounts to any level, but we will not set that

amount higher than the total estimated costs of plugging wells, removing structures, and reclaiming the surface and other resources, plus any uncollected royalties due MMS or moneys owed to BLM due to previous violations.

§ 3214.15 What kind of financial guarantee will BLM accept to back my bond?

We will not accept cash bonds. We will only accept:

(a) Corporate surety bonds, provided that the surety company is approved by the Department of the Treasury (see Department of the Treasury Circular No. 570, which is published in the **Federal Register** every year on or about July 1); and

(b) Personal bonds, which are secured by a cashier's check, certified check, certificate of deposit, negotiable securities such as Treasury notes, or an irrevocable letter of credit (see §§ 3214.21 and 3214.22).

§ 3214.16 Is there a special bond form I must use?

You must use a BLM-approved bond form (Form 3000–4, or Form 3000–4a, June 1988 or later editions) for corporate surety bonds and personal bonds.

§ 3214.17 Where must I submit my bond?

File personal or corporate surety bonds and statewide bonds in the BLM State Office that oversees your lease or operations. You may file nationwide bonds in any BLM State Office. File bond riders in the BLM State Office where your underlying bond is located. For personal or corporate surety bonds, file one originally-signed copy of the bond.

§ 3214.18 Who will BLM hold liable under the lease and what are they liable for?

BLM will hold all interest owners in a lease jointly and severally liable for compliance with the requirements of § 3200.4 for obligations that accrue while they hold their interest. Among other things, all interest owners are jointly and severally liable for:

(a) Plugging and abandoning wells;

(b) Reclaiming the surface and other resources;

(c) Compensatory royalties assessed for drainage; and

(d) Rent and royalties due.

§ 3214.19 What are my bonding requirements when a lease interest is transferred to me?

(a) Except as otherwise provided in this section, if the lands to be transferred to you contain a well or any other surface disturbance which the original lessee did not reclaim, you must post a bond under this subpart before BLM will approve the transfer.

(b) If the original lessee does not transfer all interest in the lease to you, you may become a co-principal on the original bond, rather than posting a new bond.

(c) You do not need to post an additional bond if:

(1) You previously furnished a statewide or nationwide bond sufficient to cover the lands transferred; or

(2) The operator provided the original bond, and the operator does not change.

§ 3214.20 How do I modify my bond?

You may modify your bond by submitting a rider to the BLM State Office where your bond is held. There is no special form required.

§ 3214.21 What must I do if I want to use a certificate of deposit to back my bond?

Your certificate of deposit must:

(a) Be issued by a Federally-insured financial institution authorized to do business in the United States;

(b) Include on its face the statement, "This certificate cannot be redeemed by any party without approval by the Secretary of the Interior or the Secretary's delegate;" and

(c) Be payable to the Department of the Interior, Bureau of Land Management.

§ 3214.22 What must I do if I want to use a letter of credit to back my bond?

Your letter of credit must:

(a) Be issued by a Federally-insured financial institution authorized to do business in the United States;

(b) Be payable to the Department of the Interior, Bureau of Land Management;

(c) Be irrevocable during its term and have an initial expiration date of no sooner than one year after the date we receive it;

(d) Be automatically renewable for a period of at least one year beyond the end of the current term, unless the issuing financial institution gives us written notice, at least 90 days before the letter of credit expires, that it will no longer renew the letter of credit; and

(e) Include a clause authorizing the Secretary of the Interior to demand immediate payment, in part or in full:

(1) If you do not meet your obligations under the requirements of § 3200.4; or

(2) Provide substitute security for a letter of credit which the issuer has stated it will not renew before the letter of credit expires.

Subpart 3215—Bond Release, Termination, and Collection

§ 3215.10 When may BLM collect against my bond?

If you fail to comply with the requirements listed at § 3200.4, we may collect money from the bond to correct your noncompliance. This amount can be as large as the face amount of the bond. Some examples of when we will collect against your bond are when you do not properly or in a timely manner:

(a) Plug and abandon a well;

(b) Reclaim the lease area;

(c) Pay outstanding royalties; or

(d) Pay assessed royalties to compensate for drainage.

§ 3215.11 Must I replace my bond after BLM collects against it?

If BLM collects against your bond, before you conduct any further operations you must either:

(a) Post a new bond equal to the value of the original bond; or

(b) Restore your existing bond to the original face amount.

§ 3215.12 What will BLM do if I do not restore the face amount or file a new bond?

If we collect against your bond and you do not restore it to the original face amount, we may shut in any well(s) or utilization facilities covered by that bond, and may terminate affected leases.

§ 3215.13 Will BLM terminate or release my bond?

(a) BLM does not cancel or terminate bonds. We may inform you that your existing bond is insufficient.

(b) The bond provider may terminate your bond provided it gives you and BLM 30-days notice. The bond provider remains responsible for obligations that accrued during the period of liability while the bond was in effect.

(c) BLM will release a bond, terminating all liability under that bond, if:

(1) The new bond that you file covers all existing liabilities and we accept it; or

(2) After a reasonable period of time, we determine that you paid all royalties, rents, penalties, and assessments, and satisfied all permit and lease obligations.

(d) If an adequate bond is not in place, do not conduct any operations until you provide a new bond which meets our requirements.

§ 3215.14 When BLM releases my bond, does that end my responsibilities?

When BLM releases your bond, we relinquish the security but we continue to hold the lessee or operator responsible for noncompliance with applicable requirements under the lease. Specifically, we do not waive any legal claim we may have against any person under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9601 *et seq.*), or other laws and regulations.

Subpart 3216—Transfers

§ 3216.10 What types of lease interests may I transfer?

You may transfer record title or operating rights, but you need BLM approval before your transfer is effective (see § 3216.21).

§ 3216.11 Where must I file a transfer request?

File your transfer in the BLM State Office that handles your lease.

§ 3216.12 When does a transferee take responsibility for lease obligations?

After BLM approves your transfer, the transferee is responsible for performing all lease obligations accruing after the date of the transfer, and for plugging and abandoning wells which exist and are not plugged and abandoned at the time of the transfer.

§ 3216.13 What are my responsibilities after I transfer my interest?

After you transfer an interest in a lease you are still responsible for rents, royalties, compensatory royalties, and other obligations that accrued before your transfer became effective. You must also plug and abandon any wells drilled or existing on the lease while you held your interest.

§ 3216.14 What filing fees and forms does a transfer require?

With each transfer request you must send BLM the correct form and pay the transfer fee required by this section. When you calculate your fee, make sure it covers the full amount. For example, if you are transferring record title for three leases, submit $225 with the application. Use the following chart to determine forms and fees:

Type of transfer	Form required?	Form No.	Number of copies	Filing transfer fee (per lease)
(a) Record Title	Yes	3000–3	2 executed copies	*
(b) Operating Rights	Yes	3000–3(a)	2 executed copies	*
(c) Estate Transfers	No	N/A	1 List of Leases	*
(d) Corporate Mergers	No	N/A	1 List of Leases	*
(e) Name Changes	No	N/A	1 List of Leases	*

*The applicable transfer fees are in the fee schedule in § 3000.12 of this chapter.

§ 3216.15 When must I file my transfer request?

(a) File a transfer request to transfer record title or operating rights within 90 days after you sign an agreement with the transferee. If BLM receives your request more than 90 days after signing, we may require you to re-certify that you still intend to complete the transfer.

(b) There is no specific time deadline for filing estate transfers, corporate mergers, and name changes. File them within a reasonable time.

§ 3216.16 Must I file separate transfer requests for each lease?

File two copies of a separate request for each lease for which you are transferring record title or operating rights. The only exception is if you are transferring more than one lease to the same transferee, in which case you file two copies of one transfer application.

§ 3216.17 Where must I file estate transfers, corporate mergers, and name changes?

(a) If you have posted a bond for any Federal lease, you must file estate transfers, corporate mergers, and name changes in the BLM State Office that maintains your bond.

(b) If you have not posted a bond, you must file estate transfers, corporate mergers and name changes in the State Office having jurisdiction over the lease.

§ 3216.18 How do I describe the lands in my lease transfer?

(a) If you are transferring an interest in your entire lease, you do not need to give BLM a legal description of the land.

(b) If you are transferring an interest in a portion of your lease, describe the lands that are transferred in the same way they are described in the lease.

§ 3216.19 May I transfer record title interest for less than 640 acres?

Except for direct use leases, you may transfer record title interest for less than 640 acres only if your transfer includes an irregular subdivision or all of the lands in your lease are in a section. We may make an exception to the minimum acreage requirements if it is necessary to conserve the resource.

§ 3216.20 When does a transfer segregate a lease?

If you transfer 100 percent of the record title interest in a portion of your lease, BLM will segregate the transferred portion from the original lease and give it a new serial number with the same terms and conditions as those in the original lease.

§ 3216.21 When is my transfer effective?

Your transfer is effective the first day of the month after we approve it.

§ 3216.22 Does BLM approve all transfer requests?

BLM will not approve a transfer if:

(a) The lease account is not in good standing;

(b) The transferee does not qualify to hold a lease under this part; or

(c) An adequate bond has not been provided.

Subpart 3217—Cooperative Agreements

§ 3217.10 What are unit agreements?

Under unit agreements, lessees unite with each other, or jointly or separately with others, in collectively adopting and operating under agreements to conserve the resources of any geothermal reservoir, field, or like area, or any part thereof,. BLM will only approve unit agreements that we determine are in the public interest. Unit agreement application procedures are provided in part 3280 of this title.

§ 3217.11 What are communitization agreements?

Under communitization agreements (also called drilling agreements), operators who cannot independently develop separate tracts due to well-spacing or well development programs may cooperatively develop such tracts. Lessees may ask BLM to approve a communitization agreement or, in some cases, we may require the lessees to enter into such an agreement.

§ 3217.12 What does BLM need to approve my communitization agreement?

For BLM to approve a communitization agreement, you must give us the following information:

(a) The location of the separate tracts comprising the drilling or spacing unit;

(b) How you will prorate production or royalties to each separate tract based on total acres involved;

(c) The name of each tract operator; and

(d) Provisions for protecting the interests of all parties, including the United States.

§ 3217.13 When does my communitization agreement go into effect?

(a) Your communitization agreement is effective when BLM approves and signs it.

(b) Before we approve the agreement:

(1) All parties must sign the agreement; and (2)(i) We must determine that the tracts cannot be independently developed; and

(ii) That the agreement is in the public interest.

§ 3217.14 When will BLM approve my drilling or development contract?

BLM may approve a drilling or development contract when:

(a) One or more geothermal lessees enter into the contract with one or more persons; or

(b) Lessees need the contract for regional exploration of geothermal resources;

(c) BLM has coordinated the review of the proposed contract with appropriate state agencies; and

(d) BLM determines that approval best serves or is necessary for the conservation of natural resources, public convenience or necessity, or the interests of the United States.

§ 3217.15 What does BLM need to approve my drilling or development contract?

For BLM to approve your drilling or development contract, you must send us:

(a) The contract and a statement of why you need it;

(b) A statement of all interests held by the contracting parties in that geothermal area or field;

(c) The type of operations and schedule set by the contract;

(d) A statement that the contract will not violate Federal antitrust laws by concentrating control over the production or sale of geothermal resources; and

(e) Any other information we may require to make a decision about the contract or to attach conditions of approval.

Subpart 3250—Exploration Operations—General

§ 3250.10 When do the exploration operations regulations apply?

(a) The exploration operations regulations contained in this subpart and subparts 3251 through 3256 of this part apply to geothermal exploration operations:

(1) On BLM-administered public lands, whether or not they are leased for geothermal resources; and

(2) On lands whose surface is managed by another Federal agency, where BLM has leased the subsurface geothermal resources and the lease operator wishes to conduct exploration. In this case, we will consult with the surface managing agency regarding surface use and reclamation requirements before we approve the exploration operations.

(b) These regulations do not apply to:

(1) Unleased land administered by another Federal agency;

(2) Unleased geothermal resources whose surface land is managed by another Federal agency;

(3) Privately owned land; or

(4) Casual use activities.

§ 3250.11 May I conduct exploration operations on my lease, someone else's lease, or unleased land?

(a) You may request BLM approval to explore any BLM-managed public lands open to geothermal leasing, even if the lands are leased to another person. A BLM-approved exploration permit does not give you exclusive rights.

(b) If you wish to conduct operations on your lease, you may do so after we have approved your Notice of Intent to Conduct Geothermal Resource Exploration Operations. If the lands are already leased, your operations may not unreasonably interfere with or endanger those other operations or other authorized uses, or cause unnecessary or undue degradation of the lands.

§ 3250.12 What general standards apply to exploration operations?

BLM-approved exploration operations must:

(a) Meet all operational and environmental standards;

(b) Protect public health, safety, and property;

(c) Prevent unnecessary impacts on surface and subsurface resources;

(d) Be conducted in a manner consistent with the principles of multiple use; and

(e) Comply with the requirements of § 3200.4.

§ 3250.13 What additional BLM orders or instructions govern exploration?

BLM may issue the following types of orders or instructions:

(a) Geothermal resource operational orders that contain detailed requirements of nationwide applicability;

(b) Notices to lessees that contain detailed requirements on a statewide or regional basis;

(c) Other orders and instructions specific to a field or area;

(d) Conditions of approval contained in an approved Notice of Intent; and

(e) Verbal orders that BLM will confirm in writing.

§ 3250.14 What types of operations may I propose in my application to conduct exploration?

(a) You may propose any activity fitting the definition of "exploration operations" in § 3200.1. Submit Form 3200–9, Notice of Intent to Conduct Geothermal Resource Exploration Operations, together with the information required under § 3251.11, and BLM will review your proposal.

(b) The exploration operations regulations do not address drilling wells intended for production or injection, which is covered in subpart 3260 of this part, or geothermal resources utilization, which is covered in subpart 3270 of this part.

Subpart 3251—Exploration Operations: Getting BLM Approval

§ 3251.10 Do I need a permit before I start exploration operations?

BLM must approve a Notice of Intent to Conduct Geothermal Resource Exploration Operations (NOI) before you conduct exploration operations. The approved NOI, including any necessary conditions for approval, constitutes your permit.

§ 3251.11 What information is in a complete Notice of Intent to Conduct Geothermal Resource Exploration Operations application?

To obtain approval of exploration operations on BLM-managed lands, your application must:

(a) Include a complete and signed Form 3200–9, Notice of Intent to Conduct Geothermal Resource Exploration Operations that describes the lands you wish to explore;

(b) For operations other than drilling temperature gradient wells, describe your exploration plans and procedures, including the approximate starting and ending dates for each phase of operations;

(c) For drilling temperature gradient wells, describe your drilling and completion procedures, and include, for each well or for several wells you propose to drill in an area of geologic and environmental similarity:

(1) A detailed description of the equipment, materials, and procedures you will use;

(2) The depth of each well;

(3) The casing and cementing program;

(4) The circulation media (mud, air, foam, etc.);

(5) A description of the logs that you will run;

(6) A description and diagram of the blowout prevention equipment you will use during each phase of drilling;
(7) The expected depth and thickness of fresh water zones;
(8) Anticipated lost circulation zones;
(9) Anticipated temperature gradient in the area;
(10) Well site layout and design;
(11) Existing and planned access roads or ancillary facilities; and
(12) Your source of drill pad and road building material and water supply.
(d) Show evidence of bond coverage (see § 3251.15);
(e) Estimate how much surface disturbance your exploration may cause;
(f) Describe the proposed measures you will take to protect the environment and other resources;
(g) Describe methods to reclaim the surface; and
(h) Include all other information BLM may require.

§ 3251.12 What action will BLM take on my Notice of Intent to Conduct Geothermal Resource Exploration Operations?

(a) When BLM receives your Notice of Intent to Conduct Geothermal Resource Exploration Operations, we will make sure it is complete and signed, and review it for compliance with the requirements of § 3200.4.
(b) If the proposed operations are located on lands described under § 3250.10(a)(2), we will consult with the Federal surface management agency before approving your Notice of Intent.
(c) We will check your Notice of Intent for technical adequacy and we may require additional information.
(d) We will notify you if we need more information to process your Notice of Intent, and suspend the review of your Notice of Intent until we receive the information.
(e) After our review, we will notify you whether we approved or denied your Notice of Intent and of any conditions of approval.

§ 3251.13 Once I have an approved Notice of Intent, how can I change my exploration operations?

Send BLM a complete and signed Form 3260–3, Geothermal Sundry Notice, which fully describes the requested changes. Do not proceed with the change in operations until you receive written approval from BLM.

§ 3251.14 Do I need a bond for conducting exploration operations?

(a) You must not start any exploration operations on BLM-managed lands until we approve your bond. You may meet the requirement for an exploration bond in two ways:
(1) If you have an existing nationwide or statewide oil and gas exploration bond, provide a rider in an amount we have specified to include geothermal resources exploration operations; or
(2) If you must file a new bond for geothermal exploration, the minimum amounts are:
(i) $5,000 for a single operation;
(ii) $25,000 for all of your operations within a state;
(iii) $50,000 for all of your operations on public lands nationwide.
(b) See subparts 3214 and 3215 of this part for additional details on bonding procedures.

§ 3251.15 When will BLM release my bond?

BLM will release your bond after you request it and we determine that you have:
(a) Plugged and abandoned all wells;
(b) Reclaimed the land and, if necessary, resolved other environmental, cultural, scenic or recreational issues; and
(c) Complied with the requirements of § 3200.4.

Subpart 3252—Conducting Exploration Operations

§ 3252.10 What operational standards apply to my exploration operations?

You must keep exploration operations under control at all times by:
(a) Conducting training during your operation which ensures your personnel are capable of performing emergency procedures quickly and effectively;
(b) Using properly maintained equipment; and
(c) Using operational practices that allow for quick and effective emergency response.

§ 3252.11 What environmental requirements must I meet when conducting exploration operations?

(a) You must conduct your exploration operations in a manner that:
(1) Protects the quality of surface and subsurface waters, air, and other natural resources, including wildlife, soil, vegetation, and natural history;
(2) Protects the quality of cultural, scenic and recreational resources;
(3) Accommodates other land uses, as BLM deems necessary; and
(4) Minimizes noise.
(b) You must remove or, with our permission, properly store all equipment and materials not in use.
(c) You must provide and use pits, tanks, and sumps of adequate capacity. They must be designed to retain all materials and fluids resulting from drilling temperature gradient wells or other operations, unless we have specified otherwise in writing. When they are no longer needed, you must properly abandon pits and sumps in accordance with your exploration permit.
(d) BLM may require you to submit a contingency plan describing procedures to protect public health, safety, property and the environment.

§ 3252.12 How deep may I drill a temperature gradient well?

(a) You may drill a temperature gradient well to any depth that we approve in your exploration permit or sundry notice. In all cases, you may not flow test the well or perform injection tests of the well unless you follow the procedures for geothermal drilling operations in subparts 3260 through 3267 of this part.
(b) BLM may modify your permitted depth at any time before or during drilling, if we determine that the bottom hole temperature or other information indicates that drilling to the original permitted depth could directly encounter the geothermal resource or create risks to public health, safety, property, the environment, or other resources.

§ 3252.13 How long may I collect information from my temperature gradient well?

You may collect information from your temperature gradient well for as long as your permit allows.

§ 3252.14 How must I complete a temperature gradient well?

Complete temperature gradient wells to allow for proper abandonment, and to prevent interzonal migration of fluids. Cap all tubing when not in use.

§ 3252.15 When must I abandon a temperature gradient well?

When you no longer need it, or when BLM requires you to.

§ 3252.16 How must I abandon a temperature gradient well?

(a) Before abandoning your well, submit a complete and signed Sundry Notice, Form 3260–3, describing how you plan to abandon wells and reclaim the surface. Do not begin abandoning wells or reclaiming the surface until BLM approves your Sundry Notice.
(b) You must plug and abandon your well for permanent prevention of interzonal migration of fluids and migration of fluids to the surface. You must reclaim your well location according to the terms of BLM approvals and orders.

Subpart 3253—Reports: Exploration Operations

§ 3253.10 Must I share with BLM the data I collect through exploration operations?

(a) For exploration operations on your geothermal lease, you must submit all data you obtain as a result of the operations with a signed notice of completion of exploration operations under § 3253.11, unless we approve a later submission.

(b) For exploration operations on unleased lands or on leased lands where you are not the lessee or unit operator, you are not required to submit data. However, if you want your exploration operations to count toward your diligent exploration expenditure requirement (see § 3210.13), or if you are making significant expenditures to extend your lease (see § 3208.14), you must send BLM the resulting data under the rules of those sections.

§ 3253.11 Must I notify BLM when I have completed my exploration operations?

After you complete exploration operations, send to BLM a complete and signed notice of completion of exploration operations, describing the exploration operations, well history, completion and abandonment procedures, and site reclamation measures. You must send this to BLM within 30 days after you:

(a) Complete any geophysical exploration operations;

(b) Complete the drilling of temperature gradient well(s) approved under your approved Notice of Intent to conduct exploration;

(c) Plug and abandon a temperature gradient well; and

(d) Plug shot holes and reclaim all exploration sites.

Subpart 3254—Inspection, Enforcement, and Noncompliance for Exploration Operations

§ 3254.10 May BLM inspect my exploration operations?

BLM may inspect your exploration operations to ensure compliance with the requirements of § 3200.4 and the regulations in this subpart.

§ 3254.11 What will BLM do if my exploration operations are not in compliance with my permit, other BLM approvals or orders, or the regulations in this subpart?

(a) BLM will issue you a written Incident of Noncompliance and direct you to correct the problem within a set time. If the noncompliance continues or is serious in nature, we will take one or more of the following actions:

(1) Correct the problem at your expense;

(2) Direct you to modify or shut down your operations; or

(3) Collect all or part of your bond.

(b) We may also require you to take actions to prevent unnecessary impacts on the lands. If so, we will notify you of the nature and extent of any required measures and the time you have to complete them.

(c) Noncompliance may result in BLM terminating your lease, if appropriate under §§ 3213.17 through 3213.19.

Subpart 3255—Confidential, Proprietary Information

§ 3255.10 Will BLM disclose information I submit under these regulations?

All Federal and Indian data and information submitted to the BLM are subject to part 2 of this title. Part 2 includes the regulations of the Department of the Interior covering public disclosure of data and information contained in Department of the Interior records. Certain mineral information not protected from disclosure under part 2 may be made available for inspection without a Freedom of Information Act (FOIA) request.

§ 3255.11 When I submit confidential, proprietary information, how can I help ensure it is not available to the public?

When you submit data and information that you believe to be exempt from disclosure by 43 CFR part 2, you must clearly mark each page that you believe contains confidential information. BLM will keep all data and information confidential to the extent allowed by 43 CFR 2.13(c).

§ 3255.12 How long will information I give BLM remain confidential or proprietary?

The FOIA (5 U.S.C. 552) does not provide a finite period of time during which information may be exempt from public disclosure. BLM will review each situation individually and in accordance with part 2 of this title.

§ 3255.13 How will BLM treat Indian information submitted under the Indian Mineral Development Act?

Under the Indian Mineral Development Act of 1982 (IMDA) (25 U.S.C. 2101 *et seq.*), the Department of the Interior will hold as privileged proprietary information of the affected Indian or Indian tribe:

(a) All findings forming the basis of the Secretary's intent to approve or disapprove any Minerals Agreement under IMDA; and

(b) All projections, studies, data, or other information concerning a Minerals Agreement under IMDA, regardless of the date received, related to:

(1) The terms, conditions, or financial return to the Indian parties;

(2) The extent, nature, value, or disposition of the Indian mineral resources; or

(3) The production, products, or proceeds thereof.

§ 3255.14 How will BLM administer information concerning other Indian minerals?

For information concerning Indian minerals not covered by § 3255.13, BLM will withhold such records as may be withheld under an exemption to the FOIA when it receives a request for information related to tribal or Indian minerals held in trust or subject to restrictions on alienation.

§ 3255.15 When will BLM consult with Indian mineral owners when information concerning their minerals is the subject of a FOIA request?

(a) We use the standards and procedures of § 2.15(d) of this title before making a decision about the applicability of FOIA exemption 4 to information obtained from a person outside the United States Government.

(b) BLM will notify the Indian mineral owner(s) identified in the records of the Bureau of Indian Affairs (BIA), and BIA, and give them a reasonable period of time to state objections to disclosure. BLM will issue this notice following consultation with a submitter under § 2.15(d) of this title if:

(1) BLM determines that the submitter does not have an interest in withholding the records that can be protected under FOIA; and

(2) BLM has reason to believe that disclosure of the information may result in commercial or financial injury to the Indian mineral owner(s), but is uncertain that such is the case.

Subpart 3256—Exploration Operations Relief and Appeals

§ 3256.10 How do I request a variance from BLM requirements that apply to my exploration operations?

(a) You may submit a request for a variance for your exploration operations from any requirement in § 3200.4. Your request must include enough information to explain:

(1) Why you cannot comply with the regulatory requirement; and

(2) Why you need the variance to control your well, conserve natural resources, or protect public health and safety, property, or the environment.

(b) BLM may approve your request orally or in writing. If we give you an oral approval, we will follow up with written confirmation.

§ 3256.11 How may I appeal a BLM decision regarding my exploration operations?

You may appeal a BLM decision regarding your exploration operations in accordance with § 3200.5.

Subpart 3260—Geothermal Drilling Operations—General

§ 3260.10 What types of geothermal drilling operations are covered by these regulations?

(a) The regulations in subparts 3260 through 3267 of this part establish permitting and operating procedures for drilling wells and conducting related activities for the purposes of performing flow tests, producing geothermal fluids, or injecting fluids into a geothermal reservoir. These subparts also address redrilling, deepening, plugging back, and other subsequent well operations.

(b) The operations regulations in subparts 3260 through 3267 of this part do not address conducting exploration operations, which are covered in subpart 3250 of this part, or geothermal resources utilization, which is covered in subpart 3270 of this part.

§ 3260.11 What general standards apply to my drilling operations?

Your drilling operations must:

(a) Meet all environmental and operational standards;

(b) Prevent unnecessary impacts on surface and subsurface resources;

(c) Conserve geothermal resources and minimize waste;

(d) Protect public health, safety, and property; and

(e) Comply with the requirements of § 3200.4.

§ 3260.12 What other orders or instructions may BLM issue?

BLM may issue:

(a) Geothermal resource operational orders for detailed requirements that apply nationwide;

(b) Notices to Lessees for detailed requirements on a statewide or regional basis;

(c) Other orders and instructions specific to a field or area;

(d) Permit conditions of approval; and

(e) Oral orders, which will be confirmed in writing.

Subpart 3261—Drilling Operations: Getting a Permit

§ 3261.10 How do I get approval to begin well pad construction?

(a) If you do not have an approved geothermal drilling permit, Form 3260–2, apply using a completed and signed Sundry Notice, Form 3260–3, to build well pads and access roads. Send us a complete operations plan (see § 3261.12) and an acceptable bond with your Sundry Notice. You may start well pad construction after we approve your Sundry Notice.

(b) If you already have an approved drilling permit and you have provided an acceptable bond, you do not need any further permission from BLM to start well pad construction, unless you intend to change something in the approved permit. If you propose a change in an approved permit, send us a completed and signed Sundry Notice so we may review your proposed change. Do not proceed with the change until we approve your Sundry Notice.

§ 3261.11 How do I apply for approval of drilling operations and well pad construction?

(a) Send to BLM:

(1) A completed and signed drilling permit application, Form 3260–2;

(2) A complete operations plan (§ 3261.12);

(3) A complete drilling program (§ 3261.13); and

(4) An acceptable bond (§ 3261.18).

(b) Do not start any drilling operations until after BLM approves the permit.

§ 3261.12 What is an operations plan?

An operations plan describes how you will drill for and test the geothermal resources covered by your lease. Your plan must tell BLM enough about your proposal to allow us to assess the environmental impacts of your operations. This information should generally include:

(a) Well pad layout and design;

(b) A description of existing and planned access roads;

(c) A description of any ancillary facilities;

(d) The source of drill pad and road building material;

(e) The water source;

(f) A statement describing surface ownership;

(g) A description of procedures to protect the environment and other resources;

(h) Plans for surface reclamation; and

(i) Any other information that BLM may require.

§ 3261.13 What is a drilling program and how do I apply for drilling program approval?

(a) A drilling program describes all the operational aspects of your proposal to drill, complete and test a well.

(b) Send to BLM:

(1) A detailed description of the equipment, materials, and procedures you will use;

(2) The proposed/anticipated depth of the well;

(3) If you plan to directionally drill your well, also send us:

(i) The proposed bottom hole location and distances from the nearest section or tract lines;

(ii) The kick-off point;

(iii) The direction of deviation;

(iv) The angle of build-up and maximum angle; and

(v) Plan and cross section maps indicating the surface and bottom hole locations;

(4) The casing and cementing program;

(5) The circulation media (mud, air, foam, etc.);

(6) A description of the logs that you will run;

(7) A description and diagram of the blowout prevention equipment you will use during each phase of drilling;

(8) The expected depth and thickness of fresh water zones;

(9) Anticipated lost circulation zones;

(10) Anticipated reservoir temperature and pressure;

(11) Anticipated temperature gradient in the area;

(12) A plat certified by a licensed surveyor showing the surveyed surface location and distances from the nearest section or tract lines;

(13) Procedures and durations of well testing; and

(14) Any other information we may require.

§ 3261.14 When must I give BLM my operations plan?

Send us a complete operations plan before you begin any surface disturbance on a lease. You do not need to submit an operations plan for subsequent well operations or altering existing production equipment, unless these activities will cause more surface disturbance than originally approved, or we notify you that you must submit an operations plan. Do not start any activities that will result in surface disturbance until we approve your permit or Sundry Notice.

§ 3261.15 Must I give BLM my drilling permit application, drilling program, and operations plan at the same time?

You may submit your completed and signed drilling permit application and complete drilling program and operations plan either together or separately.

(a) If you submit them together and we approve your drilling permit, the approved drilling permit will authorize both the pad construction and the drilling and testing of the well.

(b) If you submit the operations plan separately from the drilling permit application and program, you must:

(1) Submit the operations plan before the drilling permit application and drilling program to allow BLM time to comply with NEPA; and

(2) Submit a completed and signed Sundry Notice for well pad and access road construction. Do not begin construction until we approve your Sundry Notice.

§ 3261.16 Can my operations plan, drilling permit, and drilling program apply to more than one well?

(a) Your operations plan and drilling program can sometimes be combined to cover several wells, but your drilling permit cannot. To include more than one well in your operations plan, give us adequate information for all well sites, and we will combine your plan to cover those well sites that are in areas of similar geology and environment.

(b) Your drilling program may also apply to more than one well, provided you will drill the wells in the same manner, and you expect to encounter similar geologic and reservoir conditions.

(c) You must submit a separate geothermal drilling permit application for each well.

§ 3261.17 How do I amend my operations plan or drilling permit?

(a) If BLM has not yet approved your operations plan or drilling permit, send us your amended plan and completed and signed permit application.

(b) To amend an approved operations plan or drilling permit, submit a completed and signed Sundry Notice describing your proposed change. Do not start any amended operations until after BLM approves your drilling permit or Sundry Notice.

§ 3261.18 Do I need to file a bond with BLM before I build a well pad or drill a well?

Before starting any operation, you must:

(a) File with BLM either a surety or personal bond in the following minimum amount:

(1) $10,000 for a single lease;

(2) $50,000 for all of your operations within a state; or

(3) $150,000 for all of your operations nationwide;

(b) Get our approval of your surety or personal bond; and

(c) To cover any drilling operations on all leases committed to a unit, either submit a bond for that unit in an amount we specify, or provide a rider to a statewide or nationwide bond specifically covering the unit in an amount we specify.

(d) See subparts 3214 and 3215 of this part for additional details on bonding procedures.

§ 3261.19 When will BLM release my bond?

BLM will release your bond after you request it and we determine that you have:

(a) Plugged and abandoned all wells;

(b) Reclaimed the surface and other resources; and

(c) Met all the requirements of § 3200.4.

§ 3261.20 How will BLM review applications submitted under this subpart and notify me of its decision?

(a) When we receive your operations plan, we will make sure it is complete and review it for compliance with the requirements of § 3200.4.

(b) If another Federal agency manages the surface of your lease, we will consult with them before we approve your drilling permit.

(c) We will review your drilling permit and drilling program or your Sundry Notice for well pad construction, to make sure they conform with your operations plan and any mitigation measures we developed while reviewing your plan.

(d) We will check your drilling permit and drilling program for technical adequacy and we may require additional information.

(e) We will check your drilling permit for compliance with the requirements of § 3200.4.

(f) If we need any further information to complete our review, we will contact you in writing and suspend our review until we receive the information.

(g) After our review, we will notify you as to whether your permit has been approved or denied, as well as any conditions of approval.

§ 3261.21 How do I get approval to change an approved drilling operation?

(a) Send BLM a Sundry Notice, form 3260–3, describing the proposed changes. Do not proceed with the changes until we have approved them in writing, except as provided in paragraph (c) of this section. If your operations such as redrilling, deepening, drilling a new directional leg, or plugging back a well would significantly change your approved permit, BLM may require you to send us a new drilling permit (see 43 CFR 3261.13). A significant change would be, for example, redrilling the well to a completely different target, especially a target in an unknown area.

(b) If your changed drilling operation would cause additional surface disturbance, we may also require you to submit an amended operations plan.

(c) If immediate action is required to properly continue drilling operations, or to protect public health, safety, property or the environment, BLM may provide oral approval to change an approved drilling operation. However, you must submit a written Sundry Notice within 48 hours after we orally approve your change.

§ 3261.22 How do I get approval for subsequent well operations?

Send BLM a Sundry Notice describing your proposed operation. For some routine work, such as cleanouts, surveys, or general maintenance (see § 3264.11(b)), we may waive the Sundry Notice requirement. Contact your local BLM office to ask about waivers for subsequent well operations. Unless you receive a waiver, you must submit a Sundry Notice. Do not start your operations until we grant a waiver or approve the Sundry Notice.

Subpart 3262—Conducting Drilling Operations

§ 3262.10 What operational requirements must I meet when drilling a well?

(a) When drilling a well, you must keep the well under control at all times by:

(1) Conducting training during your operation to maintain the capability of your personnel to perform emergency procedures quickly and effectively;

(2) Using properly maintained equipment; and

(3) Using operational practices that allow for quick and effective emergency response.

(b) You must use sound engineering principles and take into account all pertinent data when:

(1) Selecting and using drilling fluid types and weights;

(2) Designing and implementing a system to control fluid temperatures;

(3) Designing and using blowout prevention equipment; and

(4) Designing and implementing a casing and cementing program.

(c) Your operation must always comply with the requirements of § 3200.4.

§ 3262.11 What environmental requirements must I meet when drilling a well?

(a) You must conduct your operations in a manner that:

(1) Protects the quality of surface and subsurface water, air, natural resources, wildlife, soil, vegetation, and natural history;

(2) Protects the quality of cultural, scenic, and recreational resources;

(3) Accommodates, as necessary, other land uses;

(4) Minimizes noise; and

(5) Prevents property damage and unnecessary or undue degradation of the lands.

(b) You must remove or, with BLM's approval, properly store all equipment and materials that are not in use.

(c) You must retain all fluids from drilling and testing the well in properly designed pits, sumps, or tanks.

(d) When you no longer need a pit or sump, you must abandon it and restore the site as we direct you to.

(e) BLM may require you to give us a contingency plan showing how you will protect public health and safety, property, and the environment.

§ 3262.12 Must I post a sign at every well?

Yes. Before you begin drilling a well, you must post a sign in a conspicuous place and keep it there throughout operations until the well site is reclaimed. Put the following information on the sign:

(a) The lessee or operator's name;

(b) Lease serial number;

(c) Well number; and

(d) Well location described by township, range, section, quarter-quarter section or lot.

§ 3262.13 May BLM require me to follow a well spacing program?

BLM may require you to follow a well spacing program if we determine that it is necessary for proper development. If we require well spacing, we will consider the following factors when we set well spacing:

(a) Hydrologic, geologic, and reservoir characteristics of the field, minimizing well interference;

(b) Topography;

(c) Interference with multiple use of the land; and

(d) Environmental protection, including ground water.

§ 3262.14 May BLM require me to take samples or perform tests and surveys?

(a) BLM may require you to take samples or to test or survey the well to determine:

(1) The well's mechanical integrity;

(2) The identity and characteristics of formations, fluids or gases;

(3) Presence of geothermal resources, water, or reservoir energy;

(4) Quality and quantity of geothermal resources;

(5) Well bore angle and direction of deviation;

(6) Formation, casing, or tubing pressures;

(7) Temperatures;

(8) Rate of heat or fluid flow; and

(9) Any other necessary well information.

(b) See § 3264.11 for information reporting requirements.

Subpart 3263—Well Abandonment

§ 3263.10 May I abandon a well without BLM's approval?

(a) You must have a BLM-approved Sundry Notice documenting your plugging and abandonment program before you start abandoning any well.

(b) You must also notify the local BLM office before you begin abandonment activities, so that we may witness the work. Contact your local BLM office before starting to abandon your well to find out what notification we need.

§ 3263.11 What information must I give BLM to approve my Sundry Notice for abandoning a well?

Send us a Sundry Notice with:

(a) All the information required in the well completion report (see § 3264.10), unless we already have that information;

(b) A detailed description of the proposed work, including:

(1) Type, depth, length, and interval of plugs;

(2) Methods you will use to verify the plugs (tagging, pressure testing, etc.);

(3) Weight and viscosity of mud that you will use in the uncemented portions;

(4) Perforating or removing casing; and

(5) Restoring the surface; and

(c) Any other information that we may require.

§ 3263.12 How will BLM review my Sundry Notice to abandon my well and notify me of their decision?

(a) When BLM receives your Sundry Notice, we will make sure it is complete and review it for compliance with the requirements of § 3200.4. We will notify you if we need more information or require additional procedures. If we need any further information to complete our review, we will contact you in writing and suspend our review until we receive the information. If we approve your Sundry Notice, we will send you an approved copy once our review is complete. Do not start abandonment of the well until we approve your Sundry Notice.

(b) BLM may orally approve plugging procedures for a well requiring immediate action. If we do, you must submit the information required in § 3263.11 within 48 hours after we give oral approval.

§ 3263.13 What must I do to restore the site?

You must remove all equipment and materials and restore the site according to the terms of your permit or other BLM approval.

§ 3263.14 May BLM require me to abandon a well?

If we determine that your well is no longer needed for geothermal resource production, injection, or monitoring, or if we determine that the well is not mechanically sound, BLM may order you to abandon the well. In either case, if you disagree you may explain to us why the well should not be abandoned. We will consider your reasons before we issue any final order.

§ 3263.15 May I abandon a producible well?

(a) You may abandon a producible well only after you receive BLM's approval. Before abandoning a producing well, send BLM the information listed in § 3263.11. We may also require you to explain why you want to abandon the well.

(b) BLM will deny your request if we determine that the well is needed:

(1) To protect a Federal lease from drainage; or

(2) To protect the environment or other resources of the United States.

Subpart 3264—Reports—Drilling Operations

§ 3264.10 What must I submit to BLM when I complete a well?

You must submit a Geothermal Well Completion Report, Form 3260–4, within 30 days after you complete a well. Your report must include the following:

(a) A complete, chronological well history;

(b) A copy of all logs;

(c) Copies of all directional surveys; and

(d) Copies of all mechanical, flow, reservoir, and other test data.

§ 3264.11 What must I submit to BLM after I finish subsequent well operations?

(a) Submit to BLM a subsequent well operations report within 30 days after completing operations. At a minimum, this report must include:

(1) A complete, chronological history of the work done;

(2) A copy of all logs;

(3) Copies of all directional surveys;

(4) The results of all sampling, tests, or surveys we require you to make (see § 3262.14);

(5) Copies of all mechanical, flow, reservoir, and other test data; and

(6) A statement of whether you achieved your goals. For example, if the well was acidized to increase production, state whether the production rate increased when you put the well back on line.

(b) We may waive this reporting requirement for work we determine to

be routine, such as cleanouts, surveys, or general maintenance. To request a waiver, contact BLM. If you do not receive a waiver, you must submit the report.

§ 3264.12 What must I submit to BLM after I abandon a well?

Send us a well abandonment report within 30 days after you abandon a well. If you plan to restore the site at a later date, you may submit a separate report within 30 days after completing site restoration. The well abandonment report must contain:

(a) A complete chronology of all work done;

(b) A description of each plug, including:

(1) Type and amount of cement used;

(2) Depth that the drill pipe or tubing was run to set the plug;

(3) Depth to top of plug; and

(4) If the plug was verified, whether it was done by tagging or pressure testing; and

(c) A description of surface restoration procedures.

§ 3264.13 What drilling and operational records must I maintain for each well?

You must keep the following information for each well, and make it available for BLM to inspect, upon request:

(a) A complete and accurate drilling log, in chronological order;

(b) All other logs;

(c) Water or steam analyses;

(d) Hydrologic or heat flow tests;

(e) Directional surveys;

(f) A complete log of all subsequent well operations, such as cementing, perforating, acidizing, and well cleanouts; and

(g) Any other information regarding the well that could affect its status.

§ 3264.14 How do I notify BLM of accidents occurring on my lease?

You must orally inform us of all accidents that affect operations or create environmental hazards within 24 hours of the accident. When you contact us, we may require you to submit a written report fully describing the incident.

Subpart 3265—Inspection, Enforcement, and Noncompliance for Drilling Operations

§ 3265.10 What part of my drilling operations may BLM inspect?

(a) BLM may inspect all of your Federal drilling operations regardless of surface ownership. We will inspect your operations for compliance with the requirements of § 3200.4.

(b) BLM may inspect all of your maps, well logs, surveys, records, books, and accounts related to your Federal drilling operations.

§ 3265.11 What records must I keep available for inspection?

You must keep a complete record of all aspects of your activities related to your drilling operation available for our inspection. Store these records in a place which makes them conveniently available to us. Examples of records which we may inspect include:

(a) Well logs, maps;

(b) Records, books, and accounts related to your Federal drilling operations;

(b) Directional surveys;

(c) Records pertaining to casing type and setting;

(d) Records pertaining to formations penetrated;

(e) Well test results;

(f) Records pertaining to characteristics of the geothermal resource;

(g) Records pertaining to emergency procedure training; and

(h) Records pertaining to operational problems.

§ 3265.12 What will BLM do if my operations do not comply with my permit and applicable regulations?

(a) We will issue you a written Incident of Noncompliance, directing you to take required corrective action within a specific time period. If the noncompliance continues or is of a serious nature, we will take one or more of the following actions:

(1) Enter your lease, and correct any deficiencies at your expense;

(2) Collect all or part of your bond;

(3) Direct modification or shutdown of your operations; and

(4) Take other enforcement action under subpart 3213 against a lessee who is ultimately responsible for noncompliance.

(b) Noncompliance may result in BLM terminating your lease. See §§ 3213.17 through 3213.19.

Subpart 3266—Confidential, Proprietary Information

§ 3266.10 Will BLM disclose information I submit under these regulations?

All Federal and Indian data and information submitted to the BLM are subject to part 2 of this title. Part 2 includes the Department of the Interior regulations covering public disclosure of data and information contained in Department records. Certain mineral information not protected from disclosure under part 2 of this title may be made available for inspection without a Freedom Of Information Act (FOIA) request. BLM will not treat surface location, surface elevation, or well status information as confidential.

§ 3266.11 When I submit confidential, proprietary information, how can I help ensure that it is not available to the public?

When you submit data and information that you believe to be exempt from disclosure by part 2 of this title, you must clearly mark each page that you believe contains confidential information. BLM will keep all data and information confidential to the extent allowed by § 2.13(c) of this title.

§ 3266.12 How long will information that I give BLM remain confidential or proprietary?

The FOIA does not provide a finite period of time during which information may be exempt from public disclosure. BLM reviews each situation individually and in accordance with part 2 of this title.

Subpart 3267—Geothermal Drilling Operations Relief and Appeals

§ 3267.10 How do I request a variance from BLM requirements that apply to my drilling operations?

(a) You may file a request for a variance from the requirements of § 3200.4 for your approved drilling operations. Your request must include enough information to explain:

(1) Why you cannot comply with the requirements of § 3200.4; and

(2) Why you need the variance to control your well, conserve natural resources, or protect public health and safety, property, or the environment.

(b) We may approve your request orally or in writing. If BLM gives you an oral approval, we will follow up with written confirmation.

§ 3267.11 How may I appeal a BLM decision regarding my drilling operations?

You may appeal our decisions regarding your drilling operations in accordance with § 3200.5.

Subpart 3270—Utilization of Geothermal Resources—General

§ 3270.10 What types of geothermal operations are governed by these utilization regulations?

(a) The regulations in subparts 3270 through 3279 of this part cover the permitting and operating procedures for the utilization of geothermal resources. This includes:

(1) Electrical generation facilities;

(2) Direct use facilities;

(3) Related utilization facility operations;

(4) Actual and allocated well field production and injection; and

(5) Related well field operations.

(b) The utilization regulations in subparts 3270 through 3279 of this part do not address conducting exploration operations, which is covered in subpart 3250 of this part, or drilling wells intended for production or injection, which is covered in subpart 3260 of this part.

§ 3270.11 What general standards apply to my utilization operations?

Your utilization operations must:

(a) Meet all operational and environmental standards;

(b) Prevent unnecessary impacts on surface and subsurface resources;

(c) Result in the maximum ultimate recovery;

(d) Result in the beneficial use of geothermal resources, with minimum waste;

(e) Protect public health, safety, and property; and

(f) Comply with the requirements of § 3200.4.

§ 3270.12 What other orders or instructions may BLM issue?

BLM may issue:

(a) Geothermal resource operational orders, for detailed requirements that apply nationwide;

(b) Notices to lessees, for detailed requirements on a statewide or regional basis;

(c) Other orders and instructions specific to a field or area;

(d) Permit conditions of approval; and

(e) Oral orders, which BLM will confirm in writing.

Subpart 3271—Utilization Operations: Getting a Permit

§ 3271.10 What do I need to start preparing a site and building and testing a utilization facility on Federal land leased for geothermal resources?

In order to use Federal land to produce geothermal power, you must obtain a site license and construction permit from BLM before you start preparing the site. Send BLM a plan that shows what you want to do, and draft a proposed site license agreement that you think is fair and reasonable. We will review your proposal and decide whether to give you a permit and license to proceed with work on the site.

§ 3271.11 Who may apply for a permit to build a utilization facility?

The lessee, the facility operator, or the unit operator may apply to build a utilization facility.

§ 3271.12 What do I need to start preliminary site investigations that may disturb the surface?

(a) You must:

(1) Fully describe your proposed operations in a Sundry Notice; and

(2) File a bond meeting the requirements of either § 3251.14 or § 3273.19. See subparts 3214 and 3215 of this part for additional details on bonding procedures.

(b) Do not begin the site investigation or surface disturbing activity until BLM approves your Sundry Notice and bond.

§ 3271.13 How do I obtain approval to build pipelines and facilities connecting the well field to utilization facilities not located on Federal lands leased for geothermal resources?

Before constructing pipelines and well field facilities on Federal lands leased for geothermal resources, you as lessee, unit operator, or facility operator must submit to BLM a utilization plan and facility construction permit addressing any pipelines or facilities. Do not start construction of your pipelines or facilities until BLM approves your facility construction permit.

§ 3271.14 What do I need to do to start building and testing a utilization facility if it is not located on Federal lands leased for geothermal resources?

(a) You do not need a BLM permit to construct a facility located on either:

(1) Private land; or

(2) Lands where the surface is privately owned and BLM has leased the underlying Federal geothermal resources, when the facility will utilize Federal geothermal resources.

(b) Before testing a utilization facility that is not located on Federal lands leased for geothermal resources, send us a Sundry Notice describing the testing schedule and the quantity of Federal geothermal resources you expect to be delivered to the facility during the testing. Do not start delivering Federal geothermal resources to the facility until we approve your Sundry Notice.

§ 3271.15 How do I get a permit to begin commercial operations?

Before using Federal geothermal resources, you as lessee, operator, or facility operator must send us a completed commercial use permit (see § 3274.11). This also applies when you use Federal resources allocated through any form of agreement. Do not start any commercial use operations until BLM approves your commercial use permit.

Subpart 3272—Utilization Plans and Facility Construction Permits?

§ 3272.10 What must I submit to BLM in my utilization plan?

Submit to BLM an application describing:

(a) The proposed facilities as set out in § 3272.11; and

(b) The anticipated environmental impacts and how you propose to mitigate those impacts, as set out at § 3272.12.

§ 3272.11 How do I describe the proposed utilization facility?

Your submission must include:

(a) A generalized description of all proposed structures and facilities, including their size, location, and function;

(b) A generalized description of proposed facility operations, including estimated total production and injection rates; estimated well flow rates, pressures, and temperatures; facility net and gross electrical generation; and, if applicable, interconnection with other utilization facilities. If it is a direct use facility, send us the information we need to determine the amount of resource utilized;

(c) A contour map of the entire utilization site, showing production and injection well pads, pipeline routes, facility locations, drainage structures, existing and planned access, and lateral roads;

(d) A description of site preparation and associated surface disturbance, including the source for site or road building materials, amounts of cut and fill, drainage structures, analysis of all site evaluation studies prepared for the site(s), and a description of any additional tests, studies, or surveys which are planned to assess the geologic suitability of the site(s);

(e) The source, quality, and proposed consumption rate of water to be used during facility operations, and the source and quantity of water to be used during facility construction;

(f) The methods for meeting air quality standards during facility construction and operation, especially standards concerning non-condensable gases;

(g) An estimated number of personnel needed during construction and operation of the facility;

(h) A construction schedule;

(i) A schedule for testing of the facility and/or well equipment, and for the start of commercial operations;

(j) A description of architectural landscaping or other measures to minimize visual impacts; and

(k) Any additional information or data that we may require.

§ 3272.12 What environmental protection measures must I include in my utilization plan?

(a) Describe, at a minimum, your proposed measures to:

(1) Prevent or control fires;

(2) Prevent soil erosion;

(3) Protect surface or ground water;
(4) Protect fish and wildlife;
(5) Protect cultural, visual, and other natural resources;
(6) Minimize air and noise pollution; and
(7) Minimize hazards to public health and safety during normal operations.

(b) If BLM requires it, you must also describe how you will monitor your facility operations to ensure that they comply with the requirements of § 3200.4, and applicable noise, air, and water quality standards, at all times. We will consult with other involved surface management agencies, if any, regarding monitoring requirements. You must also include provisions for monitoring other environmental parameters we may require.

(c) Based on what level of impacts that BLM finds your operations may cause, we may require you to collect data concerning existing air and water quality, noise, seismicity, subsidence, ecological systems, or other environmental information for up to one year before you begin operating. BLM must approve your data collection methodologies, and will consult with any other surface managing agencies involved.

(d) You must also describe how you will abandon utilization facilities and restore the site, in order to comply with the requirements of § 3200.4.

(e) Finally, you must submit any additional information or data that BLM may require.

§ 3272.13 How will BLM review my utilization plan and notify me of its decision?

(a) When BLM receives your utilization plan, we will make sure it is complete and review it for compliance with § 3200.4.

(b) If another Federal agency manages the surface of your lease, we will consult with that agency as part of the plan review.

(c) If we need any further information to complete our review, we will contact you in writing and suspend our review until we receive the information.

(d) We will notify you in writing of our decision on your plan.

§ 3272.14 How do I get a permit to build or test my facility?

(a) Before building or testing a utilization facility, you must submit to BLM a:

(1) Utilization plan;

(2) Completed and signed facility construction permit; and

(3) Completed and signed site license. (See subpart 3273 of this part.)

(b) Do not start building or testing your utilization facility until we have approved both your facility construction permit and your site license.

(c) After our review, we will notify you whether we have approved or denied your permit, as well as of any conditions we require for conducting operations.

Subpart 3273—How To Apply for a Site License

§ 3273.10 When do I need a site license for a utilization facility?

You must obtain a site license approved by BLM, unless your facility will be located on lands leased as provided in § 3273.11. Do not start building or testing your utilization facility on public lands leased for geothermal resources until BLM has approved both your facility construction permit (see § 3272.14) and your site license. The facility operator must apply for the license.

§ 3273.11 When is a site license unnecessary?

You do not need a site license if your facility will be located:

(a) On private land or on split estate land where the United States does not own the surface; or

(b) On Federal land not leased for geothermal resources. In this situation, the Federal surface management agency will issue you the permit you need.

§ 3273.12 How will BLM review my site license application?

(a) When BLM receives your site license application, we will make sure it is complete. If we need more information for our review, we will ask you for that information and stop our review until we receive the information.

(b) If your site license is located on leased lands managed by the Department of Agriculture, we will consult with that agency and obtain concurrence before we approve your application. The agency may require additional license terms and conditions.

(c) If the land is subject to section 24 of the Federal Power Act, we will issue the site license with the terms and conditions requested by the Federal Energy Regulatory Commission.

(d) If another Federal agency manages the surface, we will consult with them to determine if they recommend additional license terms and conditions.

(e) After our review, we will notify you whether we approved or denied your license, as well as any additional conditions we require.

§ 3273.13 What lands are not available for geothermal site licenses?

BLM will not issue site licenses for lands that are not leased or not available for geothermal leasing (see § 3201.11).

§ 3273.14 What area does a site license cover?

A site license covers a reasonably compact tract of Federal land, limited to as much of the surface as is necessary to utilize geothermal resources. That means the site license area will only include the utilization facility itself and other necessary structures, such as substations and processing, repair, or storage facility areas.

§ 3273.15 What must I include in my site license application?

Your site license application must include:

(a) A description of the boundaries of the land applied for, as determined by a certified licensed surveyor. Describe the land by legal subdivision, section, township and range, or by approved protraction surveys, if applicable;

(b) The affected acreage;

(c) A non-refundable filing fee of $50;

(d) A site license bond (see § 3273.19);

(e) The first year's rent, if applicable (see § 3273.18); and

(f) Documentation that the lessee or unit operator accepts the siting of the facility, if the facility operator is neither the lessee nor the unit operator.

§ 3273.16 What is the annual rent for a site license?

BLM will specify the annual rent in your license and the date you must pay it, if you are required to pay rent (see § 3273.18). Your rent will be at least $100 per acre or fraction thereof for an electrical generation facility, and at least $10 per acre or fraction thereof for a direct use facility. Send the first year's rent to BLM, and all subsequent rental payments to MMS under 30 CFR part 218.

§ 3273.17 When may BLM reassess the annual rent for my site license?

BLM may reassess the rent for lands covered by the license, beginning with the tenth year and every ten years after that.

§ 3273.18 What facility operators must pay the annual site license rent?

If you are a lessee siting a utilization facility on your own lease, or a unit operator siting a utilization facility on leases committed to the unit, you are not required to pay rent. Only a facility operator who is not also a lessee or unit operator must pay rent.

§ 3273.19 What are the bonding requirements for a site license?

(a) For an electrical generation facility, the facility operator must submit a surety or personal bond to BLM for at least $100,000 that meets the requirements of subpart 3214 of this

part. BLM may increase the required bond amount. See subparts 3214 and 3215 of this part for additional details on bonding procedures.

(b) For a direct use facility, the facility operator must submit a surety or personal bond to BLM that meets the requirements of subpart 3214 of this part in an amount BLM will specify.

(c) The bond's terms must cover compliance with the requirements of § 3200.4.

(d) Until BLM approves your bond, do not start construction, testing, or any other activity that would disturb the surface.

§ 3273.20 When will BLM release my bond?

We will release your bond after you request it and we determine that you have:

(a) Removed the utilization facility and all associated equipment;

(b) Reclaimed the land; and

(c) Met all the requirements of § 3200.4.

§ 3273.21 What are my obligations under the site license?

As the facility operator, you:

(a) Must comply with the requirements of § 3200.4;

(b) Are liable for all damages to the lands, property, or resources of the United States caused by yourself, your employees, or your contractors or their employees;

(c) Must indemnify the United States against any liability for damages or injury to persons or property arising from the occupancy or use of the lands authorized under the site license; and

(d) Must restore any disturbed surface, and remove all structures when they are no longer needed for facility construction or operation. This includes the utilization facility if you cannot operate the facility and you are not diligent in your efforts to return the facility to operation.

§ 3273.22 How long will my site license remain in effect?

(a) The primary term of a site license is 30 years, with a preferential right to renew the license under terms and conditions set by BLM.

(b) If your lease on which the licensed site is located ends, you may apply for a facility permit under Section 501 of FLPMA, 43 U.S.C. 1761, if your facility is on BLM-managed lands. Otherwise, you must get permission from the surface management agency to continue using the surface for your facility.

§ 3273.23 May I renew my site license?

(a) You have a preferential right to renew your site license under terms and conditions BLM determines.

(b) If your site license is located on leased lands managed by the Department of Agriculture, we will consult with the surface management agency and obtain concurrence before renewing your license. The agency may require additional license terms and conditions. If another Federal agency manages the surface, we will consult with them before granting your renewal.

§ 3273.24 When may BLM terminate my site license?

(a) BLM may terminate a site license by written order. We may terminate your site license if you:

(1) Do not comply with the requirements of § 3270.11; or

(2) Do not comply with the requirements of § 3200.4.

(b) To prevent termination, you must correct the violation within 30 days after you receive a correction order from BLM, unless we determine that:

(1) The violation cannot be corrected within 30 days; and

(2) You are diligently attempting to correct it.

§ 3273.25 When may I relinquish my site license?

You may relinquish your site license by sending BLM a written notice requesting relinquishment for review and approval. We will not approve the relinquishment until you comply with § 3273.21.

§ 3273.26 When may I assign or transfer my site license?

You may assign or transfer your site license in whole or in part. Send BLM your completed and signed transfer application and a $50 filing fee. Your application must include a written statement that the transferee will comply with all license terms and conditions, and that the lessee accepts the transfer. The transferee must submit a bond meeting the requirements of § 3273.19. The transfer is not effective until we approve the bond and site license transfer.

Subpart 3274—Applying for and Obtaining a Commercial Use Permit

§ 3274.10 Do I need a commercial use permit to start commercial operations?

You must have a commercial use permit approved by BLM before you begin commercial operations from a Federal lease, a Federal unit, or a utilization facility.

§ 3274.11 What must I give BLM to approve my commercial use permit application?

Submit a completed and signed commercial permit form, to BLM, containing the following information:

(a) The design specifications, and the inspection and calibration schedule of production, injection, and royalty meters;

(b) A schematic diagram of the utilization site or individual well, showing the location of each production and royalty meter. If the sales point is located off the utilization site, give us a generalized schematic diagram of the electrical transmission or pipeline system, including meter locations;

(c) A copy of the sales contract for the sale and/or utilization of geothermal resources;

(d) A description and analysis of reservoir, production, and injection characteristics, including the flow rates, temperatures, and pressures of each production and injection well;

(e) A schematic diagram of each production and injection well showing the wellhead configuration, including meters;

(f) A schematic flow diagram of the utilization facility, including interconnections with other facilities, if applicable;

(g) A description of the utilization process in sufficient detail to enable BLM to determine whether the resource will be utilized in a manner consistent with law and regulations;

(h) The planned safety provisions for emergency shutdown to protect public health, safety, property, and the environment. This should include a schedule for the testing and maintenance of safety devices;

(i) The environmental and operational parameters that will be monitored during the operation of the facility and/or well(s); and

(j) Any additional information or data that we may require.

§ 3274.12 How will BLM review my commercial use permit application?

(a) When BLM receives your completed and signed commercial use permit application, we will make sure it is complete and review it for compliance with § 3200.4.

(b) If another Federal agency manages the surface of your lease, we will consult with that agency before we approve your commercial use permit.

(c) We will review your commercial use permit to make sure it conforms with your utilization plan and any mitigation measures we developed while reviewing your plan.

(d) We will check your commercial use permit for technical adequacy, and will ensure that your meters meet the accuracy standards (see §§ 3275.14 and 3275.15.)

(e) If we need any further information to complete our review, we will contact

you in writing and suspend our review until we receive the information.

(f) After our review, we will notify you whether your permit has been approved or denied, as well as any conditions of approval.

§ 3274.13 May I get a permit even if I cannot currently demonstrate I can operate within required standards?

Yes, but we may limit your operations to a prescribed set of activities and a set period of time, during which we will give you a chance to show you can operate within environmental and operational standards, based on actual facility and well data you collect. Send us a Sundry Notice to get BLM approval for extending your permit. If during this set time period you still cannot demonstrate your ability to operate within the required standards, we will terminate your authorization. You must then stop all operations and restore the surface to the standards we set in the termination notice.

Subpart 3275—Conducting Utilization Operations

§ 3275.10 How do I change my operations if I have an approved facility construction or commercial use permit?

Send BLM a completed and signed Sundry Notice describing your proposed change. Until we approve your Sundry Notice, you must continue to comply with the original permit terms.

§ 3275.11 What are a facility operator's obligations?

You must:

(a) Keep the facility in proper operating condition at all times by;

(1) Conducting training during your operation to ensure that your personnel are capable of performing emergency procedures quickly and effectively;

(2) Using properly maintained equipment; and,

(3) Using operational practices that allow for quick and effective emergency response.

(b) Base the design of the utilization facility siting and operation on sound engineering principles and other pertinent geologic and engineering data;

(c) Prevent waste of, or damage to, geothermal and other energy and minerals resources; and

(d) Comply with the requirements of § 3200.4.

§ 3275.12 What environmental and safety requirements apply to facility operations?

(a) You must perform all utilization facility operations in a manner that:

(1) Protects the quality of surface and subsurface waters, air, and other natural resources, including wildlife, soil, vegetation, and natural history;

(2) Prevents unnecessary or undue degradation of the lands;

(3) Protects the quality of cultural, scenic, and recreational resources;

(4) Accommodates other land uses as much as possible;

(5) Minimizes noise;

(6) Prevents injury; and

(7) Prevents damage to property.

(b) You must monitor facility operations to identify and address local environmental resources and concerns associated with your facility or lease operations.

(c) You must remove or, with BLM approval, properly store all equipment and materials not in use.

(d) You must properly abandon the facility and reclaim any disturbed surface to standards approved or prescribed by us, when the land is no longer needed for facility construction or operation.

(e) When we require, you must submit a contingency plan describing procedures to protect public health and safety, property, and the environment.

(f) You must comply with the requirements of § 3200.4.

§ 3275.13 How must the facility operator measure the geothermal resources?

The facility operator must:

(a) Measure all production, injection and utilization in accordance with methods and standards approved by BLM (see § 3275.15);

(b) Maintain and test all metering equipment. If your equipment is defective or out of tolerance, you must promptly recalibrate, repair, or replace it; and

(c) Determine the amount of production and/or utilization in accordance with methods and procedures approved by BLM (see § 3275.17).

§ 3275.14 What aspects of my geothermal operations must I measure?

(a) For all well operations, you must measure wellhead flow, wellhead temperature, and wellhead pressure.

(b) For all electrical generation facilities, you must measure:

(1) Steam and/or hot water flow entering the facility;

(2) Temperature of the water and/or steam entering the facility;

(3) Pressure of the water and/or steam entering the facility;

(4) Gross electricity generated;

(5) Net electricity at the facility tailgate;

(6) Electricity delivered to the sales point; and

(7) Temperature of the steam and/or hot water exiting the facility.

(c) For direct use facilities, you must measure:

(1) Flow of steam and/or hot water; and

(2) Temperature of the steam or water entering the facility.

(d) We may also require additional measurements, depending on the type of facility, the type and quality of the resource, and the terms of the sales contract.

§ 3275.15 How accurately must I measure my production and utilization?

It depends on whether you use a meter to calculate Federal production or royalty, and what quantity of resource you are measuring.

(a) For meters that you use to calculate Federal royalty:

(1) If the meter measures electricity, it must have an accuracy of ±0.25% or better of reading;

(2) If the meter measures steam flowing at more than 100,000 lbs/hr on a monthly basis, it must have an accuracy of ±2 percent or better of reading;

(3) If the meter measures steam flowing at less than 100,000 lbs/hr on a monthly basis, it must have an accuracy of ±4 percent or better of reading;

(4) If the meter measures water flowing at more than 500,000 lbs/hr on a monthly basis, it must have an accuracy of ±2 percent or better of reading;

(5) If the meter measures water flowing at 500,000 lbs/hr or less on a monthly basis, it must have an accuracy of ±4 percent or better of reading;

(6) If the meter measures heat content, it must have an accuracy of ±4%, or better; or

(7) If the meter measures two phase flow at any rate, BLM will determine and inform you of the meter accuracy requirements. You must obtain our prior written approval before installing and using meters for two phase flow.

(b) Any meters that you do not use to calculate Federal royalty are considered production meters, which must maintain an accuracy of ±5 percent or better.

(c) We may modify these requirements as necessary to protect the interests of the United States.

§ 3275.16 What standards apply to installing and maintaining meters?

(a) You must install and maintain all meters that we require, either according to the manufacturer's recommendations and specifications or paragraphs (b) through (e) of this section, whichever are more restrictive.

(b) If you use an orifice plate to calculate Federal royalty, the orifice plate installation must comply with "API Manual of Petroleum

Measurement Standards, Chapter 14, Section 3, Part 2, Fourth Edition, April 2000."

(c) For meters used to calculate Federal royalty, you must calibrate the meter against a known standard as follows:

(1) You must annually calibrate meters measuring electricity;

(2) You must calibrate meters measuring steam or hot water flow with a turbine, vortex, ultrasonics, or other linear devices, every six months, or as recommended by the manufacturer, whichever is more frequent; and

(3) You must calibrate meters measuring steam or hot water flow with an orifice plate, venturi, pitot tube, or other differential device, every month, and you must inspect and repair the primary device (orifice plate, venturi, pitot tube) annually.

(d) You must use calibration equipment that is more accurate than the equipment you are calibrating.

(e) BLM may modify any of these requirements as necessary to protect the resources of the United States.

§ 3275.17 What must I do if I find an error in a meter?

(a) If you find an error in a meter used to calculate Federal royalty, you must correct the error immediately and notify BLM by the next working day of its discovery.

(b) If the meter is not used to calculate Federal royalty, you must correct the error and notify us within 3 days of its discovery.

(c) If correcting the error will cause a change in the sales quantity of more than 2 percent for the month(s) in which the error occurred, you must adjust the sales quantity for that month(s) and submit an amended facility report to us within three working days.

§ 3275.18 May BLM require me to test for byproducts associated with geothermal resource production?

You must conduct any tests we require, including tests for byproducts, if we find it necessary to require such tests for a given operation.

§ 3275.19 How do I apply to commingle production?

To request approval to commingle production, send us a completed and signed Sundry Notice. We will review your request to commingle production from wells on your lease with production from your other leases or from leases where you do not have an interest. Do not commingle production until we have approved your Sundry Notice.

§ 3275.20 What will BLM do if I waste geothermal resources?

We will determine the amount of any resources you have lost through waste. If you did not take all reasonable precautions to prevent waste, we will require you to pay compensation based on the value of the lost production. If BLM finds that you have not adequately corrected the situation, we will follow the noncompliance procedures in § 3277.12.

§ 3275.21 May BLM order me to drill and produce wells on my lease?

BLM may order you to drill and produce wells on your lease when we find it necessary to protect Federal interests, prevent drainage, or ensure that lease development and production occur in accordance with sound operating practices.

Subpart 3276—Reports: Utilization Operations

§ 3276.10 What are the reporting requirements for facility and lease operations involving Federal geothermal resources?

(a) When you begin commercial production and operation, you must notify BLM in writing within 5 business days.

(b) Submit completed and signed monthly reports thereafter to BLM as follows:

(1) If you are a lessee or unit operator supplying Federal geothermal resources to a utilization facility on Federal land leased for geothermal resources, submit a monthly report of well operations for all wells on your lease or unit;

(2) If you are the operator of a utilization facility on Federal land leased for geothermal resources, submit a monthly report of facility operations;

(3) If you are both a lessee or unit operator and the operator of a utilization facility on Federal land leased for geothermal resources, you may combine the requirements of paragraphs (b)(1) and (b)(2) of this section into one report; or

(4) If you are a lessee or unit operator supplying Federal geothermal resources to a utilization facility not located on Federal land leased for geothermal resources, and the sales point for the resource utilized is at the facility tailgate, submit all the requirements of paragraphs (b)(1) and (b)(2) of this section. You may combine these into one report.

(c) Unless BLM grants a variance, your reports must be received by BLM by the end of the month following the month that the report covers. For example, the report covering the month of July is due by August 31.

§ 3276.11 What information must I include for each well in the monthly report of well operations?

(a) Any drilling operations or changes made to a well;

(b) Total production or injection in thousands of pounds (klbs);

(c) Production or injection temperature in degrees Fahrenheit (deg.F);

(d) Production or injection pressure in pounds per square inch (psi). You must also specify whether this is gauge pressure (psig) or absolute pressure (psia);

(e) The number of days the well was producing or injecting;

(f) The well status at the end of the month;

(g) The amount of steam or hot water lost to venting or leakage, if the amount is greater than 0.5 percent of total lease production. We may modify this standard by a written order describing the change;

(h) The lease number or unit name where the well is located;

(i) The month and year to which the report applies;

(j) Your name, title, signature, and a phone number where BLM may contact you; and

(k) Any other information that we may require.

§ 3276.12 What information must I give BLM in the monthly report for facility operations?

(a) For all electrical generation facilities, include in your monthly report of facility operations:

(1) Mass of steam and/or hot water, in klbs, used or brought into the facility. For facilities using both steam and hot water, you must report the mass of each;

(2) The temperature of the steam or hot water in deg. F;

(3) The pressure of the steam or hot water in psi. You must also specify whether this is psig or psia;

(4) Gross generation in kilowatt hours (kwh);

(5) Net generation at the tailgate of the facility in kwh;

(6) Temperature in deg. F and volume of the steam or hot water exiting the facility;

(7) The number of hours the plant was on line;

(8) A brief description of any outages; and

(9) Any other information we may require.

(b) For electrical generation facilities where Federal royalty is based on the sale of electricity to a utility, in addition to the information required under paragraph (a) of this section, you must include the following information in

your monthly report of facility operations:

(1) Amount of electricity delivered to the sales point in kwh, if the sales point is different from the tailgate of the facility;

(2) Amount of electricity lost to transmission;

(3) A report from the utility purchasing the electricity which documents the total number of kwhs delivered to the sales point during the month, or monthly reporting period if it is not a calendar month, and the number of kwhs delivered during diurnal and seasonal pricing periods; and

(4) Any other information we may require.

§ 3276.13 What additional information must I give BLM in the monthly report for flash and dry steam facilities?

In addition to the regular monthly report information required by § 3276.12, send to BLM:

(a) Steam flow into the turbine in klbs; for dual flash facilities, you must separate the steam flow into high pressure steam and low pressure steam;

(b) Condenser pressure in psia;

(c) Condenser temperature in deg. F;

(d) Auxiliary steam flow used for gas ejectors, steam seals, pumps, etc., in klbs;

(e) Flow of condensate out of the plant (after the cooling towers) in klbs; and

(f) Any other information we may require.

§ 3276.14 What information must I give BLM in the monthly report for direct use facilities?

(a) Total monthly flow through the facility in thousands of gallons (kgal) or klbs;

(b) Monthly average temperature in, in deg. F;

(c) Number of hours that geothermal heat was used; and

(d) Any other information we may require.

§ 3276.15 How must I notify BLM of accidents occurring at my utilization facility?

You must orally inform us of all accidents that affect operations or create environmental hazards within 24 hours after each accident. When you contact us, we may require you to submit a written report fully describing the incident.

Subpart 3277—Inspections, Enforcement, and Noncompliance

§ 3277.10 When will BLM inspect my operations?

BLM may inspect all operations to ensure compliance with the requirements of § 3200.4. You must give us access during normal operating hours to inspect all facilities utilizing Federal geothermal resources.

§ 3277.11 What records must I keep available for inspection?

(a) The operator or facility operator must keep all records and information pertaining to the operation of your utilization facility, royalty and production meters, and safety training available for BLM inspection for a period of 6 years following the time the records and information are created.

(b) This requirement also pertains to records and information from meters located off your lease or unit when BLM needs them to determine:

(1) Resource production to a utilization facility, or

(2) The allocation of resource production to your lease or unit.

(c) Store all of these records in a place where they are conveniently available.

§ 3277.12 What will BLM do if I do not comply with all BLM requirements pertaining to utilization operations?

(a) We will issue you a written Incident of Noncompliance, directing you to take required corrective action within a specific time period. If the noncompliance continues or is serious in nature, BLM will take one or more of the following actions:

(1) Enter the lease, and correct any deficiencies at your expense;

(2) Collect all or part of your bond;

(3) Order modification or shutdown of your operations; and

(4) Take other enforcement action against a lessee who is ultimately responsible for the noncompliance.

(b) Noncompliance may result in BLM terminating your lease (see §§ 3213.23 through 3213.25).

Subpart 3278—Confidential, Proprietary Information

§ 3278.10 When will BLM disclose information I submit under these regulations?

All Federal and Indian data and information submitted to BLM are subject to part 2 of this title. Part 2 includes the regulations of the Department of the Interior covering public disclosure of data and information contained in Department records. Certain mineral information not protected from disclosure under part 2 may be made available for inspection without a Freedom of Information Act (FOIA) request. Examples of information we will not treat as confidential include:

(a) Facility location;

(b) Facility generation capacity; or

(c) To whom you are selling electricity or produced resources.

§ 3278.11 When I submit confidential, proprietary information, how can I help ensure it is not available to the public?

When you submit data and information that you believe to be exempt from disclosure under part 2 of this title, you must clearly mark each page that you believe contains confidential information. BLM will keep all data and information confidential to the extent allowed by § 2.13(c) of this title.

§ 3278.12 How long will information I give BLM remain confidential or proprietary?

The FOIA does not provide a finite period of time during which information may be exempt from public disclosure. BLM will review each situation individually and in accordance with part 2 of this title.

Subpart 3279—Utilization Relief and Appeals

§ 3279.10 When may I request a variance from BLM requirements pertaining to utilization operations?

(a) You may file a request with BLM for a variance for your approved utilization operations from the requirements of § 3200.4. Your request must include enough information to explain:

(1) Why you cannot comply with the requirements; and

(2) Why you need the variance to operate your facility, conserve natural resources, or protect public health and safety, property, or the environment.

(b) We may approve your request orally or in writing. If we give you oral approval, we will follow up with written confirmation.

§ 3279.11 How may I appeal a BLM decision regarding my utilization operations?

You may appeal our decision affecting your utilization operations in accordance with § 3200.5.

2. Revise part 3280 to read as follows:

PART 3280—GEOTHERMAL RESOURCES UNIT AGREEMENTS

Subpart 3280—Geothermal Resources Unit Agreements—General

Sec.

Authority: 30 U.S.C. 1001–1028 and 43 U.S.C. 1701 *et seq.*

Subpart 3280—Geothermal Resources Unit Agreements—General

§ 3280.1 What is the purpose and scope of this part?

(a) The purpose of this part is to provide holders of Federal and non-Federal geothermal leases and owners of non-Federal mineral interests the opportunity to unite under a Federal geothermal unit agreement to explore for and develop geothermal resources in a manner meeting the public interest.

(b) These regulations identify:

(1) The procedures a prospective unit operator must follow to receive BLM approval for unit area designation and a Federal geothermal unit agreement;

(2) The operational requirements a unit operator must meet once the unit agreement is approved; and

(3) The procedures BLM will follow in reviewing, approving, and administering a Federal geothermal unit agreement.

§ 3280.2 Definitions.

The following terms, as used in this part or in any agreement approved under the regulations in this part, have the following meanings unless otherwise defined in such agreement:

Minimum initial unit obligation means the requirement to complete at least one unit well within the time frame specified in the unit agreement. If this requirement is not met, BLM deems the unit void as though it was never in effect.

Participating area means that part of the Unit Area that BLM deems to be productive from a horizon or deposit, and to which production would be

allocated in the manner described in the unit agreement assuming that all lands are committed to the unit agreement.

Plan of development means the document a unit operator submits to BLM defining how the unit operator will diligently pursue unit exploration and development to meet both initial and subsequent unit development and public interest obligations.

Public interest means operations within a geothermal unit resulting in:

(1) Diligent development;

(2) Efficient exploration, production and utilization of the resource;

(3) Conservation of natural resources; and

(4) Prevention of waste.

Reasonably proven to produce means a sufficient demonstration, based on scientific and technical information, that lands are contributing to unit production in commercial quantities or are providing reservoir pressure support for unit production.

Unit agreement means an agreement for the exploration, development, production, and utilization of separately owned interests in the geothermal resources made subject thereto as a single consolidated unit without regard to separate ownerships and which provides for the allocation of costs and benefits on a basis defined in the agreement or plan.

Unit area means the area described in a unit agreement as constituting the land logically subject to development under such agreement.

Unit contraction provision means a term of a unit agreement providing that the boundaries of the unit area will contract to the size of the participating area, by having those lands outside of the participating area removed. BLM will contract the unit area if additional unit wells are not drilled and completed within the timeframe specified in the unit agreement.

Unit operator means the person, association, partnership, corporation, or other business entity designated under a unit agreement to conduct operations on unitized land as specified in such agreement.

Unit well means a well that is:

(1) Designed to produce or utilize geothermal resources in commercial quantities;

(2) Drilled and completed to the bona fide geologic objective specified in the unit agreement, unless a commercial resource is found at a shallower depth; and

(3) Located on a lease committed to the unit agreement.

Unitized land means the part of a unit area committed to a unit agreement.

Unitized substances means deposits of geothermal resources recovered from unitized land by operation under and pursuant to a unit agreement.

Working interest means the interest held in geothermal resources or in lands containing the same by virtue of a lease, operating agreement, fee title, or otherwise, under which, except as otherwise provided in a unit agreement, the owner of such interest is vested with the right to explore for, develop, produce, and utilize such resources. The right delegated to the unit operator as such by the unit agreement is not to be regarded as a working interest.

§ 3280.3 What is BLM's general policy regarding the formation of unit agreements?

For the purpose of more properly conserving the natural resources of any geothermal reservoir, field, or like area, or any part thereof (whether or not any part of the geothermal reservoir, field, or like area, is subject to any unit agreement), lessees thereof and their representatives may unite with each other, or jointly or separately with others, in collectively adopting and operating under a unit agreement for the reservoir, field, or like area, or any part thereof, including direct use resources, if BLM determines and certifies this to be necessary or advisable in the public interest.

§ 3280.4 When may BLM require Federal lessees to unitize their leases or require a Federal lessee to commit a lease to a unit?

(a) BLM may initiate the formation of a unit agreement, or require an existing Federal lease to commit to a unit agreement, if in the public interest.

(b) BLM may require that leases that become effective on or after August 8, 2005, contain a provision stating that BLM may require commitment of the lease to a unit agreement, and may prescribe the unit agreement to which such lease must commit to protect the rights of all parties in interest, including the United States.

§ 3280.5 May BLM require the modification of lease requirements in connection with the creation and operation of a unit agreement?

(a) BLM may, in its discretion and with the consent of the lessees involved, establish, alter, change, or revoke rates of operations (including drilling, operations, production, and other requirements) of the leases, and make conditions with respect to the leases, with the consent of the lessees, in connection with the creation and operation of any such unit agreement as BLM may consider necessary or advisable to secure the protection of the public interest.

(b) If leases to be included in a unit have unlike lease terms, such leases need not be modified to be in the same unit.

§ 3280.6 When may BLM require a unit operator to modify the rate of exploration, development, or production?

BLM may require a unit agreement applying to lands owned by the United States to contain a provision under which BLM or an entity designated in the unit agreement may alter or modify, from time to time, the rate of resource exploration or development, or production quantity or rate, under the unit agreement.

§ 3280.7 Can BLM require an owner or lessee of lands not under Federal administration to unitize their lands or leases?

BLM cannot require the commitment of lands or leases not under Federal administration or jurisdiction to a Federal unit.

Subpart 3281—Application, Review, and Approval of a Unit Agreement

§ 3281.1 What steps must I follow for BLM to approve my unit agreement?

Before a unit agreement becomes effective, BLM must designate the unit area and approve the unit agreement. Procedures for designating the unit area are set forth in §§ 3281.2 through 3281.6. Procedures for approving the unit agreement are set forth in §§ 3281.7 through 3281.17.

§ 3281.2 What documents must the unit operator submit to BLM before we may designate a unit area?

(a) The unit operator must submit the following documents before BLM may designate a proposed unit area:

(1) A report detailing the geologic information and interpretation that indicates, to the satisfaction of BLM, the proposed area is geologically appropriate for unitization;

(2) A map showing:

(i) The proposed unit area;

(ii) All leases (including Federal, state, or private) and tracts (unleased privately owned land or mineral rights);

(iii) The Federal lease number and lessee; and

(iv) An individual unit tract number;

(3) A list which includes the following information as to each Federal, state, and private leases, and tracts of unleased land, to be included in the unit:

(i) The lease number;

(ii) The legal land description of each lease and tract;

(iii) The acreage of each lease or tract;

(iv) The lessor and lessee of each lease;

(v) The mineral rights owner of any unleased tract; and

(vi) The total number of acres:

(A) In the unit area;

(B) Under Federal administration; and

(C) In private or other (such as state) ownership; and

(4) Any other information BLM may require.

(b) Before submitting any documents, ask BLM how many copies are required.

§ 3281.3 What geologic information may a unit operator use in proposing a unit area?

(a) A unit operator may use any reasonable geologic information necessary to justify its proposed unit area. The information must document that the proposed unit area is:

(1) Geologically contiguous; and

(2) Suitable for resource exploration, development and production under a unit agreement.

(b) BLM will decide which information and interpretations are acceptable. BLM's acceptance of the information and interpretations may vary depending on the types and level of geologic information available for the area.

§ 3281.4 What are the size and shape requirements for a unit area?

There are no specific size or shape requirements for a unit area, except that it must meet the requirements of § 3281.3. The size of the unit area may affect the minimum initial unit obligation requirements (see § 3281.15(b)).

§ 3281.5 What happens if BLM receives applications that include overlapping unit areas?

(a) If BLM receives unit area applications that include overlapping lands, we will request that each prospective unit operator resolve the issue with the other operator(s). If the prospective operators cannot reach a resolution, BLM may:

(1) Return all unit applications and request all applicants to revise their proposed unit areas;

(2) Designate any unit area proposal that is geologically appropriate for unitization and best meets public interest requirements; or

(3) Designate a different area for unitization when doing so is in the public interest.

(b) BLM will reject any application that includes lands already in an approved unit area.

§ 3281.6 What action will BLM take after reviewing a proposed unit area designation?

(a) BLM will approve the unit area designation in writing and notify the prospective unit operator once we determine that:

(1) We have received the information required at § 3281.2;

(2) Information available to BLM documents that the area is geologically appropriate for unitization; and

(3) Unitization is appropriate to conserve the natural resources of a geothermal reservoir, field, or like area, or part thereof.

(b) BLM will notify a prospective unit operator in writing if we do not designate a proposed unit area.

§ 3281.7 What documents must a unit operator submit to BLM before we will approve a unit agreement?

After BLM approves a unit area designation, a unit operator must submit the following information in order for BLM to approve a unit agreement:

(a) Documentation of tract commitment (see §§ 3281.8 and 3281.9);

(b) The unit agreement (see § 3281.15);

(c) The map required by § 3281.2(a)(2), if any modifications have occurred since the unit area was designated;

(d) The list required by § 3281.2(a)(3) indicating whether each lease or tract is committed to the unit agreement; and

(e) The plan of development.

§ 3281.8 Must a unit operator provide working interests within the designated unit area the opportunity to join the unit?

After BLM designates a unit area, the unit operator must invite all owners of mineral rights (leased or unleased) and lease interests (record title and operating rights) in the designated unit area to join the unit. The unit operator must provide the lease interests and mineral rights owners 30 days to respond. If an interest or owner does not respond, the unit operator must provide BLM with written evidence that all the interests or owners were invited to join the unit. BLM will not approve a unit agreement proposal if this evidence is not submitted.

§ 3281.9 How does a unit operator provide documentation to BLM of lease and tract commitment status?

(a) The unit operator must provide documentation to BLM of the commitment status of each lease and tract in the designated unit area. The documentation must include a joinder or other comparable document signed by the lessee or mineral rights owner, or evidence that an opportunity to join was offered and no response was received. (see § 3281.8).

(b) A majority interest of owners of any single lease has authority to commit the lease to a unit agreement.

§ 3281.10 How will BLM determine that I have sufficient control of the proposed unit area?

(a) BLM will determine whether:

(1) A unit operator has sufficient control of the proposed unit area by reviewing the number and location of leases and tracts committed and their geologic potential for development in relation to the entire proposed unit area; and

(2) The committed tracts provide the unit operator with sufficient control of the unit area to conduct resource exploration and development in the public interest.

(b) If BLM determines that the unit operator does not have sufficient control of the unit area, we will not approve the unit agreement.

§ 3281.11 What are the unit operator qualifications?

(a) Before BLM will approve a unit agreement, the unit operator must:

(1) Meet the same qualifications as a lessee (see § 3202.10 of this chapter); and

(2) Demonstrate sufficient control of the unit area (see § 3281.10).

(b) A unit operator is not required to have an interest in the unit area.

§ 3281.12 Who designates the unit operator?

The owners of mineral rights and lease interests committed to the unit agreement will nominate a unit operator. Before designating the unit operator, BLM must also determine whether the prospective unit operator meets the requirements of § 3281.11.

§ 3281.13 Is there a format or model a unit operator must use when proposing a unit agreement?

When proposing a unit agreement, submit to BLM:

(a) The model unit agreement (see § 3286.1);

(b) The model unit agreement with variances noted; or

(c) Any unit agreement format that contains all the terms and conditions BLM requires (see §§ 3281.14 and 3281.15).

§ 3281.14 What minimum requirements and terms must be incorporated into the unit agreement?

(a) The unit agreement must, at a minimum:

(1) State who the unit operator is, and that the unit operator and participating lessees accept the unit terms and obligations set forth in the agreement and applicable BLM regulations;

(2) State the size and general location of the unit area;

(3) Include procedures for revising the unit area or participating area(s);

(4) Include procedures for amending the unit agreement;

(5) State the effective date and term of the unit, which is typically 5 years;

(6) Incorporate the minimum initial unit obligations, as specified in § 3281.16;

(7) State that BLM may require a modification of the rate of resource exploration or development, or the production quantity or rate, within the unit area;

(8) State that the agreement is subject to periodic BLM review;

(9) State that BLM will deem the unit agreement as void as if it were never in effect if the minimum initial unit obligations are not met;

(10) Include a plan of development; and

(11) Include a unit contraction provision.

(b) The agreement may include any other provisions or terms that BLM and the unit operator agree are necessary for proper resource exploration and development, and management of the unit area.

§ 3281.15 What is the minimum initial unit obligation a unit agreement must contain?

(a) The unit agreement must:

(1) Require the unit operator to drill, within the time frame specified in the unit agreement, at least one unit well;

(2) Specify the location and the minimum depth and/or geologic structure to which the initial unit well will be drilled; and

(3) Require the unit operator, upon completing a unit well, to provide to BLM in a timely manner the information required at § 3264.10 of this chapter.

(b) Depending on the size of the proposed unit area, BLM may require the minimum initial unit agreement obligation to include the drilling of more than one unit well.

(c) If necessary to aid in the evaluation of drilling locations, BLM and the unit operator may agree to include types of exploration operations as part of the initial unit obligation. An example of such work is drilling temperature gradient wells.

(d) BLM will not consider any work done prior to unit approval for the purpose of meeting initial unit obligations.

§ 3281.16 When must a Plan of Development be submitted to BLM?

(a) The prospective unit operator must submit an initial Plan of Development at the time the unit area is proposed for designation.

(b) Subsequent Plans of Development that were not already provided must be submitted to address future unit activities to be conducted throughout the term of the unit agreement. For example, if the Plan only addressed activities until a unit well is completed, the subsequent Plan must address activities including the drilling of additional unit wells until a producible well is completed. Once a producible well is completed, the Plan or subsequent Plan must address those activities related to utilizing the resource.

(c) There is no requirement to submit a Plan of Development once unitized resources begin commercial operation.

§ 3281.17 What information must be provided in the Plan of Development?

(a) The Plan of Development must state the types of and time frames for activities the unit operator will conduct in diligent pursuit of unit exploration and development. The Plan may address those activities that will be conducted until the minimum initial unit obligation is met, or it may address all activities that will occur through the term of the unit agreement.

(b) The Plan of Development may specify that the activities will be conducted in phases during the term of the unit agreement. For example, the number, location, and depth of temperature gradient wells, and the time frame for the completion of these wells, may be the first phase. A second phase may include drilling of observation or slim wells to a greater depth than that specified in the first phase. Completion of the unit well may be the third phase. In all cases, the Plan of Development must include the completion of at lease one unit well.

§ 3281.18 What action will BLM take in reviewing the Plan of Development?

BLM will review the Plan of Development to ensure that the types of activities and the time frames for their completions meet public interest requirements. If BLM determines that the Plan of Development does not meet these requirements, BLM will negotiate with the prospective unit operator to revise the proposed activities. BLM will not designate a unit area until the Plan of Development meets applicable requirements.

§ 3281.19 What action will BLM take on a proposed unit agreement?

BLM will:

(a) Review the proposed unit agreement to ensure that the public interest is protected and that the agreement conforms to applicable laws and regulations;

(b) Coordinate the review of a proposed unit agreement with appropriate state agencies, and other Federal surface management agencies, if applicable;

(c) Approve the unit agreement and provide the unit operator with signed copies of the agreement, if we determine:

(1) That the unit operator has submitted all required information;

(2) That the unit agreement and the unit operator satisfy all required terms and conditions, including the requirements specified at §§ 3281.14 and 3281.15, and conform with all applicable laws and regulations; and

(3) That the unit agreement is necessary or advisable to meet the public interest;

(d) Notify the unit operator in writing if we reject the unit agreement proposal; and

(e) Reject any unit application that includes lands already committed to an approved unit agreement.

§ 3281.20 When is a unit agreement effective?

The effective date of the unit agreement approval is the first day of the month following the date BLM approves and signs it. The unit operator may request that the effective date be the first day of the month in which the agreement is signed by BLM, or a more appropriate date agreed to by BLM.

Subpart 3282—Participating Area

§ 3282.1 What is a participating area?

(a) A participating area is the combined portion of the unitized area which BLM determines:

(1) Is reasonably proven to produce geothermal resources; or

(2) Supports production in commercial quantities, such as pressure support from injection wells.

(b) The size and configuration of all participating areas and revisions are not effective until BLM approves them.

§ 3282.2 When must the unit operator have a participating area approved?

You must have an established BLM-approved participating area to allocate production and royalties before beginning commercial operations under a unit agreement to allocate production within the unit.

§ 3282.3 When must the unit operator submit an application for BLM approval of a proposed initial participating area?

The unit operator must submit an application for BLM approval of a proposed participating area no later than:

(a) 60 days after receiving BLM's determination identified in § 3281.15(a)(3) that a unit well will produce or utilize in commercial quantities; or

(b) 30 days before the initiation of commercial operations, whichever occurs earlier.

§ 3282.4 What general information must the unit operator submit with a proposed participating area application?

The unit operator must submit the following information with a participating area application:

(a) Technical information supporting its application (see § 3282.5);

(b) The information required in § 3281.2(a)(2) and (3) for the lands in the proposed participating area; and

(c) Any other information BLM may require.

§ 3282.5 What technical information must the unit operator submit with a proposed participating area application?

At a minimum, the unit operator must submit the following technical information with a proposed participating area application:

(a) Documentation that the participating area includes:

(1) The production and injection wells necessary for unit operations;

(2) Unit wells that are capable of being produced or utilized in commercial quantities; and

(3) The area each well drains or supplies pressure communication.

(b) Data, including logs, from production and injection well testing, if not previously submitted under § 3264.10 of this chapter;

(c) Interpretations of well performance, and reservoir geology and structure, that document that the lands are reasonably proven to produce; and

(d) Any other information BLM may require.

§ 3282.6 When must the unit operator propose to revise a participating area boundary?

(a) The unit operator must submit a written application to BLM to revise a participating area boundary no later than 60 days after receipt of the BLM determination described herein, when either:

(1) A well is completed that BLM has determined will produce or utilize in commercial quantities, and such well:

(i) Is located outside of an existing participating area; or

(ii) Drains an area outside the existing participating area; or

(2) An injection well located outside of an existing participating area is put into use that BLM has determined provides reservoir pressure support to production.

(b) The unit operator may submit a written application for a revision of a participating area when new or additional technical information or revised interpretations of any information provides a basis for revising the boundary.

(c) The unit operator may submit a written request to BLM to delay a participation area revision decision when drilling multiple wells in the unit is actively pursued or the drilling is providing additional technical information. A delay will not affect the effective date of any participation area revision (see § 3282.7). The request must include:

(1) The well locations;

(2) Anticipated spud and completion dates of each well;

(3) The timing of well testing and analyses of technical information; and

(4) The anticipated date BLM will receive the participation area revision for review.

(d) BLM will provide the unit operator with a written decision on the application to revise a participating area or the request to delay a participating area revision decision by BLM.

§ 3282.7 What is the effective date of an initial participating area or revision of an existing participating area?

(a) BLM will establish the appropriate effective date of an initial participating area or any revision to a participating area. The effective date may be, but is not limited to, the first day of the month in which:

(1) A well is completed that causes the participating area to be formed or revised;

(2) Commercial operations start; or

(3) New or additional technical information becomes known that provides a basis for revising the boundary (such as when production from, or injection to, an area outside the participating area first became known).

(b) The unit operator may request BLM approve a specific effective date for the participating area or revision, but the date may not be earlier than the effective date of the unit.

§ 3282.8 What are the reasons BLM would not approve a revision of the participating area boundary?

BLM will not approve a revision of the participating area boundary:

(a) If the unit operator does not submit the required information;

(b) If BLM determines that the new or additional technical information does not support a boundary revision; or

(c) If it reduces the size of a participating area because of depletion of the resource.

§ 3282.9 How is production allocated within a participating area?

Allocation of production to each committed lease or tract within a participating area is in the same proportion as that lease's or tract's surface acreage within the participating area.

§ 3282.10 When will unleased Federal lands in a participating area receive a production allocation?

(a) Unleased Federal lands within a participating area that are available for leasing are treated as follows:

(1) For royalty purposes only, you must allocate production to unleased Federal lands in the participating area as if the acreage were committed to the participating area.

(2) The unit operator must pay royalty to the United States based on a rate not less than the highest royalty rate for any Federal lease in the participating area.

(b) If BLM is not allowed to lease the unleased Federal lands in the participating area because of restrictions based on planning decisions or other statutory requirements, the lands will not receive an allocation of production (see § 3201.11 of this chapter).

§ 3282.11 May a participating area continue if there is intermittent unit production?

A participating area may continue if there is intermittent unit production only if BLM determines that intermittent production is in the public interest. For example, a direct use facility may only require production to occur during winter months.

§ 3282.12 When does a participating area terminate?

A participating area terminates when either:

(a) The unit operator permanently stops operations in or affecting the participating area; or

(b) Sixty days after BLM notifies the unit operator in writing that we have determined that operations in the participating area are not being conducted in accordance with the unit agreement, the participating area approval, or the public interest. If before the expiration of the 60 days, the unit operator demonstrates to BLM's satisfaction that the basis for BLM's determination is erroneous or has been rectified, BLM will not terminate the participating area.

Subpart 3283—Modifications to the Unit Agreement

§ 3283.1 When may the unit operator modify the unit agreement?

(a) The unit operator may propose to modify a unit agreement by submitting an application to BLM that:

(1) Identifies the proposed change and the reason for the change; and

(2) Certifies that all necessary unit interests have agreed to the change.

(b) BLM will send the unit operator written notification of BLM's decision regarding the application. Proposed modifications to a unit agreement will not become effective until BLM approves them. BLM's approval may be made effective retroactively to the date the application was complete. BLM may approve a different effective date, including a date the unit operator requests and for which the unit operator provides acceptable justification.

§ 3283.2 When may the unit operator revise the unit contraction provision of a unit agreement?

(a) The unit operator may submit to BLM a request to revise the unit contraction provision of a unit agreement, if the unit operator has either:

(1) Commenced commercial operations of unitized resources; or

(2) Completed a unit well that produces or utilizes geothermal resources in commercial quantities.

(b) The request may propose an extension of the unit contraction date and/or a partial contraction of the unit area, and must include the following information:

(1) The period for which the revision is requested; and

(2) Whether an extension of the unit contraction date and/or a partial contraction of the unit area is requested.

(c) The request should address the following factors when applicable:

(1) Economic constraints that limit the opportunity to drill and utilize the resource from additional wells;

(2) Reservoir monitoring or injection wells that BLM determines are necessary for unit operations are not located in the participating area;

(3) An inability to drill additional wells is due to circumstances beyond the unit operator's control, and a unit well that has produced or utilized in commercial quantities already is located in the unit;

(4) The types and intensity of unit operations already conducted in the unit area;

(5) The availability of viable electrical or resource sales contracts;

(6) The opportunity to utilize the resource economically; or

(7) Any other information that supports revision of the unit contraction provision.

(d) BLM will consider the factors discussed along with any other information submitted, and will approve the request if we determine that the revision is in the public interest. The approval may be subject to conditions such as requiring an annual renewal, or setting the timing and conditions for when phased contractions or termination of the revision may occur.

§ 3283.3 How will the unit operator know the status of a unit contraction revision request?

BLM will notify the unit operator in writing of our decision. If we approve the request, we:

(a) Will specify the term of the contraction extension and/or which lands will remain in the unit agreement;

(b) May require the unit operator to update the informational requirements of § 3282.3; and

(c) May terminate the participating area contraction revision when we find it necessary in the public interest.

§ 3283.4 When may I add lands to or remove lands from a unit agreement?

(a) The unit operator may request BLM to designate the addition or removal of lands to or from a unit agreement.

(b) In order for BLM to complete a review of the unit area revision request, the unit operator must submit to BLM the information required in §§ 3281.2. and 3281.7.

(c) BLM will:

(1) Review the request;

(2) Determine whether the information provided is sufficient and whether the new or additional geologic information or interpretation provides an acceptable basis for the unit boundary change; and

(3) Notify the unit operator in writing of our decision.

(d) If BLM approves the revision, the unit operator must notify all owners of lease interests or mineral rights of the unit area revision.

§ 3283.5 When will BLM periodically review unit agreements?

BLM will periodically review all unit agreements to determine compliance with § 3283.6 in accordance with the following schedule:

(a) Not later than 5 years after the approval of each unit agreement; and

(b) At least every 5 years following the initial unit review.

§ 3283.6 What is the purpose of BLM's periodic review?

(a) BLM must review all unit agreements to determine whether any of the leases, or portions of leases, committed to any unit are no longer reasonably necessary for unit operations, and eliminate from inclusion in the unit agreement any such lands it determines not reasonably necessary for unit operations.

(b) The elimination will be based on scientific evidence, and occur only for the purpose of conserving and properly managing the geothermal resources.

(c) BLM will not eliminate any lands from a unit until the unit operator, the lessee, and any other person with a legal interest in such lands, have been given reasonable notice and opportunity to comment.

(d) Any lands eliminated from a unit under this section are eligible for a lease extension under subpart 3207 of part 3200 of this chapter if the land meets the requirements for the extension.

§ 3283.7 When may unit operators be changed?

Unit operators may be changed only with BLM's written approval.

§ 3283.8 What must be filed with BLM to change the unit operator?

To change the unit operator, the new operator must:

(a) Meet the requirements of § 3281.11;

(b) Submit to BLM evidence of bonding acceptable under §§ 3214.13 or 3261.18(c) of this chapter, if operations have caused an adverse impact on Federal lands; and

(c) File with BLM written acceptance of the unit terms and obligations.

§ 3283.9 When is a change of unit operator effective?

The change is effective when BLM approves the new unit operator in writing.

§ 3283.10 If there is a change in the unit operator, when does the previous operator's liability end?

(a) The previous unit operator remains responsible for all duties and obligations of the unit agreement until BLM approves a new unit operator. The change of the unit operator does not release the previous unit operator from any liability for any obligations that accrued before the effective date of the change (see § 3215.14 of this chapter).

(b) The new unit operator is responsible for all unit duties and obligations after BLM approves the change.

§ 3283.11 Do the terms and conditions of a unit agreement modify Federal lease stipulations?

Nothing in a unit agreement modifies stipulations included in any Federal lease.

§ 3283.12 Are transferees and successors in interest of Federal geothermal leases bound by the terms and conditions of the unit agreement?

The terms and conditions of the unit agreement are binding on transferees

and successors in interest to Federal geothermal leases.

Subpart 3284—Unit Operations

§ 3284.1 What general standards apply to operations within a unit?

All unit operations must comply with:

(a) The terms and conditions of the unit agreement; and

(b) The standards and orders listed in the following chart:

Type of operation	Operational standards regulations (43 CFR)	Orders or instructions regulations (43 CFR)
Exploration	§ 3250.12	§ 3250.13
Drilling	§ 3260.11	§ 3260.12
Production or Utilization	§ 3270.11	§ 3270.12

§ 3284.2 What are the principal operational responsibilities of the unit operator?

The unit operator is responsible for:

(a) Diligently drilling for and developing in the public interest the geothermal resource occurring in the unit area. Only the unit operator is authorized to conduct:

(1) Any phase of drilling authorized under subpart 3260 of part 3200 of this chapter, unless another person is specifically authorized by BLM to conduct drilling (see § 3284.3);

(2) Resource development activities such as production and injection; and

(3) Delivery of the resource for commercial operation. An entity other than the unit operator, such as a facility operator, may purchase or utilize the resource produced from the unit.

(b) Providing written notification to BLM within 30 days after any changes to the commitment status of any lease or tract in the unit area (see §§ 3281.9 and 3284.11); and

(c) Insuring that the Federal Government receives all royalties, direct use fees, and rents for activities within the participating area.

§ 3284.3 What happens if the minimum initial unit obligations are not met?

(a) If the unit operator does not drill a well designed to produce or utilize geothermal resources in commercial quantities within the time frame specified in the unit agreement, or the unit operator relinquishes the unit agreement before meeting the minimum initial unit obligations:

(1) BLM will deem the unit agreement void as though it was never in effect;

(2) BLM will deem any lease extension based upon the existence of the unit as void retroactive to the date the unit was effective; and

(3) Any lease segregations based on the unit becomes invalid.

(b) BLM will send the unit operator a written decision confirming that the unit agreement is void.

§ 3284.4 How are unit agreement terms affected after completion of the initial unit well?

(a) Upon completion of a unit well that BLM determines will produce or utilize geothermal resources in commercial quantities, the unit operator must submit a proposed participating area application pursuant to § 3282.2, and no additional drilling to meet unit obligations is required. If no additional drilling in the unit occurs, the unit area will contract to the participating area as specified in the unit agreement.

(b) If a unit operator drills a well designed to produce or utilize geothermal resources in commercial quantities, but the well will not produce commercially or is not producible, the unit operator must continue drilling additional wells within the timeframes specified in the unit agreement until a unit well is completed that BLM determines will produce or utilize geothermal resources in commercial quantities. BLM may terminate a unit if additional wells are not drilled within the time frames specified in the unit agreement.

(c) The unit agreement will expire if no well that BLM determines will produce or utilize geothermal resources in commercial quantities is completed within the time frames specified in the unit agreement.

(d) BLM will send the unit operator a written decision confirming that the unit agreement has been terminated or has expired.

§ 3284.5 How do unit operations affect lease extensions?

(a) Once the minimum initial unit obligation is met, lease extensions based upon unit commitment will remain in effect until the unit is relinquished, expires, terminates, or the lease on which the initial unit obligation was met is eliminated from the unit.

(b) As long as there are commercial operations within the unit or there exists a unit well that BLM has determined is producing or utilizing geothermal resources in commercial quantities, lease extensions for any leases or portions of leases within the participating area will remain in effect as long as operations meet the requirements of § 3207.7 of this chapter.

§ 3284.6 May BLM authorize a working interest owner to drill a well on lands committed to the unit?

(a) BLM may authorize a working interest owner to drill a well on the interest owner's lease only if it is located outside of an established participating area. However, BLM will only do so upon determining that:

(1) The unit operator is not diligently pursuing unit development; and

(2) Drilling the well is in the public interest.

(b) If BLM determines that a working interest has completed a well that will produce or utilize geothermal resources in commercial quantities, the unit operator must

(1) Apply to revise the participating area to include the well; and

(2) Must operate the well.

§ 3284.7 May BLM authorize operations on uncommitted Federal leases located within a unit?

BLM may authorize a lessee/operator to conduct operations on an uncommitted Federal lease located within a unit, if the lessee/operator demonstrates to our satisfaction that operations on the lease are:

(a) In the public interest; and

(b) Will not unnecessarily affect unit operations.

§ 3284.8 May a unit have multiple operators?

A unit may have only one operator.

§ 3284.9 May BLM set or modify production or injection rates?

BLM may set or modify the quantity, rate, or location of production or injection occurring under a unit agreement.

§ 3284.10 What must a unit operator do to prevent or compensate for drainage?

The unit operator must take all necessary measures to prevent or

compensate for drainage of geothermal resources from unitized land by wells on land not subject to the unit agreement (see §§ 3210.22 and 3210.23 of this chapter).

§ 3284.11 Must the unit operator develop and operate on every lease or tract in the unit to comply with the obligations in the underlying leases or agreements?

The unit operator is not required to develop and operate on every lease or tract in the unit agreement to comply with the obligations in the underlying leases or agreement. The development and operation on any lands subject to a unit agreement is considered full performance of all obligations for development and operation for every separately owned lease or tract in the unit, regardless of whether there is development of any particular tract of the unit area.

§ 3284.12 When must the unit operator notify BLM of any changes of lease and tract commitment status?

The unit operator must provide updated documentation of commitment status (see §§ 3281.1(a)(2) and (3)) of all leases and tracts to BLM whenever a change in commitment, such as the expiration of a private lease, occurs. The unit operator must submit the documentation to BLM within 30 days after the change occurs. The unit operator must also notify all lessees and mineral interest owners of these changes.

Subpart 3285—Unit Termination

§ 3285.1 When may BLM terminate a unit agreement?

BLM may terminate a unit agreement if the unit operator does not comply with any term or condition of the unit agreement.

§ 3285.2 When may BLM approve a voluntary termination of a unit agreement?

BLM may approve the voluntary termination of a unit agreement at any time:

(a) After receiving a signed certification agreeing to the termination from a sufficient number of the working interest owners specified in the unit agreement who together represent a majority interest in the unit agreement; and

(b)(1) After the completion of the initial unit obligation well but before the establishment of a participating area; or

(2) After a participating area is established, upon receipt of information providing adequate assurance that:

(i) Diligent development and production of known commercial geothermal resources will occur; and

(ii) The public interest is protected.

Subpart 3286—Model Unit Agreement

§ 3286.1 Model Unit Agreement.

A unit agreement may use the following language:

Unit Agreement for the Development and Operation of the _____ Unit Area, County of _____, State of _____

Table of Contents

This Agreement entered into as of the _____ day of _____, 20____, by and between the parties subscribing, ratifying, or consenting hereto, and herein referred to as the "parties hereto".

WITNESSETH:

Whereas the parties hereto are the owners of working, royalty, or other geothermal resources interests in land subject to this Agreement; and

Whereas the Geothermal Steam Act of 1970 (84 Stat. 1566), as amended, hereinafter referred to as the "Act" authorizes Federal lessees and their representatives to unite with each other, or jointly or separately with others, in collectively adopting and operating under a unit agreement for the purpose of more properly conserving the natural resources of any geothermal resources reservoir, field, or like area, or any part thereof, whenever determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest; and

Whereas the parties hereto hold sufficient interest in the _____ Unit Area covering the land herein described to effectively control operations therein; and

Whereas, it is the purpose of the parties hereto to conserve natural resources, prevent waste, and secure other benefits obtainable through development and operations of the area subject to this Agreement under the terms, conditions, and limitations herein set forth;

Now, therefore, in consideration of the premises and the promises herein contained, the parties hereto commit to this agreement their respective interests in the below-defined Unit Area, and agree severally among themselves as follows:

Article I—Enabling Act and Regulations

1.1 The Act and all valid pertinent regulations, including operating and unit plan regulations, heretofore or hereafter issued thereunder are accepted and made a part of this agreement as to Federal lands.

1.2 As to non-Federal lands, the geothermal resources operating regulations in effect as of the effective date hereof governing drilling and producing operations, not inconsistent with the laws of the State in which the non-Federal land is located, are hereby accepted and made a part of this agreement.

Article II—Definitions

2.1 The following terms shall have the meanings here indicated:

(a) *Geothermal Lease.* A lease issued under the act of December 24, 1970 (84 Stat. 1566), as amended, pursuant to the leasing regulations contained in 43 CFR Group 3200 and, unless the context indicates otherwise, "lease" shall mean a geothermal lease.

(b) *Unit Area.* The area described in Article III of this Agreement.

(c) *Unit Operator.* The person, association, partnership, corporation, or other business entity designated under this Agreement to conduct operations on Unitized Land as specified herein.

(d) *Participating Area.* That area of the Unit deemed to be productive as described in Article 12.1 herein and areas committed to the Unit by the Authorized Officer needed for support of operations of the Unit Area. The production allocated for lands used for support of operations shall be approved by the Authorized Officer pursuant to Articles 12.1 and 13.1 herein.

(e) *Working Interest.* The interest held in geothermal resources or in lands containing the same by virtue of a lease, operating agreement, fee title, or otherwise, under which, except as otherwise provided in this Agreement, the owner of such interest is vested with the right to explore for, develop, produce and utilize such resources. The right delegated to the Unit Operator as such by this Agreement is not to be regarded as a Working Interest.

(f) *Secretary.* The Secretary of the Interior or any person duly authorized to exercise powers vested in that officer.

(g) *Director.* The Director of the Bureau of Land Management or any person duly authorized to exercise powers vested in that officer.

(h) *Authorized Officer.* Any person authorized by law or by lawful delegation of authority in the Bureau of Land Management to perform the duties described.

Article III—Unit Area and Exhibits

3.1 The area specified on the map attached hereto marked "Exhibit A" is hereby designated and recognized as constituting the Unit Area, containing _____ acres, more or less. The above-described Unit Area shall be expanded, when practicable, to include therein any additional lands or shall be contracted to exclude lands whenever such expansion or contraction is deemed to be necessary or advisable to conform with the purposes of this Agreement.

3.2 Exhibit A attached hereto and made a part hereof is a map showing the boundary of the Unit Area, the boundaries and identity of tracts and leases in said area to the extent known to the Unit Operator.

3.3 Exhibit B attached hereto and made a part thereof is a schedule showing to the extent known to the Unit Operator the acreage, percentage, and kind of ownership of geothermal resources interests in all lands in the Unit Area.

3.4 Exhibits A and B shall be revised by the Unit Operator whenever changes in the Unit Area render such revision necessary, or when requested by the authorized officer, and not less than five copies of the revised Exhibits shall be filed with the authorized officer.

Article IV—Contraction and Expansion of Unit Area

4.1 Unless otherwise specified herein, the expansion and/or contraction of the Unit Area contemplated in Article 3.1 hereof shall be effected in the following manner:

(a) The Unit Operator, either on demand of the authorized officer or on its own motion and after prior concurrence by the authorized officer, shall prepare a notice of proposed expansion or contraction describing the contemplated changes in the boundaries of the Unit Area, the reasons therefore, and the proposed effective date thereof, preferably the first day of a month subsequent to the date of notice.

(b) Said notice shall be delivered to the authorized officer, and copies thereof mailed to the last known address of each Working Interest Owner, Lessee, and Lessor whose interests are affected, advising that 30 days will be allowed to submit any objections to the Unit Operator.

(c) Upon expiration of the 30-day period provided in the preceding item 4.1(b), Unit Operator shall file with the authorized officer evidence of mailing of the notice of expansion or contraction and a copy of any objections thereto that have been filed with the Unit Operator, together with an application in sufficient number, for approval of such expansion or contraction and with appropriate joinders.

(d) After due consideration of all pertinent information, the expansion or contraction shall, upon approval by the authorized officer, become effective as of the date prescribed in the notice thereof.

4.2 Unitized Leases, insofar as they cover any lands excluded from the Unit Area under any of the provisions of this Article IV, may be maintained and continued in force and effect in accordance with the terms, provisions, and conditions contained in the Act, and the lease or leases and amendments thereto, except that operations and/or production under this Unit Agreement shall not serve to maintain or continue the excluded portion of any lease.

4.3 All legal subdivisions of unitized lands (i.e., 40 acres by Governmental survey or its nearest lot or tract equivalent in instances of irregular surveys), no part of which is entitled to be within a Participating Area on the 5th anniversary of the effective date of the initial Participating Area established under this Agreement, shall be eliminated automatically from this Agreement effective as of said 5th anniversary. Such lands shall no longer be a part of the Unit Area and shall no longer be subject to this Agreement, unless diligent drilling operations are in progress on an exploratory well on said 5th anniversary, in which event such lands shall not be eliminated from the Unit Area for as long as exploratory drilling operations are continued diligently with not more than six (6) months time elapsing between the completion of one exploratory well and the commencement of the next exploratory well.

4.4 An exploratory well, for the purposes of this Article IV, is defined as any well, regardless of surface location, projected for completion:

(a) In a zone or deposit below any zone or deposit for which a Participating Area has been established and is in effect; or

(b) At a subsurface location under Unitized Lands not entitled to be within a Participating Area.

4.5 In the event an exploratory well is completed during the six (6) months immediately preceding the 5th anniversary of the initial Participating Area established under this Agreement, lands not entitled to be within a Participating Area shall not be eliminated from this Agreement on said 5th anniversary, provided the drilling of another exploratory well is commenced under an approved Plan of Development within six (6) months after the completion of said well. In such event, the land not entitled to be in participation shall not be eliminated from the Unit Area so long as exploratory drilling operations are continued diligently with not more than six (6) months time elapsing between the completion of one exploratory well and the commencement of the next exploratory well.

4.6 With prior approval of the authorized officer, a period of time in excess of six (6) months may be allowed to elapse between the completion of one well and the commencement of the next well without the automatic elimination of nonparticipating acreage.

4.7 Unitized lands proved productive by drilling operations that serve to delay automatic of lands under this Article IV shall be incorporated into a Participating Area (or Areas) in the same manner as such lands would have been incorporated in such areas had such lands been proven productive during the year preceding said 5th anniversary.

4.8 In the event nonparticipating lands are retained under this Agreement after the 5th anniversary of the initial Participating Area as a result of exploratory drilling operations, all legal subdivisions of unitized land (i.e., 40 acres by Government survey or its nearest lot or tract equivalent in instances of irregular Surveys), no part of which is entitled to be within a Participating Area, shall be eliminated automatically as of the 183rd day, or such later date as may be established by the authorized officer, following the completion of the last well recognized as delaying such automatic elimination beyond the 5th anniversary of the initial Participating Area established under this Agreement.

Article V—Unitized Land and Unitized Substances

5.1 All land committed to this Agreement shall constitute land referred to herein as "Unitized Land." All geothermal resources in and produced from any and all formations of the Unitized Land are unitized under the terms of this agreement and herein are called "Unitized Substances."

Article VI—Unit Operator

6.1 _____ is hereby designated as Unit Operator, and by signature hereto as Unit Operator agrees and consents to accept the duties and obligations of Unit Operator for the discovery, development, production, distribution, and utilization of Unitized Substances as herein provided. Whenever reference is made herein to the Unit Operator, such reference means the Unit Operator acting in that capacity and not as an owner of interest in Unitized Substances, and the term "Working Interest Owner," when used herein, shall include or refer to Unit Operator as the owner of a Working Interest when such an interest is owned by it.

Article VII—Resignation or Removal of Unit Operator

7.1 The Unit Operator shall have the right to resign. Such resignation shall not become effective so as to release Unit Operator from the duties and obligations of Unit Operator or terminate Unit Operators rights, as such, for a period of six (6) months after notice of its intention to resign has been served by Unit Operator on all Working Interest Owners and the authorized officer, nor until all wells then drilled hereunder are placed in a satisfactory condition for suspension or abandonment, whichever is required by the authorized officer, unless a new Unit Operator shall have been selected and approved and shall have taken over and assumed the duties and obligations of Unit Operator prior to the expiration of said period.

7.2 The Unit Operator may, upon default or failure in the performance of its duties or obligations hereunder, be subject to removal by the same percentage vote of the owners of Working Interests as herein provided for the selection of a new Unit Operator. Such removal shall be effective upon notice thereof to the authorized officer.

7.3 The resignation or removal of Unit Operator under this Agreement shall not terminate its right, title, or interest as the

owner of a Working Interest or other interest in Unitized Substances, but upon the resignation or removal of Unit Operator becoming effective, such Unit Operator shall deliver possession of all wells, equipment, material, and appurtenances used in conducting the unit operations to the new duly qualified successor Unit Operator or, if no such new unit operator is elected, to the common agent appointed to represent the Working Interest Owners in any action taken hereunder, to be used for the purpose of conducting operations hereunder.

7.4 In all instances of resignation or removal, until a successor Unit Operator is selected and approved as hereinafter provided, the Working Interest Owners shall be jointly responsible for performance of the duties and obligations of Unit Operator, and shall not later than 30 days before such resignation or removal becomes effective appoint a common agent to represent them in any action to be taken hereunder.

7.5 The resignation or removal of Unit Operator shall not release Unit Operator from any liability for any default by it hereunder occurring prior to the effective date of its resignation or removal.

Article VIII—Successor Unit Operator

8.1 If, prior to the establishment of a Participating Area hereunder, the Unit Operator shall resign as Operator, or shall be removed as provided in Article VII, a successor Unit Operator may be selected by vote of the more than one-half of the owners of the Working Interests in Unitized Substances, based on their respective shares, on an acreage basis, in the Unitized Land.

8.2 If, after the establishment of a Participating Area hereunder, the Unit Operator shall resign as Unit Operator, or shall be removed as provided in Article VII, a successor Unit Operator may be selected by a vote of more than one-half of the owners of the Working Interests in Unitized Substances, based on their respective shares, on a participating acreage basis; provided that, if a majority but less than 60 percent of the Working Interest in the Participating Lands is owned by a party to this agreement, a concurring vote of one or more additional Working Interest Owners owning 10 percent or more of the Working Interest in the participating land shall be required to select a new Unit Operator.

8.3 The selection of a successor Unit Operator shall not become effective until:

(a) The Unit Operator so selected shall accept in writing the duties, obligations, and responsibilities of the Unit Operator; and

(b) The selection shall have been approved by the authorized officer.

8.4 If no successor Unit Operator is selected and qualified as herein provided, the authorized officer at his or her election may declare this Agreement terminated.

Article IX—Accounting Provisions and Unit Operating Agreement

9.1 Costs and expenses incurred by Unit Operator in conducting unit operations hereunder shall be paid and apportioned among and borne by the owners of Working Interests; all in accordance with the agreement or agreements entered into by and between the Unit Operator and the owners of Working Interests, whether one or more, separately or collectively.

9.2 Any agreement or agreements entered into between the Working Interest Owners and the Unit Operator as provided in this Article, whether one or more, are herein referred to as the "Unit Operating Agreement."

9.3 The Unit Operating Agreement shall provide the manner in which the Working Interest Owners shall be entitled to receive their respective share of the benefits accruing hereto in conformity with their underlying operating agreements, leases, or other contracts, and such other rights and obligations, as between Unit Operator and the Working Interest Owners.

9.4 Neither the Unit Operating Agreement nor any amendment thereto shall be deemed either to modify any of the terms and conditions of this Agreement or to relieve the Unit Operator of any right or obligation established under this Agreement.

9.5 In case of any inconsistency or conflict between this Agreement and the Unit Operating Agreement, this Agreement shall govern.

9.6 Three true copies of any Unit Operating Agreement executed pursuant to this Article IX shall be filed with the authorized officer prior to approval of this Agreement.

Article X—Rights and Obligations of Unit Operator

10.1 The right, privilege, and duty of exercising any and all rights of the parties hereto that are necessary or convenient for exploring, producing, distributing, or utilizing Unitized Substances are hereby delegated to and shall be exercised by the Unit Operator as provided in this Agreement in accordance with a Plan of Development approved by the authorized officer.

10.2 Upon request by Unit Operator, acceptable evidence of title to geothermal resources interests in the Unitized Land shall be deposited with the Unit Operator and together with this Agreement shall constitute and define the rights, privileges, and obligations of Unit Operator.

10.3 Nothing in this Agreement shall be construed to transfer title to any land or to any lease or operating agreement, it being understood that the Unit Operator, in its capacity as Unit Operator, shall exercise the rights of possession and use vested in the parties hereto only for the purposes specified in this Agreement.

10.4 The Unit Operator shall take such measures as the authorized officer deems appropriate and adequate to prevent drainage of Unitized Substances from Unitized Land by wells on land not subject to this Agreement.

10.5 The authorized officer is hereby vested with authority to alter or modify, from time to time, in his discretion, the rate of prospecting and development and the quantity and rate of production under this Agreement.

Article XI—Plan of Development

11.1 Concurrently with the submission of this Agreement to BLM for approval, the Unit Operator shall submit to BLM an acceptable initial Plan of Development. Said plan shall be as complete and adequate as the authorized officer may determine to be necessary for timely exploration and/or development, and to insure proper protection of the environment and conservation of the natural resources of the Unit Area.

11.2 Prior to the expiration of the initial Plan of Development, or any subsequent Plan of Development, Unit Operator shall submit for approval of the authorized officer an acceptable subsequent Plan of Development for the Unit Area which, when approved by the authorized officer, shall constitute the exploratory and/or development drilling and operating obligations of Unit Operator under this Agreement for the period specified therein.

11.3 Any Plan of Development submitted hereunder shall:

(a) Specify the number and locations of any exploration operations to be conducted or wells to be drilled, and the proposed order and time for such operations or drilling; and

(b) To the extent practicable, specify the operating practices regarded as necessary and advisable for proper conservation of natural resources and protection of the environment in compliance with section 1.1 of this Agreement.

11.4 The Plan of Development submitted concurrently with this Agreement for approval shall prescribe that the Unit Operator shall begin to drill a unit well identified in the Plan of Development approved by the authorized officer, unless on such effective date a well is being drilled conformably with the terms hereof, and thereafter continue such drilling diligently until the ____ formation has been tested or until at a lesser depth unitized substances shall be discovered that can be produced in paying quantities (i.e., quantities sufficient to repay the costs of drilling, completing, and producing operations, with a reasonable profit) or the Unit Operator shall at any time establish to the satisfaction of the authorized officer that further drilling of said well would be unwarranted or impracticable; provided, however, that the Unit Operator shall not in any event be required to drill said well to a depth in excess of ____ feet.

11.5 The initial Plan of Development and/or subsequent Plan of Development submitted under this Article shall provide that the Unit Operator shall initiate a continuous drilling program providing for drilling of no less than one well at a time, and allowing no more than six (6) months time to elapse between completion and testing of one well and the beginning of the next well, until a well capable of producing or utilizing Unitized Substances in commercial quantities is completed to the satisfaction of the authorized officer, or until it is reasonably proven that the Unitized Land is incapable of producing Unitized Substances in paying quantities in the formations drilled under this Agreement.

11.6 The authorized officer may modify the exploration operation or drilling requirements of the initial or subsequent Plans of Development by granting reasonable extensions of time when, in his or her opinion, such action is warranted and in the public interest.

11.7 Until a well capable of producing or utilizing Unitized Substances in commercial quantities is completed, the failure of Unit Operator in a timely manner to conduct any exploration operations or drill any of the wells provided for in Plans of Development required under this Article XI or to submit a timely and acceptable subsequent Plan of Development, shall, after notice of default or notice of prospective default to Unit Operator by the authorized officer, and after failure of Unit Operator to remedy any actual default within a reasonable time (as determined by the authorized officer), result in automatic termination of this Agreement effective as of the date of the default, as determined by the authorized officer.

11.8 Separate Plans of Development may be submitted for separate productive zones, subject to the approval of the authorized officer. Also subject to the approval of the authorized officer, Plans of Development shall be modified or supplemented when necessary to meet changes in conditions or to protect the interest of all parties to this Agreement.

Article XII—Participating Areas

12.1 Prior to the commencement of production of Unitized Substances, the Unit Operator shall submit for approval by the authorized officer a schedule (or schedules) of all land then regarded as reasonably proven to be productive from a pool or deposit discovered or developed; all lands in said schedule (or schedules), on approval of the authorized officer, will constitute a Participating Area (or Areas), effective as of the date production commences or the effective date of this Unit Agreement, whichever is later. Said schedule (or schedules) shall also set forth the percentage of Unitized Substances to be allocated, as herein provided, to each tract in the Participating Area (or Areas), and shall govern the allocation of production, commencing with the effective date of the Participating Area.

12.2 A separate Participating Area shall be established for each separate pool or deposit of Unitized Substances or for any group thereof that is produced as a single pool or deposit, and any two or more Participating Areas so established may be combined into one, on approval of the authorized officer. The effective date of any Participating Area established after the commencement of actual production of Unitized Substances shall be the first of the month in which is obtained the knowledge or information on which the establishment of said Participating Area is based, unless a more appropriate effective date is proposed by the Unit Operator and approved by the authorized officer.

12.3 Any Participating Area (or Areas) established under 12.1 or 12.2 above shall, subject to the approval of the authorized officer, be revised from time to time to:

(a) Include additional land then regarded as reasonably proved to be productive from the pool or deposit for which the Participating Area was established;

(b) Include lands necessary to unit operations;

(c) Exclude land then regarded as reasonably proved not to be productive from the pool or deposit for which the Participating Area was established; or

(d) Exclude land not necessary to unit operations; and

(e) Revise the schedule (or schedules) of allocation percentages accordingly.

12.4 Subject to the limitation cited in 12.1 hereof, the effective date of any revision of a Participating Area established under Articles 12.1 or 12.2 shall be the first of the month in which is obtained the knowledge or information on which such revision is predicated; provided, however, that a more appropriate effective date may be used if justified by the Unit Operator and approved by the authorized officer.

12.5 No land shall be excluded from a Participating Area on account of depletion of the Unitized Substances, except that any Participating Area established under the provisions of this Article XII shall terminate automatically whenever all operations are abandoned in the pool or deposit for which the Participating Area was established.

12.6 Nothing herein contained shall be construed as requiring any retroactive adjustment for production obtained prior to the effective date of the revision of a Participating Area.

Article XIII—Allocation of Unitized Substances

13.1 All Unitized Substances produced from a Participating Area established under this Agreement shall be deemed to be produced equally, on an acreage basis, from the several tracts of Unitized Land within the Participating Area established for such production.

13.2 For the purpose of determining any benefits accruing under this Agreement, each Tract of Unitized Land shall have allocated to it such percentage of said production as the number of acres in the Tract included in the Participating Area bears to the total number of acres of Unitized Land in said Participating Area.

13.3 Allocation of production hereunder for purposes other than settlement of the royalty obligations of the respective Working Interest Owners shall be on the basis prescribed in the Unit Operating Agreement, whether in conformity with the basis of allocation set forth above or otherwise.

13.4 The Unitized Substances produced from a Participating Area shall be allocated as provided herein, regardless of whether any wells are drilled on any particular part or tract of said Participating Area.

Article XIV—Relinquishment of Leases

14.1 Pursuant to the provisions of the Federal leases and 43 CFR subpart 3213, a lessee of record shall, subject to the provisions of the Unit Operating Agreement, have the right to relinquish any of its interests in leases committed hereto, in whole or in part; provided, that no relinquishment shall be made of interests in land within a Participating Area without the prior approval of the authorized officer.

14.2 A Working Interest Owner may exercise the right to surrender, when such right is vested in it by any non-Federal lease, sublease, or operating agreement, provided that each party who will or might acquire the Working Interest in such lease by such surrender or by forfeiture is bound by the terms of this Agreement, and further provided that no relinquishment shall be made of such land within a Participating Area without the prior written consent of the non-Federal Lessor.

14.3 If, as the result of relinquishment, surrender, or forfeiture, the Working Interests become vested in the fee owner or lessor of the Unitized Substances, such owner may:

(a) Accept those Working Interest rights and obligations subject to this Agreement and the Unit Operating Agreement, or

(b) Lease the portion of such land as is included in a Participating Area established hereunder, subject to this Agreement and the Unit Operating Agreement, and provide for the independent operation of any part of such land that is not then included within a Participating Area established hereunder.

14.4 If the fee owner or lessor of the Unitized Substances does not, (1) accept the Working Interest rights and obligations subject to this Agreement and the Unit Operating Agreement, or (2) lease such lands as provided in 14.3 above within six (6) months after the relinquished, surrendered, or forfeited Working Interest becomes vested in said fee owner or lessor, the Working Interest benefits and obligations accruing to such land under this Agreement and the Unit Operating Agreement shall be shared by the owners of the remaining unitized Working Interests in accordance with their respective Working Interest ownerships, and such owners of Working Interests shall compensate the fee owner or lessor of Unitized Substances in such lands by paying sums equal to the rentals, minimum royalties, and royalties applicable to such lands under the lease or leases in effect when the Working Interests were relinquished, surrendered, or forfeited.

14.5 Subject to the provisions of 14.4 above, an appropriate accounting and settlement shall be made for all benefits accruing to or payments and expenditures made or incurred on behalf of any surrendered or forfeited Working Interest subsequent to the date of surrender or forfeiture, and payment of any moneys found to be owing by such an accounting shall be made as between the parties within thirty (30) days.

14.6 In the event no Unit Operating Agreement is in existence and a mutually acceptable agreement cannot be consummated between the proper parties, the authorized officer may prescribe such reasonable and equitable conditions of agreement as he deems warranted under the circumstances.

14.7 The exercise of any right vested in a Working Interest Owner to reassign such Working Interest to the party from whom it was obtained shall be subject to the same conditions as set forth in this Article XIV in regard to the exercise of a right to surrender.

Article XV—Rentals

15.1 Any unitized lease on non-Federal land containing provisions that would terminate such lease unless (1) drilling operations are commenced upon the land covered thereby within the time therein

specified or (2) rentals are paid for the privilege of deferring such drilling operations, the rentals required thereby shall, notwithstanding any other provisions of this Agreement, be deemed to accrue as to the portion of the lease not included within a Participating Area and become payable during the term thereof as extended by this Agreement, and until the required drillings are commenced upon the land covered thereby.

15.2 Rentals are payable on Federal leases on or before the anniversary date of each lease year.

15.3 Beginning with the lease year commencing on or after _____ and for each lease year thereafter, rental payments for lands of the United States subject to this Agreement shall be made on the following basis: An annual rental in the amount prescribed in unitized Federal leases, in no event creditable against production royalties, shall be paid for each acre or fraction thereof that is not within a Participating Area.

15.4 Rental due on the leases committed to the Unit shall be paid by Working Interest Owners responsible under existing contracts, laws, and regulations, or by the Unit Operator.

15.5 Settlement for royalty interest shall be made by Working Interest Owners responsible under existing contracts, laws, and regulations, or by the Unit Operator, on or before the last day of each month for Unitized Substances produced during the preceding calendar month.

15.6 Royalty due the United States shall be computed as provided in the operating regulations, and paid in value as to all Unitized Substances, on the basis of the amounts thereof allocated to unitized Federal land as provided herein, at the royalty rate or rates specified in the respective Federal leases.

15.7 Nothing herein shall operate to relieve the lessees of any land from their respective lease obligations for the payment of any rental, or royalty due under their leases.

Article XVI—Operations on Nonparticipating Land

16.1 Any party hereto owning or controlling the Working Interest in any Unitized Land having a regular well location may, with the approval of the authorized officer and at such party's sole risk, costs, and expense, drill a well to test any formation of deposit for which a Participating Area has not been established or to test any formation or deposit for which a Participating Area has been established if such location is not within said Participating Area, unless within 30 days of receipt of notice from said party of his intention to drill the well, the Unit Operator elects and commences to drill such a well in like manner as other wells are drilled by the Unit Operator under this Agreement.

16.2 If any well drilled by a Working Interest Owner other than the Unit Operator proves that the land upon which said well is situated may properly be included in a Participating Area, such Participating Area shall be established or enlarged as provided in this Agreement, and the well shall thereafter be operated by the Unit Operator in accordance with the terms of this Agreement and the Unit Operating Agreement.

Article XVII—Leases and Contracts Conformed and Extended

17.1 The terms, conditions, and provisions of all leases, subleases, and other contracts relating to exploration, drilling, development, or utilization of geothermal resources on lands committed to this Agreement, are hereby expressly modified and amended only to the extent necessary to make the same conform to the provisions hereof. Otherwise said leases, subleases, and contracts shall remain in full force and effect.

17.2 The parties hereto consent that the Secretary shall, by his or her approval hereof, modify and amend the Federal leases committed hereto to the extent necessary to conform said leases to the provisions of this Agreement.

17.3 The development and/or operation of lands subject to this Agreement under the terms hereof shall be deemed full performance of any obligations for development and operation with respect to each and every separately owned tract subject to this Agreement, regardless of whether there is any development of any particular tract of the Unit Area.

17.4 Drilling and/or producing operations performed hereunder upon any tract of Unitized Lands will be deemed to be performed upon and for the benefit of each and every tract of Unitized Land.

17.5 Suspension of operations and/or production on all Unitized Lands pursuant to direction or consent of the Secretary or his duly authorized representative shall be deemed to constitute such suspension pursuant to such direction or consent as to each and every tract of Unitized Land. A suspension of operations and/or production limited to specified lands shall be applicable only to such lands.

17.6 Subject to the provisions of Article XV hereof and 17.10 of this Article, each lease, sublease, or contract relating to the exploration, drilling, development, or utilization of geothermal resources of lands other than those of the United States committed to this Agreement, is hereby extended beyond any such term provided therein so that it shall be continued for and during the term of this Agreement.

17.7 Subject to the lease renewal and the readjustment provision of the Act, any Federal lease committed hereto may, as to the Unitized Lands, be continued for the term so provided therein, or as extended by law. This subsection shall not operate to extend any lease or portion thereof as to lands excluded from the Unit Area by the contraction thereof.

17.8 Each sublease or contract relating to the operations and development of Unitized Substances from lands of the United States committed to this Agreement shall be continued in force and effect for and during the term of the underlying lease.

17.9 Any Federal lease heretofore or hereafter committed to any such unit plan embracing lands that are in part within and in part outside of the area covered by any such plan shall be segregated into separate leases as to the lands committed and the lands not committed, as of the effective date of unitization.

17.10 In the absence of any specific lease provision to the contrary, any lease, other than a Federal lease, having only a portion of its land committed hereto shall be segregated as to the portion committed and the portion not committed, and the provisions of such lease shall apply separately to such segregated portions, commencing as of the effective date hereof. In the event any such lease provides for a lump-sum rental payment, such payment shall be prorated between the portions so segregated in proportion to the acreage of the respective tracts.

17.11 Upon termination of this Agreement, the leases covered hereby may be maintained and continued in force and effect in accordance with the terms, provisions, and conditions of the Act, the lease or leases, and amendments thereto.

Article XVIII—Effective Date and Term

18.1 This Agreement shall become effective upon approval by the Secretary or his duly authorized representative, and shall terminate five (5) years from said effective date unless,

(a) Such date of expiration is extended by the authorized officer;

(b) Unitized Substances are produced or utilized in commercial quantities in which event this Agreement shall continue for so long as Unitized Substances are produced or utilized in commercial quantities; or

(c) This Agreement is terminated prior to the end of said five (5) year period as heretofore provided.

18.2 This Agreement may be terminated at any time by the owners of a majority of the Working Interests on an acreage basis, with the approval of the authorized officer. Notice of any such approval shall be given by the Unit Operator to all parties hereto.

Article XIX—Appearances

19.1 Unit Operator shall, after notice to other parties affected, have the right to appear for and on behalf of any and all interests affected hereby before the Department of the Interior, and to appeal from decisions, orders or rulings issued under the regulations of said Department, or to apply for relief from any of said regulations or in any proceedings relative to operations before the Department of the Interior or any other legally constituted authority: Provided, however, That any interested parties shall also have the right, at their own expense, to be heard in any such proceeding.

Article XX—No Waiver of Certain Rights

20.1 Nothing contained in this Agreement shall be construed as a waiver by any party hereto of the right to assert any legal or constitutional right or defense pertaining to the validity or invalidity of any law of the State wherein lands subject to this Agreement are located, or of the United States, or regulations issued thereunder, in any way affecting such party, or as a waiver by any such party of any right beyond his or its authority to waive.

Article XXI—Unavoidable Delay

21.1 The obligations imposed by this Agreement requiring Unit Operator to commence or continue drilling or to produce or utilize Unitized Substances from any of the land covered by this Agreement, shall be suspended while, but only so long as, Unit Operator, despite the exercise of due care and diligence, is prevented from complying with such obligations, in whole or in part, by strikes, Acts of God, Federal or other applicable law, Federal or other authorized governmental agencies, unavoidable accidents, uncontrollable delays in transportation, inability to obtain necessary materials in open market, or other matters beyond the reasonable control of Unit Operator, whether similar to matters herein enumerated or not.

21.2 No unit obligation that is suspended under this section shall become due less than thirty (30) days after it has been determined that the suspension is no longer applicable.

21.3 Determination of creditable "Unavoidable Delay" time shall be made by the Unit Operator, subject to approval by the authorized officer.

Article XXII—Postponement of Obligations

22.1 Notwithstanding any other provisions of this Agreement, the Authorized officer, on his own initiative or upon appropriate justification by Unit Operator, may postpone any obligation established by and under this Agreement to commence or continue drilling or to operate on or produce Unitized Substances from lands covered by this Agreement when, in his judgment, circumstances warrant such action.

Article XXIII—Nondiscrimination

23.1 In connection with the performance of work under this Agreement, the Operator agrees to comply with all of the provisions of section 202(1) to (7) inclusive, of Executive Order 11246 (30 FR 12319), as amended by Executive Order 11375 (32 FR 14303), which are hereby incorporated by reference in this Agreement.

Article XXIV—Counterparts

24.1 This Agreement may be executed in any number of counterparts, no one of which needs to be executed by all parties, or may be ratified or consented to by separate instruments in writing specifically referring hereto, and shall be binding upon all parties who have executed such a counterpart, ratification, or consent hereto, with the same force and effect as if all such parties had signed the same document.

Article XXV—Subsequent Joinder

25.1 If the owner of any substantial interest in geothermal resources under a tract within the Unit Area fails or refuses to subscribe or consent to this Agreement, the owner of the Working Interest in that tract may withdraw said tract from this Agreement by written notice delivered to the authorized officer and the Unit Operator prior to the approval of this Agreement by the authorized officer.

25.2 Any geothermal resources interests in lands within the Unit Area not committed hereto prior to approval of this Agreement may thereafter be committed by the owner or owners thereof subscribing or consenting to this Agreement, and, if the interest is a Working Interest, by the owner of such interest also subscribing to the Unit Operating Agreement.

25.3 After operations are commenced hereunder, the right of subsequent joinder, as provided in this Article XXV, by a Working Interest Owner is subject to such requirements or approvals, if any, pertaining to such joinder, as may be provided for in the Unit Operating Agreement. Joinder to the Unit Agreement by a Working Interest Owner at any time must be accompanied by appropriate joinder to the Unit Operating Agreement, if more than one committed Working Interest Owner is involved, in order for the interest to be regarded as committed to this Unit Agreement.

25.4 After final approval hereof, joinder by a nonworking interest owner must be consented to in writing by the Working Interest Owner committed hereto and responsible for the payment of any benefits that may accrue hereunder in behalf of such nonworking interest. A nonworking interest may not be committed to this Agreement unless the corresponding Working Interest is committed hereto.

25.5 Except as may otherwise herein be provided, subsequent joinders to this Agreement shall be effective as of the first day of the month following the filing with the authorized officer of duly executed counterparts of all or any papers necessary to establish effective commitment of any tract to this Agreement, unless objection to such joinder is duly made within sixty (60) days by the authorized officer.

Article XXVI—Covenants Run With the Land

26.1 The covenants herein shall be construed to be covenants running with the land with respect to the interest of the parties hereto and their successors in interest until this Agreement terminates, and any grant, transfer, or conveyance, of interest in land or leases subject hereto shall be and hereby is conditioned upon the assumption of all privileges and obligations hereunder by the grantee, transferee, or other successor in interest.

26.2 No assignment or transfer of any Working Interest or other interest subject hereto shall be binding upon Unit Operator until the first day of the calendar month after Unit Operator is furnished with the original, photostatic, or certified copy of the instrument of transfer.

Article XXVII—Notices

27.1 All notices, demands, or statements required hereunder to be given or rendered to the parties hereto shall be deemed fully given if given in writing and personally delivered to the party or sent by postpaid registered or certified mail, addressed to such party or parties at their respective addresses set forth in connection with the signatures hereto, or to the ratification or consent hereof, or to such other address as any such party may have furnished in writing to the party sending the notice, demand, or statement.

Article XXVIII—Loss of Title

28.1 In the event title to any tract of Unitized Land shall fail and the true owner cannot be induced to join in this Agreement, such tract shall be automatically regarded as not committed hereto, and there shall be such readjustment of future costs and benefits as may be required on account of the loss of such title.

28.2 In the event of a dispute as to title to any royalty, Working Interest, or other interests subject hereto, payment or delivery on account thereof may be withheld without liability for interest until the dispute is finally settled: Provided, That, as to Federal land or leases, no payments of funds due the United States shall be withheld, but such funds shall be deposited as directed by the authorized officer to be held as unearned money pending final settlement of the title dispute, and then applied as earned or returned in accordance with such final settlement.

Article XXIX—Taxes

29.1 The Working Interest Owners shall render and pay for their accounts and the accounts of the owners of nonworking interests all valid taxes on or measured by the Unitized Substances in and under, or that may be produced, gathered, and sold or utilized from, the land subject to this Agreement after the effective date hereof.

29.2 The Working Interest Owners on each tract may charge a proper proportion of the taxes paid under 29.1 hereof to the owners of nonworking interests in said tract, and may reduce the allocated share of each royalty owner for taxes so paid. No taxes shall be charged to the United States or the State of _____ or to any lessor who has a contract with his lessee which requires the lessee to pay such taxes.

Article XXX—Relation of Parties

30.1 It is expressly agreed that the relation of the parties hereto is that of independent contractors, and nothing in this Agreement contained, expressed, or implied, nor any operations conducted hereunder, shall create or be deemed to have created a partnership or association between the parties hereto or any of them.

Article XXXI—Special Federal Lease Stipulations and/or Conditions

31.1 Nothing in this Agreement shall modify special lease stipulations and/or conditions applicable to lands of the United States. No modification of the conditions necessary to protect the lands or functions of lands under the jurisdiction of any Federal agency is authorized except with prior consent in writing whereby the authorizing official specifies the modification permitted.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and have set opposite their respective names the date of execution.

Unit operator (as unit operator and as working interest owner):

By:

_____

Name:

_____

Title:

Date:

Subpart 3287—Relief and Appeals

§ 3287.1 May the unit operator request a suspension of unit obligations or development requirements?

The unit operator may provide a written request to BLM to suspend any or all obligations under the unit agreement. BLM will specify the term of the suspension and any requirements the unit operator must meet for the suspension to remain in effect.

§ 3287.2 When may BLM grant a suspension of unit obligations?

(a) BLM may grant a suspension of unit obligations when, despite the exercise of due care and diligence, the unit operator is prevented from complying with such obligations, in whole or in part, by:

(1) Acts of God;

(2) Federal, State, or municipal laws;

(3) Labor strikes;

(4) Unavoidable accidents;

(5) Uncontrollable delays in transportation;

(6) The inability to obtain necessary materials or equipment in the open market; or

(7) Other circumstances, which BLM determines are beyond the reasonable control of the unit operator, such as agency time frames required to complete environmental documents.

(b) BLM may deny the request for suspension of unit obligations when the suspension would involve a lengthy or indefinite period. For example, BLM might not approve a suspension of initial drilling obligations due to a unit operator's inability to obtain an electrical sales contract, or when poor economics affect the electrical generation market, limiting the opportunity to obtain a viable sales contract. BLM may grant a suspension of subsequent drilling obligations when it is in the public interest.

§ 3287.3 How does a suspension of unit obligations affect the terms of the unit agreement?

(a) At BLM's discretion, we may suspend any terms of the unit agreement during the period a suspension is effective. During the period of the suspension, the involved unit terms are tolled. The suspension may not relieve the unit operator of its responsibility to meet other requirements of the unit agreement. For example, the unit operator may continue to be required to diligently develop or produce the resource during a suspension of drilling obligations.

(b) The unit operator must ensure all interests in the agreement are notified of any changes regarding the agreement.

§ 3287.4 May a decision made by BLM under this subpart be appealed?

A unit operator or any other adversely affected person may appeal a BLM decision regarding unit administration or operations in accordance with § 3200.5 of this chapter.

[FR Doc. 06–6220 Filed 7–20–06; 8:45 am]

BILLING CODE 4310–84–P

Federal Register

Friday,
July 21, 2006

Part III

Department of Labor

Employee Benefits Security Administration

Department of the Treasury

Internal Revenue Service

Pension Benefit Guaranty Corporation

Proposed Revision of Annual Information Return/Reports; Notice

DEPARTMENT OF LABOR

Employee Benefits Security Administration

DEPARTMENT OF THE TREASURY

Internal Revenue Service

PENSION BENEFIT GUARANTY CORPORATION

RIN 1210–AB06

Proposed Revision of Annual Information Return/Reports

AGENCIES: Employee Benefits Security Administration, Labor, Internal Revenue Service, Treasury, Pension Benefit Guaranty Corporation.

ACTION: Notice of proposed forms revisions.

SUMMARY: This document contains proposed revisions to the Form 5500 Annual Return/Report forms, including a proposed new Short Form 5500, filed for employee pension and welfare benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code). The Form 5500 Annual Return/Report, including its schedules and attachments (Form 5500 Annual Return/Report), is an important source of financial, funding, and other information about employee benefit plans for the Department of Labor, the Pension Benefit Guaranty Corporation, and the Internal Revenue Service (the Agencies), as well as for plan sponsors, participants and beneficiaries, and the general public. The proposed revisions to the Form 5500 Annual Return/Report, contained in this document, including a new Form 5500–SF short form annual return/report for certain types of small pension plans, are intended to reduce and streamline annual reporting burdens, especially for small businesses, update the annual reporting forms to reflect current issues and agency priorities, and facilitate the establishment of a wholly electronic filing system for receipt of the Form 5500 Annual Returns/Reports. The form revisions thus would, upon adoption, apply for the reporting year for which the electronic filing requirement is implemented. The proposed revisions would affect employee pension and welfare benefit plans, plan sponsors, administrators, and service providers to plans subject to annual reporting requirements under ERISA and the Code.

DATES: Written comments must be received by the Department of Labor on or before September 19, 2006.

ADDRESSES: Comments should be addressed to the Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA), Room N–5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attn: Revision of Form 5500 (RIN 1210–AB06). Comments also may be submitted electronically to *e-ori@dol.gov* or by using the Federal eRulingmaking Portal: *www.regulations.gov* (follow instructions provided for submission of comments). EBSA will make all comments available to the public on its Web site at *http://www.dol.gov/ebsa*. The comments also will be available for public inspection at the Public Disclosure Room, N–1513, EBSA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Goodman or Michael Baird, Employee Benefits Security Administration (EBSA), U.S. Department of Labor, (202) 693–8523, for questions relating to the Form 5500, and its Schedules A, C, D, G, H, and I, and lines 1 through 11 of the proposed Form 5500–SF (Short Form 5500), as well as the general reporting requirements under Title I of ERISA; Ann Junkins, Internal Revenue Service (IRS), (202) 283–0722, for questions relating to Schedules B and R of the Form 5500, lines 12 and 13 of the proposed Short Form 5500, and the filing of Short Form 5500 instead of the Form 5500–EZ for plans that are not subject to Title I of ERISA, as well as questions relating to the general reporting requirements under the Internal Revenue Code; and Michael Packard, Pension Benefit Guaranty Corporation (PBGC), (202) 326–4080 for questions relating to Schedule B of the Form 5500, and line 13 of Schedule R, as well as questions relating to the general reporting requirements under Title IV of ERISA. For further information on an item not mentioned above, contact Mr. Baird. The telephone numbers referenced above are not toll-free numbers.

SUPPLEMENTARY INFORMATION: Sections 101 and 104 of Title I and section 4065 of Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, sections 6058(a) and 6059(a) of the Internal Revenue Code of 1986 (Code), as amended, and the regulations issued under those sections, impose certain annual reporting and filing obligations on pension and welfare benefit plans, as well as on certain other entities.[1] Plan administrators, employers, and others generally satisfy these annual reporting obligations by the filing of the Form 5500 Annual Return/Report, in accordance with the instructions and related regulations.

The Form 5500 Annual Return/Report is the principal source of information and data available to the Department of Labor (Department), the IRS, and the PBGC concerning the operations, funding, and investments of more than 800,000 pension and welfare benefit plans. These plans cover an estimated 150 million participants and hold an estimated $4.3 trillion in assets. Accordingly, the Form 5500 Annual Return/Report necessarily constitutes an integral part of each Agency's enforcement, research, and policy formulation programs, and is a source of information and data for use by other federal agencies, Congress, and the private sector in assessing employee benefit, tax, and economic trends and policies. The Form 5500 Annual Return/Report also serves as the primary means by which plan operations can be monitored by participants and beneficiaries and by the general public.

I. EFAST and Electronic Filing

The Agencies currently use an automated processing system, the ERISA Filing Acceptance System (EFAST) to process the Form 5500 Annual Return/Report. As part of the Department's efforts to update and streamline EFAST's current paper-based processing system, the Department published in the **Federal Register** today, a notice of final rulemaking establishing an electronic filing requirement for the Form 5500 Annual Return/Report for plan years or, for direct filing entities' reporting years, beginning on or after January 1, 2008 (Electronic Filing Rule).[2] The rule establishes an electronic filing requirement for the Form 5500 Annual Return/Report and the proposed Form 5500–SF (Short Form 5500) under Title I of ERISA. The Electronic Filing Rule provides that any Form 5500 Annual Return/Report (including any Short Form 5500) to be filed with the Secretary of Labor

[1] Other filing requirements may apply to certain employee benefit plans and to multiple employer welfare arrangements under ERISA or to other benefit arrangements under the Code, and such other filing requirements are not within the scope of this proposal. For example, Code sec. 6033(a) imposes an additional reporting and filing obligation on organizations exempt from tax under Code sec. 501(a), which may be related to retirement trusts that are qualified under sec. 401(a) of the Code.

[2] The notice of proposed rulemaking to mandate electronic filing was published in the **Federal Register** on August 30, 2005 (70 FR 51542).

(Secretary) for any plan year or reporting year beginning on or after January 1, 2008, must be filed electronically in accordance with instructions and such other guidance as the Secretary may provide, applicable to such annual report. The Electronic Filing Rule explains that such electronic filing by the administrator of a pension or welfare benefit plan would constitute compliance with the applicable limited exemption, alternative method of compliance, and/or simplified reporting requirements, as applicable, prescribed in 29 CFR 2520.103–1 et seq. and promulgated in accordance with the authority granted by the Secretary under sections 104(a) and 110 of Title I of ERISA. For purposes of the PBGC's annual filing and reporting requirements under section 4065 of Title IV of ERISA, a plan administrator's electronic filing of a Form 5500 Annual Return/Report or the proposed Short Form 5500, in accordance with the instructions, will be treated as satisfying the administrator's annual reporting obligation under section 4065 of Title IV of ERISA.[3] Similarly, for purposes of the annual filing and reporting requirements of the Code, the IRS has advised the Department that, although there are no mandatory electronic filing requirements for a Form 5500 Annual Return/Report or the proposed Short Form 5500 under the Code or the regulations issued thereunder, the electronic filing of a Form 5500 Annual Return/Report or the proposed Short Form 5500 (described below), in accordance with the instructions and such other guidance as the Secretary of Treasury may provide, will be treated as satisfying the annual filing and reporting requirements under Code sections 6058(a) and 6059(a).[4]

The Form 5500–EZ is used by certain plans that are not subject to the requirements of section 104(a) of ERISA to satisfy the annual reporting and filing obligations imposed by the Code. To ease the burdens on these filers, the IRS has also advised the Department that certain Form 5500–EZ filers will be permitted to satisfy the requirement to file the Form 5500–EZ with the IRS by filing the proposed Short Form 5500 electronically through the EFAST processing system. Information regarding the Form 5500–EZ filers who would be eligible for this proposed electronic filing option is included in the proposed instruction for the Short Form 5500 attached as Appendix B. Therefore, under the IRS' proposal, certain Form 5500–EZ filers will be provided both electronic and paper filing options. The electronic option will allow Form 5500–EZ filers to complete and electronically file selected information on the Short Form 5500. Form 5500–EZ filers will also have the option to file a paper Form 5500–EZ.[5]

At the same time as the Electronic Filing Rule was being developed, the Agencies undertook a comprehensive review of the current forms and instructions in an effort to improve the data collected and to determine what, if any, design or data changes should be made in anticipation of the new processing system. This proposed revision of the forms and instructions, in conjunction with the Electronic Filing Rule, is intended to streamline the return/report, facilitate the electronic filing requirement, and reduce the burden on plans that file the Form 5500 Annual Return/Report.

Public comments submitted in response to the notice of proposed rulemaking on the electronic filing requirement (Electronic Filing Proposal) generally recognized the value of electronic filing over paper filing and expressed support for increasing the use of electronic filing. In response to the concerns of some commenters about whether the proposed 2007 reporting year implementation date would give plans, plan administrators, plan sponsors, and service providers enough time to make adjustments necessary to migrate to an e-filing environment, especially in the absence of specific information on the characteristics and technical specifications of the new e-filing system, the Electronic Filing Rule is now effective for plan years, or for direct filing entities reporting years, beginning on or after January 1, 2008. Further, in response to commenters' concerns, the preamble to the final rule states the Department, in deciding whether to assess annual reporting civil penalties, will take into account technical and logistical obstacles experienced by plan administrators who acted prudently and in good faith in attempting to timely file a complete annual report in the first year of the wholly electronic filing system. The revised and streamlined data requirements for the Form 5500 Annual Return/Report being proposed in this document are intended to be applicable for the reporting year for which the new e-filing system is implemented.

II. Overview of Form Revisions

The proposed revisions to the annual return/report forms involve the following major categories of changes, along with other technical revisions and updates, to the current structure and content of the Form 5500 Annual Return/Report:

- Establishment of the Form 5500–SF Annual Return/Report (Short Form or Short Form 5500) as a new simplified report for certain small plans;
- Removal of the IRS-only schedules from the Form 5500 Annual Return/Report as part of the move to a wholly electronic filing system;
- Elimination of the special limited financial reporting rules for Code section 403(b) plans;
- Revision of the Schedule C (Service Provider Information) to clarify the reporting requirements and improve the information plan officials receive regarding amounts being received by plan service providers; and
- Addition of new questions to improve information on pension plan funding and compliance with minimum funding requirements.

In addition to the description of the proposed form changes contained in this Notice, the Agencies have included the following appendices: (1) Appendix A—a facsimile of the proposed Form 5500–SF; (2) Appendix B—a facsimile of the proposed Instructions to the Form 5500–SF; (3) Appendix C—detailed description of the proposed changes to the Form 5500 and Schedules; and (4) Appendix D—detailed description of the proposed changes to the instructions for the Form 5500 and Schedules. The Agencies are also making available on the Department's Web site mark-ups of the Form 5500, Schedules, and related instructions showing the proposed form and instruction changes. The facsimiles and mark-ups are provided to show the data proposed to be collected electronically beginning with the first reporting year for which the new e-filing system is implemented. Because of the electronic filing requirement for the revised Form 5500 Annual Return/Report, including the proposed Short Form 5500, copies of facsimile forms and schedules, will not be acceptable for filing under ERISA. Rather, the facsimile forms and schedules the

[3] Administrators of plans required to file reports under ERISA section 4065 also are required to file annual reports for purposes of section 104(a) of ERISA.

[4] The IRS intends that plan administrators, employers, and certain other entities that are subject to various other filing and reporting requirements under Code sections 6033(a), 6047(e), 6057 and 6058(a) must continue to satisfy these requirements in accordance with IRS revenue procedures, regulations, publications, forms, and instructions.

[5] Under the voluntary electronic filing option, 5500–EZ filers filing an amended return for a plan year must file the amended return electronically using the Form 5500–SF if they initially filed electronically for the plan year and must file with the IRS using the paper Form 5500–EZ if they filed for plan year with the IRS on a paper Form 5500–EZ.

Agencies anticipate publishing in conjunction with the final regulation will show the required format for satisfying disclosure obligations under ERISA, including the plan administrator's obligation to furnish copies of the annual report to participants and beneficiaries on request pursuant to section 104(b) of ERISA, but paper versions will not be able to be used for filing.

A. Short Form 5500 as New Simplified Report for Certain Small Plans

As part of continuing efforts to streamline and simplify the annual reporting process, the Agencies are proposing a new two page form—the Short Form 5500—to be filed by certain small plans (generally, plans with fewer than 100 participants) with secure and easy to value investment portfolios. The Agencies have previously issued simplified reporting provisions and limited exemptions for small plans to ease the burdens and costs attributable to annual reporting. After careful review, the Agencies determined that certain small plans, by virtue of their assets being held by regulated financial institutions and having a readily determinable fair market value, present reduced risks for their participants and beneficiaries. In such cases, therefore, an abbreviated annual report filing (i.e., the Short Form 5500) could be established without compromising the enforcement and research needs of the Agencies or the disclosure needs of participants and beneficiaries in such plans. In establishing the criteria for such Short Form filers, the Agencies relied in part on the conditions for a waiver of the audit requirements for small plans under 29 CFR 2520.104–46.[6]

As proposed, a pension or welfare plan would be eligible to file the Short Form if the plan: (1) Covers fewer than 100 participants or would be eligible to file as a small plan under the 80 to 120 rule in 29 CFR 2520.103–1(d); (2) is eligible for the small plan audit waiver under 29 CFR 2520.104–46 (but not by virtue of enhanced bonding); (3) holds no employer securities; and (4) has 100% of its assets in investments that have a readily ascertainable fair market value. For this purpose, participant loans meeting the requirements of ERISA section 408(b)(1), whether or not they have been deemed distributed, and investment products issued by banks and licensed insurance companies that provide valuation information at least annually to the plan administrator, will be treated as having a readily ascertainable fair market value. Plans with assets that are employer securities will not be eligible to file the Short Form. The Agencies believe that the separate financial information about employer securities on the Schedule I is important for regulatory, enforcement, and disclosure purposes. The Agencies also believe that due to the importance of obtaining financial information concerning employer securities, allowing plans that hold employer securities to file the Short Form would conflict with the need to obtain such information. Similarly, because the Agencies believe that all multiemployer plans should be required to answer newly proposed questions on the Form 5500 Annual Return/Report and the Schedule R regarding contributing employers, multiemployer plans would not be eligible to file the Short Form.

In brief, Short Form filers would be required to provide: (1) Basic plan and plan sponsor identifying information; (2) abbreviated participant count data, with defined contribution plan filers providing the number of participants with account balances at the end of the plan year; (3) information on features of the plan (e.g., plan type, manner of providing benefits) using delineated codes; (4) an abbreviated statement of assets and liabilities and income and expenses; and (5) responses to a series of "yes/no/amount" compliance questions, such as identification of any delinquent participant contributions, non-exempt party-in-interest transactions, fidelity bonding coverage, losses caused by fraud or dishonesty, and total participant loan balances at the end of the plan year. Like other filers, Short Form filers would be required to answer new questions on whether during the plan year the plan reduced or failed to provide any benefit under the plan, whether there was a blackout period during the plan year, and whether the blackout notice requirements were met. Short Form pension plan filers also would be required to provide certain basic pension coverage and pension funding compliance information. Short Form defined benefit pension plan filers still would have to file a Schedule B and its attachments. Plans filing the Short Form on an extension of time or in connection with the Department's Delinquent Filer Voluntary Compliance Program would have to include attachments relevant to the extension or participation in the program.

Because eligible plans can only hold certain types of investments, several compliance questions have been eliminated for Short Form filers (e.g., Schedule I questions relating to leases in default or uncollectible, non-cash contributions, and assets whose current value was not readily determinable).

Instead of filing Schedule A, Short Form 5500 filers would be required to provide a total of all fees or commissions paid to any brokers, agents, or other persons by an insurance carrier, insurance service, or other organization that provides some or all of the benefits under the plan. Short Form filers will still need to receive, and insurers will still be required to provide, Schedule A fee and commission information with respect to each contract necessary to complete the Short Form 5500. Plan administrators will be required to retain this information to meet the recordkeeping requirements of section 107 of ERISA.

Under this proposal, most Short Form filers would not be required to file any schedules, although defined benefit pension plans would continue to be

[6] In additional to meeting the small plan size requirement applicable to both pension and welfare plans, for pension plans the eligibility requirements for the audit waiver under 29 CFR 2520.104–46 are: (1) as of the last day of the preceding plan year at least 95% of a small pension plan's assets were "qualifying plan assets;" (2) the plan must include certain information in the Summary Annual Report (SAR) furnished to participants and beneficiaries regarding its compliance with the audit waiver conditions in addition to the information ordinarily required (see 29 CFR 2520.104b–10(d)(3) for a model SAR and the Notice of Proposed Rulemaking published today for model language for the enhanced notice requirement); and (3) in response to a request from any participant or beneficiary, the plan administrator must furnish without change copies of statements from the regulated financial institutions holding or issuing the plan's "qualifying plan assets" describing the assets and the amount of the assets as of the end of the plan year. "Qualifying plan assets, " for this purpose include: shares issued by an investment company registered under the Investment Company Act of 1940 (e.g., mutual fund shares); investment and annuity contracts issued by any insurance company qualified to do business under the laws of a state; participant loans meeting the requirements of ERISA section 408(b)(1), whether or not they have been deemed distributed; and any asset held by banks or similar financial institutions, including trust companies, savings and loan associations, domestic building and loan associations, and credit unions, insurance companies qualified to do business under the laws of a state, organizations registered as broker-dealers under the Securities Exchange Act of 1934, investment companies registered under the Investment Company Act of 1940, or any other organization authorized to act as a trustee for individual retirement accounts under Code section 408. In the case of an individual account plan, qualifying plan assets also include any assets in the individual account of a participant or beneficiary over which the participant or beneficiary had the opportunity to exercise control and with respect to which the participant or beneficiary has been furnished, at least annually, a statement from one of the above regulated financial institutions describing the plan assets held or issued by the institution and the amount of such assets.

required to file Schedule B, where applicable.[7]

The Agencies believe that the eligibility conditions for Short Form filers, especially the requirements relating to security and valuation of the plan's investments, ensure that the Short Form 5500 will provide adequate disclosure to the participants and beneficiaries in the plan and adequate annual reporting to the Agencies.

Small plans that are not eligible to file the Short Form would continue to be able to file simplified reports as under the current system. Specifically, small plan Form 5500 filers would file the Form 5500, Schedules A, B, D, I, and R, where applicable. This proposal also would not change the conditions for the small pension plan audit waiver in 29 CFR 2520.104–46. Small pension plans will still be able to claim the audit waiver even if they are not eligible to file the Short Form. Conversely, small pension plans filing the Short Form would continue to be required to meet all applicable requirements for the audit waiver, including the enhanced Summary Annual Report (SAR) and other disclosure requirements of that regulation. Similarly, all welfare plans that file the Form 5500 Annual Return/Report and have fewer than 100 participants are currently exempt from the audit requirement without regard to how their assets are invested. *See* 29 CFR 2520.104–46(b)(2). The proposed Short Form would not change the welfare plan audit waiver conditions. For a funded welfare plan to be eligible to file the Short Form, however, the plan would have to meet the Short Form requirements regarding investment assets.

B. Removal of IRS-Only Components From the Form 5500 Annual Return/Report

The second category of changes involves the removal of schedules and information that were filed as part of the Form 5500 Annual Return/Report to meet various annual reporting requirements under the Code. The IRS has advised that there are currently no mandatory electronic filing requirements for a Form 5500 Annual Return/Report under the Code or the regulations issued thereunder. As described more fully in the Electronic Filing Rule, the Department has concluded that, taking into account the costs and inefficiencies inherent in the maintenance of any form of a paper filing system, it is not in the overall interest of plan participants and beneficiaries, the Department, and taxpayers generally to continue to accept and process paper Form 5500 Annual Returns/Reports filings as part of a new processing system. To effectuate the electronic filing requirement, the portions of the Form 5500 Annual Return/Report required to satisfy filing obligations imposed by the Code, but not required under ERISA, had to be removed. Accordingly, under this proposal, the following schedules will no longer be required to be filed as part of the Form 5500 Annual Return/Report: Schedule E (ESOP Annual Information), Schedule P (Annual Return of Fiduciary of Employee Benefit Trust), and Schedule SSA (Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits). In that regard, the IRS has independently eliminated the Schedule P (which served as the Trust's information return that is filed under Code section 6033(a)) from the 2006 Form 5500 in anticipation of the transition to a wholly electronic filing environment. Further, as described elsewhere in this document, the Department is proposing to move to the Schedule R three questions on ESOP information formerly on the Schedule E, and the IRS has advised the Department that it does not anticipate requiring separate filings by ESOPs on the remaining questions from the Schedule E. The IRS is evaluating the information collected on Schedule SSA, and considering whether other existing information collections could be used in place of the Form 5500 Annual Return/Report.

The IRS, however, also advised the Department that it intends that plan administrators, employers, and certain other entities that are subject to filing and reporting requirements under the Code will have to continue to satisfy any applicable requirements in accordance with IRS revenue procedures, regulations, publications, forms, and instructions.

The Form 5500 Annual Return/Report would thus be comprised of the Form 5500, and Schedule A (Insurance Information), Schedule B (Actuarial Information), Schedule C (Service Provider Information), Schedule D (DFE/Participating Plan Information), Schedule G (Financial Transaction Schedules), Schedule H (Financial Information), Schedule I (Financial Information Small Plan), and Schedule R (Retirement Plan Information).

C. Elimination of Limited Reporting Option for Code Section 403(b) Pension Plans

Code section 403(b) pension plans that are subject to Title I of ERISA generally have had limited reporting obligations under the Form 5500 Annual Return/Report. A pension plan or arrangement using an annuity contract under Code section 403(b)(1) and/or a custodial account for regulated investment company stock under Code section 403(b)(7) as the sole funding vehicle for providing pension benefits currently files only a Form 5500, containing basic plan identification information. The administrator currently is not required to engage an independent qualified public accountant (IQPA) to conduct an annual audit of the plan, attach an accountant's opinion to the Form 5500, or attach any schedules to the Form 5500. Over the years, the Code has been amended to give favorable tax treatment to Code section 403(b) plans similar to that for Code section 401(k) plans, and these arrangements have grown both in size and number during this time. In this regard, the IRS promulgated regulations to update the current regulations under section 403(b) generally to reflect the numerous legal changes that have been made in section 403(b) since 1964 when the IRS originally promulgated its section 403(b) regulations. 69 FR 67075, 67076 (Nov. 16, 2004). The IRS's proposed regulations note the increasing similarity among arrangements that include salary reduction contributions, i.e., section 401(k), section 403(b), and governmental section 457(b) plans.

The Department understands that the IRS has found a number of Code compliance issues with section 403(b) plans. The Department, in its own reviews, has detected violations of Title I in a high percentage of its Code section 403(b) plan investigations. The predominant issue has been the improper handling of employee contributions.

The Department concluded that these developments warrant a reexamination of the continued reporting exemptions for Code section 403(b) plans. Amending the annual reporting requirements to put Code section 403(b) plans on par with other pension plans covered by Title I of ERISA would enhance the Department's oversight capabilities and improve compliance in this area without substantial additional burden. For example, the reporting in the proposed Short Form, or on Schedules H and I, for delinquent participant contributions may help to ensure that participant contributions are

[7] Short Form 5500 filers would not be required to file Schedule D, but Direct Filing Entities (DFEs) in which such plans invest would still be required to list the plan name and Employer Identification Number (EIN) on Part II of the DFE's Schedule D.

transferred to individual investment accounts on a timely basis.

Under the proposal, Code section 403(b) plans that are subject to Title I of ERISA would be subject to the same annual reporting rules that apply to other ERISA-covered pension plans, including eligibility for the proposed Short Form 5500. In this regard, the Department notes that because Code section 403(b) plans are generally required to be invested exclusively in annuity contracts or mutual funds, they generally would be eligible to file the proposed Short Form 5500. Moreover, under section 107 of ERISA, every person who is required to file a report under Title I of ERISA, but for an exemption or simplified reporting requirement under section 104(a)(2) or (3), already is required to maintain records on which disclosure would be required but for the simplified reporting requirement.

D. Addition of New Questions to Schedules on Title I Compliance, Service Provider Compensation, and Pension Plan Funding

Schedule A: Identify Insurers That Fail To Supply Information

It is the view of the Department that compliance with annual reporting requirements consists both of filing complete, accurate, and timely annual returns/reports, including disclosing the information required to be reported on the Schedule A, and maintaining records regarding the information required to be provided under section 103 of ERISA. Plan administrators, thus, are required to take reasonable and prudent steps to secure the necessary Schedule A information. In this regard, section 103(a)(2) of ERISA provides that, if some or all of the information necessary to enable the administrator to comply with the requirements of Title I of ERISA is maintained by an insurance carrier or other organization that provides some or all of the benefits under a plan or holds assets of the plan in a separate account, such carrier or other organization is required to transmit and certify the accuracy of such information to the administrator within 120 days after the end of the plan year. The current instructions for the Schedule A state that, if necessary information is missing because of an insurer's refusal to provide the information, administrators should, to the extent possible, complete the Schedule A and file a timely return/report noting the refusal and any deficiencies in the Schedule A.

The 2004 ERISA Advisory Council Working Group on Health and Welfare Plan Reporting concluded that many employers have difficulty obtaining timely Schedule A information from insurers. *See* 2004 ERISA Advisory Council Working Group Reports at *http://www.dol.gov/ebsa.* When the Form 5500 Annual Return/Report was revised in 1988 and 1999, public commenters had complained about the difficulties administrators confronted in obtaining timely and complete Schedule A information from their insurers. *See* 65 FR 5026 (Feb. 2, 2000) and 54 FR 8631 (Mar. 1, 1989). In light of these continuing difficulties for plan administrators, the Department proposes to add a check box to the Schedule A to permit plans to identify situations in which the insurance company or other organization that provides some or all of the benefits under a plan has failed to provide Schedule A information. Space would also be provided for the administrator to indicate the type of information that was not provided. As a separate Schedule A is required for each insurance contract, the identity of the insurance company or organization will be self-evident. This would give the Department more usable data on insurers that fail to satisfy their disclosure obligations under section 103(a)(2) of ERISA and the Department's regulations.

Schedule B: Asset Allocations in Very Large Defined Benefit Pension Plans

The PBGC believes that it is important to obtain more detailed information regarding the asset allocations of very large defined benefit plans in order to help the PBGC assess the financial viability of those plans. Although the Schedule H collects certain investment information, the PBGC has found that it needs additional information on the breakdown of assets held by defined benefit plans. The funding status of these plans is highly dependent on the level and types of assets in the plan and the sensitivity of these assets to changes in market conditions. Readily ascertainable information on asset distribution information would improve the PBGC's ability to estimate the impact of economic changes on the financial status of the plans it insures, and, by extension, on the future financial status of the PBGC.

Under this proposal, new questions would be added to the Schedule B that are designed to obtain a "look-through" allocation of plan investments in certain pooled investment funds for defined benefit plans with 1,000 or more participants. The new questions would obtain the percentage of assets held in each of four categories—Stocks, Debt Instruments (Bonds), Real Estate, and Other. The debt instrument data would be further disaggregated into three categories—governmental debt, investment-grade corporate debt, and high-yield corporate debt. The new Schedule B questions would also require plans to provide a measure of the duration of the aggregate debt instruments ("Macaulay duration") in order to provide the PBGC with a more accurate basis for reflecting bond duration for modeling purposes. For this purpose, the Macaulay duration is a weighted average of the number of years until each interest payment and the principal are received. The weights are the amounts of the payments discounted by the yield-to-maturity of the bond. When calculating the distribution of debt securities, any corporate debt that has not been rated will have to be included in the High-Yield Corporate Debt category. Foreign debt will be expected to be allocated to the appropriate category as if it were debt issued by United States corporations or governmental entities.

The asset distribution information, other than the Macaulay duration, should be readily available to single-employer plans because the Financial Accounting Standards Board (FASB) requires that the aggregate asset distribution for all employer plans be included as a part of the sponsor's 10–k filings with the Securities and Exchange Commission. Multiemployer plans are not currently required to calculate these distributions, but the data should be readily available from the plan's investment committee. In addition, data from Section C of EBSA's Private Pension Plan Bulletin [8] indicates that multiemployer plans tend to have a much smaller percentage of assets invested in assets whose type is difficult to ascertain. Obtaining the overall distribution of assets should not be overly burdensome for the administrators of multiemployer plans. The Macaulay duration should be a simple computation for managers of bond portfolios. Only in rare instances would this computation be time consuming. For instance, combining these durations into an aggregate duration could be time consuming if the plan has several bond portfolio managers.

Schedule C: Compensation Received by Plan Service Providers

The Department has been examining issues regarding service provider

[8] The Private Pension Bulletin is available on-line at *http://www.dol.gov/ebsa/PDF/2000pensionplanbulletin.PDF.*

compensation from a number of perspectives.[9] Questions and issues relating to the appropriate manner and scope of the reporting of service provider compensation on the Schedule C have been raised by the ERISA Advisory Council. *See ERISA Advisory Council Report of the Working Group on Plan Fees and Reporting on Form 5500* (Nov. 10, 2004) and the Government Accountability Office (*See Private Pensions: Government Actions Could Improve the Timeliness and Content of Form 5500 Pension Information*, GAO–05–491) (discussing fee disclosure generally), as well as by Form 5500 Annual Return/Report filers and service providers. The Department has determined it is appropriate to modify the Schedule C reporting requirements in an effort both to clarify the reporting requirements and to ensure that plan officials obtain the information they need to assess the reasonableness of the compensation paid for services rendered to the plan, taking into account revenue sharing and other financial relationships or arrangements and potential conflicts of interest that might affect the quality of those services.[10]

As proposed, the Schedule C would consist of three parts. Part I of the Schedule C would require the identification of each person who received, directly or indirectly, $5,000 or more in total compensation (i.e., money or anything else of value) in connection with services rendered to the plan or their position with the plan during the plan year. This requirement would no longer be limited to the 40 highest paid service providers. Filers also would have to indicate for all service providers whether the service provider received any compensation attributable to the person's relationship with or services provided to the plan from a party other than the plan or plan sponsor. If a fiduciary to the plan or any of an enumerated list of service providers received, directly or indirectly, $5,000 or more in total compensation and also received more than $1,000 in compensation from a person other than the plan or plan sponsor, then the Schedule C would have to provide information identifying the payor of the compensation, the relationship or services provided to the plan by the payor, the amount paid, and the nature of the compensation. The enumerated service providers are contract administrator, securities brokerage (stock, bonds, commodities), insurance brokerage or agent, custodial, consulting, investment advisory (plan or participants), investment or money management, recordkeeping, trustee, appraisal, or investment evaluation.

A new Part II for Schedule C would provide a place for plan administrators to identify each fiduciary or service provider that failed or refused to provide the information necessary to complete Part I of the Schedule C.

The proposed Schedule C requirements would raise the threshold for reporting on non-fiduciary employees of the plan from the current $1,000 per month to $25,000 per year. It would also revise the current instructions to make clear that the exception for reporting employees of the plan sponsor or institutional service providers does not apply if those employees receive compensation in connection with the plan or services provided to the plan other than salary from the plan sponsor or institutional service provider.

The Department is also proposing to update the "codes" for identifying services. It is expanding certain codes and modifying others to reflect changes in the plan services industry and to provide greater clarity. It is also eliminating the codes for medical and legal benefit providers to make clear that self-insured plans need not report payments to persons who provide medical services or legal services to participants and beneficiaries. Unlike payments to other service providers required to be reported on the Schedule C, such payments by self-insured plans to medical and legal service providers constitute benefit payments under the plan. The Department notes that insured plans are not required to report on the Schedule C individual providers who are paid by the insurance company for medical and legal services provided to participants and beneficiaries. In the Department's view, the Schedule C was intended to capture information regarding payment of plan assets to persons rendering services to plans, and not information on benefit payments by the plan to participants and beneficiaries.

The proposal would change the Schedule C instructions to make explicit that, except to the extent not otherwise excluded (e.g., non-employee compensation of less than $5,000 and plan employee compensation of less than $25,000 a year), compensation in connection with services rendered to the plan or their position with the plan includes "float" or similar earnings on plan assets or plan deposits that are retained by a service provider as part of its compensation package.

Under the proposal, reportable compensation would include brokerage commissions and fees charged to the plan on purchase, sale, and exchange transactions regardless of whether the broker is granted discretion. As brokerage fees and commissions may constitute a significant part of a plan's annual expenses, the Department does not believe that continuing the current exemption from the Schedule C reporting for such expenses is appropriate. The Department believes that an annual review of such expenses is part of a plan fiduciary's on-going obligation to monitor service provider arrangements with the plan. Requiring the reporting of such information should emphasize that monitoring obligation.

When a plan acquires a unified package or bundle of services from a provider, and the amount paid for the package or bundle reflects the amount paid for all services included within the package or bundle, direct compensation would include only the aggregate amount paid by the plan to the provider of the package or bundle of services. In such cases, it would not be necessary to break out or report amounts on a service-by-service basis. Similarly, amounts paid by the provider of the bundled services to other service providers to the plan would not be reported on Schedule C unless (1) the plan is also paying the provider directly for services in addition to those included in the package or bundle, or (2) the recipient of such compensation is a fiduciary to the plan or one of the other listed service providers from whom additional information is required to be reported where the provider receives compensation in excess of $1,000 from a person other than the plan or plan sponsor.

To address possible burdens associated with allocating such revenue-sharing income and third-party payments to individual plans, the Schedule C would provide that

---

[9] In its Spring 2006 Semi-Annual Regulatory Agenda, the Department indicated that it is considering proposed rulemaking which would amend the regulation setting forth the standards applicable to the exemption under ERISA section 408(b)(2) for contracting or making reasonable arrangements with a party in interest for office spaces for services (29 CFR 2550.408b–2). The amendment would ensure that plan fiduciaries are provided or have access to that information necessary to a determination whether an arrangement for services is "reasonable" within the meaning of the statutory exemption, as well as the prudence requirements of ERISA section 404(a)(1)(B). This regulation is needed to eliminate the current uncertainty as to what information relating to services and fees plan fiduciaries must obtain and service providers must furnish for purposes of determining whether a contract for services to be rendered to a plan is reasonable.

[10] *See Staff Report Concerning Examinations of Select Pensian Consultants*, issued on May 16, 2005, by the Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission.

"indirect" compensation (i.e., amounts paid by a party other than the plan or plan sponsor) could be reported as an actual amount or an estimate of the compensation received during the reporting period. If any part of the compensation is an estimate, the Schedule C will also require an explanation of the formula used for calculating the payments.

The third part of the Schedule C (Part III) would be the current Part II of the Schedule C, used for reporting termination information on accountants and enrolled actuaries. The proposal would not alter these current requirements.

Schedule H and I: Compliance With Blackout Notice Requirements

On January 24, 2003, the Department of Labor published final rules on the disclosure of blackout periods to participants and beneficiaries. 68 FR 3716. EBSA proposes adding questions to Schedules H and I regarding whether a plan has had a blackout period during the plan year, and if so, whether it has provided the notice required by statute and regulation. The proposal would require plan administrators to report on Schedule H or I, or the Short Form 5500, as appropriate, whether there has been a temporary suspension, limitation, or restriction lasting more than three consecutive business days of the rights of participants or beneficiaries to direct or diversify assets credited to their accounts, to obtain loans from the plan, or to obtain plan distributions. If so, plan administrators will have to state whether participants have been provided the required notice of this suspension period. There are an estimated 655,000 defined contribution plans, approximately 400,000 of which are wholly or partially participant-directed. EBSA believes that incorporating a line item in the fiduciary compliance sections of the Form 5500 financial schedules regarding blackout periods and compliance with the blackout notice regulation will promote awareness among the regulated community of the blackout notice requirements, and will give EBSA an objective tool to measure its enforcement activities in the area.

Schedules H and I: Failure To Pay Benefits When Due

The proposal would add to the Schedule H and Schedule I, also included on the new Short Form 5500, a compliance question that would require plan administrators to answer whether the plan has failed to pay any benefits when due during the plan year. A similar question on the Form 5500–C/R had not been carried forward to the Form 5500 Annual Return/Report as part of the restructuring of the form for the 1999 plan year. The Department has now determined that requiring filers to respond to a modified version of this question would provide the Department with important information about plans with potentially serious management or funding problems. The information would also provide participants and beneficiaries with information that could alert them to potentially serious problems with their plan.

Schedule I: Separate Disclosure of Fees Paid to Administrative Service Providers

The Department is proposing to enhance the disclosure requirements for direct compensation paid by small plans for administrative expenses, i.e., professional and administrative salary, fee, and commission payments. Small plans currently file simplified financial information on Schedule I without having to file the more detailed Schedule C information on plan service providers. As described above, the Agencies developed an even more streamlined Short Form 5500 that small plans with secure and easily valued investment portfolios may use as their annual return/report. The proposed Short Form 5500 requires filers to report administrative service fees separately from other expenses of operating the plan. The Agencies are making a parallel change to the Schedule I for those small plans that are not eligible to file the Short Form 5500. This fee information is currently required to be reported on the Schedule I as part of an aggregate plan expense line item. The Agencies believe that having a separate line item for payments to professional and administrative service providers will promote better awareness among plan fiduciaries regarding these fee payments and will provide participants, beneficiaries, and government regulatory agencies with improved disclosure of these plan expenses.

Schedule R: Contributors to Multiemployer Pension Plans

The PBGC seeks to have plan administrators identify major contributing employers to multiemployer defined benefit pension plans. The Form 5500 Annual Return/Report lacks information describing the basis for employer contributions to multiemployer plans. This information is needed by the PBGC to assess the financial risk posed to multiemployer pension plans by the financial collapse or withdrawal of one or more contributing employers. For a number of plans, one or two employers are responsible for a large portion of the funding. If these sponsors go out of business or run into severe financial difficulties, the plan's funding can deteriorate rapidly, increasing the PBGC's exposure. As a part of its single-employer monitoring activities (the Early Warning Program), the PBGC follows the business transactions and financial conditions of many companies. When certain conditions are met, the PBGC contacts the company to negotiate protections for plan participants and the PBGC. Because the PBGC is unable to identify the major contributors to multiemployer plans, it cannot establish a similar monitoring program for its multiemployer insurance program. Over the past several years, the financial condition of many multiemployer plans has been deteriorating. The PBGC believes it is prudent to monitor those companies that are major contributors to the multiemployer plans. To accomplish this, the PBGC must be able to identify these companies.

The PBGC recognizes that the multiemployer plans most at risk when a major contributing employer encounters financial difficulties are those plans that depend upon a few employers for a large portion of the plan's funding. Accordingly, the new requirement strikes a balance between the burden that would be imposed on the plan by this information collection and the benefit to the PBGC by requiring the new information on contributions by an employer only if that employer's contributions constitute at least five percent of the total contributions for the plan year. For these employers, the plan would be required to report on Schedule R: (1) The name of the contributing employer; (2) the employer's EIN; (3) the dollar amount contributed; (4) the contribution rate; (5) the type of base units for the contribution; and (6) the expiration date for the collective bargaining agreement pursuant to which contributions are required to be made to the plan.

E. Other Improvements and Clarifications of Existing Form 5500 Reporting Requirements

The last category of revisions involves proposed amendments to the Form 5500, individual schedules, and instructions to clarify and improve existing reporting requirements.

Form 5500: Addition of Question Seeking Total Number of Contributing Employers to Multiemployer Plans

Currently, the Form 5500 Annual Return/Report does not collect any

information that identifies the employers participating in the approximately 10,000 multiemployer plans currently in existence. The Agencies do not have any information as to the number of individual employers who provide benefits to their employees through such plans. Multiemployer plans are currently required by the Department's regulations to keep information on participating employers on file and to make such information available to participants on request. *See* 29 CFR 2520.102–3(b)(4). Accordingly, adding a question to the Form 5500 asking the number of participating employers in a multiemployer plan would not create new record-keeping requirements. The Agencies believe this information would be useful to other governmental entities and private firms that use the Form 5500 data for policy and research purposes.

Form 5500: Improved Schedule Checklist

The Form 5500 includes a checklist of the various schedules that may be required to be attached. In addition to revising the checklist to eliminate the IRS-only Schedules, the Agencies have also made other cosmetic changes to the presentation of the schedule checklist to improve it as a disclosure document for participants, beneficiaries, and others. The Agencies solicit comment on whether and how the clarity and readability of the schedule checklist or other presentation on the face of the Form 5500 could be improved.

Form 5500: New Plan Characteristics Code for Pension Plans

Under the current filing requirements, plans must include on the Form 5500 all of the plan characteristics that apply to the plan from a list of codes included in the instructions. These "feature" codes allow the Agencies to identify and classify the universe of filers by their major characteristics. The Agencies do not currently collect any information as to the number of plans that provide for automatic enrollment or the number of plans that provide default investments in the event participants with the ability to direct investments in their individual accounts fail to provide directions. The Department has decided to add new plan feature codes for defined contribution pension plans with automatic enrollment features and default investment provisions. The Department believes this information would be useful both to the Department and to other governmental and non-governmental organizations for policy and research purposes. The Department added these new feature codes partly in response to the Reports of the ERISA Advisory Council and the GAO, discussed previously, that noted that the Form 5500 Annual Return/Report could be updated to better reflect the current plan and financial universe. The Department seeks comments as to whether any additional feature codes should be added to better describe the types of benefit and funding arrangements used for defined benefit pension plans, defined contribution pension plans, and welfare benefit plans. The Agencies also have eliminated the feature codes for certain types of plans that are not subject to Title I of ERISA because they will not be filing the Form 5500 with EFAST under the proposed electronic filing system.

Schedules H and I: New Supplemental Schedule for Line 4a of the Schedule H for Reporting Delinquent Participant Contributions

Beginning with the 2003 Form 5500 Annual Return/Report, information on delinquent participant contributions must be reported only on Schedule H, Line 4a, or on Schedule I, Line 4a, and should not be reported on Schedule H, Line 4d, on Schedule G, Part III, Nonexempt Transactions, or on Schedule I, Line 4d. This change was made to avoid double reporting of information on delinquent participant contributions and otherwise to simplify the reporting requirements. In the case of employee benefit plans subject to an ERISA audit requirement, the supplemental schedules referenced in ERISA section 103(a)(3)(A) and 29 CFR 2520.103–1(b) and 2520.103–2(b), including information on nonexempt prohibited transactions, are subject to the IQPA audit. The IQPA must express an opinion on whether the scheduled information is presented fairly in all material respects in relation to the basic financial statements taken as a whole. In that regard, the instructions state that delinquent participant contributions reported on Schedule H, Line 4a, should be treated as part of the supplemental schedules for purposes of the required IQPA audit and opinion. The instructions also provide that, if the information contained on Schedule H, Line 4a is not presented in accordance with the Department's regulatory requirements, the IQPA report must make the appropriate disclosures in accordance with Generally Accepted Auditing Standards (GAAS). In response to requests for guidance from some in the accounting profession, the Department posted on its Web site FAQs about reporting delinquent participant contributions, including examples of formats for supplemental schedules that plan administrators and IQPAs could use to meet those reporting and disclosure obligations.

The Department proposes modifying the Instructions to Schedule H, Line 4a to require delinquent participant contributions to be presented on a standardized supplemental schedule. The proposed Schedule H, Line 4a—Schedule of Delinquent Participant Contributions would identify the total participant contributions transferred late to the plan, the total that are nonexempt prohibited transactions, and the total contributions fully corrected under the Voluntary Fiduciary Correction Program (VFCP) 71 FR 20261 and 20135 (Apr. 19, 2006). Those that constitute nonexempt prohibited transactions would be broken down into contributions not corrected, contributions corrected outside of the VFCP, and contributions pending correction in the VFCP. This supplemental schedule is one of those already published on the Department's Web site at *http://www.dol.gov/ebsa/faqs/faq_compliance_5500.html* and can be viewed as part of the proposed forms mark-ups displayed on the Department's Web site.[11] The Department specifically seeks comments from the accounting profession as to whether this supplemental schedule should in fact be made mandatory, whether the Department should continue to allow filers to choose the format in which to present the required information, or whether a different version of the supplemental schedule should be made mandatory.

The Schedule H and I instructions for Line 4a would also be revised to incorporate guidance included in FAQs on the Department's website on including delinquent forwarding of participant loan repayments on line 4a. In Advisory Opinion 2002–02A (May 17, 2002), the Department stated that participant loan repayments paid to or withheld by an employer for purposes of transmittal to an employee benefit plan are sufficiently similar to participant contributions to justify, in the absence of regulations providing otherwise, the application of principles similar to those underlying the participant contribution regulation for purposes of determining when such repayments become assets of the plan. Delinquent forwarding of participant loan repayments is eligible for

[11] A similar addition would be made to the instructions for Line 4a of the Schedule I applicable to small plans filers who are not eligible for the audit waiver.

correction under the VFCP and PTE 2002–51 on terms similar to those that apply to delinquent participant contributions. The Department advised filers in its FAQs that the Department would not reject a Form 5500 Annual Return/Report based solely on the fact that delinquent forwarding of participant loan repayments are included on Line 4a of the Schedule H or Schedule I, provided that filers that choose to include such participant loan repayments on Line 4a use the same supplemental schedule and IQPA disclosure requirements for the loan repayments as for delinquent transmittals of participant contributions.

Schedule R: ESOP Questions Moved From Schedule E

In evaluating the consequences of removing the IRS-only schedules from the Form 5500 Return/Report, the Department determined that ESOP-filers should continue to be asked the following questions regarding the operations and investments of the ESOP: (1) Whether any unallocated employer securities or proceeds from the sale of unallocated securities were used to repay any exempt loan; (2) whether the ESOP holds any preferred stock, and if so, whether the ESOP has an exempt loan with the employer as lender that is part of a "back-to-back" loan—the repayment terms of the employer loan to the ESOP are substantially similar to the repayment terms of a loan to the employer from a commercial lender; and (3) whether the ESOP holds any stock that is not readily tradable on an established securities market. The Department believes these questions provide important information for investigators in reviewing the operations and activities of ESOPs and identifying potential violations of the statute and regulations. Public disclosure of this information would also serve as a deterrent to non-compliance with ESOP statutory duties.

Technical and Conforming Changes for Forms and Instructions

Various technical and conforming changes are being proposed to the forms and instructions. For example, the proposal would delete the optional line for identifying the principal preparer of the Form 5500. The Agencies added this line item in 1999. Only a very small number of filers have provided this optional information, and the Agencies have not been able to make systematic use of the data. Similarly, Schedule R currently contains questions regarding minimum required contributions for the plan year, and the proposal would add a question on whether the minimum funding amount reported will be met by the funding deadline. The Agencies generally seek input from the public as to whether other technical or conforming changes would further clarify or improve required reporting obligations for the Form 5500 Annual Return/Report.

F. Other Welfare Plan Issues

In developing these proposed revisions, the Department also considered the ERISA Advisory Council's, *Report of the Working Group on Health and Welfare Form 5500 Requirements* (Nov. 10, 2004). The Department already has addressed several of this Report's recommendations through improvements in the instructions for the 2005 Form 5500 Annual/Return Report. Others are addressed by the proposed form and instruction changes discussed above.

While the Department recognizes that the current reporting framework does not capture information on the entire universe of welfare plans, the Department believes that generally retaining the current reporting requirements is important for disclosure purposes for both the Department and for participants and beneficiaries in the welfare plans that currently report. One suggestion of this Working Group was for the Department to consider developing a separate Form 5500 Annual Return/Report just for welfare plans. The Department, through its restructuring of the Form 5500 Annual Return/Report in 1999, and by providing separate instructions for pension and welfare plans, already has limited the need to examine the form and schedules to determine which questions and instructions are required for the type of plan filing. The Department also believes that considerations for having a separate form for welfare plans will be less significant in a system where all filing is electronic. What will be significant in that type of system is the instructions as they relate to the data appropriate to each type of plan. In this regard, it should be noted, as discussed above, that the Department has published the Electronic Filing Rule requiring that all Form 5500 Annual Return/Reports be filed electronically. Under any type of electronic system, we anticipate that filers would need to access the instructions relevant only to their type of plan, eliminating any potential confusion from determining in a unified form package which instructions are relevant to the filer.

The Working Group also suggested that the Department consider limiting certain reporting currently required of welfare plans. The Department believes that retaining the current requirements as they relate to funded welfare plans (i.e., those with assets held in trust) and large fully insured plans, without imposing new reporting burdens on all welfare plans, best serves to balance the needs of the Department and participants and beneficiaries and the burden associated with the reporting requirements. Similarly, the Department believes that continuing the audit requirement for large funded welfare plans provides important protections to participants and beneficiaries of those plans, even when the trust principally serves as a conduit for the payment of benefits. Accordingly, the Department is not proposing to change the application of the audit requirement to such plans.

As noted above, the Department already has taken steps to address some of the issues raised by the Working Groups. It modified the 2005 Form 5500 Annual Return/Report instructions by adding language regarding how to count participants in a welfare plan, by providing guidance on how to determine the number of welfare plans a sponsor has for annual reporting purposes, and by including new language reflecting a recent advisory opinion on fee and commission reporting by insurance companies for purposes of Schedule A. The Department invites comments and suggestions on what, if any, additional steps the Department could take to clarify reporting rules for welfare plans.

III. Regulations Relating to the Proposed Form

As noted above, certain amendments to the annual reporting regulations are necessary to accommodate some of the proposed revisions to the forms. The Department is publishing separately today in the **Federal Register** proposed amendments to the Department's annual reporting regulations. That document includes a discussion of the findings required under sections 104 and 110 of ERISA that are necessary for the Department to adopt the Form 5500 Annual Return/Report, if revised as proposed herein, and the proposed Short Form 5500, as an alternative method of compliance, limited exemption, and/or simplified report under the reporting and disclosure requirements of Part 1 of Subtitle B of Title I of ERISA.

Paperwork Reduction Act Statement

As part of continuing efforts to reduce paperwork and respondent burden, the general public and Federal agencies are invited to comment on proposed and/or

continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data will be provided in the desired format, reporting burden (time and financial resources) will be minimized, collection instruments will be clearly understood, and the impact of collection requirements on respondents is properly assessed. Currently, comments concerning the proposed revision of the Form 5500 Annual Return/Report, pursuant to Part 1 of Subtitle B of Title I and Title IV of ERISA and the Internal Revenue Code are being solicited. A copy of the Information Collection Request (ICR) may be obtained by contacting the person listed in the PRA Addressee section below.

The Department has submitted a copy of the proposed forms revisions to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for its review of the Department's information collection. The IRS and the PBGC intend to submit separate requests for OMB review and approval based upon the final forms revisions. Of particular interest are comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agencies, including whether the information will have practical utility;
- Evaluate the accuracy of the 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.

Comments should be sent to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration, Department of Labor. Although comments may be submitted through September 19, 2006, OMB requests that comments be received within 30 days of publication of the Notice of Proposed Forms Revision to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N–5718, Washington, DC 20210. Telephone: (202) 693–8410; Fax: (202) 219–4745. These are not toll-free numbers.

Type of Review: Revision of a currently approved collection.

Agencies: Employee Benefits Security Administration (OMB Control No. 1210–0110); Internal Revenue Service (OMB Control No. 1545–0710); Pension Benefit Guaranty Corporation (OMB Control No. 1212–0057).

Title: Form 5500 Series.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions.

Form Number: DOL/IRS/PBGC Form 5500 and Schedules.

Total Respondents: The total number of annual Form 5500 filers will be approximately 833,000.

Total Responses: See "Total Respondents" Above.

Frequency of Response: Annually.

Estimated Total Burden Hours: 2.3 million.

Estimated Time per Response, Estimated Burden Hours, Total Annual Burden: See below for each Agency.

Total Annualized Capital/Startup Costs: $0.

Total Burden Cost (Operating and Maintenance): $754 million.

Total Annualized Costs: $754 million.

The Agencies' burden estimation methodology excludes certain activities from the calculation of "burden." If the activity is performed for any reason other than compliance with the applicable federal tax administration system or the Title I annual reporting requirements, it was not counted as part of the paperwork burden. For example, most businesses or financial entities maintain, in the ordinary course of business, detailed accounts of assets and liabilities, and income and expenses for the purposes of operating the business or entity. These recordkeeping activities were not included in the calculation of burden because prudent business or financial entities normally have that information available for reasons other than federal tax or Title I annual reporting. Only time for gathering and processing information associated with the tax return/annual reporting systems, and learning about the law, was included. In addition, an activity is counted as a burden only once if performed for both tax and Title I purposes. The Agencies also have designed the instruction package for the Form 5500 Series so that filers generally will be able to complete the Form 5500 Annual Return/Report by reading the instructions without needing to refer to the statutes or regulations. The Agencies, therefore, have included in their PRA calculations a burden for reading the instructions and find there is no recordkeeping burden attributable to the Form 5500 Annual Return/Report.

The comments are solicited on whether or not any recordkeeping beyond that which is usual and customary is necessary to complete the Form 5500 Annual Return/Report. Comments are also solicited on whether the Form 5500 Annual Return/Report instructions are generally sufficient to enable filers to complete the Form 5500 Annual Return/Report without needing to refer to the statutes or regulations.

Paperwork and Respondent Burden

Estimated time needed to complete the forms listed below reflects the combined requirements of the IRS, the Department, and the PBGC. The times will vary depending on individual circumstances. The estimated average times are:

	Pension		Welfare	
	Large	Small	Large	Small
Form 5500	1 hr., 55 min	1 hr., 7 min	1 hr., 38 min	1 hr., 5 min.
Sch A	1 hr., 48 min	55 min	8 hr., 31 min	2 hr., 17 min.
Sch B	6 hr., 51 min	31 min.		
Sch C	1 hr., 35 min		56 min.	
Sch D	10 hr	10 hr.		
Sch G	11 hr., 58 min		6 hr., 28 min.	
Sch H	8 hr., 26 min		3 hr., 35 min.	
Sch I		1 hr., 33 min		1 hr., 33 min.

	Pension		Welfare	
	Large	Small	Large	Small
Sch R	1 hr., 4 min	31 min.		
Short Form		2 hr., 5 min		2 hr., 5 min.

The aggregate hour burden for the Form 5500 Annual Return/Report (including schedules and short form) is estimated to be 2.3 million hours annually. The hour burden reflects filing activities carried out directly by filers. The cost burden is estimated to be $754 million annually. The cost burden reflects filing services purchased by filers. Presented below is a chart showing the total hour and cost burden of the revised Form 5500 Annual Return/Report separately allocated across the Department and the IRS. There is no separate PBGC entry on the chart because, as explained below, its share of the paperwork burden is very small relative to that of the IRS and the Department.

Agency		Pension plans		Welfare plans		Total		Total
		Large	Small	Large	Small	Large	Small	
DOL	Hours 000s	1,437	158	266	2	1,703	159	1,862
	$MM	$428	$59	$121	$1	$549	$60	$608
IRS	Hours 000s	226	152	29	1	255	154	409
	$MM	$72	$63	$4	>$.5	$76	$64	$140

The paperwork burden allocated to the PBGC includes a portion of the general instructions, basic plan identification information, a portion of Schedule B, and a portion of Schedule R. The PBGC's Estimated Share of Total Form 5500 Annual Return/Report Burden is: 4,000 hours and $5 million dollars per year.

BILLING CODE 4510–29–P

APPENDIX A

Form **5500-SF**
Department of the Treasury
Internal Revenue Service
Department of Labor
Employee Benefits Security Administration
Pension Benefit Guaranty Corporation

Short Form Annual Return/Report of Employee Benefit Plan

This form is required to be filed under sections 104 and 4065 of the Employee Retirement Income Security Act of 1974 (ERISA) and sections 6047(e), 6057(b), and 6058(a) of the Internal Revenue Code (Code).

▶ Complete all entries in accordance with the instructions to the Form 5500-SF

OMB Nos. 1210-0110
1210-0089

2008

This Form is Open to Public Inspection.

Part I Annual Report Identification Information

For the calendar plan year 2008 or fiscal plan year beginning , and ending ,

A This return/report is for: ☐ single-employer plan ☐ multiple-employer plan (not multiemployer) ☐ one-participant plan

B This return/report is: ☐ first return/report ☐ final return/report
☐ amended return/report ☐ short plan year return/report (less than 12 months)

C Check box if filing under an extension of time ☐ or the DFVC program ☐ and attach required information. *(see instructions)*

Part II Basic Plan Information — enter all requested information.

1a Name of plan

1b Three-digit plan number (PN) ▶

1c Effective date of plan (mo., day, yr.)

2a Plan sponsor's name and address (employer, if for single-employer plan)

2b Employer Identification Number (EIN)

2c Plan sponsor's/employer's telephone number

2d Business code *(see instructions)*

3a Plan administrator's name and address (if same as Plan sponsor, enter "same")

3b Administrator's EIN

3c Administrator's telephone number

4 If the name and/or EIN of the plan sponsor has changed since the last return/report filed for this plan, enter the name, EIN, and the plan number from the last return/report.
a Sponsor's name
b EIN
c PN

5a	Total number of participants at the beginning of the plan year	5a
b	Total number of participants as of the end of the plan year	5b
c	Total number of participants with account balances as of the end of the plan year *(defined benefit plans do not complete this item)*	5c

6a Were all of the plan's assets during the plan year invested in eligible assets? *(see instructions)* ☐ Yes ☐ No

b Are you claiming a waiver of the annual examination and report of an independent qualified public accountant (IQPA) under 29 CFR 2520.104-46? *(See instructions on waiver eligibility and conditions.)* ☐ Yes ☐ No

If you answered "No" to either 6a or 6b, the plan cannot use Form 5500-SF and must instead file the Form 5500.

Part III Financial Information

7 Plan Assets and Liabilities:		(a) Beginning of Year	(b) End of Year
a Total plan assets	7a		
b Total plan liabilities	7b		
c Net plan assets (subtract line 7b from line 7a)	7c		

8 Income, Expenses, and Transfers for this Plan Year:		(a) Amount	(b) Total
a Contributions received or receivable			
(1) Employers	8a(1)		
(2) Participants	8a(2)		
(3) Others (including rollovers)	8a(3)		
b Other income (loss)	8b		
c Total income (add lines 8a(1), 8a(2), 8a(3), and 8b)	8c		
d Benefits paid (including direct rollovers and insurance premiums to provide benefits)	8d		
e Certain deemed and/or corrective distributions *(see instructions)*	8e		
f Administrative service providers (salaries, fees, commissions)	8f		
g Other expenses	8g		
h Total expenses (add lines 8d, 8e, 8f, and 8g)	8h		
i Net income (loss) (subtract line 8h from line 8c)	8i		
j Transfers to (from) the plan *(see instructions)*	8j		

Part IV Plan Characteristics

9a If the plan provides pension benefits, enter the applicable pension feature codes from the List of Plan Characteristics Codes in the instructions: ☐☐☐☐☐☐☐☐☐☐

b If the plan provides welfare benefits, enter the applicable welfare feature codes from the List of Plan Characteristics Codes in the instructions: ☐☐☐☐☐☐☐☐☐☐

Part V Compliance Questions

10 During the plan year:		Yes	No	Amount
a Was there a failure to transmit to the plan any participant contributions within the time period described in 29 CFR 2510.3-102? *(See instructions and DOL's Voluntary Fiduciary Correction Program.)*	10a			
b Were there any nonexempt transactions with any party-in-interest? (Do not include transactions reported on line 10a.)	10b			
c Was the plan covered by a fidelity bond?	10c			
d Did the plan have a loss, whether or not reimbursed by the plan's fidelity bond, that was caused by fraud or dishonesty?	10d			
e Were any fees or commissions paid to any brokers, agents, or other persons by an insurance carrier, insurance service or other organization that provides some or all of the benefits under the plan? *(see instructions)*	10e			
f Has the plan failed to provide any benefit when due under the plan?	10f			
g Did the plan have any participant loans? (If "Yes," enter amount as of year end.)	10g			
h If this is an individual account plan, was there a blackout period? *(see instructions and 29 CFR 2520.101-3)*	10h			
i If 10h was answered "Yes," did the plan administrator comply with the blackout period notice requirements in 29 CFR 2520.101-3?	10i			

Part VI Pension Funding Compliance

11 Is this a defined benefit plan subject to minimum funding requirements? (If "Yes," complete Schedule B (Form 5500) and see instructions.) ☐ Yes ☐ No

12 If this is a defined contribution money purchase plan, is it subject to the minimum funding standards? (If this is a defined benefit plan, leave blank.) ☐ Yes ☐ No

If 12 is answered "Yes," complete a, b, c, and d below:

a Amount of employer contribution required for the plan year under Code sec. 412	12a	
b Amount of contribution paid by the employer for the plan year	12b	
Enter date of last payment by employer Month_____ Day_____ Year_____		
c If the amount of employer contribution required is greater than the amount paid by the employer, enter the funding deficiency here. Otherwise, enter -0-. (If you have a funding deficiency, file Form 5330.)	12c	

d Was a funding waiver granted? ☐ Yes ☐ No

Part VII Plan Terminations and Transfers of Assets

13a Has a resolution to terminate the plan been adopted during the plan year or any prior plan year? ☐ Yes ☐ No

If "Yes," enter the amount of any plan assets that reverted to the employer this year _____

b Were all the plan assets distributed to participants or beneficiaries, transferred to another plan, or brought under the control of the PBGC? ☐ Yes ☐ No

c If during this plan year, any assets or liabilities were transferred from this plan to another plan(s), identify the plan(s) to which assets or liabilities were transferred. *(see instructions)*

(1) Name of plan(s)	(2) EIN(s)	(3) PN(s)

Under penalties of perjury and other penalties set forth in the instructions, I declare that I have examined this return/report, including, if applicable, a Schedule B completed and signed by an enrolled actuary, as well as the electronic version of this return/report, and to the best of my knowledge and belief, it is true, correct, and complete.

Sign Here

Signature of plan administrator	Date	Enter name of individual signing as plan administrator
Signature of employer/plan sponsor	Date	Enter name of individual signing as employer/plan sponsor

Appendix B
Proposed Instructions for Form 5500-SF

2008
Instructions for Form 5500-SF

Short Form Annual Return/Report of Employee Benefit Plan

ERISA refers to the Employee Retirement Income Security Act of 1974, and Code references are to the Internal Revenue Code, unless otherwise noted.

General Instructions

The Form 5500-SF, Short Form Annual Return/Report of Employee Benefit Plan, is a simplified annual reporting form for use by certain small pension and welfare benefit plans. To be eligible, the plan generally must have fewer than 100 participants at the beginning of the plan year; it must be exempt from the requirement that the plan's books and records be audited by an independent qualified public accountant; it must have 100% of its assets invested in certain secure investments with a readily determinable fair value; and it must hold no employer securities. See Who May File Form 5500-SF for more detailed instructions on who may file the Form 5500-SF. Plans required to file an annual return/report that are not eligible to file the Form 5500-SF must file a Form 5500 Return/Report of Employee Benefit Plan.

To reduce the possibility of correspondence and penalties, we remind filers that the Internal Revenue Service (IRS), Department of Labor (DOL), and Pension Benefit Guaranty Corporation (PBGC) have consolidated their return/report forms to minimize the filing burden for employee benefit plans. Administrators and sponsors of employee benefit plans generally will satisfy their IRS and DOL annual reporting requirements for the plan under ERISA sections 104 and 4065 and Code section 6058 by filing either the Form 5500 or Form 5500-SF. Defined contribution and defined benefit pension plans may be required to file additional information with the IRS regarding their compliance with tax laws. See www.irs.gov for more information. Defined benefit pension plans covered by the PBGC may have special additional requirements, including filing the PBGC Form 1, Annual Premium Payment, and reporting certain transactions directly with that agency. See the PBGC's Premium Payment Package (Form 1 Package), available at www.pbgc.gov.

The Form 5500-SF must be filed electronically. See How to File - Electronic Filing Requirement instructions on page xx. Your entries will be initially screened. Your entries must satisfy this screening in order to be initially accepted as a filing. Once initially accepted, your form may be subject to further detailed review, and your filing may be rejected based upon this further review.

ERISA and the Code provide for the assessment or imposition of penalties for not submitting the required information when due. See Penalties on page xx.

Note: The Form 5500-EZ generally is used by one-participant plans (as defined below on page XX) that are not subject to the requirements of section 104(a) of ERISA to satisfy the annual reporting and filing obligations imposed by the Code. Certain one-participant plans who are eligible to file Form 5500-EZ may file the Form 5500-SF to satisfy the filing obligations under the Code. One participant plans that are eligible to file the Form 5500-SF electronically, complete only certain questions on the Form 5500-SF. (See Specific Instructions for one-participant plans on page xx). Therefore, a plan that is required to file Form 5500-EZ may file the paper Form 5500-EZ with the IRS or the Form 5500-SF electronically. For more information on filing with the IRS go to www.irs.gov/ep or call 1-877-829-5500.

How to Get Assistance

If you need help completing this form or have related questions, call the EFAST Help Line at 1-866-463-3278 (toll free). The EFAST Help Line is available Monday through Friday from 8:00 am to 8:00 pm, Eastern Time.

You can access the EFAST Web Site 24 hours a day, 7 days a week at *www.efast.dol.gov* to:

- View forms and related instructions.
- Get information regarding EFAST, including approved software vendors.

- See answers to frequently asked questions about the Form 5500-SF, the Form 5500 and its Schedules, and EFAST.
- Access the main EBSA and DOL Web Sites for news, regulations, and publications.

You can access the IRS Web Site 24 hours a day, 7 days a week at *www.irs.gov* to:

- View forms, instructions, and publications.
- See answers to frequently asked tax questions.
- Search publications on-line by topic or keyword.
- Send comments or request help by e-mail.
- Sign up to receive local and national tax news by e-mail.

You can order related forms and IRS publications by calling **1-800-TAX-FORM** (1-800-829-3676). You can order EBSA publications by calling **1-800-998-7542**. In addition, most IRS forms and publications are available at your local IRS office.

Table of Contents Page

Pension and Welfare Plans Required to File Annual Return/Report

All pension benefit plans and welfare benefit plans covered by ERISA are required to file a Form 5500 or Form 5500-SF unless they are eligible for a filing exemption. (Code section 6058 and ERISA sections 104 and 4065). A return/report is due even if the plan is not "tax qualified" or if benefits no longer accrue, contributions were not made during this plan year, or contributions are no longer made. Pension benefit plans required to file include both defined benefit plans and defined contribution plans. Profit sharing, stock bonus, money purchase, 401(k) plans, Code section 403(b) plans and IRA plans established by an employer are among the pension benefit plans for which a return/report must be filed. Welfare benefit plans provide benefits such as medical, dental, life insurance, apprenticeship and training, scholarship funds, severance pay, disability, etc.

Plans Exempt From Filing

The Department of Labor has issued regulations under which some pension plans and many welfare plans with fewer than 100 participants are exempt from filing a return/report. Do not file a return/report for an employee benefit plan that is any of the following:

1. A welfare benefit plan that covers fewer than 100 participants as of the beginning of the plan year and is unfunded, fully insured, or a combination of insured and unfunded. For this purpose:

a. An unfunded welfare benefit plan has its benefits paid as needed directly from the general assets of the employer or the employee organization that sponsors the plan. Note: Plans which are NOT unfunded include those plans that received employee (or former employee) contributions during the plan year and/or used a trust or separately maintained fund (including a Code section 501(c)(9) trust) to hold plan assets or act as a conduit for the transfer of plan assets during the plan year.
b. A fully insured welfare benefit plan has its benefits provided exclusively through insurance contracts or policies, the premiums of which must be paid directly to the insurance carrier by the employer or employee organization from its general assets or partly from its general assets and partly from contributions by its employees or members (which the employer or organization forwards within 3 months of receipt). The insurance contracts or policies discussed above must be issued by an insurance company or similar organization (such as Blue Cross, Blue Shield or a health maintenance organization) that is qualified to do business in any state.
c. A combination unfunded/insured welfare plan has its benefits provided partially as an unfunded plan and partially as a fully insured plan. An example of such a plan is a welfare plan that provides medical benefits as in a above and life insurance benefits as in b above. See 29 CFR 2520.104-20 and the DOL Technical Release 92-01.

Note: A "voluntary employees' beneficiary association" as used in Code section 501(c)(9) should not be confused with the employee organization or employer that establishes and/or maintains (i.e., sponsors) the welfare benefit plan.

2. An unfunded pension benefit plan or an unfunded or insured welfare benefit plan: (a) whose benefits go only to a select group of management or highly compensated employees, and (b) which meets the terms of 29 CFR 2520.104-23 (including the requirement that a registration statement be timely filed with DOL) or 29 CFR 2520.104-24.
3. Plans maintained only to comply with workers' compensation, unemployment compensation, or disability insurance laws.
4. An unfunded excess benefit plan.
5. A welfare benefit plan maintained outside the United States primarily for persons substantially all of whom are nonresident aliens.
6. A pension benefit plan maintained outside the United States if it is a qualified foreign plan within the meaning of Code section 404A(e) that does not qualify for the treatment provided in Code section 402(e)(5).
7. A Code section 403(b) voluntary annuity arrangement that is not sponsored by an employer or employee organization as described in 29 CFR 2510.3-2(f).
8. A simplified employee pension (SEP) described in Code section 408(k) that conforms to the alternative method of compliance described in 29 CFR 2520.104-48 or 29 CFR 104-49. A SEP is a pension plan that meets certain minimum qualifications regarding eligibility and employer contributions.
9. A Savings Incentive Match Plan for Employees of Small Employers (SIMPLE) that involves SIMPLE IRAs under Code section 408(p).
10. A church welfare plan under ERISA section 3(33).
11. A church pension plan if the pension plan did not elect coverage under Code section 410(d).
12. A governmental plan.
13. A welfare benefit plan that participates in a group insurance arrangement that files a return/report Form 5500 on its behalf. A group insurance arrangement is an arrangement that provides benefits to the employees of two or more unaffiliated employers (not in connection with a multiemployer plan or a collectively bargained multiple-employer plan), fully insures one or more welfare plans of each participating employer, uses a trust (or other entity such as a trade association) as the holder of the insurance contracts and uses a trust as the conduit for payment of premiums to the insurance company. For further details, see 29 CFR 2520.104-43.
14. An apprenticeship or training plan meeting all of the conditions specified in 29 CFR 2520.104-22.
15. One-Participant (Owners and Their Spouses) Retirement Plan (generally referred to as a One-Participant Plan). A one-participant plan is: (1) a pension benefit plan that covers only an individual or an individual and his or her spouse who wholly own a trade or business, whether incorporated or unincorporated; or (2) a pension benefit plan for a partnership that covers only the partners or the partners and the partners' spouses. See Specific Instructions for One-Participant Plans on page xx. One-participant plans may be eligible to file the Form 5500-SF electronically (See How to File - Electronic Filing Requirement instructions on page xx.) or the paper Form 5500-EZ with the Internal Revenue Service. See www.irs.gov/ep or call 1-877-829-5500.

For more information on plans that are exempt from filing an annual return/report, see the Instructions for Form 5500 Annual Return/Report of Employee Benefit Plan or call the EFAST Help Line at 1-866-463-3278.

Who May File Form 5500-SF

If your plan is required to file an annual return/report, you may file the Form 5500-SF instead of the Form 5500 only if you meet all of the eligibility conditions listed below.

1. The plan is a small plan that covers fewer than 100 participants at the beginning of the plan year, or was eligible to and filed as a small plan last year and did not cover more than 120 participants at the beginning of the current plan year (see instructions for line 5 on page x);
2. The plan does not hold any employer securities;
3. The plan is 100% invested in certain secure, easy to value assets such as mutual fund shares, investment contracts with insurance companies and banks, publicly traded securities held by a registered broker dealer, cash and cash equivalents, and plan loans to participants (see the instructions for line 6a on page x); and
4. The plan gives certain disclosures and supporting documents to participants and beneficiaries regarding both the plan's investments and the fact that the plan meets the conditions for being exempt from the requirement to be audited each year by an independent qualified public accountant (see instructions for line 6b on page x).

Note: Multiemployer plans, ESOPs and Direct Filing Entities (DFEs) cannot file the Form 5500-SF.

TIP: Section III of Schedule D must be completed by DFEs for all participating plans even those plans filing the Form 5500-SF.

Note: One-Participant Plans should follow the "Specific Instructions for One-Participant Plans" in lieu of the instructions 1-4 above.

Caution: One-participant Plans that are an ESOP cannot file the Form 5500-SF electronically. These plans must file the paper Form 5500-EZ with the IRS.

What to File

Plans required to file an annual return/report that meet all of the conditions for filing the Form 5500-SF may complete and file the Form 5500-SF in accordance with its instructions. Defined benefit pension plans using the Form 5500-SF must also file the Schedule B (Form 5500), Actuarial Information. See the instructions for Schedule B [insert web link]. One-participant plans see Specific Instructions for One-Participant Plans on page XX. Plans filing under an extension of time or the DOL's Delinquent Filer Voluntary Compliance Program must include the required supporting attachment (see instructions for box C on page x). No other schedules or attachments have to be filed with the Form 5500-SF.

When to File

File the 2008 Form 5500-SF for plan years that began in 2008. The form, and any required schedules and attachments, must be filed by the last day of the 7th calendar month after the end of the plan year (not to exceed 12 months in length) that began in 2008.

Note: If the filing due date falls on a Saturday, Sunday, or Federal holiday, the return may be filed on the next day that is not a Saturday, Sunday, or Federal holiday.

Extension of Time to File

Using Form 5558

A one-time extension of time to file the Form 5500-SF (up to 2 ½ months) may be obtained by filing IRS Form 5558, Application For Extension Of Time To File Certain Employee Plan Returns, on or before the normal due date (not including any extensions) of the return/report. You must file the Form 5558 with the IRS at the Internal Revenue Service Center, Ogden, UT 84201-0027. Approved copies of the Form 5558 will not be returned to the filer. An electronic copy of the completed and signed Form 5558 extension request that was filed must be submitted as an electronic attachment to the Form 5500-SF.

Using Extension of Time to File Federal Income Tax Return

An automatic extension of time to file Form 5500-SF until the due date of the Federal income tax return of the employer will be granted if all of the following conditions are met: (1) the plan year and the employer's tax year are the same; (2) the employer has been granted an extension of time to file its federal income tax return to a date later than the normal due date for filing the Form 5500-SF (except IRS Form 8736, Application for Automatic Extension of Time To File U.S. Return for a Partnership, REMIC, or for Certain Trusts); and (3) an electronic copy of the application for extension of time to file the Federal income tax return is attached to the Form 5500-SF. An extension granted by using this automatic extension procedure CANNOT be extended further by filing a Form 5558.

If the application for extension of time contains social security numbers, ensure that these social security numbers are not visible in the copy attached to the Form 5500-SF. The Form 5500-SF and its attachments are open to public inspection, and the contents are public information and are subject to publication on the Internet. Because of privacy concerns, the inclusion of a visible social security number on the Form 5500-SF or its attachments may result in the rejection of the filing.

Other Extensions of Time

The IRS, DOL, and PBGC may announce special extensions of time under certain circumstances, such as extensions for presidentially declared disasters or for service in, or in support of, the Armed Forces of the United States in a combat zone. See www.irs.gov and www.efast.dol.gov for announcements regarding such special extensions. If you are relying on one of these announced special extensions, check Form 5500-SF, Part I, box C and attach a statement citing the announcement for the extension.

Change in Plan Year

Generally, only defined benefit pension plans need to get approval for a change in plan year. (See Code section 412(c)(5)). However, under Rev. Proc. 87-27, 1987-1 C.B. 769, these pension plans may be eligible for automatic approval of a change in plan year.

If a change in plan year for a pension or a welfare plan creates a short plan year, you must check the "short plan year return/report (less than 12 months)" box in Part I of the Form 5500-SF, and file the Form 5500-SF, with all required schedules and attachments, by the last day of the 7th calendar month after the end of the short plan year.

Delinquent Filer Voluntary Compliance (DFVC) Program

The DFVC Program facilitates voluntary compliance by plan administrators who are delinquent in filing annual return/report forms under Title I of ERISA by permitting administrators to pay reduced civil penalties for voluntarily complying with their DOL annual reporting obligations. If the Form 5500-SF is being filed under the DFVC Program, check Form 5500-SF, Part I, box C, and attach an explanation that the Form 5500-SF is being

filed under the DFVC Program. See www.efast.dol.gov for information concerning the DFVC Program. Send penalty payments to the DFVC Program processing center in Atlanta, GA. Do not submit penalty payments to EFAST.

Penalties

Plan administrators and plan sponsors must provide complete and accurate information and must otherwise comply fully with the filing requirements. ERISA and the Code provide for the DOL, and the IRS, respectively, to assess or impose penalties for not giving complete information and for not filing statements and returns/reports. Certain penalties are administrative (i.e., they may be imposed or assessed in an administrative proceeding). Others require a legal conviction.

Administrative Penalties

Listed below are various penalties under ERISA and the Code that may be assessed or imposed for not meeting the annual return/report filing requirements. The penalty may be assessed under ERISA or the Code, or both, depending upon the nature of the violation and the type of plan involved. One or more of the following administrative penalties may be assessed or imposed in the event of incomplete filings or filings received after the due date unless it is determined that your explanation for failure to file properly is for reasonable cause:

1. A penalty of up to $1,100 a day for each day a plan administrator fails or refuses to file a complete report. See ERISA section 502(c)(2) and 29 CFR 2560.502c-2.
2. A penalty of $25 a day (up to $15,000) for not filing returns for certain plans of deferred compensation, trusts, and annuities, and bond purchase plans by the due date(s). See Code section 6652(e).
3. A penalty of $1,000 for not filing an actuarial statement. See Code section 6692.

Other Penalties

1. Any individual who willfully violates any provision of Part 1 of Title I of ERISA shall be fined not more than $100,000 or imprisoned not more than 10 years, or both. See ERISA section 501.
2. A penalty up to $10,000, five (5) years imprisonment, or both, may be imposed for making any false statement or representation of fact, knowing it to be false, or for knowingly concealing or not disclosing any fact required by ERISA. See section 1027, Title 18, U.S. Code, as amended by section 111 of ERISA.

How to File – Electronic Filing Requirement

Under the computerized ERISA Filing Acceptance System (EFAST), you must file your 2008 Form 5500-SF electronically. You may file your 2008 Form 5500-SF on-line, using EFAST's web-based filing system, or you may file through an EFAST-approved vendor. Detailed information on electronic filing is available at (insert web address). For telephone assistance, call the EFAST Help Line at 1-866-463-3278. The EFAST Help Line is available Monday through Friday from 8:00 am to 8:00 pm, Eastern Time.

[CAUTION] Annual reports filed under Title I of ERISA must be made available by plan administrators to plan participants and by the DOL to the public pursuant to ERISA sections 104 and 106. Even though the Form 5500-SF must be filed electronically, the administrator must keep a copy of the Form 5500-SF, including schedules and attachments, with all required manual signatures on file as part of the plan's records and must make a paper copy available on request to participants, beneficiaries, and the DOL as required by section 104 of ERISA and 29 CFR 2520.103-1.

Answer all questions with respect to the plan year unless otherwise explicitly stated in the instructions or on the form itself. Therefore, responses usually apply to the year entered at the top of the first page of the form.

Your entries will be initially screened. Your entries must satisfy this screening in order to be initially accepted as a filing. Once initially accepted, your form may be subject to further detailed review, and your filing may be rejected based upon this further review. To reduce the possibility of correspondence and penalties:

- Complete all lines on the Form 5500-SF unless otherwise specified. Also electronically attach any applicable schedules and attachments.
- Do not enter "N/A" or "Not Applicable" on the Form 5500-SF or Schedule B unless specifically permitted. "Yes" or "No" questions on the forms and schedules cannot be left blank, but must be answered either "Yes" or "No," and not both.

The Form 5500-SF, Schedule B, and attachments are open to public inspection, and the contents are public

information subject to publication on the Internet. Do not enter social security numbers in response to questions asking for an EIN. Because of privacy concerns, the inclusion of a social security number on the Form 5500-SF or on a schedule or attachment that is open to public inspection may result in the rejection of the filing. EINs may be obtained by applying for one on Form SS-4, Application for Employer Identification Number. You can obtain Form SS-4 by calling 1-800-TAX-FORM (1-800-829-3676) or at the IRS Web Site at www.irs.gov. The EBSA does not issue EINs.

Specific Instructions for One-Participant Plans.

A One-Participant Plan is: (1) a pension benefit plan that covers only an individual or an individual and his or her spouse who wholly own a trade or business, whether incorporated or unincorporated; or (2) a pension benefit plan for a partnership that covers only the partners or the partners and the partners' spouses. One-participant plans may be eligible to file the Form 5500-SF electronically or the paper Form 5500-EZ with the Internal Revenue Service.

One-participant plan filers that meet the following conditions are eligible to file a Form 5500–SF electronically. You may file a Form 5500-SF electronically if you meet all of the following conditions:

1. The plan is a one-participant plan.
2. The plan meets the minimum coverage requirements of section 410(b) without being combined with any other plan you may have that covers other employees of your business.
3. The plan does not provide benefits for anyone except you, or you and your spouse, or one or more partners and their spouses.
4. The plan does not hold any employer securities.

If you do not meet all the conditions listed above, file the complete Form 5500-SF or the Form 5500.

One-participant plans only complete the following questions on the Form 5500-SF. Part I A, B and C, Part II 1a -5 a, Part III 7 a-c, 8 a, Part IV 9a, Part V 10g, Part VI 11-12d.

Note: A Form 5500-SF may be filed for one-participant plans that are either defined contribution plans (which include profit-sharing plans, money purchase pension plans, but not an ESOP or stock bonus plan) or defined benefit plans.

Note: Actuaries of one-participant plans that are defined benefit plans subject to the minimum funding standards for this plan year must complete Schedule B (Form 5500), Actuarial Information, and forward the completed Schedule to the person responsible for filing the Form 5500-SF. The completed Schedule B is subject to the records retention provisions of these instructions. See the instruction for Schedule B (Form 5500).

Note: If you are filing a paper form, you must file the Form 5500-EZ with the Internal Revenue Service (address to be added). You may order the paper Form 5500-EZ by calling 1-800-TAX-FORM (1-800-829-3676).

Note: If you are filing an amendment for a one-participant plan that filed a Form 5500-SF electronically, you must submit the amendment using the Form 5500-SF electronically as well. Similarly, if you are filing an amendment for a one-participant plan that previously filed on a paper Form 5500-EZ, you must submit the amendment using the paper Form 5500-EZ with the IRS.

Specific Line By Line Instructions

Part I – Annual Report Identification Information

Box A – Single-Employer Plan. Check this box if the Form 5500-SF is filed for a single-employer plan. A single-employer plan for purposes of the Form 5500-SF is an employee benefit plan maintained by one employer or one employee organization.

Box A – Multiple-Employer Plan. Check this box if the Form 5500-SF is being filed for a multiple-employer plan. For purposes of the Form 5500-SF, a multiple-employer plan is a plan that is maintained by more than one employer and is not a single-employer plan or a multiemployer plan. Multiple-employer plans can be collectively bargained and collectively funded. If multiple-employer plans are covered by PBGC termination insurance, they must have properly elected before September 27, 1981, not to be treated as a multiemployer plan under Code section 414(f)(5) or ERISA sections 3(37)(E) and 4001(a)(3). Participating employers do not file individually for multiple-employer plans. *Do not check this box if the employers maintaining the plan are members of the same controlled group.*

[Caution] Multiemployer plans cannot use the Form 5500-SF to satisfy their annual reporting obligations. They must file the Form 5500 and its required schedules and attachments. For these purposes, a plan is a multiemployer plan if: (a) more than one employer is required to contribute; (b) the plan is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer; and (c) an election under Code section 414(f)(5) and ERISA section 3(37)(E) has not been made.

Box A - One-Participant Plan. Check this box if the Form 5500-SF is being filed for a plan that is: (1) a pension

benefit plan that covers only an individual or an individual and his or her spouse who wholly own a trade or business, whether incorporated or unincorporated; or (2) a pension benefit plan for a partnership that covers only the partners, or the partners and the partners' spouses. See Specific Instructions for One-Participant Plans on page xx.

Box B – First Annual/Return Report. Check this box if this is the first annual return/report filing for this plan. Do not check this box if you have ever filed for this plan, even if it was a different form (e.g., Form 5500 or Form 5500-EZ).

Box B – Amended Return/Report. Check this box – if you have already filed for the 2008 plan year and are now filing an amended return to correct errors and/or omissions on the previously filed return.

Note. File an amended return/report to correct errors and/or omissions in a previously filed annual return/report for the 2008 plan year. The amended Form 5500-SF and any amended schedules must conform to the requirements in these instructions. If you need to file an amended return/report to correct errors and or omissions in a previously filed annual return/report for the 2008 plan year AND you are eligible to file the Form 5500-SF, you may use the Form 5500-SF even if the original filing was a Form 5500. If you determine that you were not eligible to file the Form 5500-SF, your amended return/report must be the Form 5500 and its required schedules and attachments.

[TIP] *If you are filing a corrected return/report in response to correspondence from EBSA regarding processing of your return/report, do not check the box for an "amended return report" on the Form 5500-SF.*

Box B – Final Return/Report. Check this box if this is the final report for the plan. Only check this box if all assets under the plan (including insurance/annuity contracts) have been distributed to the participants and beneficiaries or legally transferred to the control of another plan, and when all liabilities for which benefits may be paid under a welfare benefit plan have been satisfied. Do not mark final return/report if you are reporting participants and/or assets at the end of the plan year. If a trustee is appointed for a terminated defined benefit plan pursuant to ERISA section 4042, the last plan year for which a return/report must be filed is the year in which the trustee is appointed.

Examples:

Mergers/Consolidations

A final return/report should be filed for the plan year (12 months or less) that ends when all plan assets were legally transferred to the control of another plan.

Pension and Welfare Plans That Terminated Without Distributing All Assets

If the plan was terminated but all plan assets were not distributed, a return/report must be filed for each year the plan has assets. The return/report must be filed by the plan administrator, if designated, or by the person or persons who actually control the plan's assets/property.

Welfare Plans Still Liable To Pay Benefits

A welfare plan cannot file a final return/report if the plan is still liable to pay benefits for claims that were incurred prior to the termination date, but not yet paid. See 29 CFR 2520.104b-2(g)(2)(ii).

Box B – Short Plan Year. Check this box if this form is filed for a period of less than 12 months. Show the dates at the top of the form.

Box C. If this form is being filed under an extension of time or under the DOL's DFVC Program, check the appropriate box in this line. If you are filing under the DFVC Program, attach a statement that the report is submitted under the DFVC Program. Information on how to file under the DFVC Program is available at www.efast.dol.gov.

Part II – Basic Plan Information

Line 1a. Enter the formal name of the plan or enough information to identify the plan. Abbreviate if necessary. If an annual return/report has previously been filed on behalf of the plan, regardless of the type of Form that was filed (Form 5500, Form 5500-EZ, Form 5500-SF) use the same abbreviation as was used on the prior filings. Once you use an abbreviation, continue to use it for that plan on all future annual return/report filings with the IRS, DOL, and PBGC. Do not use the same name or abbreviation for any other plan, even if the first plan is terminated.

Line 1b. Enter the three-digit plan or entity number (PN) that the employer or plan administrator assigned to the plan. This three-digit number, in conjunction with the employer identification number (EIN) entered on line 2b, is used by the IRS, DOL, and PBGC as a unique 12-digit number to identify the plan.

Start at 001 for plans providing pension benefits. Start at 501 for welfare plans. Do not use 888 or 999.

Once you use a plan number, continue to use it for that plan on all future filings with the IRS, DOL, and PBGC. Do not use it for any other plan, even if the first plan is terminated.

For each Form 5500-SF with same EIN (line 2b), when	Assign PN
Codes are entered in line 9a	001 to the first plan. Consecutively number others as 002, 003...
Codes are entered in line 9b, and not in line 9a	501 to the first plan. Consecutively number others at 502, 503...

Line 1c. Enter the date the plan first became effective.

Line 2a. Enter the plan sponsor's (employer, if for a single-employer plan) name, postal address (only use a P.O. Box number if the Post Office does not deliver mail to the employer's street address), foreign routing code where applicable, and "doing business as (D/B/A)" or trade name of the employer if different from the employer's name.

Line 2b. Enter the employer's nine-digit employer identification number (EIN). Do not enter your Social Security Number. The inclusion of a Social Security Number on this line may result in the rejection of the filing.

Employers who do not have an EIN number must apply for one on Form SS-4, Application for Employer Identification Number, as soon as possible. You can obtain Form SS-4 by calling 1-800-TAX-FORM (1-800-829-3676) or at the IRS Web Site at www.irs.gov. The EBSA does not issue EINs.

A multiple-employer plan or plan of a controlled group of corporations should use the EIN number of the sponsor identified in line 2a. The EIN must be used in all subsequent filings of the Form 5500-SF (or any subsequent Form 5500 in a year where the plan is not eligible to file the Form 5500-SF) for these plans. (See instructions to line 4 concerning change in EIN).

Note. EINs for funds (trusts or custodial accounts) associated with plans are generally not required to be on the Form 5500-SF. The IRS, however, will issue EINs for such funds for other reporting purposes. EINs may be obtained by filing Form SS-4 as explained above. Plan sponsors should use the trust EIN when opening a bank account or conducting other transactions for a trust.

Line 2c. Enter the telephone number for the plan sponsor.

Line 2d. Enter the six-digit business code that best describes the nature of the plan sponsor's business from the list of business codes on pages xx-xx. If more than one employer or employee organization is involved, enter the business code for the main business activity of the employers and/or employee organizations.

Line 3a. Enter the plan administrator's name, postal address (only use a P.O. Box number if the Post Office does not deliver mail to the employer's street address), and foreign routing code where applicable . Enter "same" if the plan administrator identified on line 2 is the same as the plan sponsor identified on line 2.

Plan administrator means:
- The person or group of persons specified as the administrator by the instrument under which the plan is operated;
- The plan sponsor/employer if an administrator is not so designated; or
- Any other person prescribed by regulations if an administrator is not designated and a plan sponsor cannot be identified.

Line 3b. Enter the plan administrator's nine-digit EIN. A plan administrator must have an EIN for Form 5500-SF reporting. If the plan administrator does not have an EIN, it must apply for one as explained in the instructions for line 2b. One EIN should be entered for a group of individuals who are, collectively, the plan administrator.

Note. Employees of the plan sponsor who perform administrative functions for the plan are generally not the plan administrator unless specifically designated in the plan document. If an employee of the plan sponsor is designated as the plan administrator, that employee must obtain an EIN.

Line 3c. Enter the telephone number for the plan administrator.

Line 4. If the plan sponsor's name and/or EIN have changed since the last return/report was filed for this plan, enter the plan sponsor's name, EIN, and the plan number as it appeared on the last return/report filed.

[CAUTION] *Failure to indicate on line 4 that a plan was previously identified by a different EIN or PN could result in correspondence from the DOL and the IRS.*

Line 5 – Number of Participants. Enter in element (a) the total number of participants at the beginning of the plan year. Enter in element (b) the total number of participants at the end of the plan year. Enter in element (c) the total number of participants with account balances as of the end of the plan year. Welfare plans and defined benefit plans do not complete element (c).

The description of "participant" in the instructions below is only for purposes of these lines.

An individual becomes a participant covered under an employee welfare benefit plan on the earliest of the date designated by the plan as the date on which the

individual begins participation in the plan; the date on which the individual becomes eligible under the plan for a benefit subject only to occurrence of the contingency for which the benefit is provided; or the date on which the individual makes a contribution to the plan, whether voluntary or mandatory. See 29 CFR 2510.3-3(d)(1). This includes former employees who are receiving group health continuation coverage benefits pursuant to Part 6 of ERISA and who are covered by the employee welfare benefit plan. Covered dependents are not counted as participants. A child who is an "alternate recipient" entitled to health benefits under a qualified medical child support order (QMCSO) should not be counted as a participant for line 5. An individual is not a participant covered under an employee welfare plan on the earliest date on which the individual is ineligible to receive any benefit under the plan even if the contingency for which such benefit is provided should occur, and is not designated by the plan as a participant. See 29 CFR 2510.3-3(d)(2).

For pension benefit plans, "alternate payees" entitled to benefits under a qualified domestic relations order (QDRO) are not to be counted as participants for this line.

Before counting the number of participants, especially in a welfare plan, it is important to determine whether the plan sponsor has established one or more plans for Form 5500/Form 5500-SF reporting purposes. As a matter of plan design, plan sponsors can offer benefits through various structures and combinations. For example a plan sponsor could create (i) one plan providing major medical benefits, dental benefits, and vision benefits, (ii) two plans with one providing major medical benefits and the other providing self-insured dental and vision benefits, or (iii) three separate plans. You must review the governing documents and actual operations to determine whether welfare benefits are being provided under a single plan or separate plans.

The fact that you have separate insurance policies for each different welfare benefit does not necessarily mean that you have separate plans. Some plan sponsors use a "wrap" document to incorporate various benefits and insurance policies into one comprehensive plan. In addition, whether a benefit arrangement is deemed to be a single plan may be different for purposes other than Form 5500/Form 5500-SF reporting. For example, special rules may apply for purposes of HIPAA, COBRA, and Code compliance. If you need help determining whether you have a single welfare benefit plan for Form 5500/Form 5500-SF reporting purposes, you should consult a qualified benefits consultant or legal counsel.

For pension plans, "participant" for this line means any individual who is included in one of the categories below:

1. Active participants, i.e., any individuals who are currently in employment covered by a plan and who are earning or retaining credited service under a plan. This includes any individuals who are eligible to elect to have the employer make payments into a Code section 401(k) qualified cash or deferred arrangement. Active participants also include any nonvested individuals who are earning or retaining credited service under a plan. This does not include (a) nonvested former employees who have incurred the break in service period specified in the plan or (b) former employees who have received a "cash-out" distribution or deemed distribution of their entire nonfortfeitable accrued benefit.
2. Retired or separated participants receiving benefits, *i.e.*, individuals who are retired or separated from employment covered by the plan and who are receiving benefits under the plan. This does not include any individual to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan.
3. Other retired or separated participants entitled to future benefits, i.e., any individuals who are retired or separated from employment covered by the plan and who are entitled to begin receiving benefits under the plan in the future. This does not include any individual to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan.
4. Deceased individuals who had one or more beneficiaries who are receiving or are entitled to receive benefits under the plan. This does not include any individual to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the beneficiaries of that individual are entitled under the plan.

80-120 Participant Rule: If the number of participants reported on line 5 is between 80 and 120, and a Form 5500 was filed in 2007 as a "small plan filer," and the conditions for filing the Form 5500-SF described in the instructions for line 6a and line 6b are met, you may elect to file the Form 5500-SF in 2008. (29 CFR 2520.103-1(d)).

Note: One-participant plans skip to Part III.

Line 6 – Short Form Eligible Plans. Except for one-participant plans filing the Form 5500-SF in accordance with the instructions on page x, to be eligible to file the Form 5500-SF, a pension or welfare plan must: (1) cover fewer than 100 participants or be a pension plan eligible to file as a small plan under the 80 to 120 rule in 29 CFR 2520.103-1(d); (2) be eligible for the small plan audit waiver under 29 CFR 2520.104-46 (but not by virtue of enhanced bonding); (3) hold no employer securities; and (4) have 100% of its assets in investments that have a readily ascertainable fair market value for purposes of this annual reporting requirement as described in 29 CFR 2520.103-1(c)(2)(iii).

Line 6a – Eligible Plan Assets. To be eligible to file the Form 5500-SF, all of the plan's assets must be "eligible plan assets." Answer line 6a "yes" or "no." Do not leave this question blank. If the answer to line 6a is "no" you CANNOT file the Form 5500-SF and must file the Form 5500. See discussion under Who May File Form 5500-SF on page 1.

For purposes of this line, "eligible plan assets" are assets that have a readily determinable fair market value for purposes of this annual reporting requirement as described in 29 CFR 2520.103-1(c)(2)(iii), are not employer securities, and are held or issued by one of the following regulated financial institutions: a bank or similar financial institution as defined in 29 CFR 2550.408b-4(c) (for example, banks, trust companies, savings and loan associations, domestic building and loan associations, and credit unions); an insurance company qualified to do business under the laws of a state; organizations registered as broker-dealers under the Securities Exchange Act of 1934; investment companies registered under the Investment Company Act of 1940; or any other organization authorized to act as a trustee for individual retirement accounts under Code section 408. Examples of assets that would qualify as eligible plan assets for this annual reporting purpose are: mutual fund shares; investment contracts with insurance companies or banks that provide the plan with valuation information at least annually; publicly traded stock held by a registered broker dealer; and cash and cash equivalents held by a bank. Participant loans meeting the requirements of ERISA section 408(b)(1) are also "eligible plan assets" for this purpose whether or not they have been deemed distributed.

Line 6b – In addition to all of the plan's assets being eligible plan assets, to be able to file the Form 5500-SF the plan also must be exempt from the requirement to be audited annually by an independent qualified public accountant (IQPA).

Welfare plans that cover fewer than 100 participants at the beginning of the plan year are exempt from the annual audit requirement. A pension plan is exempt from the annual audit requirement if it covered fewer than 100 participants at the beginning of the plan year or is eligible to file as a small plan under the 80 to 120 rule (described above) and meets the following three requirements for the audit waiver under 29 CFR 2520.104-46: (1) as of the last day of the preceding plan year at least 95% of a small pension plan's assets were "qualifying plan assets;" (2) the plan includes the required audit waiver disclosure in the Summary Annual Report (SAR) furnished to participants and beneficiaries (see 29 CFR 2520.104-46 and 2520.104b-10(d)(3) for a model audit waiver disclosure); and (3) in response to a request from any participant or beneficiary, the plan administrator must furnish without charge copies of statements from the regulated financial institutions holding or issuing the plan's "qualifying plan assets."

"Qualifying plan assets" for this purpose include: shares issued by an investment company registered under the Investment Company Act of 1940 (e.g., mutual fund shares); investment and annuity contracts issued by any insurance company qualified to do business under the laws of a state; participant loans meeting the requirements of ERISA section 408(b)(1), whether or not they have been deemed distributed, and any eligible assets, e.g., publicly traded stocks and bonds, held by banks or similar financial institutions, including trust companies, savings and loan associations, domestic building and loan associations, and credit unions; insurance companies qualified to do business under the laws of a state; organizations registered as broker-dealers under the Securities Exchange Act of 1934; investment companies registered under the Investment Company Act of 1940; or any other organization authorized to act as a trustee for individual retirement accounts under Code section 408. In the case of an individual account plan, "qualifying plan assets" also include any assets in the individual account of a participant or beneficiary over which the participant or beneficiary had the opportunity to exercise control and with respect to which the participant or beneficiary has been furnished, at least annually, a statement from one of the above regulated financial institutions describing the plan assets held or issued by the institution and the amount of such assets.

CAUTION: In order to be able to file the Form 5500-SF, a small plan must meet the audit waiver conditions by virtue of having 95% or more of its assets as qualifying plan assets in accordance with 29 CFR 2520.104-46(b)(1)(i)(A)(1). If the small plan satisfies the conditions of the audit waiver by virtue of having enhanced fidelity bond under 29 CFR 2520.104-46(b)(1)(i)(A)(2), the plan does not satisfy the conditions for filing the Form 5500-SF and must file the Form 5500, along with the appropriate schedules and attachments. Also, many "qualifying plan assets" for audit waiver purposes will also be "eligible plan assets" as described in the instructions for line 6a, but the definitions are not the same. For example, real estate held by a bank as trustee for a plan could be a qualifying plan asset for purposes of the small pension plan audit waiver conditions but it would not be a "eligible plan asset" for purposes of the plan being eligible to file the Short Form 5500 because real estate would not have a readily determinable fair market value as described in described in 29 CFR 2520.103-1(c)(2)(iii).

Part III – Financial Information

Line 7 – Plan Assets and Liabilities.

Amounts reported on line 7a, 7b, and 7c for the beginning of the plan year must be the same as reported for the end of the plan year for the corresponding lines on the return/report for the preceding plan year. That means that if the Form 5500 was filed the previous year, the amounts reported on the Form 5500-SF line 7a, column (a), 7b, column (a), and 7c, column (a) should correspond to the amounts entered in line 1a, column (b), 1b, column (b), and 1c, column (b) of Schedule I (Form 5500) or the amounts entered in line 1f, column (b), 1k, column (b), and 1l, column (b) of Schedule H (Form 5500) filed for the previous plan year, whichever schedule was filed.

Line 7a. Enter the total amount of plan assets at the beginning of the plan year in column (a). Do not include contributions designated for the 2008 plan year in column (a).

Enter the total amount of plan assets at the end of the plan year in column (b). Do not include in column (b) a participant loan that has been deemed distributed during the plan year under the provisions of Code section 72(p) and Treasury Regulation section 1.72(p)-1, if both the following circumstances apply: (1) Under the plan, the participant loan is treated as a direct investment solely of the participant's individual account; and (2) As of the end of the plan year, the participant is not continuing repayment under the loan.

If the deemed distributed participant loan is included in column (a) and both of these circumstances apply, include the value of the loan as a deemed distribution on line 8e. However, if either of these two circumstances does not apply, the current value of the participant loan (including interest accruing thereon after the deemed distribution) should be included in column (b) without regard to the occurrence of a deemed distribution.

After a participant loan that has been deemed distributed is included in the amount reported on line 8e, it is no longer to be reported as an asset on line 7a unless, in a later year, the participant resumes repayment under the loan. However, such a loan (including interest accruing thereon after the deemed distribution) that has not been repaid is still considered outstanding for purposes of applying Code section 72(p)(2)(A) to determine the maximum amount of subsequent loans. Also, the deemed distribution is not treated as an actual distribution for other purposes, such as the qualification requirements of Code section 401, including, for example, the determination of top-heavy status under Code section 416 and the vesting requirements of Treasury Regulation section 1.411(a)-7(d)(5). See Q&As 12 and 19 of Treasury Regulation section 1.72(p)-1.

The entry on line 7a, column (b) (plan assets at end of year) must include the current value of any participant loan included as a deemed distribution in the amount reported for any earlier year if, during the plan year, the participant resumes repayment under the loan. In addition, the amount to be entered on line 8e must be reduced by the amount of the participant loan reported as a deemed distribution for the earlier year.

Line 7b. Enter the total liabilities at the beginning and end of the plan year. Liabilities to be entered here do not include the value of future pension payments to participants. The amount to be entered in line 7b for accrual basis filers includes, among other things:

1. Benefit claims that have been processed and approved for payment by the plan but have not been paid (including all incurred but not reported welfare benefit claims);
2. Accounts payable obligations owed by the plan that were incurred in the normal operations of the plan but have not been paid; and
3. Other liabilities such as acquisition indebtedness and any other amount owed by the plan.

Line 7c. Enter the net assets as of the beginning and end of the plan year. (Subtract line 7b from 7a). Line 7c, column (b) must equal the sum of line 7c, column (a), plus lines 8i (net income (loss)) and 8j (transfers to (from) the plan).

Line 8 – Income, Expenses, and Transfers for this Plan Year

Line 8a. Include the total cash contributions received and/or (for accrual basis plans) due to be received.

Line 8a(1). Plans using the accrual basis of accounting must not include contributions designated for years before the 2008 plan year on line 8a(1).

Line 8a(2). For welfare plans, report all employee contributions, including all elective contributions under a cafeteria plan (Code section 125). For pension plans, participant contributions, for purposes of this item, include elective contributions under a qualified cash or deferred arrangement (Code section 401(k)).

Line 8a(3). Enter the value of all other contributions, including rollovers from other plans.

Line 8b. Enter all other plan income for the plan year. Do not include transfers from other plans that should be reported on line 8j. Examples of other income received and/or receivable include:

1. Interest on investments (including money market accounts, sweep accounts, etc.)
2. Dividends. (Accrual basis plans should include dividends declared for all stock held by the plan even if the dividends have not been received as of the end of the plan year.)
3. Net gain or loss from the sale of assets.

4. Other income such as unrealized appreciation (depreciation) in plan assets.

Line 8c. Enter the total of all cash contributions (line 8a(1) through 8a(3)) and other plan income (line 8b) during the plan year. Put negative numbers in parentheses.

Line 8d. Include (1) payments made (and for accrual basis filers payments due) to or on behalf of participants or beneficiaries in cash, securities, or other property (including rollovers of an individual's accrued benefit or account balance). Include all eligible rollover distributions as defined in Code section 401(a)(31)(D) paid at the participant's election to an eligible retirement plan (including an IRA within the meaning of section 401(a)(31)(E)); (2) payments to insurance companies and similar organizations such as Blue Cross, Blue Shield, and health maintenance organizations for the provision of plan benefits (e.g., paid-up annuities, accident insurance, health insurance, vision case, dental coverage, etc.); and (3) payments made to other organizations or individuals providing benefits. Generally, these payments discussed in (3) are made to individual providers of welfare benefits such as legal services, day care services, and training and apprenticeship services. If securities or other property are distributed to plan participants or beneficiaries, include the current value of the date of distribution.

Line 8e. Include on this line all distributions paid during the plan year of excess deferrals under Code section 402(g)(2)(A)(ii), excess contributions under section 401(k)(8), and excess aggregate contributions under section 401(m)(6). Include allocable income distributed. Also include on this line any elective deferrals and employee contributions distributed or any elective deferrals and employee contributions distributed or returned to employees during the plan year in accordance with Treasury Regulation section 1.415-6(b)(6)(iv), as well as any attributable gains that were also distributed.

For line 8e, also include in the total amount a participant loan included in line 7a, column (a) that has been deemed distributed during the plan year under the provisions of Code section 72(p) and Treasury Regulation section 1.72(p)-1 only if both of the following circumstances apply:

1. Under the plan, the participant loan is treated as a directed investment solely of the participant's individual account; and
2. As of the end of the plan year, the participant is not continuing repayment under the loan.

If either of these circumstances does not apply, a deemed distribution of a participant loan should not be included in the total on line 8e. Instead, the current value of the participant loan (including interest accruing thereon after the deemed distribution) should be included on lines 7a, column (b) (plan assets – end of year), and 10j (participant loans - end of year), without regard to the occurrence of a deemed distribution.

Note: The amount to be reported on line 8e must be reduced if, during the plan year, a participant resumes repayment under a participant loan reported as a deemed distribution on line 2g of Schedule H or Schedule I of a prior Form 5500 or line 8e of a prior Form 5500-SF for any earlier year. The amount of the required reduction is the amount of the participant loan that was reported as a deemed distribution on such line for any earlier year. Put negative numbers in parentheses. The current value of the participant loan must then be included in line 10i (participant loans – end of year) and line 7a, column (b) (plan assets – end of year).

Although certain participant loans deemed distributed are to be reported on line 8e, and are not to be reported on the Form 5500-SF or on the Schedule H or Schedule I of the Form 5500 as an asset thereafter (unless the participant resumes repayment under the loan in a later year), they are still considered outstanding loans and are not treated as actual distributions for certain purposes. See Q&As 12 and 19 of Treasury Regulation section 1.72(p)-1.

Line 8f. The amount to be reported for administrative service providers (salaries, fees, and commissions) must include the total fees paid (or in the case of accrual basis plans, costs incurred during the plan year but not paid as of the end of the plan year) by the plan for, among others:

1. Salaries to employees of the plan;
2. Fees and expenses for accounting, actuarial, legal, and securities brokerage services, and investment management and advice;
3. Contract administrator fees;
4. Fees and expenses for corporate and plan trustees, including reimbursement for travel, seminars, and meeting expenses;
5. Fees and expenses paid for valuations and appraisals of real estate and closely held securities; and
6. Fees for legal services provided to the plan (do not include legal services as a benefit to plan participants).

Do not include in this line amounts paid to plan employees to perform administrative services.

Line 8g. Other expenses (paid and/or payable) include other administrative and miscellaneous expenses paid by or charged to the plan, including among others office supplies and equipment, telephone, and postage.

Line 8h. Enter the total of all benefits paid or due reported on lines 8d and 8e and all other plan expenses reported on lines 8f and 8g.

Line 8i. Subtract line 8h from line 8c.

Line 8j. Enter the net value of all assets transferred to and from the plan during the plan year including those resulting from mergers and spin-offs. A transfer of assets or liabilities occurs when there is a reduction of assets or liabilities with respect to one plan and the receipt of these assets or the assumption of these liabilities by another plan. Transfers out at the end of the year should be reported as occurring during the plan year.

Note. A distribution of all or part of an individual participant's account balance that is reportable on Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., should not be included on line 8j but must be included in benefit payments reported on Line 8d. Do not submit Form 1099-R with Form 5500-SF.

Part IV Plan Characteristics

Line 9 – Benefits Provided Under the Plan. Enter in lines 9a and 9b, as appropriate, in the boxes provided all applicable plan characteristic codes from the table on pages [___] that describe the characteristics of the plan being reported. (See examples on page ___).

[The charts showing plan feature codes that are in the Form 5500 Instructions will be included here in the Short Form instructions. Codes for ESOP and multiemployer plans that cannot file the Short Form will be eliminated from the list of Codes for the Short Form Instructions].

Part V – Compliance Questions

Line 10. Answer all lines either "Yes" or "No." Do not leave any answer blank. For items 10a, b, c, d, e, f, and i, if the answer is "Yes," an amount must be entered.

Note: One-participant plans should only complete question 10g.

Line 10a. Amounts paid by a participant or beneficiary to an employer and/or withheld by an employer for contribution to the plan are participant contributions that become plan assets as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets. See 29 CFR 2510.3-102. Plans that check "Yes" must enter the aggregate amount of all late contributions for the year. The total amount of the delinquent contributions should be included on line 10a for the year in which the contributions were delinquent and should be carried over and reported again on line 10a for each subsequent year (or on line 4a of Schedule H or I of the Form 5500 if not eligible to file the Form 5500-SF in the subsequent year) until the year after the violation has been fully corrected by payment of the late contributions and reimbursement of the plan for lost earnings or profits.

An employer holding participant contributions commingled with its general assets after the earliest date on which such contributions can reasonably be segregated from the employer's general assets will have engaged in a prohibited use of plan assets (see ERISA section 406). If such a nonexempt prohibited transaction occurred with respect to a disqualified person (see Code section 4975(e)(2)), file Form 5330, Return of Excise Taxes Related to Employee Benefit Plans, with the IRS to pay any applicable excise tax on the transaction. Applicants that satisfy both the DOL Voluntary Fiduciary Correction Program (VFCP) and the conditions of Prohibited Transaction Exemption (PTE) 2002-51 are eligible for immediate relief from payment of certain prohibited transaction excise taxes for certain corrected transactions, and are also relieved from the requirement to file the Form 5330 with the IRS. For more information on how to apply under the VFCP, the specific transactions covered (which transactions include delinquent participant contributions to pension and welfare plans), and acceptable methods for correcting violations, see 67 Fed. Reg. 15062 (Mar. 28, 2002), 67 Fed. Reg. 70623 (Nov. 25, 2002), and 70 Fed. Reg. 17515 (Apr. 6, 2005). All delinquent participant contributions must be reported on line 10a at least for the year in which they were delinquent even if violations have been fully corrected by the close of the plan year. Information about the VFCP is also available on the Internet at www.dol.gov/ebsa.

Line 10b. Plans that check "Yes" must enter the amount. Check "Yes" if any nonexempt transaction with a party-in-interest occurred. Do not check "Yes" with respect to transactions that are: (1) statutorily exempt under Part 4 of Title I of ERISA; (2) administratively exempt under ERISA section 408(a); (3) exempt under Code sections 4975(c) or 4975(d); (4) the holding of participant contributions in the employer's general assets for a welfare plan that meets the conditions of ERISA Technical Release 92-01; or (5) delinquent participant contributions reported on line 10a. You may indicate that an application for an administrative exemption is pending. If you are unsure whether a transaction is exempt or not, you should consult either with a qualified public accountant, legal counsel, or both. If the plan is a qualified pension plan and a nonexempt prohibited transaction occurred with respect to a disqualified person, a Form 5330 should be filed with the IRS to pay the excise tax on the transaction.

Non-exempt transactions with a party-in-interest include any direct or indirect:
A. Sale or exchange, or lease, of any property between the plan and a party-in-interest.
B. Lending of money or other extension of credit between the plan and a party-in-interest.

C. Furnishing of goods, services, or facilities between the plan and a party-in-interest.
D. Transfer to, or use by or for the benefit of, a party-in-interest, of any income or assets of the plan.
E. Acquisition, on behalf of the plan, of any employer security or employer real property in violation of Code section 407(a).
F. Dealing with the assets of the plan for a fiduciary's own interest or own account.
G. Acting in a fiduciary's individual or any other capacity in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.
H. Receipt of any consideration for his or her own personal account by a party-in-interest who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

Party-in-Interest. For purposes of this form, party-in-interest is deemed to include a disqualified person. See Code section 4975(e)(2). The term "party-in-interest" means, as to an employee benefit plan:

A. Any fiduciary (including, but not limited to, any administrator, officer, trustee or custodian), counsel, or employee of the plan;
B. A person providing services to the plan;
C. An employer, any of whose employees are covered by the plan;
D. An employee organization, any of whose members are covered by the plan;
E. An owner, direct or indirect, of 50% or more of: (1) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation; (2) the capital interest or the profits interest of a partnership; or (3) the beneficial interest of a trust or unincorporated enterprise which is an employer or an employee organization described in C or D;
F. A relative of any individual described in A, B, C, or E;
G. A corporation, partnership, or trust or estate of which (or in which) 50% or more of: (1) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation, (2) the capital interest or profits interest of such partnership, or (3) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in A, B, C, D, or E;
H. An employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10% or more shareholder directly or indirectly, of a person described in B, C, D, E, or G, or of the employee benefit plan; or
I. A 10% or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in B, C, D, E, or G.

[TIP] *Applicants that satisfy the VFCP requirements and the conditions of PTE 2002-51 (see the instructions for line 10a) are eligible for immediate relief from payment of certain prohibited transaction excise taxes for certain corrected transactions and from the requirement to file the Form 5330 with the IRS. For more information, see 67 Fed. Reg. 15062 (Mar. 28, 2002), 67 Fed. Reg. 70623 (Nov. 25, 2002), and 70 Fed. Reg. 17515 (Apr. 6, 2005). When the conditions of PTE 2002-51 have been satisfied, the corrected transactions should be treated as exempt under Code section 4975(c) for the purposes of answering line 10b.*

Line 10c. Plans that check "Yes" must enter the aggregate amount of fidelity bond coverage for all claims. Check "Yes" only if the plan itself (as opposed to the plan sponsor or administrator) is a named insured under a fidelity bond that is from an approved surety covering plan officials and that protects the plan from losses due to fraud or dishonesty as described in 29 CFR Part 2580. Generally, every plan official of an employee benefit plan who "handles" funds or other property of such plan must be bonded. Generally, a person shall be deemed to be "handling" funds or other property of a plan, so as to require bonding, whenever his or her other duties or activities with respect to given funds are such that there is a risk that such funds could be lost in the event of fraud or dishonesty on the part of such person, acting either alone or in collusion with others. Section 412 of ERISA and DOL regulations (29 CFR Part 2580) describe the bonding requirements, including the definition of "handling" (29 CFR 2580.412-6), the permissible forms of bonds (29 CFR 2580.412-10), the amount of the bond (29 CFR Part 2580 Subpart C), and certain exemptions such as the exemption for certain banks and insurance companies and the exemption allowing plan officials to purchase bonds from surety companies authorized by the Secretary of the Treasury as acceptable reinsurers on Federal bonds (29 CFR 2580.412-23). Information concerning the list of approved sureties and reinsurers is available on the Internet at www.fms.treas.gov/c570.

Note. Plans are permitted under certain conditions to purchase fiduciary liability insurance with plan assets. These fiduciary liability insurance policies are not written specifically to protect the plan from losses due to dishonest acts and are not fidelity bonds reported in line 10c.

Line 10d. Check "Yes" if the plan had suffered or discovered any loss as a result of any dishonest or fraudulent act(s) even if the loss was reimbursed by the plan's fidelity bond or from any other source. If "Yes" is checked enter the full amount of the loss. If the full amount of the loss has not yet been determined, provide an estimate and disclose that the figure is an estimate, such as "@1000."

[CAUTION] *Willful failure to report is a criminal offense. See ERISA section 501.*

Line 10e. If any benefits under the plan are provided by an insurance company, insurance service, or other similar organization (such as Blue Cross, Blue Shield, or a health maintenance organization) or if the plan has investments with insurance companies such as guaranteed investment contracts (GICs), report the total of all insurance fees and commissions paid to agents, brokers and/or other persons directly or indirectly attributable to the contract(s) placed with or retained by the plan.

For purposes of line 10e, commissions and fees include sales or base commissions and other monetary and non-monetary compensation where the broker's, agent's, or other person's eligibility for the payment or the amount of the payment is based, in whole or in part, on the value (e.g., policy amounts, premiums) of contracts or policies (or classes thereof) placed with or retained by an ERISA plan, including, for example, persistency and profitability bonuses. For more detailed information on what are reportable fees and commissions, see the instructions to Line 2 of the Schedule A for the Form 5500.

Important Reminder. The insurer (or similar organization) is required under ERISA section 103(a)(2) to provide the plan administrator with the information needed to complete the return/report. Your insurance company should provide you with the information you need to answer this question. If your insurer (or similar organization) does not automatically send you this information, you should make a written request for the information. If you have difficulty getting the information from your insurance company, contact the nearest office of the DOL's Employee Benefits Security Administration.

Line 10f. You must check "Yes" if any benefits due under the plan were not timely paid or not paid in full. Include in this amount the total of any outstanding amounts that were not paid when due in previous years, that have continued to remain unpaid.

Line 10h. Check "yes" if there was a "blackout period." A blackout period is a temporary suspension of more than three consecutive business days during which participants or beneficiaries of a 401(k) or other individual account pension plan were unable to, or were limited or restricted in their ability to, direct or diversify assets credited to their accounts, obtain loans from the plan, or obtain distributions from the plan. A "blackout period" generally does not include a temporary suspension of the right of participants and beneficiaries to direct or diversify assets credited to their accounts, obtain loans from the plan, or obtain distributions from the plan if the temporary suspension is: (1) part of the regularly scheduled operations of the plan that has been disclosed to participants and beneficiaries; (2) due to a qualified domestic relations order (QDRO) or because of a pending determination as to whether a domestic relations order is a QDRO; (3) due to an action or a failure to take action by an individual participant or because of an action or claim by someone other than the plan regarding a participant's individual account; or (4) by application of federal securities laws. For more information, see the Department of Labor's regulation at 29 CFR 2520.101-3 (available at www.dol.gov/ebsa).

Line 10i. If there was a blackout period, did you provide the required notice not less than 30 days nor more than 60 days in advance of restricting the rights of participants and beneficiaries to change their plan investments, obtain loans from the plan, or obtain distributions from the plan? See 29 CFR 2520.101-3 for specific notice requirements and for exceptions from the notice requirement. Answer "no" if notice was not provided even if the plan met one of the exceptions to the notice requirement.

Part VI – Pension Funding Compliance

Line 11. If "Yes," is checked, you must attach Schedule B (Form 5500). If this is a defined contribution pension plan, leave blank. One-participant plans, however, do not attach Schedule B to the Form 5500-SF. Instead, one-participant plans keep the Schedule B in accordance with the applicable record retention requirements.

Line 12. Check "Yes" if this is a defined contribution money purchase plan (including a target benefit plan) that is subject to the minimum funding requirements. If "Yes" is checked, answer lines 12a, b, c and d.

Line 12a. The minimum required contribution for a money purchase defined contribution plan (including a target benefit plan) for a plan year is the amount required to be contributed for the year under the formula set forth in the plan document. If there is an accumulated funding deficiency for a prior year that has not been waived, that amount should also be included as part of the contribution required for the current year.

Line 12b. Include all contributions for the plan year made not later than 8 ½ months after the end of the plan year. Show only contributions actually made to the plan by the date the form is filed, *i.e.*, do not include receivable contributions for this purpose.

Line 12c. If the minimum required contribution exceeds the contributions for the plan year made not later than 8½ months after the end of the plan year, the excess is an accumulated funding deficiency for the plan year and Form 5330, Return of Excise Taxes Related to Employee Benefit Plans, should be filed with the IRS to pay the excise tax on the deficiency. There is a penalty for not filing Form 5330 on time.

Note: One-participant plans skip the reminder of these instructions.

Part VII – Plan Terminations and Transfers of Assets

Line 13a. Check "Yes" if a resolution to terminate the plan was adopted during this or any prior plan year, unless the termination was revoked and no assets reverted to the employer. If "Yes" is checked, enter the amount of plan assets that reverted to the employer during the plan year in connection with the implementation of such termination. Enter "-0-" if no reversion occurred during the current plan year.

[CAUTION] *IRS Form 5310-A, Notice of Plan Merger or Consolidation, Spinoff, or Transfer of Plan Assets or Liabilities; Notice of Qualified Separate Lines of Business, must be filed at least 30 days before any plan merger or consolidation or any transfer of plan assets or liabilities to another plan. There is a penalty for not filing Form 5310-A on time. In addition, a transfer of benefit liabilities involving a plan covered by PBGC insurance may be reportable to the PBGC (see PBGC Form 10 and Form 10-Advance).*

Line 13b. Check "Yes" if all of the plan assets (including insurance/annuity contracts) were distributed to the participants and beneficiaries, legally transferred to the control of another plan, or brought under the control of the PBGC.

Check "No" for a welfare benefit plan that is still liable to pay benefits for claims that were incurred before the termination date, but not yet paid. See 29 CFR 2520.104b-2(g)(2)(ii).

Line 13c. Enter information concerning assets and/or liabilities transferred from this plan to another plan(s) (including spin-offs) during the plan year. A transfer of assets or liabilities occurs when there is a reduction of assets or liabilities with respect to one plan and the receipt of these assets or the assumption of these liabilities by another plan. Enter the name, PN, and EIN of the transferee plan(s) involved on lines 13c(1), c(2) and c(3).

Do not use a social security number in lieu of an EIN. The Form 5500-SF is open to public inspection, and the contents are public information and are subject to publication on the Internet. Because of privacy concerns, the inclusion of a social security number on this Form 5500-SF may result in the rejection of the filing.

ERISA COMPLIANCE QUICK CHECKLIST

Compliance with the Employee Retirement Income Security Act (ERISA) begins with knowing the rules. Plan administrators and other plan officials can use this checklist as a quick diagnostic tool for assessing a plan's compliance with certain important ERISA rules; it is not a complete description of all ERISA's rules and it is not a substitute for a comprehensive compliance review. Use of this checklist is voluntary, and it should not be filed with your Form 5500.

If you answer "No" to any of the questions below, you should review your plan's operations because you may not be in full compliance with ERISA's requirements.

1. Have you provided plan participants with a summary plan description, summaries of any material modifications of the plan, and annual summary financial reports?
2. Do you maintain copies of plan documents at the principal office of the plan administrator for examination by participants and beneficiaries?
3. Do you respond to written participant inquires for copies of plan documents and information within 30 days?
4. Does your plan include written procedures for making benefit claims and appealing denied claims, and are you complying with those procedures?
5. Is your plan covered by a fidelity bond against losses due to fraud or dishonesty?
6. Are the plan's investments diversified so as to minimize the risk of large losses?
7. If the plan permits participants to select the investments in their plan accounts, has the plan provided them with enough information to make informed decisions?
8. Has a plan official determined that the investments are prudent and solely in the interest of the plan's participants and beneficiaries, and evaluated the risks associated with plan investments before making the investments?
9. Did the employer or other plan sponsor send participant contributions to the plan on a timely basis?
10. Did the plan pay participant benefits on time and in the correct amounts?
11. Did the plan give participants and beneficiaries 30 days advance notice before imposing a "blackout period" of at least three consecutive business days during which participants or beneficiaries of a 401(k) or other individual account pension plan were unable to change their plan investments, obtain loans from the plan, or obtain distributions from the plan?

If you answer "Yes" to any of the questions below, you should review your plan's operations because you may not be in full compliance with ERISA's requirements.

1. Has the plan engaged in any financial transactions with persons related to the plan or any plan official? (For example, has the plan made a loan to or participated in an investment with the employer?)
2. Has the plan official used the assets of the plan for his/her own interest?
3. Have plan assets been used to pay expenses that were not authorized in the plan document, were not necessary to the proper administration of the plan, or were more than reasonable in amount?

If you need help answering these questions or want additional guidance about ERISA requirements, a plan official should contact the U.S. Department of Labor Employee Benefits Security Administration office in your region or consult with the plan's legal counsel or professional employee benefit advisor.

Note: The list of business codes published with the Form 5500 will be included in the Short Form Instructions and will be updated to reflect the North American Industry Classification System Update for 2007. See 70 FR 12390 (Mar. 11, 2005).

OMB Control Numbers

Agency	OMB Number
Employee Benefits Security Administration	1210-0110
	1210-0089
Internal Revenue Service	1545-1610
Pension Benefit Guaranty Corporation	1212-0057

Paperwork Reduction Act Notice

We ask for the information on this form to carry out the law as specified in ERISA and in Code sections 6058(a), and 6059(a). You are required to give us the information. We need it to determine whether the plan is operating according to the law.

Your are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books and records relating to a form or its instructions must be retained as long as their contents may become material in the administration of the Internal Revenue Code or are required to be maintained pursuant to Title I or IV of ERISA. The Form 5500 return/reports are open to public inspection and are subject to publication on the Internet.

The time needed to complete and file the form 5500-SF and the Schedule B reflects the combined requirements of the Internal Revenue Service, Department of Labor, and Pension Benefit Guaranty Corporation. These times will vary depending on individual circumstances. The estimated average times are:

	Pension Plans	Welfare Plans
Form 5500-SF	2 hours, 5 minutes	2 hours, 5 minutes
Schedule B	53 minutes	

If you have comments concerning the accuracy of these time estimates or suggestions for making these forms simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave., NW, IR-6406, Washington, DC 20224. DO NOT send any of these forms or schedules to this address. The forms and schedules must be filed electronically. See How to File - Electronic Filing Requirement on page xx.

BILLING CODE 4510-29-C

Appendix C—Description of Changes to Existing Form 5500

General Changes to Form 5500 and Schedules

Appearance of check boxes and line items may be changed in order to reflect electronic input format. Dates and line numbering will be changed to reflect plan year and insertions and deletions throughout. Line titles may be changed to provide for fewer or additional entries to reflect changed appearance and electronic data entry on the Form 5500 and all Schedules. Instructions for schedules and line items being eliminated will also be eliminated. Conforming changes to titles and line items changed in the forms will be made in the instructions.

To enable filers to better evaluate the proposed changes, the Department is making available on its Web site at *http://www.dol.gov/ebsa*, handwritten mark-ups of the existing Form 5500 and Schedules to show the changes proposed. Copies of the mark-ups may also be obtained by calling the EBSA's Public Disclosure Room at 1.866.444.EBSA (3272).

Specific Changes

Form 5500

- Signature lines will be changed to reflect shift to electronic filing; plan administrators still will be required to maintain a manually signed copy with the plan's records.
- Separate signature line will be added for DFEs.
- Line 5 (Preparer information) will be eliminated.
- New Line 7 will be added to request total number of contributing employers to multiemployer plan.
- List of Schedules will be modified to eliminate references to schedules being eliminated.

Schedule A

- Minor non-substantive changes will be made to language of lines to make questions clearer.
- Line 2(b) entry will be changed to "Amount of sales and base commissions paid"
- Line 2 (c) entry will be changed to "Fees and other commissions paid"
- New Part IV will be added to enable plan administrator to identify any insurance company that failed to provide the information necessary to complete Schedule A and the information that was not provided by the insurance company.

Schedule B

New Line 12 will be added that provides as follows:

12 If the total participant count on Schedule B, line 2(b)(1)(4) is 1,000 or more, then answer questions 12a and 12b.

a Enter percentage of plan assets held as: Stock ____% Debt ____% Real Estate ____% Other ____%

b For the debt securities, provide the Macaulay duration for all debt securities and the percentage held as (see instructions):

Macaulay Duration	____.____
Government Debt	____.____
Investment Grade Corporate Debt	____.____
High-Yield Corporate Debt	____.____

Schedule C

Existing Part I will be deleted; new Part II will be added; existing Part II will be renumbered Part III.

New Part I and II will be as follows:

Part I—Service Provider Compensation Information (See Instructions)

Line 1. The information required by this Part must be completed, in accordance with the instructions, for each person receiving, directly or indirectly, $5,000 or more in total compensation (i.e., money or anything else of value) in connection with services rendered to the plan or their position with the plan during the plan year.

(a) Name _____
(b) Enter EIN or, if reported person does not have an EIN, address and telephone number
1. EIN – –
2. Address and Phone Number _____
( ) – Ext.
(c) Enter Code(s) for relationship or services provided to the plan (see instructions)
(d) Relationship to employer, employee organization, or person known to be a party-in-interest. _____
(e) Total amount received (see instructions)
1. $ _____
2. Is the amount entered in element (d)(l) an estimate? Yes No
3. If applicable, describe formula for calculating payment(s) _____
(f) Did the person identified in element (a) (above) receive during the plan year compensation (money or anything else of value) from a source other than the plan or plan sponsor in connection with the person's position with the plan or services provided to the plan? Yes No
(g) If the answer to (f) is "Yes," enter the following information for each source from whom the person identified in element (a) received $1,000 or more in compensation if the person is a fiduciary to the plan or provides one or more of the following services to the plan— contract administrator, securities brokerage (stock, bonds, commodities), insurance brokerage or agent, custodial, consulting, investment advisory (plan or participants), investment or money management, recordkeeping, trustee, appraisal, or investment evaluation.
(1) Name and EIN of source from whom compensation was received
(payor)_____ –
(2) Enter Code(s) for relationship or services provided by the payor to the plan (see instructions)
(3) Amount paid by the payor (see instructions)
(A) $_____
(B) Is the amount entered in element (3)(A) an estimate? Yes No
(C) If applicable, describe formula for calculating payment(s)

_____

(4) Describe nature of compensation reported in (g)(3) (see instructions)

_____

Part II. Service Providers Who Fail or Refuse to Provide Information

Line 2. Provide, to the extent possible, the following information for each fiduciary or service provider who failed or refused to provide the information necessary to complete Part I of this Schedule.
(a) Name _____
(b) Enter EIN or, if reported person does not have an EIN, address and telephone number
1. EIN – –
2. Address and Phone Number _____
( ) – Ext.

Schedule H

Part IV will be changed as follows:

- Title will be changed to "Compliance Questions." General instructions will be modified to note that MTIAs, 103–12IEs, and GIAs will not complete new lines 4m and 4n and that 103–12IEs and MTIAs also will not complete new Line 4l.
- Line 4a will be modified to read as follows: "Was there a failure to transmit to the plan any participant contributions within the time period described in 29 CFR 2510.3–102? (See Instructions and DOL's Voluntary Fiduciary Correction Program)." This will conform the text in Line 4a to the same question on the new proposed Short Form 5500.
- New Lines 4l–4m will be added as follows:

○ 4l Has the plan failed to provide any benefit when due under the plan? Yes__ No__ Amount __.__
○ 4m If this is an individual account plan, was there a blackout period? (see instructions and 29 CFR 2520.101–3) Yes__No __
○ 4n If 4m was answered "Yes," did the plan administrator comply with the blackout period notice requirements in 29 CFR 2520.101–3? Yes__ No__

Schedule I

- New Line 2h will be added to conform Schedule I to new Short Form, and "total expenses" description will be modified to reflect addition of new entry:

○ 2h Administrative service providers (salaries, fees, and commissions).

- Part II will be changed as follows:

○ Title changed to "Compliance Questions."
○ New Lines 4l-ndash;4m are added as follows:

- 4l Has the plan failed to provide any benefit when due under the plan? Yes__ No__Amount __.__
- 4m If this is an individual account plan, was there a blackout period? (see instructions and 29 CFR 2520.101–3) Yes__No __
- 4n If 4m was answered "Yes," did the plan administrator comply with the blackout period notice requirements in 29 CFR 2520.101–3? Yes__ No__

Schedule R

- New Line 7 will added:
- Will the minimum funding amount reported on line 6c be met by the funding deadline? Yes__ No __ N/A __
- Current Part IV Coverage will be deleted.
- New Part IV will be added as follows:

Part IV ESOPs (See Instructions) If this is not a plan described under Section 409(a) or 4975(e)(7) of the Internal Revenue Code, skip this part.

10 Were unallocated employer securities or proceeds from the sale of unallocated securities used to repay any exempt loan? ☐ Yes ☐ No
11 a Does the ESOP hold any preferred stock? ☐ Yes ☐ No
b If the ESOP has an outstanding exempt loan with the employer as lender, is such loan part of a "back-to-back" loan? (See instructions for definition of "back-to-back" loan.) ☐ Yes ☐ No
12 Does the ESOP hold any stock that is not readily tradable on an established securities market? ☐ Yes ☐ No

- New Part V will be added as follows:

Part V Contributing Employer Information for Multiemployer Defined Benefit Pension Plans

List each employer required to contribute an annual amount equal to or greater than 5% of all annual contributions to the plan (measured in dollars). (See instructions). Complete as many entries as needed to report all employers required to be listed.

a Name of contributing employer _____
b EIN _____
c Dollar Amount Contributed _____
d Contribution Rate _____
e Contribution Base Unit Measure (Check Applicable Measure):
Hourly __ Weekly __ Unit of Product __
Other (Specify): __
f CBA Expiration Date (mm/dd/yyyy) ____

Appendix D—Description of Proposed Changes to Existing Form 5500 Instructions

General Changes

All instructions regarding "hand print" and "machine print" and paper filings will be eliminated, as will be instructions as to how to file using the original EFAST system. Instructions will be updated to describe the mechanics of electronic filing and the EFAST2 processing system. Appropriate date changes, table of contents changes, and other non-substantive changes will be made. Cross-references to the Short Form instructions will be included as appropriate. Instructions regarding plans that only filed the Form 5500 for Title II purposes, and not Title I purposes will be eliminated.

To enable filers to better evaluate the proposed changes, the Department is making available on its Web site at *http://www.dol.gov/ebsa*, handwritten mark-ups of the existing Instructions to the Form 5500 and Schedules to show the changes proposed.

Specific Changes Using Format of Existing Instructions

A new general section describing electronic filing will be inserted:

Electronic Filing Requirement

Under the computerized ERISA Filing Acceptance System (EFAST), you must file your 2008 Form 5500 electronically. You may file your 2008 Form 5500 on-line, using EFAST's web-based filing system, or you may file through an EFAST-approved vendor. Detailed information on electronic filing is available at (insert web address). For telephone assistance, call the EFAST Help Line at 1–866–463–3278. The EFAST Help Line is available Monday through Friday from 8 a.m. to 8 p.m., Eastern Time.

[CAUTION] Annual reports filed under Title I of ERISA must be made available by plan administrators to plan participants and by the Department to the public pursuant to ERISA sections 104 and 106. Even though the

Form 5500 must be filed electronically, the administrator must keep a copy of the Form 5500, including schedules and attachments, with all required manual signatures on file as part of the plan's records and must make a paper copy available on request to participants, beneficiaries, and the Department of Labor as required by section 104 of ERISA and 29 CFR 2520.103–1.

Answer all questions with respect to the plan year unless otherwise explicitly stated in the instructions or on the form itself. Therefore, responses usually apply to the year entered at the top of the first page of the form.

Your entries will be initially screened. Your entries must satisfy this screening in order to be initially accepted as a filing. Once initially accepted, your form may be subject to further detailed review, and your filing may be rejected based upon this further review. To reduce the possibility of correspondence and penalties:

- Complete all lines on the Form 5500 unless otherwise specified. Also electronically attach any applicable schedules and attachments.
- Do not enter "N/A" or "Not Applicable" on the Form 5500 or Schedules unless specifically permitted. "Yes" or "No" questions on the forms and schedules cannot be left blank, but must be marked either "Yes" or "No," and not both.

The Form 5500, Schedules, and attachments are open to public inspection, and the contents are public information subject to publication on the Internet. Do not enter social security numbers in response to questions asking for an EIN. Because of privacy concerns, the inclusion of a social security number on the Form 5500 or on a schedule or attachment that is open to public inspection may result in the rejection of the filing. EINs may be obtained by applying for one on Form SS–4, Application for Employer Identification Number. You can obtain Form SS–4 by calling 1–800–TAX–FORM (1–800–829–3676) or at the IRS Web Site at *www.irs.gov*. The EBSA does not issue EINs.

- Who Must File
  - This section will be modified to eliminate paragraph 6, requiring certain foreign plans to file the Form 5500 based solely on whether the contributions are deducted on a U.S. tax return.
- Do Not File A Form 5500 For A Pension Benefit Plan That Is Any Of The Following
  - This section will be modified to eliminate paragraph 6, referring to "qualified foreign plans" under Code section 404A, and replacing it with the following: "A pension benefit plan that is maintained outside the United States primarily for the benefit of persons substantially all of whom are nonresident aliens."

Changes to Line by Line Instructions will be made as follows:

Form 5500

Instructions for the new line 7 will be added:

Line 7. For multiemployer plans, enter the total number of employers that made contributions to the plan for any part of the 2007 plan year. Any two or more contributing entities (e.g., places of business with separate collective bargaining agreements) that have the same nine-digit employer identification number (EIN) must be aggregated and counted as a single employer for this purpose.

List of plan characteristic codes will be modified as follows:

Codes 2L and 2M—reference to Limited Pension Plan reporting is eliminated. Codes 3A and 3G are eliminated.

New Codes 2S and 2T are added:

2S Plan provides for automatic enrollment in plan that has employee contributions deducted from payroll.

2T Total or partial participant-directed account plan—plan uses default investment account for participants who fail to direct assets in their account.

The Schedule A Instructions will be changed as follows:

The "Important Reminder" regarding the insurance company obligation to provide information will be deleted.

Instructions for the new proposed Part IV will be added:

Part IV—Provision of Information

The insurer (or similar organization) is required to provide the plan administrator with the information needed to complete the return/report, pursuant to ERISA section 103(a)(2). If you do not receive this information in a timely manner, contact the insurer (or similar organization). If information is missing on Schedule A (Form 5500) due to a refusal to provide information, check "Yes" on line 10 and enter a description of the information not provided on line 11.

The Schedule B Instructions will be changed as follows:

The instructions for Line 1d(2)(a) will be modified to eliminate discussion of the special rule under Code section 412(l)(7)(C)(i).

Instructions for the new line 12 will be added as follows:

Line 12. Line 12 must be filed by all defined benefit pension plans (except DFEs) with 1,000 or more participants at the beginning of the plan year as shown in line 2(b)(1)(4) of the Schedule B.

Line 12a. Show the beginning of year distribution of assets for the categories shown. These percentages should reflect the total assets held in stocks, debt instruments (bonds), real estate, or other asset classes, regardless of how they are listed on the Schedule H. For example, assets held in master trusts should be disaggregated into the four asset components and properly distributed. They should not be listed under "Other" unless the trust contains no stocks, bonds, or real estate holdings. The same methodology should be used in disaggregating trust assets as are used when disclosing the allocation of plan assets on the sponsor's 10-K filings to the Securities and Exchange Commission. REITs should be listed with stocks, while real estate limited partnerships should be included in the Real Estate category.

Line 12b. Report the Macaulay duration for the entire Debt portfolio. The Macaulay duration is a weighted average of the number of years until each interest payment and the principal are received. The weights are the amounts of the payments discounted by the yield-to-maturity of the bond.

When calculating the distribution of debt securities, any corporate debt that has not been rated should be included in the High-Yield Corporate Debt category. Foreign debt should be allocated to the appropriate category as if it were debt issued by U.S. corporations or government entity.

The Instructions for Schedule C will be modified as follows:

The existing general instructions and instructions for Part I will be eliminated. The proposed new general instructions and instructions for the revised Part I and new Part II of Schedule C will be as follows:

Who Must File

Schedule C (Form 5500) must be attached to a Form 5500 filed for a large pension or welfare benefit plan, a MTIA, 103–12IE, or GIA, to report information concerning service providers. For more information on MTIAs, 103–12IEs, and GIAs see the instructions for Direct Filing Entities on pages xx of the Form 5500 Instructions.

Check the Schedule C box on the form 5500 (Part II, line 10b(4)) if a Schedule C is attached to the Form 5500. Multiple Schedule C entries must be used (if necessary) to report the required information.

Lines A, B, C, and D. This information should be the same as reported in Part II of the Form 5500 to which this Schedule C is attached. You may abbreviate the plan name (if necessary) to fit in the space provided.

Do not use a social security number in line D in lieu of an EIN. The Schedule C and its attachments are open to public inspection, and the contents are public information and are subject to publication on the Internet. Because of privacy concerns, the inclusion of a social security number on this Schedule C or any of its attachments may result in the rejection of the filing.

EINs may be obtained by applying for one on Form SS–4, Application for Employer Identification Number. You can obtain Form SS–4 by calling 1–800–TAX–FORM (1–800–829–3676) or at the IRS Web Site at *www.irs.gov*. The EBSA does not issue EINs.

Instructions for Part I

Part I must be completed to report all service providers receiving, directly or indirectly, $5,000 or more in compensation for all services rendered to the plan, MTIA, 103–12IE, or GIA during the plan or DFE year except:

1. Employees of the plan whose only compensation in relation to the plan was less than $25,000 for the plan year;
2. Employees of the plan sponsor or other business entity where the plan sponsor or business entity was reported on the Schedule C as a service provider, provided the employee did not separately receive compensation in relation to the plan; and
3. Persons whose only compensation in relation to the plan consists of insurance fees and commissions listed in a Schedule A filed for the plan.

For purposes of this Schedule, reportable compensation includes money or any other thing of value (for example, gifts, awards,

trips) received by a person who is a service provider in connection with that person's position with the plan or services rendered to the plan. Examples of indirect compensation include: finders' fees, placement fees, commissions on investment products, transaction-based commissions, sub-transfer agency fees, shareholder serving fees, 12b–1 fees, soft-dollar payments, and float income. Also, brokerage commissions or fees (regardless of whether the broker is granted discretion) are reportable whether or not they are capitalized as investment costs.

In the case of service provider arrangements where one person offers a bundle of services priced to the plan as a package rather than on a service-by-service basis, generally only the person offering the bundled service package should be identified in Part I, except that investment service providers must be separately identified if their compensation in the bundled fee arrangement is set on a per transaction basis, e.g., brokerage fees. If, however, the person providing services is a fiduciary to the plan or provides one or more of the following services to the plan—contract administrator, securities brokerage (stock, bonds, commodities), insurance brokerage or agent, custodial, consulting, investment advisory (plan or participants), investment or money management, recordkeeping, trustee, appraisal, or investment evaluation, such person must be separately identified regardless of whether the payment received by such service provider is only as part of a bundle of services priced to the plan as a package. Also, if a person is providing services directly to the plan, as well as part of a bundle of services, that person must be separately identified on Schedule C.

Include in the compensation reported the amount of consideration received by the service provider attributable to the plan or DFE filing the Form 5500, not the aggregate amount received in connection with several plans or DFEs. If, however, reportable compensation is due to a person's position with or services rendered to more than one plan or DFE, the total amount of the consideration received generally should be reported on the Schedule C of each plan or DFE unless the consideration can reasonably be allocated to services performed for the separate plans or DFEs. For example, if an investment advisor working for multiple pension plans and other non-plan clients receives a gift valued in excess of $1,000 from a securities broker in whole or in part because of the investment advisor's relationship with plans as potential brokerage clients, the full dollar value of the gift would be reported on the Schedule C of all plans for which the investment advisor performed services. On the other hand, if a securities broker received incentive compensation from an investment provider based on amount or volume of business with the broker's clients, the Schedule C of each plan could report a proportionate allocation of the incentive compensation attributable to the plan. In such cases, any reasonable method of allocation may be used provided that the allocation method is disclosed to the plan administrator.

The term "persons" on the Schedule C instructions includes individuals, trades and businesses (whether incorporated or unincorporated). See ERISA section 3(9).

Either the cash or accrual basis may be used for the recognition of transactions reported on the Schedule C as long as you use one method consistently.

Specific Instructions

Line 1—Service Provider Compensation Information—List each person receiving, directly or indirectly, $5,000 or more in total compensation (i.e., money or any other thing of value) in connection with services rendered to the plan or their position with the plan during the plan year. Start with the most highly compensated and end with the lowest compensated. Enter in element (a) the person's name and complete elements (b) through (g) as specified below. Use as many entries as necessary to list all service providers.

Element (b). Enter the EIN for the person. If the name of an individual is entered in element (a), the EIN to be entered in element (b) should be the EIN of the individual's employer. If the person does not have an EIN, you may enter the person's address and telephone number. Do not use a social security number in lieu of an EIN. The Schedule C and its attachments are open to public inspection and are subject to publication on the Internet. Because of privacy concerns, the inclusion of a social security number on this Schedule C or any of its attachments may result in the rejection of the filing.

Element (c). Select from the list below and enter all codes that describe the nature of services provided to the plan or the position with the plan. If more than one code applies, enter the primary codes first. Complete as many entries as necessary to list all applicable codes. Do not list PBGC or IRS as a service provider on Part I of Schedule C.

Service Provider Codes

10 Accounting (including auditing)
11 Actuarial
12 Contract Administrator
13 Administration
14 Brokerage (real estate)
15 Brokerage (stocks, bonds, commodities)
16 Computing, tabulating, data processing, etc.
17 Consulting (general)
18 Consulting (pension)
19 Custodial (other than securities)
20 Custodial (securities)
21 Insurance agents and brokers
22 Investment advisory and evaluations (participants)
23 Investment advisory and evaluations (plan)
24 Investment management
25 Money management
26 Legal
27 Named fiduciary
28 Printing and duplicating
29 Recordkeeper
30 Trustee (individual)
31 Trustee (business)
32 Trustee (discretionary)
33 Trustee (directed)
34 Pension insurance advisor
35 Valuation services (appraisals, asset valuations, etc.)
36 Employee (plan)
37 Employee (plan sponsor)
99 (Other)

Element (d). Enter relationship to employer, employee organization, or person known to be a party-in-interest, for example, employee of employer, vice-president of employer, union officer, affiliate of plan recordkeeper, etc.

Element (e). Enter the total amount of direct and indirect compensation received. Indicate in the boxes provided whether the amount entered includes an estimate. If the amount or part of the amount entered includes an estimate, describe the formula used for calculating the estimated payments.

Caution: Do not report the same compensation twice on the Schedule C filed for the plan and again on the Schedule C filed for an MTIA or 103–12IE in which the plan participates. Plan filers must include in Element (e) the plan's share of compensation paid during the year to an MTIA trustee or other persons providing services to the MTIA or 103–12IE, if such compensation is not subtracted from the total income of the MTIA or 103–12IE in determining the net income (loss) reported on the MTIA's or 103–12IE's Schedule H, line 2k. MTIA and 103–12IE Schedule C filers must include compensation for services paid by the MTIA or 103–12IE during its fiscal year to the MTIA trustee and persons providing services to the MTIA or 103–12IE if such compensation is subtracted from the total income in determining the net income (loss) reported by the MTIA or 103–12IE on Schedule H, line 2k.

Element (f). You must indicate, by checking "Yes" or "No," whether the person identified in element (a) received during the plan year consideration (money or anything else of value) from a source other than the plan or plan sponsor in connection with the person's position with the plan or services provided to the plan. Do not leave element (f) blank.

Element (g). If the answer to (f) is "Yes," *and* the person identified in element (a) is a fiduciary to the plan or provides one or more of the following services to the plan—contract administrator, securities brokerage (stock, bonds, commodities), insurance brokerage or agent, custodial, consulting, investment advisory (plan or participants), investment or money management, recordkeeping, trustee, appraisal, or investment evaluation—enter the requested information for each source other than the plan or plan sponsor from whom the person received $1,000 or more in consideration.

Part II. Service Providers Who Fail or Refuse To Provide Information

Line 2. Provide, to the extent possible, the requested identifying information for each fiduciary or service provider who failed or refused to provide any of the information necessary to complete Part I of this Schedule.

The Schedule D Instructions will be changed as follows:

A statement will be added to advise that DFEs must complete Part II to identify participating plans even if those plans are filing the Form 5500–SF and not the Form 5500 with Schedule D.

The Schedule H Instructions will be changed as follows:

• Line 2i(1) and 2i(4) instructions changed to have reporting for fees and expenses for corporate trustees and individual trustees, including reimbursement of expenses associated with trustees, such as lost time, seminars, travel, meetings, etc., on line 2i(1) instead of 2i(4).

• General instructions for lines 4a through new line 4n are modified to indicate that MTIAs, 103–12IEs, and GIAs do not complete new lines 4m or 4n and MTIAs and 103–12IEs also do not complete new line 4l.

• The Line 4a Instructions are changed to add the following language permitting reporting delinquent participant loans on line 4a and requiring filers to use the following supplemental Schedule if they respond "yes" to line 4a:

Participant loan repayments paid to and/or withheld by an employer for purposes of transmittal to the plan that were not transmitted to the plan in a timely fashion may be reported on Line 4a in accordance with the reporting requirements that apply to delinquent participant contributions or they can be reported on Line 4d. See Advisory Opinion 2002–02A, available at *http://www.dol.gov/ebsa.*

Line 4a Schedule. Attach a Schedule of Delinquent Participant Contributions using the format below if you entered "Yes." If you choose to include participant loan repayments on Line 4a, you must apply the same supplemental schedule and IQPA disclosure requirements to the loan repayments as apply to delinquent transmittals of participant contributions.

2008 FORM 5500 LINE 4a.—SCHEDULE OF DELINQUENT PARTICIPANT CONTRIBUTIONS

Participant contributions transferred late to plan	Total that constitute nonexempt prohibited transactions			Total fully corrected under VFCP and PTE 2002–51
	Contributions not corrected	Contributions corrected outside VFCP	Contributions pending correction in VFCP	

• Instructions will be added for the new lines 4l, 4m, and 4n as follows:

Line 4l. You must check "Yes" if any benefits due under the plan were not timely paid or not paid in full. Include in this amount the total of any outstanding amounts that were not paid when due in previous years that have continued to remain unpaid.

Line 4m. Check "Yes" if there was a "blackout period." A blackout period is a temporary suspension of more than three consecutive business days during which participants or beneficiaries of a 401(k) or other individual account pension plan were unable to, or were limited or restricted in their ability to, direct or diversify assets credited to their accounts, obtain loans from the plan, or obtain distributions from the plan. A "blackout period" generally does not include a temporary suspension of the right of participants and beneficiaries to direct or diversify assets credited to their accounts, obtain loans from the plan, or obtain distributions from the plan if the temporary suspension is: (1) Part of the regularly scheduled operations of the plan that has been disclosed to participants and beneficiaries; (2) due to a qualified domestic relations order (QDRO) or because of a pending determination as to whether a domestic relations order is a QDRO; (3) due to an action or a failure to take action by an individual participant or because of an action or claim by someone other than the plan regarding a participant's individual account; or (4) by application of federal securities laws. For more information, see the Department of Labor's regulation at 29 CFR 2520.101–3 (available at *www.dol.gov/ebsa*).

Line 4n. If there was a blackout period, did you provide the required notice not less than 30 days nor more than 60 days in advance of restricting the rights of participants and beneficiaries to change their plan investments, obtain loans from the plan, or obtain distributions from the plan? See 29 CFR 2520.101–3 for specific notice requirements and for exceptions from the notice requirement. Answer "no" if notice was not provided even if the plan met one of the exceptions to the notice requirement.

The Schedule I Instructions will be changed as follows:

• The line 2h and 2i Instructions will be changed to conform to the Instructions for the proposed Form 5500–SF:

Line 2h. Administrative service providers (salaries, fees, and commissions) include the total fees paid (or in the case of accrual basis plans, costs incurred during the plan year but not paid as of the end of the plan year) by the plan for, among others:

1. Salaries to employees of the plan;
2. Fees and expenses for accounting, actuarial, legal and investment management, investment advice, and securities brokerage services;
3. Contract administrator fees;
4. Fees and expenses for corporate trustees and individual trustees, including reimbursement for travel, seminars, and meeting expenses;
5. Fees and expenses paid for valuations and appraisals of real estate and closely held securities;
6. Fees for legal services provided to the plan (do not include legal services as a benefit to plan participants).

Do not include in this line amounts paid to plan employees to perform administrative services.

Line 2i. Other expenses (paid and/or payable) include other administrative and miscellaneous expenses paid by or charged to the plan, including among others, office supplies and equipment, telephone, postage, rent and expenses associated with the ownership of a building used in operation of the plan.

• The Line 4a Instructions will be changed to add the following language permitting filers to report delinquent participant loan repayments on line 4a and to require filers to use the following supplemental Schedule if they respond "yes" to line 4a:

Participant loan repayments paid to and/or withheld by an employer for purposes of transmittal to the plan that were not transmitted to the plan in a timely fashion may be reported on Line 4a in accordance with the reporting requirements that apply to delinquent participant contributions or they can be reported on Line 4d. See Advisory Opinion 2002–02A, available at *www.dol.gov.ebsa.*

Line 4a Schedule. Attach a Schedule of Delinquent Participant Contributions using the format below if you entered "Yes" on Line 4a and you are checking "No" on Line 4k because you are not claiming the audit waiver for the plan. If you choose to include participant loan repayments on Line 4a, you must apply the same supplemental schedule and IQPA disclosure requirements to the loan repayments as apply to delinquent transmittals of participant contributions.

2008 FORM 5500 LINE 4a.—SCHEDULE OF DELINQUENT PARTICIPANT CONTRIBUTIONS

Participant Contributions Transferred Late to Plan	Total that Constitute Nonexempt Prohibited Transactions			Total Fully Corrected Under VFCP and PTE 2002–51
	Contributions Not Corrected	Contributions Corrected Outside VFCP	Contributions Pending Correction in VFCP	

• The Instructions for line 4k will be updated to indicate that a model notice that plans can use to satisfy the enhanced SAR requirements to be eligible for the audit waiver is made available as an appendix to 29 CFR 2520.104–46 under the proposed regulations published simultaneously with this Notice.

• Instructions will be added for the new lines 4l, 4m, and 4n as follows:

Line 4l. You must check "Yes" if any benefits due under the plan were not timely paid or not paid in full. Include in this amount the total of any outstanding amounts that were not paid when due in previous years that have continued to remain unpaid.

Line 4m. Check "Yes" if there was a "blackout period." A blackout period is a temporary suspension of more than three consecutive business days during which participants or beneficiaries of a 401(k) or other individual account pension plan were unable to, or were limited or restricted in their ability to, direct or diversify assets credited to their accounts, obtain loans from the plan, or obtain distributions from the plan. A "blackout period" generally does not include a temporary suspension of the right of participants and beneficiaries to direct or diversify assets credited to their accounts, obtain loans from the plan, or obtain distributions from the plan if the temporary suspension is: (1) Part of the regularly scheduled operations of the plan that has been disclosed to participants and beneficiaries; (2) due to a qualified domestic relations order (QDRO) or because of a pending determination as to whether a domestic relations order is a QDRO; (3) due to an action or a failure to take action by an individual participant or because of an action or claim by someone other than the plan regarding a participant's individual account; or (4) by application of federal securities laws. For more information, see the Department of Labor's regulation at 29 CFR 2520.101–3 (available at *www.dol.gov/ebsa*).

Line 4n. If there was a blackout period, did you provide the required notice not less than 30 days nor more than 60 days in advance of restricting the rights of participants and beneficiaries to change their plan investments, obtain loans from the plan, or obtain distributions from the plan? See 29 CFR 2520.101–3 for specific notice requirements and for exceptions from the notice requirement. Answer "no" if notice was not provided even if the plan met one of the exceptions to the notice requirement.

The Schedule R Instructions will be modified as follows:

• The general instructions will be updated to explain how Schedule R now also applies to ESOPs.

• Instructions will be deleted for old Part IV, Coverage, and instructions will be added for new Part IV, line 11b as follows:

Line 11b. A loan is a "back-to-back loan" if the following requirements are satisfied:

1. The loan from the employer corporation to the ESOP qualifies as an exempt loan under Department regulations at 29 CFR 2550.408b–3 and under Treasury Regulation sections 54.4975–7 and 54.4975–11; and

2. The repayment terms of the loan from the sponsoring corporation to the ESOP are substantially similar to the repayment terms of the loan from the commercial lender to the sponsoring employer.

Instructions will be added for new Part V, line 13 as follows:

Part V Contributing Employer Information for Multiemployer Defined Benefit Pension Plans

Line 13 should be completed only by multiemployer defined benefit pension plans that are subject to the minimum funding standards (see Code section 412 and Part 3 of Title I of ERISA). Enter the information on Lines 13a through 13f for any employer that contributed five (5) percent or more of the plan's total contributions for the 2008 plan year. The employers should be listed in descending order according to the dollar amount of their contributions to the plan. Complete as many entries as are necessary to list all employers that contributed five (5) percent or more of the plan's contributions.

Line 13a. Enter the name of the contributing employer to the plan.

Line 13b. Enter the EIN number of the contributing employer to the plan. Do not enter a social security number in lieu of an EIN. The Form 5500 is open to public inspection, and the contents are public information and are subject to publication on the Internet. Because of privacy concerns, the inclusion of a social security number on this line may result in the rejection of the filing.

EINs may be obtained by applying for one on Form SS–4, Application for Employer Identification Number. You can obtain Form SS–4 by calling 1–800–TAX–FORM (1–800–829–3676) or at the IRS Web Site at *http://www.irs.gov*. The EBSA does not issue EINs.

Line 13c. Dollar Amounts Contributed. Enter the total dollar amount contributed to the plan by the employer for all covered workers in all locations for the plan year. Do not include the portion of an aggregated contribution that is for another plan, such as a welfare benefit plan, a defined contribution pension plan or another defined benefit pension plan.

Line 13d. Contribution Rate. Enter the employer's contribution rate per contribution base unit (*e.g.*, if the contribution rate is $xx.xx per covered hour worked, enter $xx.xx). If the employer's contribution rate changed during the plan year, enter the last contribution rate in effect for the plan year. If the employer uses different contribution rates for different classifications of employees or different places of business, complete separate entries for each contribution rate.

Line 13e. Contribution Base Units. Check the contribution base unit on which the contribution rate is based. If the contribution rate is not measured on an hourly, weekly, or unit-of-production basis, check "other" and indicate the basis of measurement. If you entered more than one contribution rate for an employer in line 13d, show the applicable contribution base unit for each contribution rate.

Line 13f. Collective Bargaining Agreement Expiration Date. Enter the date on which the employer's collective bargaining agreement expires. If the employer has more than one collective bargaining agreement requiring contributions to the plan, enter the expiration date of the agreement that provided for the largest dollar amount contributed by the employer for the plan year.

Statutory Authority

Accordingly, pursuant to the authority in sections 101, 103, 104, 109, 110 and 4065 of ERISA and section 6058 of the Code, the Form 5500 Annual Return/Report and the instructions thereto are proposed to be amended as set forth herein, including the addition of the proposed Short Form 5500.

Signed at Washington, DC, this 13th day of July, 2006.

Ann C. Combs,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

Carol D. Gold,

Director, Employee Plans, Tax Exempt and Government Entities Division, Internal Revenue Service.

Vincent K. Snowbarger,

Acting Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 06–6329 Filed 7–20–06; 8:45 am]
BILLING CODE 4510–29–P

Federal Register

Friday,
July 21, 2006

Part IV

Securities and Exchange Commission

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendments No. 1, 2, 3, 4, and 5 Thereto Relating to the New Amex Hybrid Market Structure; Notice

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54145; File No. SR–Amex–2005–104]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendments No. 1, 2, 3, 4, and 5 Thereto Relating to the New Amex Hybrid Market Structure

July 14, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 17, 2005, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On January 19, 2006, the Amex submitted Amendment No. 1 to the proposed rule change.[3] On March, 10, 2006, the Amex submitted Amendment No. 2 to the proposed rule change.[4] On March 14, 2006, the Amex submitted Amendment No. 3 to the proposed rule change.[5] On July 3, 2006, the Amex submitted Amendment No. 4 to the proposed rule change.[6] On July 13, 2006, the Amex submitted Amendment No. 5 to the proposed rule change.[7] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to implement a new hybrid market structure for equity products and Exchange Traded Funds ("ETFs") that will provide for a single marketplace that integrates automated execution and floor-based auction trading. To facilitate the hybrid market, the Exchange is undertaking a major technology upgrade and will implement a new trading platform for equity products and ETFs. This platform, designated as AEMI℠, is aimed at providing easy and fast access to automated order execution, as well as encompassing auction market capabilities for those situations in which there are order imbalances that require additional liquidity, or if price improvement from the auction process is desired.

The text of the proposed rule change is available on the Exchange's Web site (*http://www.amex.com*), at the Exchange's principal office, on the Commission's Web site (*http://www.sec.gov*), and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the Exchange's proposal is to implement a new hybrid market structure for equity products and ETFs[8] that would provide for a single marketplace that integrates automated execution ("auto-ex") and floor-based auction trading. In this hybrid market, direct market participants would consist of off-floor members, Specialists, Registered Traders, and Floor Brokers. Investors and off-floor members would be able to choose from a variety of execution methods the one that best suits their purpose at any point in time. They can access the electronic environment directly, or take advantage of point-of-sale representation provided by Floor Brokers in the crowd. To facilitate the hybrid market, the Exchange is undertaking a major technology upgrade and would implement a new trading platform for equity products and ETFs. According to the Exchange, this platform, designated as AEMI℠—the "Auction & Electronic Market Integration" platform (referred to hereinafter as the "AEMI platform" or "AEMI")—is expected to provide easy and fast access to automated order execution, as well as encompassing auction market capabilities for those situations in which there are order imbalances that require additional liquidity, or if price improvement from the auction process is desired. The Exchange anticipates that auto-ex would be available throughout the trading session. However, for those instances when excessive volatility occurs, auto-ex would be unavailable for a limited period of time during which the auction market would be used to dampen volatility and gyrations in the market. This fusion of auto-ex, that is based on both limit and market orders, with the auction process that creates price discovery is designed to balance the premium on speed demanded by market participants with the need to protect investors from undue and costly volatility. The Exchange also believes that this proposed hybrid market would promote fairness, stability, and competitiveness in the marketplace under Regulation NMS.[9]

Categories of Floor Participants in AEMI. In all securities traded on AEMI, Specialists would continue to provide liquidity and stabilization as they currently do.[10] They would maintain their affirmative and negative

---

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Form 19b–4 dated January 19, 2006, which replaced the original filing in its entirety ("Amendment No. 1").

[4] *See* Form 19b–4 dated March 10, 2006, which replaced Amendment No. 1 in its entirety ("Amendment No. 2").

[5] *See* Form 19b–4 dated March 14, 2006, which replaced Amendment No. 2 in its entirety ("Amendment No. 3").

[6] *See* Form 19b–4 dated July 3, 2006, which replaced Amendment No. 3 in its entirety ("Amendment No. 4"). Among other things, the amendment (1) removed the proposed Passive Price Improvement ("PPI") order type from AEMI until its parameters can be revised; (2) stated the Exchange's commitment to make AEMI's depth-of-book information broadly available; (3) added additional size and value requirements for certain cross orders; (4) distinguished two different quote indicators that may be disseminated in connection with the Exchange's publishing of non-firm quotes, (5) revised its proposed procedures with respect to an intermarket sweep order to which no response, or only a partial fill, is received; (6) changed the manner in which unexecuted or partially executed intermarket sweep orders generated during an auction are handled; and (7) made a number of other corrections and clarifications to the proposed rule changes.

[7] *See* Partial Amendment to Form 19b–4 dated July 13, 2006 ("Amendment No. 5"). In Amendment No. 5, the Exchange made a number of technical changes, including (1) stating the timeframe for the availability of depth-of-book data; (2) clarifying when Exchange Specialists may charge commissions; (3) clarifying when the Exchange will send intermarket sweep orders to other markets; and (4) acknowledging that its proposed trade-through treatment for late trade reports will not obviate or invalidate an away market's rules regarding such late trades.

[8] As used herein, the term "equity products" includes equities and securities that trade like equities on the Exchange, such as listed and UTP stocks, closed-end funds, and certain structured products. The term "ETFs" includes Portfolio Depositary Receipts, Index Fund Shares, Trust Issued Receipts, and Partnership Units.

[9] 17 CFR 242.600 *et seq.*

[10] *See infra*, the discussion under "Rule 170–AEMI" relating to proposed changes to existing requirements for Floor Official approval in connection with certain transactions for the Specialist's own account that involve destabilizing ticks.

obligations,[11] manage auctions, and may add resident liquidity to the AEMI Book (as described herein) at up to five price levels, including the quote that each Specialist must provide to meet his obligation to assist in the maintenance of a fair and orderly market and of price continuity with reasonable depth.[12] They would have a choice of quoting methods, and could stream quotes into AEMI from proprietary systems, generate quotes automatically based on parameters set by the Specialist within AEMI, or enter quotes physically. In instances where the Specialist's quote is depleted, AEMI would generate emergency quotes based on parameters set by the Specialist so that the affirmative quote obligations of the Specialist are met.

Market makers designated as Registered Traders would add liquidity to the ETF marketplace through the continuous provision of competitive quotes and must be in the crowd [13] in order to do so. The Exchange intends to foster quote competition between the Specialists and Registered Traders. Unlike the existing Amex system where Registered Traders' quotes are imbedded in the Specialist's quote, Registered Traders would be required by Amex rules to make competitive quotes separately from the Specialist. They would be able to stream quotes into AEMI from proprietary systems, generate quotes automatically based on parameters within AEMI, or enter quotes into AEMI physically from a "front-end" device supplied by the Exchange. They would also be permitted to add liquidity at up to five price levels on both sides of the market and could participate in auctions, provided that they are actively quoting, thereby serving to provide added depth and competition to the marketplace. Registered Traders would function under essentially the same restrictions that are applicable to them in the Amex's current rules.

Floor Brokers would maintain their value-added services through their point-of-sale proximity, participation in auctions, trading on parity, and provision of liquidity to the electronic environment in the form of crowd orders. They would receive orders from customers electronically via the floor booth automated routing systems and would manage their order flow using hand-held terminals. This should result in faster responses to customers. Floor Brokers could represent customer orders as crowd members electronically, trade on parity in the electronic environment, and initiate and participate in auctions, using their judgment to obtain best execution for their customers.

Off-floor members could access the electronic environment in two main ways. First, they could send orders directly to the AEMI Book. Alternatively, they could direct orders to booths on the floor, which would allow Floor Brokers to represent their orders on the floor and use their point-of-sale privileges as members of the crowd to obtain best execution for their customers. Orders sent to the Exchange that *must* be handled manually would be directed to the order-entry firm's broker booth to be managed by booth personnel or redirected to Floor Brokers. For example, "not held" and SEC Rule 144 orders would be handled outside the AEMI Book and would be sent to a booth. By contrast, orders that may *not* be handled manually (such as odd-lot orders) would be sent automatically to the AEMI Book.

The Exchange is committing to making depth-of-book information broadly available with respect to its securities that are traded in AEMI, and the Exchange intends to implement this program with the rollout of AEMI prior to the Trading Phase Date (as defined below under "Implementation of the AEMI Platform").[14] This represents a significant change from the Exchange's initial proposal, under which only the Specialist would have been able to see this information. The Exchange will make a separate rule filing with the Commission in connection with any related fees that are proposed to be charged for the depth of book information.

This proposal seeks the approval of new rules to implement AEMI for equity products and ETFs. Key features of the proposed new hybrid market are summarized under the headings below.

Automated Trading Center. By implementing AEMI, the Exchange intends to qualify as an "automated trading center" under Regulation NMS.[15] The Exchange would publish automated quotes for all securities on the AEMI platform. The publication of automated quotes means that all incoming executable orders would be processed immediately and automatically without human intervention. If Amex were not the national best bid or best offer ("NBBO"), the incoming executable order would be routed out immediately and automatically, in whole or in part, to the trading center(s) with the best-priced automated quotation that is immediately accessible (as required by Rule 611 of Regulation NMS).[16] AEMI would contain predetermined parameters that would automatically disable auto-ex when triggered, and Amex would publish non-firm manual quotes until auto-ex is re-enabled.[17]

The AEMI Platform. The AEMI platform is a single electronic system that would process quotes and orders in all equity and ETF securities on the Exchange. The "AEMI Book" is the physical part of the AEMI platform that comprises all quotes and orders that could be eligible for auto-ex during the Exchange's regular session. These orders could logically be represented in the automated environment by members in the crowd interacting directly with AEMI ("crowd orders"), or represented directly in the automated environment ("public orders"). Quotes and orders submitted to the AEMI Book by Registered Traders and Floor Brokers standing in the crowd would be considered crowd interest. All other orders and quotes would constitute the Specialist Order Book (*i.e.*, all other off-floor orders submitted directly to AEMI; other percentage, limit, and market orders left with the Specialist by Floor Brokers; and the Specialist's own quotes). The Specialist Order Book would therefore be a subset of the AEMI Book. Further, except in certain defined circumstances, the AEMI rules would provide that the Specialist's own proprietary interest would yield to orders on the Specialist Order Book, thereby ensuring that customer interest is afforded a higher priority in the electronic environment.

AEMI would generally execute orders according to price/time priority. However, AEMI would execute orders at a single price point according to Amex parity, priority, and precedence rules. The instructions and characteristics of the orders at the price point are considered first, and then, depending on

[11] *See* Amex Rule 170 and related Commentary.

[12] Amendment No. 5 eliminated references in this sentence and in a related footnote to PPI orders that were included in Amendment No. 4.

[13] In ETFs, a crowd is defined as three contiguous panels.

[14] The Exchange intends to provide depth-of-book information to vendors and direct subscribers simultaneously with the first day of AEMI operation. Moreover, the Exchange commits to providing vendors and limited direct subscribers sufficient information including technical specifications to permit them to obtain the depth-of-book data feed as of the first day of AEMI operation. *See* Amendment No. 5.

[15] *See* 17 CFR 242.600(b)(4).

[16] However, an incoming intermarket sweep order (as defined herein) or immediate-or-cancel order would not be routed out to another trading center.

[17] AEMI could also disseminate a non-firm quote, using a different indicator, when the Exchange is incapable of collecting, processing, and/or making available quotations in one or more securities due to the high level of trading activity or the existence of unusual market conditions.

product type, the capacity designation and allocation indicator for the orders would be considered. Orders with an allocation designation of "crowd" would trade on parity with public orders in the AEMI Book, and crowd orders would be restricted to crowd members. Orders with an allocation designation of "public" would trade on parity with the crowd orders and could be submitted by any on-floor or off-floor market participant, as well as by Floor Brokers in the form of percentage, limit, or market orders left with the Specialist. Generally, the Specialist interest would yield to those public orders that are being represented in the marketplace as part of the Specialist Order Book, which is part of the AEMI Book.[18] Every order would have a capacity designation of "agency" or "principal" which is derived from the account type code for the order designated by the member who enters the order. This denotes whether the order is a customer (non-broker-dealer) order or a broker-dealer order, which affects its priority standing during execution.[19] A broker-dealer order could be a principal order entered by a member that is a broker-dealer or it could be an order entered by a member acting as an agent for a broker-dealer. The rules regarding priority and precedence for ETFs would differ from the corresponding rules for equity-traded securities because ETFs are traded more like derivative products with market makers in the crowd. In summary, the principal/agency capacity designation serves to ensure that investors' orders are afforded precedence in the execution process, and the public/crowd indicator serves to distinguish off-floor orders (which are all public) from activity that is afforded the privileges of presence in the crowd. All off-floor orders are therefore public, all quotes from Registered Traders are crowd, and Floor Brokers choose between submitting public and crowd orders depending on their physical location on the trading floor.

[18] The Exchange anticipates allowing a Specialist to charge commissions under AEMI for orders that require special handling or for which the Specialist otherwise provides a service as agent for the order (*e.g.*, percentage orders). However, the Specialist would be prohibited by Amex Rule 152(c) from charging a commission if the Specialist were a contra-party to the trade. Amendment No. 5 further stated that a Specialist would not be allowed to charge a commission on any transaction in AEMI to which the Specialist's own proprietary interests were *not* required to yield by AEMI rules or the Specialist's agency responsibility. For instance, an ETF Specialist would be allowed to trade on parity with, but not charge a commission for, a broker-dealer order in AEMI. *See* Amendment No. 5.

[19] Proposed Rule 719–AEMI provides detailed descriptions of available account type codes.

The AEMI platform would also process orders that are not intended to receive auto-ex. Examples of such orders include on-close orders and opening orders, all of which would have a time dependency. Similarly, orders that require election or conversion before they could be automatically executed (*i.e.*, stop orders, stop limit orders, and percentage orders) and orders that require filing and re-filing before their terms meet conditions for automated execution (*i.e.*, tick sensitive orders) would be processed within the AEMI environment. These orders would be held separate until the conditions for automatic election, conversion, or execution are met and the orders are added to the AEMI Book, where they then would become eligible for auto-ex.

The Exchange is proposing to adopt a completely new rule for handling odd-lots in AEMI that is based on the current New York Stock Exchange ("NYSE") rule. During the regular trading session, an odd-lot trade would be limited to the size of the nearest round-lot trade that elected it. For example, assume there are two odd-lot orders of 60 shares and 50 shares, respectively, and a round-lot trade of 100 shares takes place. Odd-lots could trade up to 100 shares. However the second odd-lot order of 50 shares would trade in its entirety to avoid splitting an odd lot (*i.e.*, 110 shares executes in total). If a market odd-lot order were not filled on the basis of round-lot trades within 30 seconds of its arrival, then the odd-lot order would trade at the price of the qualified national best bid or offer, as defined in the rule.[20] If the odd lot is part of a mixed lot, then the odd lot would trade automatically against the Specialist at the same time and same price as the first round-lot of the order.

Automated Execution. Amex would by default publish an automated quotation for all securities in AEMI, and auto-ex in the AEMI platform would operate according to two basic principles. First, interest that is eligible to trade must be resident in the AEMI Book prior to an incoming order arriving, with the exception of percentage orders and emergency quotes, which are both triggered automatically. Second, Amex would immediately and automatically ship an intermarket sweep order to any away market which displays a better-priced quotation, provided Amex is publishing an automated quotation.[21] Otherwise, auto-ex of an incoming order would occur according to whether the incoming order would do one of the following:

(a) *Lock the APQ:* If an incoming order would lock the Amex Published Quote ("APQ"), it would automatically execute against any contra-side interest resident on the AEMI Book. Any unexecuted balance would be posted simultaneously on the AEMI Book and reflected immediately in the new APQ.

(b) *Cross the APQ:* If an incoming order would cross the APQ, it would automatically execute against orders at each price point up to its limit price, or until it were filled or breached a tolerance. All liquidity at each price point would be cleared before the next price point could trade. This is known as sweeping the book, and during the sweep the incoming order could access other points of liquidity prior to reaching its limit price, such as a percentage order or a Specialist's emergency quote, both of which are described later in this document. If the range of the sweep includes better-priced protected quotations at other markets, AEMI would send intermarket sweep orders to clear those better prices simultaneously with performing the sweep. Assuming no breach of a tolerance has caused auto-ex to be disabled, any unexecuted balance would be posted simultaneously on the AEMI Book and reflected immediately in the new APQ.

(c) *Lock the NBBO:* If an incoming order would lock the NBBO, AEMI would immediately issue an intermarket sweep order for the displayed quantity. If the displayed quantity were less than the size of the order, AEMI would simultaneously post any balance on the AEMI Book and reflect this immediately in the new APQ.

(d) *Cross the NBBO:* If an incoming order would cross the NBBO, AEMI would immediately issue intermarket sweep orders for the displayed quantities of those protected quotations. Therefore, AEMI would sweep the protected quotations of away markets at the same time as it sweeps in full size the same price points on the AEMI Book. As above, during the sweep the incoming order could access other points of liquidity prior to reaching its limit price, such as a percentage order or a Specialist's emergency quote.

[20] Under the current NYSE odd-lot rule, a market order not filled on the basis of a round-lot trade within 30 seconds of arrival would trade at the price of an adjusted ITS bid or offer. Amex's proposed AEMI odd-lot rule would instead use the qualified national best bid or offer, as defined in the rule, due to the Exchange's expected use of private linkages instead of ITS at the time that Regulation NMS takes full effect.

[21] In Amendment No. 5, the Exchange clarified that Amex would only ship an intermarket sweep order to an away market with a better price if the Amex were publishing an automated quotation.

Assuming no breach of a tolerance has caused auto-ex to be disabled, any unexecuted balance would be posted simultaneously on the AEMI Book and reflected immediately in the new APQ.

Auto-ex in the AEMI platform would be disabled (and re-enabled) only in specific, published circumstances that Amex believes are consistent with investor protection and with the maintenance of fair and orderly markets. Such instances could occur due to the presence of a large imbalance, during periods of high volatility, or as a result of system malfunction.

The conditions outlined below under which auto-ex could be disabled during the regular trading session are designed to work together to balance the demand for speed and immediate access to execution with the need to provide a stable and fair marketplace. Amex recognizes that periods of high volatility and low liquidity could cause auto-ex to be disabled in a single security by one or more tolerances within a short time. In compliance with Regulation NMS, Amex would continuously monitor the frequency of disablement of auto-ex and the cause in each instance in order to ensure that one or more tolerances is not being breached continuously or consistently, either in individual securities or market-wide. Should this be the case, Amex would review and, with the appropriate regulatory approvals, make adjustments to the conditions under which auto-ex is disabled so as to maintain both consistency of market quality for investors and compliance as an automated trading center under Regulation NMS.

There are six situations under which auto-ex in AEMI would be disabled. Four of these situations involve trading circumstances that could otherwise result in price volatility in an individual security and are described here. The fifth situation is the "cash close" for certain ETFs and is referred to under "Openings and Closings" below, and the sixth situation is when unusual market conditions (as defined in Rule 602 of Regulation NMS) occur. Of the four trading situations, AEMI would automatically disable auto-ex in three circumstances related to breaching predefined tolerance levels held within the system, namely "spread tolerance," "momentum tolerance," and a "gap trade tolerance" (*i.e.*, exceeding a specified maximum range from the last sale). In the fourth possible trading circumstance in which auto-ex would be disabled ("gapping the quote"), the Specialist would manually gap the quote to address a large order imbalance.

With spread tolerance, auto-ex would be disabled when an inbound order has walked the book beyond a predefined price level relative to the price of the security at the time of the initial execution against the order. The spread tolerance is designed to mitigate volatility caused by the entry of a large sized order where there is no natural contra-interest on the book (commonly known as "pounding"). The spread tolerance is an Exchange-set parameter per security and is applied dynamically according to the first execution price of the security against the incoming order, based on the table below:

Stock price	Tolerance (cents)
Less than $5	5
$5–$15	15
More than $15	25

For example, suppose the Exchange's quote is 100 shares offered at $3.10 and the best automated away market bid is $3.09 for 200 shares. Assume there are additional offers at the Amex of 500 shares each at price levels of $3.11, $3.13, $3.15, $3.16, and $3.18 and there are no protected offers between $3.11 and $3.15. An inbound order to buy 4,000 shares at the market would therefore aggress the book five cents from the first execution at Amex. This results in trades of 100 shares at $3.10, 500 shares at $3.11, 500 shares at $3.13, and 500 shares at $3.15. Auto-ex is disabled after the size offered at $3.15 is exhausted. The APQ is consequently $3.09[22] bid for 2,400 shares, 500 shares offered at $3.16 and both sides are non-firm quotations.

With momentum tolerance, auto-ex would be disabled when multiple orders have moved the price of a security in one direction beyond a predefined trading boundary in a 30-second time period. The momentum tolerance is designed to mitigate volatility caused by a rapid succession of small orders in very short time frames (commonly known as "spraying").

Spread and momentum tolerances would work simultaneously to prevent excessive volatility, so while each of a series of small orders might not individually trigger the spread tolerance, their combined effect could trigger the momentum tolerance.

With a gap trade, the gap between the current quotation and the last sale has breached the parameters of the Exchange's "1%, 2, 1, ½ point" rule.[23] The incoming order would execute against the quote and auto-ex would automatically be disabled. This rule would serve to maintain continuity and reduce volatility in the market.

In the case of a tolerance breach or a gap trade that violates the Exchange's "1%, 2, 1, ½ point" rule, auto-ex would be disabled and the APQ would be designated as non-firm, being comprised of the unexecuted balance at the price of the automated NBBO on the same side corresponding to the aggressing order (*e.g.*, automated national best bid for an aggressing buy order), with the contra-side of the quote reflecting the best bid, offer, or order in AEMI. If there is no imbalance (*e.g.*, the breaching order was an immediate-or-cancel order), then the natural current Amex market is reflected in the manual APQ. If there were no orders left on the contra-side of the AEMI Book (*e.g.* the stock is illiquid), and auto-ex has been disabled, AEMI would generate a stabilizing quote automatically so that a two-sided non-firm quotation would be published. The stabilizing quote would be for one round lot at one tick away from the price of the automated NBBO on the contra-side.[24]

Once auto-ex is disabled, incoming immediate-or-cancel orders would expire on receipt. Incoming market and limit orders would be added to the AEMI Book (but would not update the APQ) and any order could be amended or canceled. If auto-ex were disabled due to a tolerance breach or gap trade, the Specialist would have ten seconds to take action to re-enable auto-ex and disseminate a new automated APQ, after which time auto-ex would automatically attempt to resume and disseminate a new automated APQ. If the remainder of the aggressing order that caused the imbalance expired or were canceled or the AEMI Book were not locked or crossed, the Specialist could re-enable auto-ex prior to the expiration of the 10-second period through a "front-end" device. Otherwise, if the order imbalance remained and the AEMI Book were locked or crossed, the Specialist would be required to conduct an auction for the imbalance, and the action of printing the auction trade or performing a pair-off would automatically re-enable auto-ex and publish an automated quote. If the Specialist had not so acted or gapped the quote by the end of the ten-second period, then auto-ex would resume automatically, provided the AEMI Book were not locked or crossed. If the AEMI

[22] The bid is set at the prevailing best automated away market bid to insure that the Amex quote, although manual and non-firm, does not lock or cross any away market's automated offer. *See* Amendment No. 5.

[23] Proposed Rule 154–AEMI.

[24] *See* proposed Rule 128A–AEMI(g).

Book were still locked or crossed after the initial ten-second period and the Specialist had still taken no action, AEMI would attempt to re-enable auto-ex every subsequent ten seconds. The APQ would not be updated until auto-ex were re-enabled and an automated quotation were disseminated. Amex's Regulatory Division could bring enforcement action against Specialists that have a pattern of failing to take action within the initial ten seconds under the circumstances described above.

The Exchange is proposing to adopt rules for gapping the quote similar to those of the NYSE in order to maintain uniformity in the marketplace. A Specialist would gap the quote when either: (i) A large order has been represented in the crowd; or (ii) an incoming order has swept the book, disabled auto-ex, and left a large order imbalance in the security. If the Specialist gaps the quote, auto-ex would be disabled and a gapped quote would be disseminated, reflecting the order imbalance. If auto-ex had already been disabled due to the tolerance breach, then it would remain disabled and the existing non-firm quote would be updated with a non-firm gapped quote. This quote would be published in order to attract electronic contra-side interest and would be displayed until incoming order flow offsets the imbalance to such an extent that the Specialist could pair off the imbalance, which would automatically re-enable auto-ex. The quote could be gapped for a maximum of two minutes, by which time the Specialist would be required to perform an auction, or he would have to request a trading halt with Senior Floor Official or Exchange Official approval. The gapped quote disseminated by the Specialist would be comprised of the order imbalance at a bid or offer equal to the price of the automated NBBO on the side of the imbalance,[25] and a round-lot on the contra-side at the price at which the Specialist judges the stock would next print if there were no additional interest or cancellations. If the gapped quote were the result of an order represented in the crowd, the Floor Broker whose order imbalance has caused the quote to be gapped would be required to enter his order into AEMI immediately so that it participates in the pair-off. When the quote is gapped, incoming orders would be added to the AEMI Book and any order not participating in the pair-off could be amended or canceled, including the imbalance, but no auto-ex would occur until the Specialist performed a pair-off, and the APQ is updated. Note that orders that are participating in the pair-off could not be canceled or amended during the pair-off duration itself, which would last no more than three seconds.

Gap quote situations involve clearly large imbalances compared with the typical trading volume in a security. For example, assume the Exchange quote is $5.09 bid for 100 shares, 300 shares offered at $5.11, and the automated national best bid is $5.10. Further assume that a Floor Broker walks into the Crowd looking to purchase 50,000 shares. The Specialist determines that gapping the quote is in the interest of the marketplace, and enters the side and size of the imbalance and the price at which the contra-side would print. Auto-ex would be disabled and the gapped quote would be published as a non-firm quotation at $5.10 bid for 50,000 shares and a contra-side of 100 shares (a round lot) offered at $5.20. The Floor Broker would submit his imbalance from his hand-held terminal so that it is electronically captured in AEMI and could participate in the pair-off performed by the Specialist. If incoming contra-side order flow of 45,000 shares entered the book electronically, the Specialist would auction the outstanding 5,000 shares in the crowd and perform the pair-off, which would cause the trade to be printed and auto-ex to be re-enabled. The pair-off itself is described later in this document under "Performing a Pair Off."

The Auction Process. Vital to the AEMI platform is the preservation of the auction market, represented by members in the crowd trading on parity. Specialists, Floor Brokers, and Registered Traders would continue to add depth to the price discovery process by their interaction and presence in the crowd at the point of sale. The AEMI platform would support auctions and negotiated trades[26] taking place in the trading crowd and interacting with orders in the AEMI Book. If the Specialist were to conduct an auction in the new hybrid market, he would print the auction trades to the tape via AEMI. Both electronic imbalances that disable auto-ex due to a tolerance breach and oversized orders arriving via a Floor Broker in the crowd would be able to take advantage of the auction market and liquidity offered in the crowd. When the Specialist conducts an auction and prints the resulting trade, relevant orders in the electronic environment would be included and the AEMI platform would automatically satisfy better displayed automated quotations (protected quotations)[27] at away markets as part of the auction print. Since verbal bids and offers would not have standing in the AEMI Book, it would be the electronic print that finalized the trade and recorded the aggressing and contra-participants. To ensure the price discovery process is fairly leveraged, negotiated trades and auction trades could not take place outside the APQ when auto-ex is enabled.

The Specialist would conduct an auction based on information from both the crowd and AEMI relating to the imbalance, minimum Specialist and crowd exposure, and away market obligations. The Specialist and crowd exposure would represent the minimum commitment of the crowd, once the imbalance had been offset by away market obligations and the contra-side interest already on AEMI that would participate in the trade. Should the market change between the time of the verbal auction and the auction trade being printed, then the exposure of the crowd could change, up to the maximum exposure of the imbalance itself. After conducting the auction, the Specialist would print the trade and subsequently manage the post-trade allocation to the crowd, after which AEMI would send notification of individual trades to active crowd participants. To be considered an active crowd participant, at the time of the auction trade, a Registered Trader in the crowd would have to have a bid or offer on the AEMI Book, and a Floor Broker would have to be represented by a crowd order on the opposite side of the imbalance.

If a Floor Broker were to walk into a crowd with an order, he could participate in a verbally transacted trade with one or more individual crowd participants, including the Specialist. If the Specialist printed a trade inside the automated NBBO, there would be no electronic orders (including orders at the Amex) and no away exposure to be satisfied. However, if he printed a trade outside the automated NBBO, orders on the AEMI Book could participate and intermarket sweep orders would be

[25] The NYSE rule provides that the side of the gapped quote reflecting the order imbalance be at the price of the last sale.

[26] Negotiated trades are one-to-one trades between two crowd members (possibly including the Specialist) and would be allowed only while auto-ex is enabled. An auction trade is between a single crowd participant and multiple counterparties in the crowd. They are differentiated by the need to allocate on a post-trade basis to crowd participants. However, this difference does not affect priority and parity rules, the standing of orders on the AEMI Book, or the issuance of intermarket sweep orders. An auction trade could take place either while auto-ex is enabled or in order to re-enable auto-ex.

[27] *See* 17 CFR 242.600(b)(57) and (58).

automatically generated to satisfy better-priced automated quotations at away markets. If one or more intermarket sweep orders [28] had been generated by an auction trade and were unexecuted in whole or in part by away markets, the remaining portion of the aggressing order that was suspended in AEMI at the time intermarket sweep orders were generated would be reincorporated into AEMI without losing order time priority and would re-aggress the AEMI Book (including the generation of intermarket sweep orders to away markets, if necessary), except for negotiated trades where any unexecuted intermarket sweep orders expire.

The following are examples of the different types of trades discussed above:

(i) *Negotiated Trade.* Assume that two Floor Brokers negotiate a trade while standing in the crowd. They request that the Specialist print the trade, which he could do at or inside the APQ. The Specialist enters both Floor Broker badge identifiers into AEMI and the trade is printed. If the price is outside the APQ, it is rejected. If the price is outside the automated NBBO, then an intermarket sweep order is generated for the aggressing Floor Broker. Suppose that the APQ is 1,000 shares offered at $5.80 and Floor Broker A negotiates to buy 5,000 shares from Floor Broker B at $5.80. As the Specialist enters the trade, the automated national best offer changes from 1,500 shares offered at $5.80 to 500 shares offered at $5.79. AEMI would generate an intermarket sweep order for 500 shares for Floor Broker A and print 4,500 shares at $5.80. Floor Broker A has purchased the 1,000 shares offered on the AEMI Book and 3,500 shares from Floor Broker B. Should the intermarket sweep order be rejected or only partly executed by the away market, the unexecuted portion would expire and the two Floor Brokers would have no further obligations with respect to such order. In this trade, the Specialist played no part other than to print the trade.

(ii) *Auction Trade with auto-ex enabled.* Suppose the APQ for an ETF is 1,000 shares offered at $5.80 and the automated national best offer is 1,000 shares offered at $5.79. A Floor Broker walks into the crowd with an order to buy 5,000 shares. The Floor Broker announces a bid of $5.80 and the crowd, made up of four Registered Traders and two Floor Brokers, verbally confirms its offsetting interest. All of the crowd participants are represented electronically on the contra-side of the AEMI Book at the time of the trade with the exception of one Floor Broker, who is therefore not eligible to participate in the trade. Since AEMI does not permit a print outside the APQ while auto-ex is enabled, the Specialist could print the trade only at $5.80 or better. The Specialist enters into AEMI a trade of 5,000 shares at $5.80 with the Floor Broker's badge identifier as the aggressor. AEMI automatically generates an intermarket sweep order of 1,000 shares at $5.79 and prints 4,000 shares at $5.80 at the Amex. The print includes the 1,000 shares offered at $5.80 on the AEMI Book with 3,000 shares trading against the Specialist/crowd. If the away market rejects or only partly executes the intermarket sweep order for 1,000 shares, the balance of the suspended order would be released on the AEMI Book without losing order time priority.

(iii) *Auction Trade with auto-ex disabled.* If auto-ex has been disabled due to a spread or momentum tolerance breach or a gap trade has occurred, the Specialist could print the auction at a price outside of the automated NBBO and outside the APQ. For example, assume that a large order has walked the book and breached the spread tolerance, causing auto-ex to be disabled and a non-firm quote to be published. Also assume that a buy imbalance of 8,000 shares is on the AEMI Book and the manual APQ is $5.78 bid for 8,000 shares, 1,000 shares offered at $5.79. The automated national best offer is 500 shares offered at $5.80. The crowd, all of whom are represented electronically on the contra-side of the AEMI Book, verbally confirm their interest at a price of $5.83. There are no other orders on the AEMI Book and no other protected quotes at away markets between $5.80 and $5.83. The Specialist prints the auction trade at $5.83, and AEMI automatically generates an intermarket sweep order of 500 shares at $5.80 and prints 7,500 shares at $5.83 at the Amex. The offer for 1,000 shares on the AEMI book is included in the trade and receives price improvement of $0.04. The balance of the printed trade of 6,500 shares is the Specialist/crowd exposure. If the away market rejects the intermarket sweep order for 500 shares, the balance of the suspended order would be released on the AEMI Book without losing order time priority.

In both of the above auction trade examples, the Specialist would oversee the electronic capture of the crowd allocation, based on the AEMI priority and parity rules and involving an allocation table for the security as determined by the ETF Trading Committee (if the security is an ETF). For a listed stock, UTP stock, or closed-end fund, the allocation of crowd exposure is among eligible crowd participants and the Specialist Order Book and is based on equal splits among all crowd participants, with the whole of the Specialist Order Book deemed as one crowd participant for these purposes.[29] This allocation pertains to each member of the crowd participating on the contra-side at the time of the trade (*e.g.*, four Registered Traders and one Floor Broker in the first auction trade example). Each Floor Broker participating in an auction trade, whether as an aggressor or as a crowd participant on the trade, would conduct additional allocations to existing orders on their hand held terminals. These allocations, once completed, would be electronically communicated to AEMI, and Floor Brokers would have 20 seconds to complete their respective trade allocations. If an allocation were reported to AEMI more than 20 seconds later, the trade allocation would be deemed late but would still be permitted. Post-trade allocation would not occur for negotiated trades, since the Specialist would capture the two counterparties at the time of the trade.

Trading in the Crowd. A Floor Broker could trade in any crowd on the floor under the hybrid market rules, but would have to be physically present in the crowd to represent a crowd order in the AEMI Book. On leaving a crowd or logging out of his system, a Floor Broker would be required: (i) To cancel all crowd orders in the AEMI Book for securities in the crowd he is leaving; (ii) to electronically submit the orders in the form of percentage or limit orders to the Specialist for handling; or (iii) to electronically route the crowd orders to another Floor Broker in the crowd, via

[28] Amex proposes to define an intermarket sweep order as a limit order for an NMS stock (as defined in Regulation NMS): (1) Received on the Exchange by AEMI from a member or another market center which is to be executed (i) immediately at the time such order is received in the AEMI Book, (ii) without regard for better-priced protected quotations displayed at one or more other market centers, and (iii) at prices equal to or better than the limit price, with any portion not so executed to be treated as canceled; provided, however, that an order that is received through the communications network operated pursuant to the Intermarket Trading System (ITS) Plan or any successor to the ITS Plan would trade only at a single price; or (2) generated by AEMI in connection with the execution of an order by AEMI and routed to one or more away market centers to execute against all better-priced protected quotations displayed by the other market centers up to their displayed size. An intermarket sweep order would have to be marked as such to inform the receiving market center that it could be immediately executed without regard to protected quotations in other markets. Amex believes that this definition is consistent with the Regulation NMS definition of the same term.

[29] The Exchange revised the language in this sentence in Amendment No. 5 to make clear that the Specialist Order Book would be deemed as one crowd participant for purposes of the trade allocation.

his hand-held terminal. If the Floor Broker did not take one of the actions above, he would be responsible for any executions against his crowd orders on the AEMI Book, and Amex could bring regulatory action against the Floor Broker.

Floor Brokers would have a new electronic order type—a "reserve order"—which would consist of both a visible size and an undisplayed (reserve) size that would not be included in the APQ. Reserve orders would enable Floor Brokers to represent their customer interest at multiple price points at or outside the APQ and to participate in the electronic environment on parity, while shielding their orders from market impact. The aggregate amount of all undisplayed reserve orders (but not the individual orders) at each price point would be visible only to the Specialist, who would include any reserve orders in an auction. As a reserve order receives executions, the displayed size would be replenished up to the maximum of the defined display size or the remainder of the order. The price point could not be traded through until all the reserve size has been exhausted.

For example, assume the APQ is $5.10 bid for 500 shares. Further assume that a Floor Broker in the crowd enters a reserve order to buy 5,000 shares for $5.09, display 1,000, and a second Floor Broker enters a reserve order to buy 4,000 shares for $5.09, display 500. The Specialist would see the aggregated reserve size of 7,500 shares for $5.09 in addition to the individual displayed interests. If an incoming sell order subsequently exhausts the 500 shares bid at $5.10, the new APQ is $5.09 bid for 1,500 shares, reflecting the displayed portions of the Floor Brokers' orders.

If a Floor Broker were trading multiple orders for different clients simultaneously during the day, he could enter a single crowd order into the AEMI Book that represented all or a piece of each order. Prior to submission of such an order to AEMI, the Floor Broker would designate the allocation method of the trade (*i.e.*, whether the returning trade against the order is allocated to the oldest customer order represented, evenly across all the orders, or pro-rata based on size).

Floor Brokers could also leave percentage orders with the Specialist as public orders, permitting their customers' orders to participate throughout the day in the electronic environment through manual conversion, automatic conversion, and/or election. A Floor Broker could route a percentage order to the Specialist Order Book and then monitor the execution of this order from his hand-held terminal while away from the crowd. The AEMI platform could convert a percentage order automatically, based on instructions the Floor Broker submitted with the percentage order. Alternatively, the Specialist could also convert a percentage order manually, depending on market conditions and Floor Broker instructions with respect to the percentage order. Because the proposed processing of percentage orders is expected to primarily be automated, the Exchange is seeking to remove some size restrictions associated with the Specialist's conversion on destabilizing ticks.

In ETF securities, Registered Traders would also participate in crowd activity, individually adding liquidity to the AEMI Book and to the auction process. Although Registered Traders would not have the same quote obligations as Specialists, they would be required to maintain competitive two-sided quotes when physically in the crowd. This active quote would designate them as crowd members for that individual security and thus make them eligible to participate in crowd activity.

A "parity joining time" is applied in AEMI to public and crowd orders and Registered Traders' quotes that are entered within a prescribed time following certain events. A new order entered would be considered on parity if it were the only order at a price or it were entered within a two-second "parity joining time," which would permit parity to be established when a new highest bid (lowest offer) is established in AEMI, following a trade, or when all bids (offers) at the APQ are canceled. If such an order or quote established the new price, then only subsequent orders entered within the parity joining time would trade on parity. If an order or quote were submitted outside the parity joining time at a price point at which there were already an order or quote present, it would be on parity at the price after a trade at any price has occurred. This principle would be applied to public and crowd orders and to quotes entered by Registered Traders when a new APQ is established.

For example, assume that three Registered Traders are using a variety of Exchange-supplied and proprietary technology to submit quotes in a crowd, and each is bidding $6.00 for 2,000 shares. Further assume that an incoming sell order for 6,000 shares exhausts the bid, and the three Registered Traders submit fresh bids immediately. If a fourth Registered Trader joins the bid eight seconds later, the first three Registered Traders' bids would be on parity, and the fourth would not be on parity. Once a trade occurs not involving any of these bids, such as a midpoint cross or a negotiated trade at or inside the APQ, all four bids would be on parity. The establishment of parity at the price would have no effect on the execution speed or behavior of incoming order flow, but would ensure that a Registered Trader's ability to compete electronically is comparable to his ability to compete in the current crowds, irrespective of the technology used to provide liquidity to the electronic environment. Since the purpose of this principle is to mitigate the minute differences in processing time or latency between competing technologies, the concept is also applied to public orders when there is a mix of public and crowd orders at a single price point. If there are multiple public orders at a price point, they would trade in price/time priority relative to each other but on parity with crowd orders at the same price.

New Electronic Order Types. To provide more trading opportunities to off-floor participants in particular, the Exchange is proposing to introduce new electronic cross order types. In addition to current crosses negotiated in the crowd by Floor Brokers, which would continue to be available under AEMI and applicable to all equity-traded securities on the Amex unless stated otherwise in the Exchange's rules, five electronic order types are being introduced as well as one electronic "auction cross" order type.[30] All six of these electronic order types are limited to ETFs and Nasdaq UTP securities. The

[30] Following discussion with the staff of the Commission, the Exchange is adding to the proposed AEMI rules additional minimum size (greater than the largest customer order on the Specialist Order Book at the cross price) and value ($100,000 or more) requirements for certain cross orders that are priced at the APQ and allowed to trade ahead of a previously displayed public customer order. While Amex believes that these requirements would not be triggered by the operation of its proposed new electronic cross orders, they may be applicable to crosses negotiated in the crowd by Floor Brokers. *See* proposed Rule 126–AEMI, Commentaries .01 and .02. Because the initial version of AEMI has not been programmed to automatically check for these additional parameters, the Exchange will need to develop and implement a surveillance and enforcement program with respect to member compliance with these additional rule requirements that would be in effect during the short period that it will take to develop these new parameters into a future version of AEMI. Amex regulatory officials will communicate the details of the interim surveillance and enforcement program to the staff of the Commission by letter. The Exchange expects that this proposed interim program will, due to limitations on its ability to manually surveil compliance with the additional requirements on a real-time basis, be more punitive and after-the-fact in nature, as opposed to an immediate rehabilitative approach.

electronic cross order type selected at order entry by the market participant would dictate whether the cross order could be broken up by interacting with orders on the AEMI Book, whether price improvement is being sought for the cross order, and how the residual of the cross order would be handled after it had been broken up. Two examples of electronic cross order types are "cross" and "cross only", which are differentiated by their interaction with the book—a "cross" order would interact with orders in the AEMI Book at the cross price whereas a "cross only" order would not. For example, if the APQ were $5.10 bid for 100 shares, 200 shares offered at $5.11, the sell side of a "cross" order for 500 shares at $5.10 would trade 100 shares against the $5.10 bid, since the existing electronic bid would take priority, and the remaining 400 shares would be crossed against the contra-side of the cross order. After both transactions, the 100 shares to buy from the "cross" order would expire. Under the same scenario, a "cross only" order at $5.10 would be rejected, since its instructions would prevent interaction with the AEMI Book when there is an existing bid on the AEMI Book for $5.10 (*i.e.*, equal to the cross price).

Another cross order type, designated as an electronic "auction cross," would actively seek price improvement, and the sender of the order would designate which side or sides of the cross are eligible for price improvement. For example, assume that the APQ is $5.10 bid for 100 shares, 200 shares offered at $5.14, and an "auction cross" is submitted for 500 shares at $5.12, with the buy side designated for price improvement. The buy side of the cross would be put on the AEMI Book and reflected in the APQ at one tick worse than the designated cross price. The APQ would therefore become $5.11 bid for 500 shares, 200 shares offered at $5.14. If the bid for $5.11 did not receive price improvement within three seconds, it would be canceled and the cross would take places at $5.12, provided this is still feasible given market conditions and there is no trade-through. If, however, the auction price were outside the automated NBBO at the time of the trade, the auction cross would expire. To ensure consistency with rules relating to short sales, the sell side of an auction cross that is exposed for price improvement could be re-priced by AEMI. For example, assume that the APQ is $5.10 bid for 100 shares, 200 shares offered at $5.15, and the last trade on Amex is $5.13, which is a minus tick. An "auction cross" is submitted for 500 shares at $5.12, with the sell side marked as a short sale and designated for price improvement. Since this is a tick sensitive order, AEMI would take into account the tick of the last trade when generating the filing price. Since the last trade was $5.13, a minus tick, AEMI would re-price the order by one tick to $5.14 so that a plus tick would result if this order traded during the auction cross duration. In this example, the auction cross would expire at the end of the price improvement duration, since the cross could not occur at $5.12 under the short sale rule. By contrast, if two trades had occurred during the price improvement duration (at $5.10 and $5.11) to create a plus tick, the auction cross would take place at the designated cross price of $5.12.

Quoting. Specialists would be expected to maintain a two-sided quote during the regular trading session to comply with their obligations under the Exchange's rules to assist in the maintenance of a fair and orderly market and of price continuity with reasonable depth. A Registered Trader in ETF securities would be required to maintain a two-sided quote to be eligible to participate electronically and in crowd trades. Specialists and Registered Traders could submit quotes in the following three ways:

(1) Specialists and Registered Traders could optionally stream in multiple two-sided quotes (one quote per price point) to add liquidity to up to a total of five price points on each side of the AEMI Book. The Exchange is introducing a new interface to facilitate streaming in quotes from a proprietary application.

(2) Quotes could be generated automatically ("auto-quotes") within AEMI. Auto-quotes are defined as quotes automatically generated within AEMI on behalf of a Specialist or Registered Trader, based on user-specified parameters relating to size, ticks, and underlying market data. A Specialist could peg either his best bid or his best offer to the automated NBBO. Registered Traders could peg their best bid or offer to one side of the APQ (excluding their own quote if that quote represented the only interest on that side of the APQ) or the automated NBBO. Both Specialists and Registered Traders could also peg their best bid or offer in ETFs to the Intra-day Optimized Portfolio Value. The contra-side (unpegged) of the quote would be automatically generated based on a quote spread designated by the user for that security. If the price to which the quote is pegged changed, a fresh auto-quote would be generated based on the pegged price and the Specialist's or Registered Trader's size.

(3) Single, two-way quotes could also be entered physically into the AEMI platform ("solo quotes"). A Specialist or Registered Trader could enter solo quotes at any time. If the user were auto-quoting or streaming in quotes, a solo quote would override the best existing quote, auto-quote, or streamed quote. The next auto-quote or streamed quote would override the previous solo quote. These solo quotes would be represented to the market place as automated quotations while auto-ex is enabled.

At the Amex, as discussed above, Specialists are expected to maintain continuous two-sided quotes in support of their affirmative market making obligations to ensure price continuity and stability in the market. The AEMI platform would ensure that a Specialist is able to meet these obligations by generating a single two-sided, firm, automated emergency quote when the Specialist's quote is decremented below a configured size that is based on parameters set by the Specialist. This feature is available only when the Specialist is not streaming in his quotations. If the Specialist's quote in a given stock were decremented to below a specified size or were exhausted, and no price change in the marketplace had automatically generated a new quote, then an emergency quote would be generated by AEMI, based on the programmed parameters. For example, assume that a Specialist has set parameters that would generate a fresh quote of 500 shares if his quote size is decremented to below 200 shares, and this quote would be generated at two ticks away from his previous quote. Further assume that (1) the Specialist's quote is pegged to the automated national best bid, (2) his current quote is 1,000 bid at $5.08 and represents the automated national best bid, and (3) the next best bid in the marketplace is at $5.07. An incoming sell order for 900 shares depletes his quote to below the size specified and therefore an emergency quote is generated for 500 shares at $5.06 (assuming that a tick is $0.01 for this security), which is now the Specialist's best bid.

Intermarket Sweep Orders. Amex believes that the AEMI platform has been designed to be fully compliant with the newly adopted Order Protection Rule of Regulation NMS, which requires that the visible size of all best automated quotes of all away markets be cleared in order to execute or print a trade at a worse price. To this end, incoming orders at the Exchange would be routed out automatically if an away market with an automated

quotation were displaying a better price, provided Amex is publishing an automated quotation.[31] Intermarket sweep orders could be sent and received through either ITS or private linkages with those other markets or market participants. Away markets could also would need to be cleared by a Specialist's or Registered Trader's quote moving through an automated away market (where regulations so permit).

If one or more away market best prices are required to be cleared in order to conform to the Order Protection Rule, an outbound intermarket sweep order would be generated to each away market displaying a better price, in the displayed amount. The "sweep" qualifier on the order indicates to the receiving trading center that the order could be executed even though it is at an inferior price to the automated NBBO.

Only protected quotes of away markets from 9:30 a.m. to 4 p.m. Eastern Time would be considered by AEMI in the calculation of how many orders to send and where to send them. Where an outbound obligation represents an order received by the Exchange, that order would be suspended on the AEMI Book and unavailable for execution on the Amex unless it were released. If a rejection (*i.e.*, a no-fill or partial fill cancellation) were received in response to the obligation sent to away markets and no better automated quotations existed, the balance of the suspended order would be released on the AEMI Book without losing order time priority. If a rejection were received and there were better automated quotations at other markets, the released order would be resent to those markets.[32] If, following a rejection, another away market published a better quote before the balance could be released (*i.e.*, the automated NBBO has changed), the order would also be resent. Incoming intermarket sweep orders to satisfy the Order Protection Rule could also be received by the Exchange from members and away markets. Such incoming orders could trade at multiple prices up to their limit at Amex, irrespective of the prevailing automated NBBO, with the exception of intermarket sweep orders received through ITS, which would receive only the best price available at Amex. Any unexecuted balance would expire.

Amex would monitor connections at all times to ensure that systems were functioning properly. All intermarket sweep orders sent by AEMI to away markets would be immediate-or-cancel orders, and Amex therefore expects an immediate response from the away market when accessing a protected quote. To manage the issuance of immediate-or-cancel intermarket sweep orders to access manual quotes at the NBBO, each intermarket sweep order would have an expiration delay timer. This timer would control how long AEMI would wait before cancelling the intermarket sweep order and trading through the quotation. If an intermarket sweep order were sent to an away market and no response were received by the time the delay timer had expired, and assuming that no system errors had been detected, AEMI would issue a further request to cancel the order and would immediately trade through the quotation. This would occur through the release of the order that had been suspended on the AEMI Book pending the response to the intermarket sweep order, and the released order would re-aggress the AEMI Book (including the generation of intermarket sweep orders to other away markets, if necessary). Such trade-throughs by Amex would occur on a per-order basis.[33]

If an away market sends a rejection in response to an outbound intermarket sweep order and the quotation at the away market were not updated, Amex would trade through the quote, but would still continue to route other intermarket sweep orders to that market's protected quotation in the same security.

Performing a Pair-Off. At openings and closings and at the conclusion of auctions, the Specialist would be required to perform a pair-off of orders in the AEMI Book in an orderly manner. With the exception of closings, auto-ex would be automatically enabled (or re-enabled) after the pair-off. The pair-off would have to be completed within three seconds of the Specialist commencing it, and during this pair-off any new orders would queue unseen by the Specialist and would not be considered in the pair-off. This brief queuing would ensure that the pair-off is orderly, and that an incoming order that arrives at the same instant that the pair-off commences would not alter the pair-off to such an extent that it would disadvantage investors whose orders might now not be included for execution. During the pair-off itself, orders that were being processed as part of the pair-off could not be altered or canceled, while all other orders would be queued in the AEMI platform (but would not be permitted to enter the AEMI Book). These queued orders could be amended or canceled at any time. If, however, the Specialist failed to complete the pair-off within three seconds, the pair-off session would be automatically canceled, and the queue of new orders that had accumulated would be added into the AEMI Book, where they would be eligible to participate in the new pair-off that the Specialist must perform.

Openings and Closings. The Exchange is proposing to automate certain aspects of its opening session in AEMI. The Specialist would manually start the opening pair-off session at or as close to 9:30 a.m. as possible. The Specialist would perform the opening pair-off to open trading in a security. The Specialist could also open ETFs and Nasdaq UTP securities on a quote if there were no marketable orders in the AEMI Book. As described above, the pair-off would have to be completed within three seconds of the Specialist commencing it. All marketable crowd orders would be considered on parity for the opening pair-off. Any imbalance of marketable orders would be fully or partially filled against the Specialist and Registered Trader orders at the pair-off price on the contra-side of the imbalance. Market and marketable limit odd-lot orders would be automatically executed against the Specialist at the opening price. At the end of the opening pair-off session, any queue that was formed during the pair-off would then be processed, with marketable orders relative to the pair-off trade price being automatically paired off and the imbalance being added to the AEMI Book with the original time stamp priority, and intermarket sweep orders being sent to away markets as necessary.[34] At the open, if the imbalance were too large for the Specialist and the crowd to offset, the Specialist could delay the opening, with appropriate approvals pursuant to proposed Rule 22–AEMI. At the close, if the imbalance were too large for the Specialist and the crowd to offset, the Exchange would declare a trading halt

[31] In Amendment No. 5, the Exchange clarified that Amex would ship an intermarket sweep order to an away market with a better price only if the Amex were publishing an automated quotation.

[32] In the situation where there were equal-priced automated quotations at other markets, the released order would also be resent to those markets if the order exhausted all size on the AEMI Book at the price and were not completely filled. *See* Amendment No. 5.

[33] Amex expects that a late trade report from an away market following such a trade-through, while possible, would be an infrequent event. In such case, however, the Exchange acknowledges that its proposed trade-through treatment would not obviate or invalidate the away market's rules regarding such late trades. *See* Amendment No. 5.

[34] The Exchange modified this sentence in Amendment No. 5 to state that AEMI would ship intermarket sweep orders to away markets as necessary.

and there would be no closing rotation in that security.

The Exchange is also proposing to automate certain aspects of its closing process. The Specialist would conduct the closing pair-off session in his specialty security. In both UTP and listed securities, an on-close imbalance of 25,000 shares or more would be automatically published to the tape at 20 and then ten minutes before the market close at 4:00 p.m.[35] In all securities, the closing pair-off session would commence automatically at the official closing time and auto-ex would be disabled at this time. The Specialist, who would perform a pair-off of orders in the AEMI Book, would manually close each security, and all orders would have to have been entered electronically in order to participate in the close.

At the close, the Specialist would execute any imbalance at an auction price determined in a manner consistent with auction market procedures and would then pair off and execute the remaining executable orders at that closing price. Percentage orders and stop orders that would be elected by the closing price determined by the Specialist could be included in pricing the close. For example, assume that the market is in the closing pair-off session, auto-ex is disabled, and Amex is publishing a manual non-firm auction quote. Also assume that there is a resting limit order, or the Specialist's own bid, on the AEMI Book to buy 10,000 shares at $10; that there is a single market-on-close order to sell 1,000 shares; and that there is a stop order to sell 50,000 shares with a stop price of $10. The Specialist could price the close to take into account the execution of the stop order so that all trades executed at the close would receive the same price. So if the Specialist priced the close at $9.60, the market-on-close order would receive $9.60, the buy order on the AEMI Book would be filled at $9.60 (thereby receiving price improvement of $0.40), and the balance of the stop order would be filled against the Specialist at $9.60 also. Amex believes that this process would ensure price stability at the close and result in a robust close with the maximum volume being traded at a single auction price.[36]

The Specialist would conduct a post trade allocation with respect to the shares necessary to offset the imbalance, as with a regular auction. Until this post-trade allocation process were completed, the Specialist would be responsible for the contra-side of the imbalance traded. If there were no on-close orders, the closing price would be the last sale in the security.

In the case of certain ETFs that trade up to 4:15 p.m., the Specialist could perform a "cash close" pair-off during the regular trading session at 4:00 p.m., which would occur prior to the official closing session on the Exchange and would be an added service for those investors who wish to mark positions to the cash close. In the event that there are "market at 4:00 p.m. cash close" orders for an ETF in the AEMI Book, auto-ex would be disabled automatically in that security at the 4:00 p.m. cash close time. Once the pair-off is concluded, auto-ex would resume until disabled for the official closing pair-off to be conducted at 4:15 p.m.

Implementation of the AEMI Platform. Amex believes that AEMI will be rolled out over a period of time anticipated to begin early in the fourth quarter of 2006 for equities and ETFs, prior to the final date set by the Commission for full operation of all automated trading centers that intend to qualify their quotations for trade-through protection under Rule 611 of Regulation NMS ("Trading Phase Date"). By the Trading Phase Date, all Exchange-traded ETF shares, equity shares, and securities that trade like equities would be on the AEMI platform. The Exchange intends to file separate rules with the Commission for a modified version of the AEMI platform to be in effect during the rollout and prior to the Trading Phase Date. The Exchange intends to refer to this pre-Rule 611 version of AEMI as AEMI-One.

Proposed Rule 1A–AEMI, a transitional rule filed as part of this proposal, describes the plan for the phase-in of the AEMI platform and the applicability of various Exchange rules during and after the rollout period. Once the rollout of AEMI is complete for all securities that had been subject to a particular Exchange legacy rule, the Exchange will submit a "house-keeping" filing pursuant to Rule 19b–4 under the Exchange Act, which will delete each such rule that is not applicable to the Exchange's then current trading environment.[37] The following is a brief discussion of each proposed new AEMI rule.

Rule 1–AEMI. Hours of Business

The Exchange proposes to adopt this new AEMI rule, which tracks the language of its current Rule 1 with the exception of a reference to "After Hours Trading" in the current rule. This facility, which has rarely been utilized, would not be supported by the AEMI platform.

Rule 3–AEMI. General Prohibitions and Duty To Report

The Exchange proposes to adopt this new AEMI Rule, which tracks the language of its current Rule 3 with the primary exception of references in the Commentary to three specific kinds of trading activity that members and member organizations should avoid. The reason for the change is that these particular restrictions would not be compatible with the operation of AEMI, including the use of intermarket sweep orders and the ability of incoming orders to "walk the book." The Exchange is instead proposing to add new language that would emphasize the prohibition of certain "gaming" behavior that could occur under the AEMI platform.

Rule 22–AEMI. Authority of Floor Officials

The Exchange proposes to adopt this new AEMI rule, which tracks the language of its current Rule 22 with a few exceptions as follows. First, the Exchange is proposing to add language to paragraph (b) of this rule, regarding reallocation of a security, to assure that the rule is compatible with the provisions of Amex Rule 27 on reallocation. In addition, the Exchange is not including the language in Section (c)(5) of the current rule, which requires a crowd announcement by a member if he is bidding or offering pursuant to an off-floor order for an account in which a member or member organization has an interest. That provision is primarily applicable to "G" orders, which would not be accepted under AEMI due to the fact that they are infrequently used on the Amex and would require complex programming for AEMI to be able to execute them properly. Other than in connection with "G" orders, there are no other situations that would compel a need to announce in this manner, so this section of the current rule would no longer be necessary. The Exchange is

[35] The imbalances would be published to Consolidated Tape Association (CTA) Tape B for Amex-listed securities. Amex is working with the Nasdaq SIP to publish the imbalances in Nasdaq UTP securities to Tape C. Note that the Exchange is proposing to make the publication of order imbalances optional in Nasdaq UTP securities.

[36] Because a market-on-close order is a contingent order, in that it is seeking to receive the closing price that is determined by the closing pair-off, it would not necessarily be entitled to execution (or partial execution) at the price of a quote or order on the opposite side of the market if auction market principles would result in a closing price inferior to the latter quote or order.

[37] In Amendment No. 5, the Exchange changed the phrase "all Exchange-traded products" to "all securities."

also proposing to exclude some related language that is in the last paragraph of paragraph (c) of current Amex Rule 22, along with some outdated language involving hand signals. In addition, a provision in the current rule providing for the prohibition of entry of stop or stop limit orders is not being included in the proposed Rule 22–AEMI due to the fact that the election and execution of such orders would be fully automated in AEMI.

The Exchange is also proposing to add language in Commentary .02 to the proposed new rule to recognize the fact that records of rulings and decisions of Floor Officials could be created electronically under AEMI and not just by filling out paper forms. A related revision would provide that the need for Floor Official approval of a particular action with respect to a security could be indicated to the Specialist electronically on a system maintained by the Exchange. It would further provide for the proper response by a Specialist to an electronic message regarding required Floor Official approval.

Rule 60–AEMI. Vendor Liability Disclaimer

The provisions of this proposed new rule track the language of a paragraph in current Amex Rule 60 relating to liability arising out of the use of any electronic system, service, or facility provided by the Exchange to members for the conduct of their business on the Exchange. However, most of the language in the current rule is not being retained in the proposed new rule because it relates to systems and personnel (*i.e.*, "System Clerks") that are no longer utilized at the Exchange or would no longer be utilized after AEMI is implemented. These systems include the Post Execution Reporting ("PER") and Amex Options Switch ("AMOS") systems, the On-Line Comparison System ("OCS") system, and the NYSE electronic display book licensed by the Exchange.

Rule 1A–AEMI. Applicability, Definitions, References and Phase-In

Proposed Rule 1A–AEMI is a transitional rule that outlines the plan for the phase-in of AEMI and the applicability of various Exchange rules during and after this period of time. The proposed rule also sets out requirements for members and member organizations and their associated persons with respect to AEMI training and the use of AEMI technology.

During the roll-out period for the AEMI platform, while the Exchange has securities trading on both the legacy and the AEMI platforms, the Exchange's current rules (as amended from time to time) would apply to those securities that continue to trade on the legacy system, while the corresponding AEMI rules would apply to those securities trading on AEMI. When AEMI is fully implemented and there are no more securities trading on the legacy system, the Exchange will file a proposed rule change with the Commission to propose that each AEMI rule completely replace its corresponding counterpart (*e.g.*, proposed Rule 108–AEMI would replace Amex Rule 108) and that certain other rules that are not applicable to transactions in AEMI be rescinded.

The Exchange anticipates that the start of the roll-out would occur prior to the final date set by the Commission for full operation of all automated trading centers that intend to qualify their quotations for trade-through protection under Rule 611 of Regulation NMS ("Trading Phase Date"). Consequently, a somewhat modified early version of the AEMI platform (referred to as "AEMI-One") would be in operation starting with the initial roll-out and continuing through the day prior to the Trading Phase Date. The Exchange intends to file a separate set of rules in the near future that would cover the operation of AEMI-One.

When the AEMI platform is fully implemented, transitional Rule 1A–AEMI would be rescinded except for the definitions contained therein, which would migrate to the "Definitions" section at the beginning of the Amex's "General and Floor Rules." [38] Key definitions include:

- "AEMI Book"—the part of the AEMI platform that would hold and automatically match orders, bids, and offers submitted to it electronically by the Specialists, Registered Traders, Floor Brokers, and off-floor members.
- "Crowd Order"—an order in the AEMI Book that would be represented by a broker standing in the crowd or a bid or offer in the AEMI Book entered by a Registered Trader standing in the crowd.
- "Customer"—any person who is not a broker/dealer.
- "Public order"—an order, initiated either on the Floor by a Floor Broker (*e.g.*, a percentage order or a limit order) or off-floor by a member, that would be entered directly into the Specialist Order Book.
- "Registered Trader"—a member who would be authorized by the rules of the Exchange to initiate trades while on the Floor for his or her account. Registered Trader transactions in securities traded in AEMI could be effected only in accordance with the provisions of proposed Rule 110–AEMI.
- "Specialist Order Book"—the accumulation of orders on the AEMI Book that would not be represented by a broker standing in the crowd or other party. It would be a subset of the AEMI Book. The Specialist Order Book would not include the bids and offers of Registered Traders in the crowd.
- "Automated National Best Bid and Offer" ("automated NBBO")—the highest automated bid and lowest automated offer calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan.
- "Automatic conversion"—automatic conversion ("auto conversion") of percentage orders by AEMI. Auto conversions would be governed by certain conditions in the AEMI Book which would qualify a percentage order to be converted. The parameters that would trigger an auto conversion would be configurable. An auto conversion could also take place during an opening, a re-opening, and the closing pair-off.
- "Manual conversion"—The Specialist could manually convert percentage orders depending on the instruction on the percentage order. The AEMI platform would permit both active and passive manual conversions.
- "Active manual conversion"—a manually converted percentage order that becomes an immediate-or-cancel ("IOC") order and immediately aggresses the AEMI Book.
- "Passive manual conversion"—a manually converted percentage order that becomes a limit order at the APQ. It could set a new APQ or join the existing APQ.
- "Trade event"—Every execution due to an aggressing order would be considered a "trade event" by the AEMI platform. The election of a percentage order, stop order, or stop limit order would be based on a trade event.
- "Specialist emergency quote"—a firm, automated quote automatically generated by AEMI when the Specialist's mandatory quote is reduced to or below a configured size in order to ensure continuity of price and assist the specialist in meting his quoting obligations under proposed Rule 170–AEMI. Such a quote would be generated according to parameters set by the Specialist, and would be obligatory if the Specialist were utilizing an AEMI "front-end" device to generate quotes. This feature would be disabled if quotes

[38] The Exchange would have to file a proposed rule change with the Commission for this purpose.

were streamed in from a proprietary system.[39]

• "Stabilizing quote"—a non-firm quote that would automatically be generated by AEMI when auto-ex were disengaged following a tolerance breach or gap trade (*see* proposed Rule 128A–AEMI(g)) and no orders existed on the contra-side of the AEMI Book. Under those circumstances, AEMI would automatically publish a quote for one round lot at one tick away from the price of the automated NBBO on the contra-side.

Rule 108–AEMI. Priority and Parity at Openings and Reopenings

Proposed Rule 108–AEMI is an amended version of current Amex Rule 108 and provides that orders, bids, and offers must be received by AEMI prior to the commencement of the opening pair-off in order to participate in that pair-off. Orders that were not represented electronically in the AEMI Book would not participate in the opening. The proposed new rule, which would also apply to reopenings, provides the priority and parity rules (which replace the current priority and parity rules) that the AEMI platform would apply to the opening pair-off and also would provide requirements for the execution of market and limited price orders and for tick sensitive purchases and short sales. The rule identifies "Must Trade Orders" (market orders and certain limited price orders treated as market orders) that would have to be executed on the opening or reopening and "May Trade Orders" that are eligible, but are not required, to be executed on the opening or reopening. Orders within each of the two foregoing groupings would be deemed to be on parity, except that orders on the Specialist Order Book (a subset of the AEMI Book) would be executed in the order in which they were received. Further, in the case of ETFs, all customer orders to buy or sell would be executed before any broker-dealer orders, bids, or offers on the same side of the market.

The opening pair-off session for a security, once initiated by the Specialist, would have to be completed with the Specialist's selection of the single opening pair-off price within three seconds. During the opening pair-off session, incoming orders, bids, offers, cancellations, amendments, and other messages would be held in a message queue and would not be included in the opening pair-off. The rule provides that, if the Specialist did not complete the pair-off within three seconds, the pair-off session would terminate, all messages in the message queue would enter the AEMI Book and would be on parity with the orders that were part of the unsuccessful pair-off effort, and the Specialist would have to reinitiate the opening pair-off session to open the security. The Specialist would open the security on a quote if there were no bids, offers, or orders in the AEMI Book that were eligible for execution on the open.

Once any orders that were in a message queue during the opening pair-off session were entered into the AEMI Book after the opening pair-off had been completed, AEMI would attempt to automatically pair off any marketable orders from the queue at the opening price unless this would cause a trade through of a protected quotation in another market center. In the latter case, AEMI would attempt to effect the pair-off at whichever price would result in the largest trade and would not result in a trade-through of a protected quotation. If such a post-opening pair-off could not be effected or there were orders from the message queue that did not participate in the pair-off, the remaining orders from the message queue that entered the AEMI Book would be treated in the same manner as incoming orders during the regular session, including the generation of intermarket sweep orders as required.

The Exchange is also replacing the Specialist book enhanced splits during parity allocation, with an equal split between the book and each crowd participant.[40]

The foregoing proposed opening procedures would replace any conflicting procedures in current Amex Rule 108.

Rule 109–AEMI. "Stopping" Stock

The current ability of a Specialist or other member of the Exchange to agree to "stop" stock at a specified price (*i.e.*, to guarantee that the order of the member who accepts the stop would be executed at the stop price or better) would not exist under AEMI. Consequently, the current language in Amex Rule 109 governing such agreements is not included in proposed Rule 109–AEMI, which contains a simple prohibition on such arrangements with respect to any security traded in AEMI. The Exchange is including in proposed Rules 131A–AEMI(b) and 118–AEMI(j) *(see* below) language that is in current Amex Rule 109(d) relating to the manner of printing the close.

Rule 110–AEMI. Registered Traders and Floor Trading

The Exchange is proposing Rule 110–AEMI to establish the standards for floor trading by Registered Traders under AEMI, where a Registered Trader is defined as a member who is authorized by the rules of the Exchange to initiate trades while on the floor for his or her account. Under the proposed rule, Registered Traders would be limited to transactions in index warrants, currency warrants, securities listed pursuant to Section 107 of the Amex Company Guide ("Other Securities"), Trust Issued Receipts, Partnership Units, and derivative products (including ETFs).

The proposed new rule incorporates current requirements (*see* Amex Rule 958, Commentary .10) that transactions by Registered Traders in AEMI in index warrants, currency warrants, Other Securities, Trust Issued Receipts, and Partnership Units could be effected only by Registered Traders who were regular members, while transactions by Registered Traders in AEMI in derivative products could be effected by Registered Traders who were regular members, Options Principal Members, or limited trading permit holders.

Most of the provisions in proposed Rule 110–AEMI and its associated commentary are currently in the Exchange's trading rules (primarily current Amex Rules 111, 950 and 958 and their commentaries), so Registered Traders would function under essentially the same requirements that are currently applicable to them. These provisions are being adapted to the AEMI platform and placed in proposed Rule 110–AEMI for convenience of reference and to minimize the burden of multiple cross-references. Consequently,

[39] *See supra,* under "Quoting" for a discussion and related example of such an emergency quote.

[40] The allocation split between the in-parity visible size of (i) public orders on the Specialist Order Book (including the Specialist's quote) and (ii) Crowd Orders is illustrated in the following example. Suppose there are three visible in-parity public bids for a common stock in the Specialist Order Book for a total of 400 shares at $13.00, which price is at the APQ and the NBB. Also assume an in-parity bid by the specialist for 1,000 shares at the same price, as well as in-parity Crowd Order bids of 1,000 shares each by Floor Broker A and Floor Broker B. If there is an aggressing sell order at the market for 1,000 shares, the total allocation for the in-parity public orders and the specialist bid (which are aggregated and treated as a single participant for computational purposes) is ⅓ of the 1,000 shares based on two crowd participants plus the aggregated public/specialist bids treated as a third participant. The public/specialist bids therefore receive a total of 400 shares because the system will round up to the nearest round-lot when computing the allocation to the public orders. Within the public/specialist band, the Specialist is at the back of the line and must yield to all of the public orders. In this example, the three public bids for 400 shares will consume the entire public allocation, leaving none for the Specialist. The remaining 600 shares are allocated to the two Crowd Orders in the amount of 300 shares to each.

the Exchange will propose that current Amex Rule 111 be rescinded upon the full implementation of the AEMI platform.

Each Registered Trader electing to engage in transactions in AEMI would be assigned by the Exchange one or more securities in the aforementioned categories, and transactions in AEMI initiated by such Registered Trader for any account in which he or she has an interest shall, to the extent prescribed by the Exchange, be in such assigned securities. Registered Trader transactions should constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, including the making of competitive bids and offers as reasonably necessary and engaging in dealings for his or her own account in situations where there is a lack of price continuity, a temporary disparity between supply and demand, or a temporary distortion of price relationships for the products in which he or she is trading and any underlying securities.

The proposed rule would establish minimum percentages of share volume and number of transactions that a Registered Trader would have to execute in person and not through the use of orders entrusted to a broker or Specialist, and it further would require that Registered Traders and Specialists compete with each other to improve the quoted markets in all securities that they trade. The proposed rule would recognize, however, that there are circumstances in which some communication between the Specialist and Registered Traders could be necessary and appropriate, such as making a collective response to a request for a market, provided that the member representing such order requested such response and the size of the order were larger than the size disseminated in AEMI. Such a collective response would happen only in the crowd verbally. For instance, suppose the APQ for an ETF is $3.50 bid for 3,000 shares and 5,000 shares offered at $3.55. If a Floor Broker walks into the crowd with an order to buy 20,000 shares of the ETF at the market, he could request a collective quote from the specialist/crowd. This verbal process would be similar to the auction process when auto-ex is enabled, and the crowd would be required to collectively confirm their verbal interest.

A Registered Trader electing to engage in transactions in AEMI under the proposed rule would be designated as a Specialist on the Exchange for purposes of the Act and the rules and regulations thereunder with respect to transactions initiated and effected in AEMI in the capacity of a Registered Trader. This could include transactions initiated from off the floor in the capacity of a Registered Trader if certain "in-person" share volume percentage requirements are met. A Registered Trader who establishes or increases a position for an account in which he or she has an interest while on the floor of the Exchange would not retain priority over an off-floor customer order.

Rule 112–AEMI. Suspension of Registration of Registered Trader

Proposed Rule 112–AEMI replicates the language of current Amex Rule 112 but with cross-references to other AEMI rules which would contain the appropriate provisions being referenced.

Rule 115–AEMI. Exchange Procedures for Use of Unusual Market Exception

The Exchange is proposing Rule 115–AEMI which would extend to Registered Traders the provisions of current Amex Rule 115 that are applicable to Specialists with respect to procedures in the event of an inability to update quotes on a timely basis due to a high level of trading activity or the existence of an unusual market condition. Under the proposed new rule, in the event that the Exchange were unable to accurately collect, process, and/or disseminate quotation data in one or more securities owing to the high level of trading activity or the existence of unusual market conditions, AEMI would be required to immediately disable auto-ex and disseminate the indicator "N" to indicate that Amex's quotation, if a trading halt has not been declared and quotations are being published for such security or securities, was not firm.

A Specialist or Registered Trader unable to update his quotation on a timely basis due to the high level of trading activity or the existence of an unusual market condition would have to promptly notify a Floor Official. The Floor Official, with the involvement of a member of the Amex regulatory staff, would then consult with the Market Operations Division of Amex to determine whether to declare a non-regulatory halt in such security or securities if the ability of the Specialist to promptly communicate quotation data were adversely affected. In the absence of such a non-regulatory halt, incoming orders would continue to execute against orders for the security or securities in the AEMI Book.

A Registered Trader unable to publish a quotation in a security could withdraw or cancel his quotation and inform the Market Operations Division afterward, since he would not have the same quoting obligations of a Specialist as specified in proposed Rule 170–AEMI(d). In addition, the absence of a quotation from a Registered Trader would not be a basis for a non-regulatory halt in the related security.

Rule 118–AEMI. Trading in Nasdaq Securities

Proposed Rule 118–AEMI does not contain the provision in current Amex Rule 118 that allows telephone access to the Exchange Specialists by Nasdaq System market makers and other exchanges trading Nasdaq securities pursuant to Unlisted Trading Privileges ("UTP") because this is incompatible with the way orders would be processed by AEMI. Certain outdated requirements in current Amex Rule 118 with respect to Specialist registration for trading Nasdaq securities are also not in the language of proposed Rule 118–AEMI. In addition, the proposed rule has been modified to reflect recent changes to current Amex Rule 118 which provide that all Nasdaq listed securities are eligible securities, instead of just the "National Market" securities.

Under the proposed rule, odd-lot orders in Nasdaq securities would be executed pursuant to the procedures in proposed Rule 205–AEMI, which is based on the text of NYSE's odd-lot rule, with some modifications. The language of current Amex Rule 118 regarding odd-lot orders would not be a part of the proposed rule. Some change from the NYSE rule text is necessary with respect to Nasdaq securities in connection with provisions that utilize an adjusted ITS bid or offer as an execution price. In those instances, due to its expected use of private linkages instead of ITS at the time that Regulation NMS takes full effect, Amex would instead use the "qualified national best bid" or the "qualified national best offer", defined as the highest bid and lowest offer, respectively, disseminated by the Exchange or another market center; provided, however, that (i) the bid and offer in another such market center must conform to Exchange requirements for minimum price variations, (ii) the quotation does not result in a locked or crossed market, (iii) the other market center is not having quotation dissemination problems, (iv) the bid or offer is firm, and (v) the quotation disseminated by the other market center is automated.

The Exchange proposes to standardize its closing procedures under AEMI so that the procedures for Nasdaq UTP securities would be substantially the same as for listed stocks. All market-on-close ("MOC") and limit-on-close

("LOC") orders would have to be entered into AEMI by the applicable deadlines in the proposed rule to participate in the closing. Orders not represented electronically would not participate. The Exchange proposes to accept tick-sensitive MOC and LOC orders for Nasdaq UTP securities to offset imbalances, although tick-sensitive MOC and LOC orders whose execution would violate customer restrictions or the Commission's short sale rules at the time of publication would not be reflected in the closing imbalances.[41] The AEMI platform would automatically publish all imbalances to the tape; however, the Exchange proposes in this rule to make publication of imbalances optional for all Nasdaq UTP securities since the Exchange is not the primary market.

The closing procedures for Nasdaq UTP securities would change, as follows. Currently, the imbalance of MOC and marketable LOC orders is printed against the bid or offer, as the case may be. Under AEMI, if there were an imbalance at the close between the buy and sell MOC and marketable LOC orders, the Specialist would, at the close or as soon after the close of trading in the security as practicable, execute the imbalance at an auction price under prevailing market conditions that is consistent with auction market procedures. The Specialist would conduct the post-trade allocation with respect to the shares necessary to offset the imbalance of buy/sell interest at the closing price, and AEMI would then send notification of individual trades to active crowd participants (consisting of Registered Traders in the crowd with a bid or offer on the AEMI Book on the contra-side of the imbalance and Floor Brokers with a crowd order on the contra-side of the imbalance, in each case at the time of the trade), as with a regular auction and the associated priority and parity rules.

Following the printing of the closing imbalance, AEMI would print at the same price any paired quantity of MOC and LOC orders. The pair-off transaction would be reported to the tape with an appropriate indicator.[42] Subsequently, AEMI would execute at that same price stop orders and percentage orders on the AEMI Book elected by the execution of the MOC and marketable LOC imbalance at the price of the imbalance trade, if those orders were executable based on the order of execution of orders, bids, and offers on the close, as provided in proposed Rule 118–AEMI.

The proposed rule provides 11 categories that determine the order of execution by AEMI at the close, ranging from market orders (including MOC orders), which have the highest priority, to buy percentage orders and sell percentage orders with a limit price equal to the closing price, which have the lowest priority. Certain lower priority stop and percentage orders that are elected would be executed by AEMI only if there were sufficient interest in AEMI to execute them, and AEMI would execute all customer orders in ETFs in these lower priority categories before it executed any broker-dealer orders in these categories.

References to "G" orders and certain other order types that are currently acceptable are not included in proposed Rule 118–AEMI and several other proposed rules because these order types would not be available under AEMI. In addition, certain current notification requirements involving paper forms are not being included in proposed Rule 118–AEMI and other proposed rules because the information would be available electronically in AEMI.

Rule 119–AEMI. Indications, Openings and Reopenings

Proposed Rule 119—AEMI tracks the provisions of current Amex Rule 119 with several additional provisions, including the requirement of mandatory dissemination of an indication to the tape prior to an opening, if such opening would result in a price change of 10% or more from (1) the last sale reported on the Amex, (2) the offering price of the security in the case of an initial public offering, or (3) the last reported sale on a securities market from which the security is being transferred.

Rule 123—AEMI. Manner of Bidding and Offering

Proposed Rule 123–AEMI describes in detail how the AEMI platform would process bids, offers, and orders. The AEMI platform would accept electronic bids and offers from both the Specialist and Registered Traders and include them in the AEMI Book. The AEMI platform would also accept orders from Floor Brokers standing in the crowd ("Crowd Orders") and other off-floor orders transmitted to AEMI electronically, and would file all such orders in the AEMI Book. On the basis of this input of bids, offers, and orders, AEMI would disseminate the Amex best quote, together with the associated visible size, to the tape. AEMI would also disseminate an indicator to the tape whenever the Amex quote is not firm.

A Registered Trader who is not in the crowd for a security would not be allowed to submit a bid or offer to AEMI for that security but could give an order to a Floor Broker as a Crowd Order or place an order on the Specialist Order Book for the Registered Trader's account. A Floor Broker who is not in the crowd for a security would not be allowed to submit a Crowd Order to AEMI for that security.

Members could make verbal bids and offers in the trading crowd, provided that these bids/offers are deemed withdrawn if not immediately executed. Accordingly, verbal bids and offers would not be reflected in the published quotation. Because AEMI would not recognize a verbal bid or offer in the crowd, trades executed in AEMI could trade through a verbal bid/offer without satisfying it.

The Exchange is also proposing in Rule 123–AEMI that Specialists and Registered Traders be allowed to stream bids and offers into AEMI at up to five price points, as well as manually updating their bids and offers in AEMI. In addition, both Specialists and Registered Traders would be allowed to automatically generate proprietary bids and offers in AEMI ("Auto-Quote"), and the proposed rule specifies the acceptable bases for those Auto-Quotes (for example, the automated away market best bid or offer, with or without a price adjustment). Registered Traders could also Auto-Quote based on the best bid or offer published by the Amex.[43]

Except when auto-ex is disabled, the AEMI platform would immediately display any regular-way limit order, bid, or offer that would improve or add to the size of the APQ that is not executed upon receipt in the AEMI Book except for immediate-or-cancel, fill-or-kill, on-close, 4 p.m. cash close, or odd-lot orders. AEMI would not display the reserve size of a Crowd Order until it is eligible for display.[44]

If AEMI ships an order, bid, or offer to an away market to comply with Rule 611 or Rule 610 of Regulation NMS,

[41] Commentary .02 to current Amex Rule 7, the Exchange's rule on short sales, provides that Rule 7 does not apply to transactions on the Exchange in Nasdaq securities pursuant to unlisted trading privileges under Amex Rule 118.

[42] The indicator is intended to alert other market participants that (i) there is trading ahead of limit orders, bids, or offers in AEMI; and (ii) such market participants with orders, bids, or offers limited to the price of the transaction being reported are not eligible to participate in the print.

[43] Auto-quoting is a separate function from streaming in quotes and also from the generation of an emergency quote. *See supra*, the discussion of these functions and their relationship under "Quoting." *See also infra*, a similar discussion under "Rule 170–AEMI."

[44] In Amendment No. 5, the Exchange eliminated an extraneous reference to passive price improvement orders because that order type has been eliminated from the proposed rule change.

AEMI would: (1) Suspend the shipped order, bid, or offer; and (2) remove (or not incorporate) the suspended order, bid, or offer from the Amex quote to the extent that it has been shipped. An order that has been shipped to another market is deemed to have been removed from the AEMI Book and, consequently, could not be traded against and could be traded through. If a shipped order were returned unexecuted, in whole or part, by the away market, the unexecuted portion of the suspended order, bid, or offer shall be incorporated or reinserted into AEMI and quoted or requoted with the same time stamp priority as it would have had if it had not been shipped; provided, however, that additional intermarket sweep orders shall be generated as required under Rule 611 of Regulation NMS in connection with the reaggressing of the AEMI Book by the unexecuted portion of the suspended order.

A floor member whose order, bid, or offer is incorporated into the APQ would be deemed by the Exchange to be the responsible broker or dealer for such quote under the Commission's Firm Quote Rule. A Floor Broker would be responsible for any Crowd Order that he entered into AEMI, even if he leaves the crowd without withdrawing the Crowd Order.

Automated bids and offers disseminated through the AEMI platform would be firm until revised or withdrawn. Other bids and offers disseminated through AEMI, such as when the Exchange is conducting an auction or is unable to accurately collect, process, and/or make available quotations under certain circumstances, would be non-firm, and AEMI would disseminate a specified indicator whenever the APQ is not firm. The circumstances under which such a non-firm indicator would be disseminated are: (1) The Exchange is incapable of collecting, processing, and/or making available quotations in one or more securities due to the high level of trading activity or the existence of unusual market conditions; (2) auto-ex has been disabled due to the breach of a tolerance (as defined in proposed Rule 128A–AEMI(g)), and auto-ex and the dissemination of an automated quotation have not yet resumed (*see* conditions for auto-ex resumption described in proposed Rule 128A–AEMI(g)); or (3) a gap quote situation exists due to an order imbalance (as described in proposed Rule 170–AEMI(f)).[45] In conjunction with publishing a non-firm quote, AEMI would disable auto-ex.

Rule 124–AEMI. Types of Bids and Offers

Proposed Rule 124–AEMI contains provisions that differ from some of the provisions of current Amex Rule 124 regarding acceptable types of bids and offers under AEMI. The term "regular way" has been redefined in the proposed new rule to recognize that the normal settlement cycle for a security in AEMI can be either cash, next-day, or the third business day after the day of the contract.

Rule 126–AEMI. Precedence of Bids and Offers

Proposed Rule 126–AEMI sets out the rules of precedence of bids and offers in AEMI for equities and ETFs and other equity-traded securities. The priority and precedence rules are different between ETFs and other equity-traded securities (listed equities, Nasdaq stocks, closed-end funds, *etc.*) because ETFs are traded more like derivative products with market makers in the crowd.

Proposed Rule 126–AEMI would provide that bids (offers) communicated to AEMI within two seconds (the "parity joining time") of (i) the establishment of a new highest bid (lowest offer) in AEMI, (ii) a trade in AEMI, or (iii) cancellation of all bids (offers) that are at the APQ, would be considered in parity, for purposes of the next trade, with bids or offers at the same price point remaining in the AEMI Book following any of these three events. In the case of the cancellation of all bids (offers), the participant joining time would apply only to the side of the quote on which the cancellation took place. A related provision in proposed Rule 128A–AEMI specifies that bids (offers) in the AEMI Book would remain firm following any of the three events described above. Bids (offers) at the same price point remaining in the AEMI Book following such event would be considered on parity at that price point unless such bids (offers) were revised or withdrawn. A bid (offer) that is revised would lose its priority and parity status and would be treated as a newly submitted bid (offer). A reduction in order/quote size would not result in a loss of parity status.

The proposed new rule also specifies a number of exceptions to parity for certain types of orders. For a listed stock, UTP stock, or closed-end fund:

- An in-parity specialist bid (offer) would yield to a public bid (offer).
- A specialist bid (offer) would not participate in parity with a crowd bid (offer) if AEMI received a public bid (offer) outside the parity joining time.
- If a specialist bid (offer) was or would have participated in parity but for the submission of one or more public bids (offers) pursuant to the two prior bullet points, and all such public bids (offers) are subsequently canceled before the next trade in that security, the specialist bid (offer) would, for the next trade, regain the priority and parity status it held or would have held.

Similarly, for an ETF or other equity-traded product that is not a listed stock, UTP stock, or closed-end fund:

- An in-parity broker-dealer bid (offer) (including that of a specialist) would yield to a public customer bid (offer) or a crowd customer bid (offer).
- If a specialist bid (offer) was or would have participated in parity but for the submission of one or more public customer bids (offers) or crowd customer bids (offers) pursuant to the prior bullet point, and all such public customer bids (offers) and crowd customer bids (offers) are subsequently canceled before the next trade in that security, the specialist bid (offer) would, for the next trade, regain the priority and parity status it held or would have held.

A new provision on parity of refreshed size of reserve orders would provide that, if an aggressing order exhausts all visible size at a price and there are two or more reserve orders at that price at a priority level, the reserve orders would refresh and the refreshed sizes of those reserve orders would be in parity with each other. In this situation, AEMI would continue to execute the aggressing order until all size resulting from the first refreshment were exhausted. If the aggressing order had not yet been completely filled, the reserve orders would refresh again and the refreshed sizes would again be in parity with each other. (Orders having "reserve size" are more fully discussed in subparagraph(s) of proposed Rule 131–AEMI.) Once visible size and reserve size at a price were executed by an aggressing contra-order, AEMI would execute, to the extent possible, portions of percentage orders elected by the foregoing trade events. Finally, marketable stop and stop limit orders would not receive a parity allocation but would be deemed elected by the foregoing trade events only after the aggressing order had completed the final

[45] The indicator "N" would be used in connection with the first of these three circumstances, and the indicator "U" would be used in connection with the latter two circumstances (breach of a tolerance of a gapped quote). These quote indicators should not be confused with the indicators A, B, and H, which are for firm quotes and denote that a market center is not meeting the Regulation NMS definition of an automated market even though auto-ex is on.

round of the parity allocation process with respect to the foregoing categories.

Proposed Rule 126–AEMI lists the order of priority for various combinations of public and crowd orders. For example, in the case of a listed stock where there were public orders that are in parity (and no public orders outside the in-parity time window), the highest execution priority would belong to visible size of public orders (including passive manual conversion percentage orders), visible size of crowd orders, and the Specialist quote, in parity. The proposed rule describes the parity allocation process under a number of scenarios. In the foregoing example, any securities sold in execution of an aggressing order would be divided equally (with rounding as specified in the rule) among the Specialist Order Book (which includes all public orders and the Specialist quote) and each of the individual Floor Brokers representing the crowd orders. From the quantity allocated to the Specialist Order Book, the individual public orders in parity would be allocated shares in order time priority, and the Specialist quote would not receive an allocation until all of the in-parity public orders had been filled. The allocation of the individual crowd orders among the Floor Brokers in parity would be accomplished pursuant to an "allocation wheel" based on order time priority, until the allocation is exhausted.[46] The existing enhanced split for orders on the Specialist's book with respect to securities sold in the execution of simultaneous bids (offers) would be eliminated under the proposed rule.

With respect to ETFs and other equity-traded securities which are not stocks or closed-end funds, proposed Rule 126–AEMI would list the order of priority for various combinations of public and crowd customer orders and public and crowd non-customer (*i.e.*, broker-dealer) orders. Once visible customer size at a price is exhausted, AEMI would then allocate any remaining shares to in-parity bids (offers) for the account of non-customers. If the Specialist's quote is in parity with other non-customer bids (offers), AEMI would calculate the allocation to the Specialist using the appropriate percentage from the Specialist allocation table below, based on the number of crowd participants (and counting all of the public non-customer orders on the AEMI Book as a single crowd non-customer participant for this purpose).[47] The Specialist would not be required to yield precedence to other non-customer orders on the AEMI Book for such ETFs and other equity-traded securities which are not stocks or closed-end funds.

Number of crowd participants	Specialist allocation (percent)	Crowd/public allocation (percent)
1	60	40
2–4	40	60
5–7	30	70
8–15	25	75
16+	20	80

AEMI would then divide the balance of the unfilled aggressing order among visible in-parity non-customer orders based upon the number of members in the crowd representing non-customer orders (again treating all of the public non-customer orders on the AEMI Book as a single crowd non-customer participant for this purpose). From the quantity allocated to public non-customer orders in parity, the individual public non-customer orders in parity would be allocated shares in order time priority. AEMI would allocate the remaining amount of the aggressing order to the individual crowd non-customer orders in parity pursuant to an allocation wheel based on order time priority. Once visible non-customer in-parity orders are filled in full, the next priority level in AEMI for execution of any remaining balance of the aggressing order would be the not-in-parity Specialist quote and visible size of public and crowd non-customer orders, based on time priority. Replenished reserve size at a price would not be filled until non-customer visible size at that price is fully filled, and AEMI would execute customer replenished reserve size before executing any non-customer replenished reserve size.

Proposed Commentaries .01 and .02 relating to certain floor-based cross trades involving 5,000 shares or more have been modified to add certain additional value and size parameters and to clarify the application of precedence under AEMI.[48]

Rule 126A–AEMI. Protected Bids and Offers of Away Markets

Proposed Rule 126A–AEMI would provide for an intermarket sweep order that Amex believes is consistent with the definition of that term in Regulation NMS.[49] Except under eight specific circumstances that are identified in the proposed rule, AEMI would generate an intermarket sweep order to any away market displaying an automated bid or offer that is protected under the Order Protection Rule of Regulation NMS simultaneously with the execution of a transaction on the Amex that would constitute a trade-through. The circumstances under which intermarket sweep orders would not be generated include circumstances in which: (1) The trade-through transaction was effected when the trading center displaying the protected quotation that was traded through was experiencing a failure, material delay, or malfunction of its systems or equipment; (2) the trade-through transaction was not a "regular way" contract; (3) the trade-through transaction was a single-priced opening, reopening, cash closing, or closing transaction by the Amex; (4) the trade-through transaction was executed at a time when a protected bid was priced higher than a protected offer in the NMS

[46] An allocation wheel based on time priority operates in the following manner. For the first aggressing order on a given day for which none of the orders at the price point have participated in such an allocation wheel, the first order to be allocated the lost size would be the visible in-parity Crowd Order with the highest order time priority in the AEMI Book. AEMI would then work its way through the individual Crowd Orders in order time priority, allocating the lot size to each until the total in-parity crowd allocation were exhausted. If this allocation had not been exhausted after all of the Crowd Orders had been allocated one lot, the system would move back to the partially unfilled visible inparity Crowd Order with the highest order time priority at the price point and repeat the process.

If, during the same day, another allocation wheel were required and there were two or more orders in parity at the price point that had participated in a prior allocation wheel on that day, the first order that would be allocated the lot size would be the in-parity Crowd Order have the highest order time priority in the prior allocation wheel not to receive an allocation in the final round of that allocation wheel. *See* Commentary .04 to this rule for an example of the operation of an allocation wheel.

[47] The Specialist allocation talbe is the same table that is currently utilzed on the Exchange for the allocation of options contracts. *See* Amex Rule 935–ANTE. Although the table is not currently applicable to securities traded on the Exchange other than options, the Exchange believes that its application to ETFs and similar securities is appropriate. Similar to options, ETFs are traded in crowds with Registered Traders, and the specialist therefore has to split his participation with these market makers. In contrast, there are no competing market makers on the floor in equities. All ETF specialists also have to create and redeem ETF creation units, and there are attendant expenses involved that an equity specialist is not obligated to incur. In addition to the obvious fact that ETFs are derivatively priced, similar to options, the competitive landscape and market structure for ETFs differ from that for listed equities, where most order routers will go to the primary markets first. Finally, there are a number of other areas in which the ETF order handling rules differ from listed equity rules, including the election of stop orders, order types supported, closing procedures, cash closing, and auxiliary opening procedures.

[48] The additional value and size parameters that will be applicable to floor-based cross trades would not be programmed into the initial version of AEMI. *See supra* note 30 for a discussion of the surveillance and enforcement of these requirements during the short period that it will take to develop these new parameters into a future version of AEMI.

[49] *See* 17 CFR 242.600(b)(30).

stock; (5) the trade-through transaction was the execution of an order identified as an intermarket sweep order; (6) at the time Amex effected the trade-through transaction, it simultaneously routed an intermarket sweep order to execute against the full displayed size of any protected quotation in the NMS stock that was traded through; (7) the trade-through transaction was the execution of an order at a price that was not based, directly or indirectly, on the quoted price of the security at the time of execution and for which the material terms were not reasonably determinable at the time the commitment to execute the order was made; or (8) the trading center displaying the protected quotation that was traded through had displayed, within one second prior to execution of the trade-through transaction, a best bid or best offer, as applicable, for the NMS stock with a price that was equal or inferior to the price of the trade-through transaction.[50] Each outbound intermarket sweep order would be issued as an immediate-or-cancel order but would also carry an expiration delay timer.

The proposed rule also spells out the actions that the Exchange proposes to take if an intermarket sweep order were not filled under several scenarios. Amex would actively monitor all systems relating to private linkage at all times to ensure that systems are functioning correctly. Amex would also ensure that the private linkage provider is responsible for the active monitoring of all connections relating to private linkage and for providing immediate notification regarding system problems. If AEMI did not receive any response at all to an outbound intermarket sweep order and assuming that no system errors had been detected, AEMI would issue a cancellation at the expiration of the expiration delay timer. This action would release the corresponding order that had been suspended on the AEMI Book pending the response to the intermarket sweep order, and the released order would re-aggress the AEMI Book (including the generation of intermarket sweep orders to other away markets, if necessary).

Finally, in the event that AEMI receives a rejection (*i.e.*, a no-fill or partial fill cancellation) in response to an outbound intermarket sweep order and the quotation at the away market is not updated, AEMI would release the corresponding order that had been suspended on the AEMI Book so that it could re-aggress the AEMI Book as described in the immediately prior paragraph (including the generation of intermarket sweep orders to other away markets, if necessary). Other intermarket sweep orders would still continue to be routed to that particular away market's protected quotation in that security.

Rule 127–AEMI. Minimum Price Variations

For equity-traded securities, the Exchange is proposing in Rule 127–AEMI to provide for a minimum price variation of one one-hundredth of a cent ($.0001) for quotes and orders [51] priced below $1.00 per share, as provided for in Rule 612 (the "Sub-penny Rule") of Regulation NMS. To the extent that the Commission grants an exemption from the Sub-penny Rule for a security (*e.g.*, QQQQ) priced above $1.00, the Exchange would provide for a minimum price variation equal to that set forth in the Commission's exemption order for that security.

Rule 128A–AEMI. Automatic Execution

This rule being proposed by the Exchange governs the auto-ex functionality of the AEMI platform and would replace existing Amex Rule 128A. Under this proposed new rule, AEMI would automatically execute round-lot or partial round-lot orders, bids, or offers in eligible securities for regular-way delivery that are received by AEMI electronically following the opening or reopening of a security on the Exchange. Orders that hit the Amex APQ would receive immediate fills (and notification thereof), and allocations (if any) would follow thereafter.

The rule would provide that, for auto-ex eligible securities that trade until 4 p.m., auto-ex would automatically turn off one second prior to 4 p.m. if there were any on-close orders in the AEMI Book; otherwise it would be turned off at 4 p.m. However, for auto-ex eligible securities that trade until 4:15 p.m., such as ETFs, auto-ex would automatically turn off one second prior to 4 p.m. if there were any on-cash-close orders in the AEMI Book and would remain off until the cash close is performed. Once the Specialist performed the cash close, AEMI would resume automatic execution. Auto-ex would then continue until one second prior to 4:15 p.m., at which time it would automatically turn off if there were on-close orders in the AEMI Book; otherwise it would turn off at 4:15 p.m.

While open outcry would still continue to take place in the trading crowd, a bid or offer in AEMI would not be deemed accepted by a member making a verbal acceptance in the trading crowd until the Specialist had entered a trade into AEMI. Similarly, trades executed by AEMI could trade through a verbal bid or offer in the crowd without satisfying the verbal bid or offer. Verbal bids and offers have no standing in the AEMI Book.

A new auto-ex eligible order, bid, or offer would be executed against the contra-side orders, bids, or offers residing in the AEMI Book in accordance with the rules of precedence for bids and offers until: (i) Filled in full; (ii) the size of the orders, bids, or offers residing in the AEMI Book is exhausted; (iii) a Spread or Momentum Tolerance for the security is breached; or (iv) a gap trade (as defined below) occurs. Automated execution that resulted in a trade-through of a protected quotation at an away market would not occur without such protected quotation being satisfied through the issuance of an intermarket sweep order, unless a valid exception contemplated by Rule 611 of Regulation NMS exists. AEMI would not intentionally publish an automated bid (offer) equal to or higher (lower) than the national best offer (bid) without sending intermarket sweep orders to execute against the full displayed size of the protected quotations in the away markets.[52]

When a Registered Trader or Specialist moves his quote to match the APQ on the other side of the market (*e.g.*, a Registered Trader raises his bid to match the offer side of the APQ), AEMI would automatically execute the trade at the price of the APQ for the lesser of the size of the APQ or the size of the bid/offer that hit the APQ; provided, however, that any trade execution resulting from the Specialist moving his quote would have to be consistent with the requirements of proposed Rule 170–AEMI.

AEMI would automatically execute a trade when a member used the hit or take functionality of AEMI to initiate an order against the APQ or otherwise initiates an order to trade with the bid/offer displayed in the APQ. Such an order could be entered by the member from on or off the floor of the Exchange. Members who wish to use the hit or take functionality would have to specify the price and quantity of the hit or take order. When a member uses the hit or take functionality, AEMI would validate that the specified price is equal to or

[50] Each of these circumstances corresponds to one of the exceptions listed in Rule 611(b) of Regulation NMS.

[51] The language of this sentence, as provided in Amendment No. 4, was revised by Amendment No. 5 to clarify that Rule 612 of Regulation NMS applies to quotes and orders.

[52] In Amendment No. 5, the Exchange modified the last two sentences of this paragraph to clarify that AEMI would not intentionally trade through better prices at away markets, unless a valid exception to Rule 611 exists.

better than the contra-Amex quote and automatically generate a limit order at that price. Equity Specialists who use the hit or take functionality would have to do so in a manner consistent with the requirements of proposed Rule 170–AEMI. An order initiated by a member using the hit or take functionality would expire if not immediately executed but would be capable of generating intermarket sweep orders to clear better away markets before executing on the Amex.

Any quotation in a non-ETF Amex-listed security or a non-Nasdaq UTP equity security entered into the AEMI platform by the Specialist while auto-ex is enabled that would cause the APQ to be crossed would automatically be rejected.[53] Any quotation in an ETF or a Nasdaq UTP equity security entered into the AEMI platform by the Specialist or a Registered Trader while auto-ex is enabled that would cause the APQ to be locked or crossed would be automatically executed.[54] For all securities, when auto-ex is disabled due to the breach of a Spread or Momentum Tolerance or a gap trade, orders and quotations (with the exception of the Specialist's quotation) that enter the AEMI Book and are priced better than the contra-side of the APQ would participate in the auction trade to eliminate the locked or crossed market and would result in the dissemination of an automated APQ.

Following the termination of a message queue, the AEMI Book would first process any cancellations or order amendments. AEMI then would attempt to automatically execute any marketable orders in a message queue at the pair-off price unless this would cause a trade-through of a protected quotation, in which case, AEMI would attempt to effect the pair-off at whichever price would result in the largest trade and would not result in a trade-through of a protected quotation, provided, however, that AEMI would not automatically execute orders that accumulated in a message queue after the close. If such a pair-off cannot be effected or there were orders from the message queue that did not participate in the pair-off, the remaining orders from the message queue that entered the AEMI Book would be treated in the same manner as incoming orders during the regular session, including the generation of intermarket sweep orders as required.

There are six situations in which auto-ex would become unavailable for the execution of trades during the regular trading session, as follows:[55]

(1) Where the automatic execution of a single order causes a breach of the Spread Tolerance in the security, where the Spread Tolerance is (i) measured against the change in price from the first execution of the incoming order on the Amex; (ii) based on a table with three possible values of the Spread Tolerance, depending on the price level of the security (5 cents for price under $5; 15 cents for price range $5–15; 25 cents for price over $15); and (iii) applied dynamically based on the price of the security at the time of the incoming order execution;

(2) Where the automatic execution of one or more orders within a 30-second window causes a breach of the Momentum Tolerance in the security, meaning that the price of a security, as a result of trades on the Amex, has moved an amount equal to or more than the greater of 15 cents or 1% within 30 seconds (with the high price being established with reference to the price of the lowest Amex trade in the security during the previous 30 seconds and the low price being established with reference to the price of the highest Amex trade in the security during the previous 30 seconds);

(3) Where the opening is delayed, Amex is disseminating a gapped quote (*see* proposed Rule 170–AEMI(f)), or trading is halted in a security;

(4) Where a trade in a security other than an ETF has exceeded the price change parameters of the price change limits specified in proposed Rule 154–AEMI(e)—the "1%, 2, 1, ½ point" rule ("gap trade");

(5) When the Exchange is conducting the "cash close" pair-off in an ETF (*see* proposed Rule 131–AEMI, Commentary .03); or

(6) When the Exchange has determined that (i) "unusual market conditions" exist in one or more securities as described in proposed Rule 115–AEMI; or (ii) a Senior Floor Official determines that the market(s) where securities trade representing more than 25% of the index value of an ETF are experiencing communications or system problems, "unusual market conditions" as described in Rule 602 under Regulation NMS, or delays in the dissemination of quotes.

Under the proposed rule, members could not trade in the open outcry market (other than to consummate an auction trade to remove the conditions that disengaged auto-ex) while auto-ex is disabled as a result of any of the foregoing circumstances but could enter and cancel bids, offers, and orders in AEMI during this time.

In the event of the breach of the Spread Tolerance, the Momentum Tolerance, or gap trade tolerance (each being a "Tolerance") for a security, auto-ex and the dissemination of an automated APQ would be automatically disabled for an initial period of ten seconds. The re-enabling of auto-ex and the dissemination of an automated APQ would be contingent on the AEMI Book not being in a locked or crossed condition during, or at the end of, this initial ten-second time period. The Specialist would be required to pair off the remainder of an aggressing order that resulted in a locked or crossed AEMI Book to re-enable auto-ex prior to the expiration of the ten-second time period. The contra-interest applied against the aggressing order in the pair-off would come from marketable orders on the contra-side of the AEMI Book. Any portion of the aggressing order that is not paired off against marketable orders on the AEMI Book would be parity-allocated against the Specialist and/or eligible crowd participants represented electronically on the contra-side of the AEMI Book. Upon the Specialist's performance of this pair-off, AEMI would automatically disseminate a new automated APQ. Alternatively, the Specialist could re-enable auto-ex prior to the expiration of the ten-second period through a "front-end" device if the remainder of the aggressing order (if any) were expired or canceled or the AEMI Book were not locked or crossed.

Following the breach of the Tolerance, the remainder of the

[53] *See* proposed Rule 170–AEMI, Commentaries .01 and .02, regarding the requirements with respect to such quotations entered into the AEMI platform by the Specialist that would cause the APQ to be locked but not crossed.

[54] The reason for the disparate treatment of ETFs and Nasdaq UTP equity securities is the complexity surrounding the short sale "tick test" as it applies to non-ETF Amex-listed securities and non-Nasdaq UTP equity securities. In contrast, the "tick test" is not applicable to ETFs and Nasdaq UTP equity securities, and those quotations can be treated in a much simpler fashion.

[55] The Exchange considered including in the list of circumstances in which auto-ex would be unavailable the gap pricing parameters directed at abusive "gap elections" of stop orders that the Exchange first implemented on a pilot basis in 1987. *See* Securities Exchange Act Release No. 24021 (January 21, 1987), 52 FR 3370 (February 3, 1987). Although never formally part of the Exchange's rules, the Exchange has nonetheless required its Specialists to adhere to these parameters unless Floor Official approval was obtained ever since their initial application. However, the Exchange believes that, in the automated AEMI environment, the likelihood that Specialists will engage in abusive "gap elections" of stop orders will be greatly reduced and it is therefore not necessary to build these numerical parameters into the AEMI platform. This is partly the result of some protection against this form of manipulation in AEMI that will be offered by the "gap trade" provisions of proposed Rule 154–AEMI(e) in the foregoing list. Those provisions, plus the enhanced surveillance capabilities inherent in the AEMI platform, should provide adequate protection against potential gap election abuses by Amex Specialists.

aggressing order (if any) would be reflected in the APQ at the price of the automated NBBO on the same side corresponding to the aggressing order (*e.g.*, automated national best bid for an aggressing buy order), with the contra-side of the quote reflecting the best bid, offer or order in AEMI (both sides being non-firm). If there were no remainder because the aggressing order were canceled or expired (*e.g.*, it is an IOC order) or were filled upon the breach of the Tolerance, the APQ would reflect the best bid and offer in the AEMI Book with both sides non-firm. If there were no orders left on the contra-side of the AEMI Book, a stabilizing quote would be generated automatically so that a two-sided non-firm quotation is published, with a round lot at one tick away from the price of the automated NBBO on the contra-side.

During the ten-second time period following the breach of the Tolerance, if the Specialist had not resolved the locked or crossed AEMI Book along with AEMI disseminating a new automated APQ, incoming orders, amendments, and cancels would continue to enter the AEMI Book but would not update the APQ. On the expiration of the ten-second time period following the breach of the Tolerance, if the AEMI Book were not locked or crossed, auto-ex and the dissemination of an automated Amex quote would resume automatically. If the AEMI Book remained locked or crossed following the expiration of the ten-second period, auto-ex and the dissemination of an automated quotation would not resume until the Specialist had taken action to pair off the remainder of the aggressing order (*i.e.*, to resolve the locked or crossed condition). AEMI would perform a recursive check every subsequent ten seconds to determine if the locked or crossed condition had been eliminated and, if it had been eliminated, auto-ex and the dissemination of an automated Amex quote would resume automatically.[56]

Rule 128B–AEMI. Auction Trades

This proposed new rule would provide for the integration of auction trades with orders, bids, and offers on the AEMI Book and away markets. An auction trade could be (1) a trade executed between or among members on the Floor by open outcry (which trades could incorporate orders on the AEMI Book); or (2) a cross trade executed by a member on the floor by open outcry.

Under the provisions of the rule, a Specialist would immediately have to enter an auction trade into AEMI if he participates in the trade. If the Specialist were not part of an auction trade, the member who initiates the trade would have to report the trade to the Specialist for input into AEMI. Upon input, AEMI would: (i) Immediately send a report of the trade to the tape (less the size of any intermarket sweep order(s) to be immediately sent to away markets); (ii) execute any bids, offers, or orders on the AEMI Book that were able to be executed at the price of the auction trade; (iii) generate intermarket sweep order(s) to away markets; and (iv) disseminate a new automated APQ unless auto-ex were already enabled. The Specialist would conduct the post-trade allocation for trades with more than one contra-side member, and AEMI would then send notification of individual trades to active crowd participants (Registered Traders in the crowd with a bid or offer on the AEMI Book on the opposite side of the aggressing order and Floor Brokers with a Crowd Order on the opposite side of the aggressing order, in each case at the time of the trade) upon the Specialist's confirmation of the post-trade allocation. The requirement that a Specialist confirm the initial post-trade allocation (which would be an estimate computed by AEMI based on assumed participation by all of the active crowd participants and the Exchange's priority and parity rules) is to allow the active crowd participants to verbally confirm their participation or non-participation. Any necessary adjustments by the Specialist would result in a reallocation, also computed by AEMI. If the specialist had not confirmed the allocation within a three-minute period following the trade, the default allocation would be AEMI's estimated allocation to the Specialist and the active crowd participants. The Floor Brokers that are a party to the auction trade, both on the side of the aggressing order and the contra-side, would each have 20 seconds following notification by AEMI of their respective individual trades to complete an additional allocation to the existing orders in their hand held terminals. If such a trade allocation were reported to AEMI more than 20 seconds later, it would be deemed late but would still be permitted.

If one or more of the intermarket sweep orders generated by an auction trade were unexecuted in whole or in part by away markets, AEMI would release the remaining portion of any order, bid, or offer in AEMI that had been suspended at the time the intermarket sweep orders were generated, and the released order, bid, or offer would re-aggress the orders, bids, and offers in the AEMI Book (including the generation of intermarket sweep orders to away markets, if necessary); provided, however, that intermarket sweep orders generated by a trade having only a single member on the buy side and a single member on the sell side that are not executed by an away market would be automatically expired and not executed at the Amex. With respect to intermarket sweep orders to away markets generated by an auction trade, in the event that AEMI (i) does not receive any response to an outbound intermarket sweep order by the time the expiration delay timer has expired (assuming that no system errors have been detected), or (ii) receives a rejection (*i.e.*, a no-fill or partial fill cancellation) in response to such order and the quotation at the away market is not updated, the Exchange would follow the procedures described for such circumstances in proposed Rule 126A–AEMI, which would include the release of the suspended portion of the order on the AEMI Book that was represented by the unexecuted (or partially executed) outbound intermarket sweep order and the re-aggressing of the AEMI Book by the released order.

Finally, AEMI would process a cross executed by a member in the crowd in the same manner as other auction trades. However, only the member who executed the cross would receive a trade notification from AEMI in the event that the cross is not "broken up" at the cross price by the crowd (verbally) or by resting bids, offers, or orders in the AEMI Book. Further, a clean agency cross that satisfies the size and value parameters in Commentaries .02 and .03 to proposed Rule 126–AEMI could *not* be broken up at the cross price by the crowd (verbally) or by resting bids, offers, or orders in the AEMI Book, and Specialists and market makers could not interfere with such trades. In addition, a cross that takes precedence based on size (*see* Commentary .01 to proposed Rule 126–AEMI) could *not* be broken up at the cross price by resting bids, offers, or orders in the AEMI Book. In executing a cross trade by open outcry, members would be required to follow the crossing procedures set forth in proposed Rule 152–AEMI (if a member or member organization were taking or supplying stock to fill a customer's order) or proposed Rule 151–AEMI (in all other situations).

Rule 128C–AEMI. Locking or Crossing Quotations in NMS Stocks

The Exchange is proposing the adoption of this new rule which is

[56] *See supra*, related discussion under "Automated Execution."

based on the Commission's proposed SRO locking/crossing rule.

Rule 131–AEMI. Types of Orders

The Exchange is proposing to create a number of new order types, as well as to make changes to existing order types, under AEMI, as follows:

- Alternative or either/or orders would no longer be accepted on the Exchange.
- An "all or none" order would no longer be accepted on the Exchange.
- An "immediate-or-cancel" order received by the AEMI Book would *not* be routed to another market center.
- A buy (sell) limited price order would be immediately executed in AEMI if its limit price were equal to or higher (lower) than the best offer (bid) on the Amex. A buy (sell) limited price order would result in the generation of one or more intermarket sweep orders to access protected quotes at away markets if its limit price were equal to or higher (lower) than the automated national best offer (bid). The unexecuted remainder of a limited price order would be posted on the AEMI Book.
- A new intermarket sweep order would be available, which Amex believes would provide a means to satisfy better away market obligations consistent with the requirements of Regulation NMS.
- A "fill-or-kill" order for equity traded securities received in the AEMI Book would be canceled automatically if it could not be executed at the best price point in the AEMI Book. A "fill-or-kill" order would *not* be routed to another market center.
- AEMI would *not* accept a "not held" order, although such an order type would still be acceptable on the Exchange.
- A "good until a specified time" order would no longer be accepted on the Exchange.
- Other current order types that would no longer be accepted on the Exchange when AEMI is implemented are scale orders, switch or contingent orders, and time orders.
- ITS commitments to away markets that are irrevocable for a fixed time period are being retained as a valid order type on the Exchange in situations where auto-ex is not available.
- "G" orders could no longer be entered on the Exchange upon the implementation of AEMI.
- Stop and stop limit orders to buy or sell that are "too marketable" (*i.e.*, automatically executable with the next trade) would be rejected, and any and all ETF stop and stop limit orders could be elected by a quotation as provided in proposed Rule 154–AEMI(c). The Exchange could not guarantee that an elected stop order would be executed at the electing price.
- AEMI would *not* be programmed to execute (i) "company buy-back" orders in conformity with the "safe harbor" provisions of Commission Rule 10b–18; or (ii) "stabilizing" orders entered pursuant to Rule 104 of Regulation M[57] in connection with purchases of a security in distribution; although such order types would still be acceptable on the Exchange.

A "percentage order" would continue as an order type under AEMI, and it would be defined as a public, limited price, round-lot, day order to buy (or sell) 50% of the Amex volume of a specified stock after its entry into the Specialist Order Book, but it could be entered only with "last sale" or buy-minus/sell-plus election instructions. Only a Floor Broker could enter a percentage order, which is a public order for which the Specialist has agency responsibility. In the case of ETFs and other equity-traded products that are not listed or UTP stocks or closed-end funds, the percentage order would have to be on behalf of a customer and not a broker-dealer. Market circumstances could prevent a percentage order from buying (or selling) this percentage through election.

The elected portion of every percentage order would have to be executed immediately in whole or in part at the price of the electing transaction, or better. Any elected portion not so executed would revert to its status as an unelected percentage order and be subject to subsequent election or conversion.

A "percentage order" would be automatically converted into an IOC order, or manually converted into either an IOC order (active manual conversion) or a regular limit order (passive manual conversion). The automatically converted portion of every percentage order would have to be executed immediately in whole or in part at the price of the conversion, or better. Any automatically converted portion not so executed would revert to its status as an unelected percentage order and be subject to subsequent election or conversion. The Exchange is proposing to not carry over, in this rule and in proposed Rule 154–AEMI, the current restriction requiring a 5,000 share minimum order size for certain conversions, since the average trade size at the Amex is substantially less than 5,000 shares and the restriction significantly limits the execution opportunities for percentage orders with respect to securities in AEMI. The Exchange expects that conversions would primarily occur automatically when AEMI is in effect.

Subparagraph (j) of proposed Rule 154–AEMI contains further regulation concerning the handling and execution of percentage orders.

Another new order type that would be accepted in the proposed AEMI platform is a "reserve order," which is a limited price order submitted to AEMI by a Floor Broker standing in the crowd and which consists of both a visible and an undisplayed (reserve) size. The reserve size is not included in the APQ. A broker could specify the visible size of a reserve order subject to a visible minimum size established by the Exchange. Following a trade that executes against the visible size of a reserve order, AEMI would replenish the displayed size from the order's reserve quantity up to the lesser of the displayed size or the remainder of the reserve size. Only the cumulative size of all reserve size at each price point would be visible to the Specialist. A Specialist would not be permitted to disclose reserve size in response to a market probe by a member or member organization or in response to an inquiry from a representative of the issuer of the security.

A new order type that would be available to any member is a "hit or take" order, which is an order that would trade against the APQ and could be entered by the member from on or off the floor of the Exchange. It is an order that expires if not immediately executed but that is capable of generating intermarket sweep orders to clear better away markets. A hit or take order can be specified as "sell short."

AEMI would also accept several types of electronic "cross orders," but only in ETFs and Nasdaq securities admitted to dealings on Amex on an unlisted basis. A cross order would be an order submitted by a member or member organization to AEMI with both buy and sell interest specified in a single order. The types of electronic cross orders that would be accepted in AEMI are designated in proposed Rule 131–AEMI as: (1) Cross, (2) cross only, (3) mid-point cross, (4) IOC cross, (5) PNP cross, and (6) auction cross. The amount of each of the first five of the foregoing cross order types that is executed (if any), the generation of intermarket sweep orders to markets displaying protected quotes, and the execution price or prices for the order would depend on several factors, including: (1) The relationship between the cross price, the automated NBBO and the

[57] 17 CFR 242.104.

APQ; and (2) pre-existing bids, offers, and orders in the AEMI Book.

In the case of an auction cross, the person entering the cross order would have to specify the side(s) of the cross selected for possible price improvement. AEMI would display the side(s) specified for possible price improvement for a three second "Auction Cross Duration." The side(s) of the cross selected for price improvement would have to be displayed one minimum trading increment worse than the proposed cross price (*i.e.*, the buy side of the cross would have to be displayed one tick below the proposed cross price and/or the sell side of the cross would have to be displayed one tick above the proposed cross price). During the three-second Auction Cross Duration, the displayed order could be price improved by new bids, offers, or orders entering the AEMI Book. If the cross price were equal to or better than the automated NBBO and between the APQ at the end of the Auction Cross Duration, AEMI would execute the auction cross at the cross price; otherwise, the order would be canceled to avoid trading through the automated NBBO or the APQ. If one or both sides selected for display were executed in part during the Auction Cross Duration, the unfilled balance would continue to be displayed and would be executed at the end of the Auction Cross Duration at the cross price, and any remainder would be canceled at the end of the Auction Cross Duration, unless the order were designated Cross and Post ("CNP"), in which case the unexecuted balance of the cross order would be added to the AEMI Book. If a side selected for display were executed in full during the Auction Cross Duration, the other side of the auction cross order would be canceled unless the order were designated CNP. AEMI would reject auction cross orders if the cross price were at the APQ or outside the automated NBBO.

Finally, proposed Rule 131–AEMI sets forth the procedures to be followed for "Market at 4 p.m. cash close" orders in Portfolio Depositary Receipts and Index Fund Shares that trade on the Exchange until 4:15 p.m. Such market orders would be executed at one price (which would be the prevailing bid or offer on the Exchange, depending on the imbalance) at 4 p.m., or as soon as practicable thereafter. AEMI would *not* generate an intermarket sweep order to an away market displaying a protected bid or offer, even if the execution price would constitute a trade through. Market at 4 p.m. cash close orders and other market orders would be executed ahead of other limit orders, bids, and offers in AEMI at the time of the cash close.

Rule 131A–AEMI. Market on Close Policy and Expiration Procedures

The closing procedures in proposed Rule 131A–AEMI, which would apply to listed stocks and closed-end funds, are somewhat modified from the current procedures in Amex Rule 131A. Most importantly, members and member organizations must enter all MOC and LOC orders into AEMI prior to the applicable deadlines in order for them to be eligible to participate in the closing. Orders entered after the deadline that did not offset a published imbalance would be rejected.

The closing procedures for listed stocks and closed-end funds under AEMI, as set forth in this rule, would basically be the same as those described above under proposed Rule 118–AEMI for Nasdaq securities with unlisted trading privileges, including printing the close and providing for the allocation of the imbalance, as well as the order of execution of orders, bids, and offers in the AEMI Book at the close. The major difference is in the calculation of the 3:40 p.m. and 3:50 p.m. imbalances, where the last Amex sale is used for listed stocks while the consolidated last sale is used for Nasdaq UTP stocks.

Rule 132–AEMI. Price Adjustment of Open Orders on "Ex-Date"

The After Hours Trading facility on the Amex would not be available under AEMI, and the Exchange is proposing not to carry over any references to the facility in the Exchange's current rules, such as the reference in current Amex Rule 132.

Rule 135–AEMI. Cancellations of, and Revisions in, Transactions Where Both the Buying and Selling Members Agree to the Cancellation or Revision

Proposed Rule 135–AEMI would differ from current Amex Rule 135 by clarifying that a correction to the tape would change the calculation of the "tick" of the next trade only if the last published trade were the subject of the correction.

Rule 135A–AEMI. Cancellations of, and Revisions in, Transactions Where Both the Buying and Selling Members Do Not Agree to the Cancellation or Revision

The Exchange is proposing, in Rule 135A–AEMI, a change in its process for "breaking" a transaction, or modifying one or more terms of the transaction, in situations where a transaction is claimed to be erroneous as a result of the automatic execution of an order, bid, or offer by AEMI against an Amex quote that was not firm under one of the three exceptions to the firm quote requirement for bids and offers in AEMI that are set forth in proposed Rule 123–AEMI(h). The first exception involves a circumstance in which the Exchange is incapable of collecting, processing, and/or making available quotations in one or more securities due to the high level of trading activity or the existence of unusual market conditions. The second exception involves a circumstance in which auto-ex has been disabled due to the breach of a Spread or Momentum Tolerance or a gap trade, and auto-ex and the dissemination of an automated quote have not yet resumed. The third exception involves a gap quote situation that exists due to an order imbalance.[58]

A Floor Official would have the authority to review the foregoing transactions and make adjustments to the terms accordingly or declare a transaction null and void. The new rule would provide that any member who seeks to have one or more transactions reviewed would have to submit the matter to a Floor Official and deliver a written complaint to the Service Desk and the other member(s) who were part of the trade within 30 minutes of the transaction. Once a complaint had been received, the complainant would have up to 30 minutes, or any longer period specified by the Floor Official, to submit any supporting written information concerning the complaint necessary for a review of the transaction. Other procedural requirements are provided for in the revised rule.

Rule 150–AEMI. Purchases and Sales While Holding Unexecuted Market Order

The Exchange is proposing, in Rule 150–AEMI, to provide three additional exemptions to the current prohibition against a member buying or selling any security on the Exchange for his own account (or for any account in which he or his member organization or certain related parties have a direct or indirect interest) if the member (or member organization or related party) either: (1) Holds an unexecuted market order in that security for a customer, on the same side of the market; or (2) buys or sells that security at a price more favorable than that of an unexecuted limited price order in that security held for a customer on the same side of the market.

The three proposed additional "trading ahead" exemptions are: (1) A purchase or sale of any security by a

[58] *See* proposed Rule 170–AEMI(f).

Specialist where the member or member organization entering a percentage order has permitted the Specialist to be on parity with the order;[59] (2) a purchase or sale of an ETF by a Specialist where the Specialist is on parity with another broker/dealer order pursuant to the Exchange's rules (*e.g.*, proposed Rule 126–AEMI); or (3) a purchase or sale of any security by a Specialist where the order is suspended in whole or part in AEMI because it has been sent to another market.

Rule 151–AEMI. "Open Outcry" Cross Transactions

Proposed Rule 151–AEMI would have a different title from current Amex Rule 151 to clarify that the subject matter is minimum price variations of trading in open outcry cross transactions, and additional language would clarify that the rule does not apply to cross orders entered into AEMI pursuant to proposed Rule 131–AEMI.

Rule 152–AEMI. Taking or Supplying Stock To Fill Customer's Order

Similar to the changes in the preceding rule, clauses (i) and (ii) of the proposed Rule 152–AEMI(a)(2) contain language that is not in current Amex Rule 152 in order to clarify that their provisions do not apply to cross orders entered into AEMI pursuant to proposed Rule 131–AEMI.

Rule 153–AEMI. Record of Orders

This proposed rule would add provisions that are not in current Amex Rule 153 that would apply the Exchange's record keeping requirements to proprietary systems of members or member firms that are approved by the Exchange and receive orders on the floor. In addition, certain references in the current rule to the After Hours Trading Facility, which would no longer exist under AEMI, are not included in the proposed rule.

Rule 154–AEMI. Orders in the AEMI Platform

Proposed Rule 154–AEMI has a different title from current Amex Rule 154 (which is titled "Orders Left With Specialist") on which it is based, and contains additional provisions that reflect the treatment of orders when AEMI is functional. Certain references in current Amex Rule 154 to the Specialist's role in accepting orders would no longer be applicable under AEMI and are not part of the proposed new rule.

Paragraph (a) of proposed Rule 154–AEMI would provide that a Specialist could accept only orders, cancellations, or amendments to orders that are received by him/her through AEMI and could not accept orders, cancellations, or amendments to orders that were handed to him/her in writing or communicated to him/her verbally.

Paragraph (b) of proposed Rule 154–AEMI would further clarify proposed Rule 131–AEMI with respect to the types of orders that would be acceptable under AEMI. It provides that the following order types, although acceptable on the Exchange, would not be accepted by AEMI: Not-held orders, company buy back orders with instructions to adhere to safe harbor conditions of Commission Rule 10b-ndash;18, stabilizing orders, sell orders to be executed under SEC Rules 144 and 145, and sell orders requiring delivery "with prospectus."

Paragraph (c) of proposed Rule 154–AEMI would prove that stop and stop limit orders to buy or sell a security whose price is derivatively based upon another security or index of securities would automatically be elected by a quotation in the circumstances specified after the order is received in the AEMI Book. The prior approval of a Floor Official would no longer be required. The paragraph further provides that a Specialist would have to obtain a Floor Official's approval before electing a stop order by selling stock to the existing bid or buying stock at the existing offer for his own account, but that such approval would not be required for ETFs or Nasdaq securities to which the Exchange had extended unlisted trading privileges. Other changes in paragraphs (d) through (i) of proposed Rule 154–AEMI would reflect the fact that certain orders would reside on the AEMI Book rather than being held by the Specialist.

Paragraph (j) of proposed Rule 154–AEMI would supplement proposed Rule 131–AEMI(m) and specify the treatment of percentage orders in AEMI. In addition to removing references to items that are not compatible with the electronic handling of these orders by AEMI—such as time stamping; orders being given to, held and handled by the Specialist; and the use of written instructions—the following changes to the treatment of percentage orders under current Rule 154 are being made:

- In a situation where the Specialist believes that percentage orders would interfere with the maintenance of a fair and orderly market, entry of percentage orders could be banned for a given security, with Floor Official approval, provided this were done before the start of the trading session.
- The Specialist could (but is not required to) manually convert (i) a percentage order to buy into a regular limit order for transactions effected on a "minus" or "zero-minus" tick or (ii) a percentage order to sell into a regular limit order for transactions effected on a "plus" or "zero plus" tick (these ticks, under these circumstances, being hereinafter referred to as "stabilizing ticks").
- AEMI would automatically convert a percentage order into a regular limit order to effect a transaction on a stabilizing tick when an incoming order creates a market that meets the values specified by the entering broker for: (i) Maximum spread between bid and ask; (ii) ratio between the Amex published bid size and the Amex published offer size; and (iii) size parameters listed in proposed Rule 131–AEMI(m) (*i.e.*, maximum conversion size per trade and aggregate maximum conversion amount for the order).
- If an entering Floor Broker were to specify that the Specialist could manually convert a percentage order to buy or sell into a regular limit order for transactions effected on destabilizing ticks (as defined in current Amex Rule 154), this would cause AEMI to automatically convert the percentage order to effect a transaction on a destabilizing tick when an incoming order creates a market that meets the values specified on the order.
- Consecutive automatic conversions would not occur until the passage of a specified period of time. This time period is set for a given security, and could be changed only before the start of the trading session.
- The 5,000-share minimum order size parameter specified in current Amex Rule 154 with respect to certain conversions is not included in the proposed rule.[60]
- In connection with the 25 cent parameter specified in clauses (4) and (7) of paragraph (j) with respect to certain conversions, this parameter could be modified for all percentage orders in a given security with the prior approval of a Senior Floor Official, provided any such change were made before the start of the trading session.

Note that an aggressing order could trade with an existing Specialist quote and this trade could elect a percentage

[59] An example of a situation in which a member who has entered a percentage order might permit the Specialist to be on parity with the order would be if the member was attempting to build a substantial position in a security (or liquidate such a position) and simply wanted to trade along with the Specialist for the day in a passive manner (*i.e.*, without causing price fluctuations). The liquidity provided by the Specialist would be the reason that the member might permit the Specialist to be on parity with the percentage order.

[60] *See* discussion above under proposed Rule 131–AEMI.

order, thereby making the latter eligible for immediate execution. However, if there were no remaining interest from the aggressing order, the elected percentage order would not participate in the trade, in whole or in part, at the price of the electing transaction and would revert back to its status as an unelected percentage order. Such a Specialist dealer trade (as well as a subsequent dealer trade if the percentage order had not been otherwise re-elected at that time) at the limit price of the percentage order would not be deemed a violation of Amex rules prohibiting "trading ahead" of a customer order because the percentage order was not eligible for execution at the time of the Specialist trade.

Rule 155–AEMI. Precedence Accorded to Orders Entrusted to Specialists

In proposed Rule 155–AEMI, the Exchange is revising the list of exceptions to the requirement that a Specialist must give precedence to orders in the Specialist Order Book in any security in which he is registered before executing at the same price any purchase or sale in the same security for an account in which he has an interest. The exceptions to the precedence requirement would be: (1) A purchase or sale of any security by a Specialist where the member or member organization entering a percentage order has permitted the Specialist to be on parity with the order; (2) a purchase or sale of an ETF by a Specialist where the Specialist is on parity with another broker-dealer order pursuant to proposed Rule 126–AEMI; or (3) a purchase or sale of any security by a Specialist where the order has been suspended in AEMI because it had been sent to another market pursuant to the rules of the Exchange. These same exceptions are discussed above under proposed Rule 150–AEMI.

Certain other Specialist obligations in Commentary .03 and .04 of the current Amex Rule 155 are not being included as part of the proposed rule because they would be performed by AEMI. References to orders received by the Specialist through the PER and AMOS systems, which would no longer be operative, are also not included in the proposed rule.

Rule 156–AEMI. Representation of Orders

This proposed rule would not include language that is in existing Amex Rule 156 regarding "at the close" orders because that language is duplicative of language regarding such orders that would be in proposed Rules 118–AEMI and 131–AEMI. A reference to a "switch order" in the current rule is also not included in the proposed new rule because this order type would no longer exist on the Exchange.

Rule 157–AEMI. Orders With More Than One Broker

This proposed rule, whose purpose is to prohibit deceptive practices in relation to competition, would prohibit a Registered Trader from maintaining a Crowd Order with a broker or maintaining an order on the Specialist Order Book while the Registered Trader is either bidding or offering for the security in the open outcry market, or is maintaining a bid or offer for the security in AEMI.

The Commentary to the proposed rule incorporates into the rules a policy approved by the Commission[61] and would require that, to ensure fairness in trading crowds, Registered Traders in a joint account could never trade in the same crowd at the same time. Registered Traders that have a relationship with the same member organization can, however, trade in the same crowd at the same time, but only if they had first demonstrated to the Exchange's satisfaction that they were not "affiliated" with one another. However, if two or more such related Registered Traders were to trade in the same crowd at the same time, they would be limited to the match they could get if there were only two of them in the crowd. Such related Registered Traders who wish to use this exception would have to submit to the Amex Membership Department complete documentation of their relationship to their member organization as well as their relationship to each other and explain why they believe they are not "affiliated." In addition, if two Registered Traders had a relationship with the same member organization, but were not affiliated with each other, those Registered Traders would not be permitted to trade in the same crowd at the same time if the member organization's share of their profits and/or losses exceeds "100%" of those profits and/or losses.[62]

Rule 170–AEMI. Registration and Functions of Specialists

In proposed Rule 170–AEMI, there would be a number of changes from current Rule 170 regarding the registration and functions of Specialists. A new paragraph (f) would allow a Specialist to "gap the quote" when a significant order imbalance exists. This could occur as a result of an order represented in the crowd or an incoming electronic order that had swept the book, disabled auto-ex, and left an unmanageable electronic imbalance in the security. In such a situation, the Specialist would display on the side of the imbalance a bid or offer equal to the price of the automated NBBO on the same side corresponding to the order causing the imbalance (*e.g.*, the automated national best bid for an aggressing buy order) and show the full size of the electronic imbalance or the order represented in the crowd (as the case may be). The Specialist would display one round lot for the contra-side size. The price of the contra-side quote would have to represent the Specialist's determination of the price at which the security would trade if no contra-interest developed or no cancellations occurred as a result of the gapped quotation. If the gapped quote were the result of an order represented in the crowd, the Floor Broker whose order imbalance had caused the quote to be gapped would be required to enter his order (*i.e.*, the side and size and the contra-side quote price) into AEMI immediately. The gapped quote would be non-firm. After publishing the gapped quote, the Specialist would be required to ask a Senior Floor Official or an Exchange Official to supervise the process. A gapped quote shall be displayed until offsetting interest is received electronically but shall not exceed two minutes.[63] While the quotation is gapped, orders, cancellations, and other messages would continue to enter AEMI, but would not update the APQ and no trades would occur. In addition, ITS commitments received from other markets during a gapped quote would be canceled. The Senior Floor Official or Exchange Official supervising the gapped quote process would determine whether: (i) To execute the orders immediately and terminate the gapped quote; (ii) to direct the Specialist to maintain the gapped quotation for no more than two minutes in order to allow time for contra-side interest to develop or cancellations to occur; or (iii) to halt trading in the stock. At the end of the two minutes from the initiation of the gapped quote, the Specialist, in consultation with the supervising Senior Floor Official or Exchange Official, must either conduct an auction trade and disseminate an automated

[61] *See* Securities Exchange Act Release No. 23145 (April 17, 1986), 51 FR 15564 (April 24, 1986) (File No. SR–Amex–86–9).

[62] The language of this entire paragraph, as provided in Amendment No. 4, was revised by Amendment No. 5.

[63] The language of this sentence, as provided in Amendment No. 4, was revised by Amendment No. 5.

quotation or trading should be halted in the stock.

In connection with the reduction or liquidation of an existing position in a security in which a Specialist is registered by a person or party that is affiliated with the Specialist or Specialist member organization, the new conditions for allowing such orders are that they must: (1) Not be identified to the Specialist as being for an account in which such persons or party has a direct or indirect interest, and (2) be represented by an independent broker. Amex believes that these changes are necessary because existing restrictions on such liquidations require that the orders be identified as being for an account in which the affiliated person or party has a direct or indirect interest. Under AEMI, such orders would not be able to be identified to the Specialist. The Exchange believes that this alternative approach is consistent with the operation of AEMI and provides adequate safeguards against abuses.

To facilitate the Specialist's continuity responsibility, AEMI would automatically update the Specialist's quote with a Specialist emergency quote based on parameters set by the Specialist. If a Specialist were displaying an automated quote and his mandatory quote were reduced to or below a configured size, a new quote would be automatically generated. This feature would be disabled if quotes are streamed in. Emergency quotes that were generated as a result of incoming order flow sweeping the AEMI Book would be injected into the sweep (if appropriately priced) so that the incoming order could receive price improvement.[64]

Commentary .01 of proposed Rule 170–AEMI (which would not apply to the trading of ETFs or Nasdaq securities trading UTP on the Exchange) would revise, and add more flexibility to (consistent with the new automated AEMI environment), the restrictions relating to a Specialist effecting transactions for his own account for the purpose of establishing or increasing a position. The types of transactions prohibited (except when reasonably necessary to render the Specialist's position adequate to the needs of the market; with the approval of a Floor Official; or under specified market conditions) would be:

- A purchase on the offer at a price above the last regular-way trade in the same trading session, or a sale short to the bid at a price below the last regular-way trade in the same trading session where permitted by the Commission's short sale rule;
- The purchase of all or substantially all of the stock offered on the AEMI Book on a zero plus tick, when the stock so offered represents all or substantially all the stock offered in the market;
- The supplying short of all or substantially all the stock bid for on the AEMI Book on a zero-minus tick where permitted by the Commission's short sale rule, when the stock so bid for represents all or substantially all the stock bid for in the market; and
- Failing to re-offer or re-bid where necessary after effecting the transactions described above.

Because of the time delays that are inherent in the process of obtaining Floor Official approval, however, Amex is adding a provision to Commentary .01 of proposed Rule 170–AEMI that would allow a Specialist to effect an auto-ex transaction without the approval of a Floor Official in the destabilizing tick situations described above if he: (i) Purchases on the Amex Published Bid (which must be equal to his bid) when his bid is accessed by an aggressing sell order; or (ii) sells on the Amex Published Offer (which must be equal to his offer) when his offer is accessed by an aggressing buy order.

Commentary .02 of proposed Rule 170–AEMI (which would not apply to the trading of ETFs or Nasdaq securities trading UTP on the Exchange) would revise, and add more flexibility to (consistent with the new automated AEMI environment), the restrictions relating to a Specialist's transactions for his own account in liquidating or decreasing his position in a security in which he is registered. Unless such transactions are reasonably necessary in relation to the Specialist's overall position and the prior approval of a Floor Official has been obtained, the Specialist could not liquidate a position by selling stock to the bid on a direct minus tick or by purchasing stock on the offer on a direct plus tick (equivalent to the restrictions on establishing or increasing a position described in Commentary .01 as described above). However, for the same reason discussed in the preceding paragraph, the Specialist would be permitted to effect an auto-ex transaction without Floor Official approval in the destabilizing tick situations described in the prior sentence if he: (i) Purchases on the Amex Published Bid (which must be equal to his bid) when his bid is accessed by an aggressing sell order; or (ii) sells on the Amex Published Offer (which must be equal to his offer) when his offer is accessed by an aggressing buy order.

Any selling of stock to the bid on a direct minus tick or a zero-minus tick, or the purchasing of stock on the offer on a direct plus tick or a zero plus tick would have to be effected in conjunction with the Specialist's re-entry in the market on the opposite side of the market from the liquidating transaction, where the imbalance of supply and demand indicates that the immediately succeeding transactions could result in a lower price (following the Specialist's sale of stock to the bid on a direct minus tick or a zero-minus tick) or a higher price (following the Specialist's purchase of stock on the offer on a direct plus tick or a zero plus tick).

Commentary .03 would clarify that a Specialist's quotation in an ETF or other derivatively priced security should be such that a transaction effected at his quoted price or within the quoted spread would bear a proper relation to the value of underlying or related securities.

In addition, Commentary .07 of proposed Rule 170–AEMI (which would not apply to the trading of ETFs or Nasdaq securities trading UTP on the Exchange) would require that, if a "net long" position were created as a result of a Specialist's maintenance of an investment position in a security in which he is registered while a short position in such security exists in his dealer account, the Specialist could not cover such a short position by purchasing on the offer in the full-lot market on a "plus" tick. In addition, he would also have to limit his purchase on the offer to no more than 50% of the security offered on a "zero plus" tick, and in no event could he purchase the final full-lot offered. Further, this section proposes to remove the stabilizing restriction on assigning stock to an investment account, since the ability to limit destabilizing transactions would be reduced in the AEMI automated environment.

Finally, proposed Rule 170–AEMI would not contain the language in Commentary .10 of current Amex Rule 170 relating to Quote Assist, since that facility would be replaced by AEMI.

Rule 174–AEMI. Disclosures by Specialists Prohibited

Paragraph (b) of current Amex Rule 174 allows the Specialist, when requested by a member, member organization, or representative of the issuer of the security involved, to disclose to such parties the names of buying and selling member organizations in Exchange transactions

[64] *See supra*, under "Quoting" for a discussion and related example of an emergency quote.

unless specifically directed to the contrary by the parties involved. Proposed Rule 174–AEMI would make this disclosure mandatory upon such request, except that it would involve only post-trade disclosure for transactions to which the Specialist were a counterparty due to the fact that, in AEMI, the Specialist would not know the entering firm on an order nor the parties to a trade unless he were a counterparty. Comment .01 to current Amex Rule 174 would then become redundant and is not included in proposed Rule 174–AEMI.

Paragraph (c) of proposed Rule 174–AEMI, regarding the disclosure of information by the Specialist about the quantity of buying or selling interest in the market, would contain provisions that differ from the corresponding provisions of current Amex Rule 174. The proposed new rule would provide that this information also includes the quantity of buying or selling interest on the AEMI Book, other than information about the reserve (undisplayed) size of reserve orders on the AEMI Book (which the Specialist must not disclose). The same prohibition against disclosure of undisplayed reserve order size is being made applicable to the dissemination of depth indication by the Specialist.

Rule 178–AEMI. Responsibility of Specialist

Proposed Rule 178–AEMI, which would address the responsibility of the Specialist in responding to member requests for reports on orders that were, or should have been, executed, is based on the provisions of current Amex Rule 178, modified to cover orders entered into AEMI. (Amex Rule 178 currently references only orders given to the Specialist.) Proposed Rule 178–AEMI would provide that a request for a report and any response thereto would have to be transmitted through AEMI. If a request for a report were not transmitted to the Specialist though AEMI, it would not be deemed to have been given to the Specialist and would be of no force or effect. Several provisions in current Amex Rule 178 and the related Commentary regarding paper requests and reports would no longer be applicable to securities traded in AEMI and are not part of proposed Rule 178–AEMI.

Rule 179–AEMI. Expiring Equity Securities

The provisions of proposed Rule 179–AEMI track those of current Amex Rule 179, except that references relating to orders entered on the Specialist's book have been changed to reflect the fact that orders would henceforth be entered into the AEMI Book. The proposed new rule also contains updated provisions relating to delivery prior to expiration.

Rule 200–AEMI. Odd-Lot Dealer Registration

Proposed Rule 200–AEMI would include certain references that differ from current Amex Rule 200 to reflect the fact that there would no longer be any separate odd-lot dealers on the Exchange and that the Specialist in an equity-traded security is the odd-lot dealer in that security.

Rule 205–AEMI. Manner of Executing Odd-Lot Orders

In proposed Rule 205–AEMI, the Exchange would replace its current approach regarding the execution of odd-lot orders (as reflected in Amex Rule 205) with completely new language based on NYSE's odd-lot rule (although not in its entirety), with additional references to AEMI, where appropriate. Additional provisions have been added in subparagraphs (b)(iv) and (b)(vi) regarding the use, under certain circumstances, of the "qualified national best bid or offer" [65] rather than the adjusted ITS bid or offer as under the current NYSE rule with respect to the execution price of odd-lot market orders not executed within 30 seconds of receipt by AEMI, or that are entered within 30 seconds of the close of trading and not executed prior to the closing transaction.

Existing Commentary in current Amex Rule 205 concerning sales erroneously not printed on the tape is not being carried over into the proposed rule because odd-lot executions would be completely automated under AEMI and the situation envisioned should not occur. Commentary .05 in the new rule adds a definition of "qualified national best bid or offer" for a security.

[65] The "qualified national best bid or offer" for a security is defined as the highest bid and lowest offer, respectively, disseminated (A) by the Exchange or (B) by another market center; provided, however, that the bid and offer in another such market center would be considered in determining the qualified national best bid or offer in a security only if (i) the quotation conformed to the requirements of proposed Rule 127–AEMI ("Minimum Price Variations"), (ii) the quotation did not result in a locked or crossed market; (iii) the market center were not experiencing operational or system problems with respect to the dissemination of quotation information; (iv) the bid or offer were "firm," that is, members of the market center disseminating the bid or offer had not been relieved of their obligations with respect to such bid or offer under Rule 602(b)(2) of Regulation NMS pursuant to the "unusual market" exception of Rule 602(a)(3) of Regulation NMS; and (v) the quotation disseminated by the other market center is automated.

Rule 206–AEMI. Prohibition of Round-Lot Transactions Merely for Purpose of Establishing Odd-Lot Prices

References to "odd-lot dealer" in current Rule 206 would be changed in the language of proposed Rule 206–AEMI to "specialist", as discussed above under proposed Rule 200–AEMI. The first paragraph of Commentary .01 to the proposed rule would differ from the language of the current rule through the addition of the phrase "to the bid" to the restrictive language incorporated from the existing rule concerning the sale of a round-lot as principal on a minus or zero-minus tick. Similarly, the second paragraph of Commentary .01 to the new rule would differ from the language of the current rule through the addition of the phrase "on the offer" to the restrictive language incorporated from the existing rule concerning the purchase of a round-lot as principal on a plus or zero-plus tick. These changes would align the restrictions with the changes being made in proposed Rule 170–AEMI regarding the prohibition on sales to the bid and purchases on the offer by the Specialist. These changes add more flexibility to the existing restrictions, which the Exchange believes is necessary and appropriate for the new automated AEMI environment. In addition, language has been added to the proposed new rule to clarify that Commentary .01 does not apply to Specialist transactions in ETFs.[66]

Rule 207–AEMI. Limitation on Electing Odd-Lot Stop Orders

References to "odd-lot dealer" in current Amex Rule 207 would be changed in the language of the proposed Rule 207–AEMI to "specialist", as discussed above under proposed Rule 200–AEMI. In the proposed rule, the phrase "to the bid" is being added to the restrictive language incorporated from the existing rule regarding the necessity for prior approval of a Floor Official to allow the Specialist to sell any round lot at a price below the last different price, and the phrase "on the offer" is being added to the corresponding restrictive language incorporated from the existing rule regarding the purchase of a round lot at a price above the last different price. These changes are consistent with the changes being made with respect to restrictions in proposed Rules 170–AEMI and 206–AEMI as discussed above, adding additional flexibility for

[66] Specialist transactions in ETFs and Nasdaq UTP securities are not subject to the restrictive provisions of proposed Rule 170–AEMI, so the changes being made to Commentary .01 of proposed Rule 206–AEMI are not applicable to ETFs and Nasdaq UTP securities.

the Specialist that the Exchange believes would be necessary and appropriate for the new automated AEMI environment.

Rule 220–AEMI. Communications to and on the Floor

Commentary .04 to proposed Rule 220–AEMI, concerning the Exchange's policies on hand-held terminals ("HHTs"), would contain provisions that update and extend the provisions incorporated from current Amex Rule 220 to cover other means of data communications technology as well (*e.g.*, desktop computers). Proposed Rule 220–AEMI would provide that Registered Traders must develop or secure for use HHTs that would allow them to: (1) Communicate their bids and offers to AEMI; (2) execute trades against orders, bids, and offers in AEMI; and (3) receive notifications from the Specialist regarding the Registered Trader's post-trade allocation. All clock sources would have to utilize millisecond increments and be synchronized to a Stratum-1 time source, and the Exchange would use industry standard radio frequencies for the wireless portion of the data communications infrastructure. A new requirement would be added that members and member organizations must ensure that there are sufficient firewalls in their systems to ensure that inappropriate communications are not sent to the Floor. The current restriction on image transmission through the data communications infrastructure would be eliminated under the proposed rule change.[67] Finally, the Exchange would require members and member organizations (and their employees or approved persons) that have developed HHTs to maintain a record of any transmissions to or from their HHTs.

Rule 719–AEMI. Comparison of Exchange Transactions

The proposed rule would contain several changes in the account-type codes from those in the current Exchange rule for equity transactions that must be submitted as trade data by each clearing member organization. Code letter "A", which previously was available for all agency customer accounts, would be available only for agency non-broker-dealer customer accounts. Several current codes for transactions that result from telephone access to UTP Specialists are not being included in the proposed rule, since transactions would no longer originate in that manner under AEMI. Finally, several new codes would be added in the proposed rule for stock transactions with respect to orders directly tied to expiring index-related derivative contracts.

Rule 1000–AEMI. Portfolio Depositary Receipts

Commentary .04 to proposed Rule 1000–AEMI would not include a paragraph that is in current Amex Rule 1000 requiring manual input for the entry of orders, as this requirement would not be compatible with the operation of AEMI.

Commentary .05 to current Amex Rule 1000 involving facilitation orders would not be included in the language of proposed Rule 1000–AEMI due to those orders being replaced by the operation of the rules on crossing orders.[68] Similarly, Commentaries .07 and .08 to current Amex Rule 1000 would not be included in the language of proposed Rule 1000–AEMI due to the fact that the current ETF parity and allocation rules would be replaced by the parity allocation methodology of proposed Rule 126–AEMI. A minimum price variation of $0.0001 for such quotes and orders[69] priced under $1.00 is being added to the proposed rule as provided for by Regulation NMS.[70] In addition, the proposed rule would provide that the minimum price variation for quotations and orders in a security that has been exempted by the Commission from Rule 612 of Regulation NMS would be the minimum price variation set forth in the Commission's exemption order for that security.

Rule 1000A–AEMI. Index Fund Shares

The same substantive changes from the language of current Amex Rule 1000A are being made to proposed Rule 1000A–AEMI involving Index Fund Shares as described above with respect to proposed Rule 1000–AEMI for Portfolio Depositary Receipts. Commentary .05 to proposed Rule 1000A–AEMI would not include a paragraph that is in current Amex Rule 1000A requiring manual input for the entry of orders; Commentary .06 to current Amex Rule 1000A would not be included in the language of proposed Rule 1000A–AEMI due to the proposed rules on crossing orders that would become effective at that time; and Commentaries .08 and .09 to Rule 1000A would not be included in the language of proposed Rule 1000A–AEMI due to being replaced by the parity allocation methodology of proposed Rule 126–AEMI. A minimum price variation of $0.0001 for such quotes and orders[71] priced under $1.00 is being added as provided for by Regulation NMS. In addition, the proposed rule would provide that the minimum price variation for quotations and orders in a security that has been exempted by the Commission from Rule 612 of Regulation NMS would be the minimum price variation set forth in the Commission's exemption order for that security.

Rule 1200–AEMI. Trading of Trust Issued Receipts—Rules of General Applicability

As with current Amex Rules 1000 and 1000A, the Exchange is proposing to exclude from proposed Rule 1200–AEMI certain language that is in current Amex Rule 1200 requiring manual input for the entry of orders, due to incompatibility with the operation of AEMI.

Rule 1200A–AEMI. Commodity-Based Trust Shares

As with current Amex Rules 1000 and 1000A, the Exchange is proposing to exclude from proposed Rule 1200A–AEMI certain language that is in current Amex Rule 1200A requiring manual input for the entry of orders, due to incompatibility with the operation of AEMI.

Rule 1200B–AEMI. Currency Trust Shares

As with Amex Rules 1000 and 1000A, the Exchange is proposing to exclude from proposed Rule 1200B–AEMI certain language that is in current Amex Rule 1200B requiring manual input for the entry of orders, due to incompatibility with the operation of AEMI.

Rule 1500–AEMI. Trading of Partnership Units

As with current Amex Rules 1000 and 1000A, the Exchange is proposing to exclude from proposed Rule 1500–AEMI certain language that is in current Amex Rule 1500 requiring manual input for the entry of orders, due to incompatibility with the operation of AEMI.

[67] An example of an image transmission would be a picture of a written time stamp of an order. The previous restriction was based on bandwidth limitations.

[68] *See* proposed Rules 126–AEMI, 131–AEMI(r), and 152–AEMI.

[69] In Amendment No. 5, the Exchange changed the language of this sentence that the minimum price increments apply to quotes and orders in a security.

[70] *See* proposed Rule 127–AEMI.

[71] In Amendment No. 5, the Exchange changed the language of this sentence that the minimum price increments apply to quotes and orders in a security.

Company Guide, Section 910–AEMI. Relationship With Specialist Procedures, Rules and Regulations

This section of the Amex Company Guide deals with the relationship between an issuing company and the Specialist in its securities. Proposed Section 910–AEMI contains language not in current Section 910 to reflect the fact that, under AEMI, orders would be transmitted to the Specialist through the Exchange's systems rather than manually or by telephone. The proposed section would also contain revised language in paragraph (d)(i) regarding prohibited disclosure by Specialists to conform to the corresponding provisions of proposed Rule 207–AEMI (discussed above).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Regulation NMS, as well as with Section 6(b) of the Act,[72] in general, and furthers the objectives of Section 6(b)(5),[73] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes the proposed rule change would impose no burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[72] 15 U.S.C. 78f(b).

[73] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received by the Exchange on this proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve the proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Amex–2005–104 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Amex–2005–104. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2005–104 and should be submitted on or before August 11, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[74]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 06–6357 Filed 7–20–06; 8:45 am]

BILLING CODE 8010–01–P

[74] 17 CFR 200.30–3(a)(12).

Federal Register

Friday,
July 21, 2006

Part V

Department of Agriculture

Animal and Plant Health Inspection Service

9 CFR Parts 55 and 81

Chronic Wasting Disease Herd Certification Program and Interstate Movement of Farmed or Captive Deer, Elk, and Moose; Final Rule

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 55 and 81

[Docket No. 00–108–3]

RIN 0579–AB35

Chronic Wasting Disease Herd Certification Program and Interstate Movement of Farmed or Captive Deer, Elk, and Moose

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are establishing a herd certification program to eliminate chronic wasting disease (CWD) from farmed or captive cervids in the United States. Participating deer, elk, and moose herds will have to follow program requirements for animal identification, testing, herd management, and movement of animals into and from herds. After 5 years of enrollment with no evidence of chronic wasting disease, a herd may be granted "Certified" status. Owners of herds may enroll in a State program that we have determined has requirements equivalent to the Federal program, or may enroll directly in the Federal program if no State program exists. We are also establishing interstate movement requirements to prevent the interstate movement of deer, elk, and moose that pose a risk of spreading CWD. These actions will help to eliminate CWD from the farmed or captive deer, elk, and moose herds in the United States.

DATES: *Effective Date:* October 19, 2006.

FOR FURTHER INFORMATION CONTACT: Dr. Dean E. Goeldner, Senior Staff Veterinarian, Ruminant Health Programs, VS, APHIS, 4700 River Road Unit 43, Riverdale, MD 20737–1231; (301) 734–4916.

SUPPLEMENTARY INFORMATION:

Background

Chronic wasting disease (CWD) is a transmissible spongiform encephalopathy (TSE) of cervids (members of Cervidae, the deer family) that, as of October 2005, has been found only in wild and captive animals in North America and in captive animals in the Republic of Korea. First recognized as a clinical "wasting" syndrome in 1967, the disease is typified by chronic weight loss leading to death. There is no known relationship between CWD and any other TSE of animals or people. Species known to be susceptible to CWD via natural routes of transmission include Rocky Mountain elk, mule deer, white-tailed deer, black-tailed deer, and moose. Noncervid ruminant species, including wild ruminants and domestic cattle, sheep, and goats, have been housed in wildlife facilities in direct or indirect contact with CWD-affected deer and elk, and as of June 2005 there has been no evidence of transmission of CWD to these other species. Additional studies to delineate the host range of CWD are underway.

In the United States, CWD has been confirmed in free-ranging deer and elk in Colorado, Illinois, Nebraska, New Mexico, New York, South Dakota, Utah, West Virginia, Wisconsin, and Wyoming, and, as of October 2005, in 31 farmed or captive elk herds in Colorado, Kansas, Minnesota, Montana, Nebraska, Oklahoma, South Dakota, and Wisconsin, and in 8 farmed or captive deer herds in New York and Wisconsin. The disease was first detected in U.S. farmed elk in 1997. It was also diagnosed in a wild moose in Colorado in 2005.

The Animal and Plant Health Inspection Service's (APHIS's) regulations in 9 CFR subchapter B govern cooperative programs to control and eradicate communicable diseases of livestock. In accordance with the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Secretary of Agriculture has the authority to issue orders and promulgate regulations to prevent the introduction into the United States and the dissemination within the United States of any pest or disease of livestock, and to pay claims growing out of the destruction of animals.

On December 24, 2003, we published in the **Federal Register** (68 FR 74513–74529, Docket No. 00–108–2) a proposal to amend 9 CFR subchapter B by establishing regulations in part 55 for a CWD Herd Certification Program to help eliminate chronic wasting disease from the farmed or captive deer and elk herds in the United States. Under that proposal, deer and elk herd owners who choose to participate would have to follow program requirements for animal identification, testing, herd management, and movement of animals into and from herds. We also proposed to amend 9 CFR subchapter B by establishing a new part 81 containing interstate movement requirements to prevent the interstate movement of deer and elk that pose a risk of spreading CWD.

We solicited comments concerning our proposal for 60 days ending February 23, 2004. We received 105 comments by that date, from cervid ranches, national and State cervid producer associations, national wildlife associations, State wildlife and agriculture agencies, and others. These comments are discussed below by topic. In response to these comments, APHIS has decided to amend the proposed rule by making the following changes:

- Adding moose to the animals covered by the regulations, in addition to deer and elk.
- Change the definition of *commingled, commingling* by replacing "30 feet of physical separation" with "10 feet of physical separation" and by eliminating the exception for animals in brief contact for less than 48 hours.
- Change the definition of *CWD-positive animal* to require two positive official CWD tests, rather than one.
- Change the definition of *CWD-suspect animal* to clarify that it would include animals that have tested positive to an unofficial CWD test.
- Change the definition of *herd plan* to specify that it must be signed by the herd owner, in addition to APHIS and the State, to emphasize the involvement of all three parties in a herd plan's development.
- Change the requirements for animal identification to require that free-ranging animals captured for interstate movement and release, like other farmed or captive cervids, must have two forms of animal identification, including one form with a nationally unique animal identification number. Add "or other identification approved by APHIS" to the list of allowed identification devices we proposed (electronic implant, flank tattoo, ear tattoo, or tamper-resistant ear tag).
- Change the interstate movement restrictions for farmed or captive cervids to exempt cervids moving directly to slaughter from the requirements of § 81.3, "General restrictions," when the sending and receiving States have agreed to the movement and certain other conditions are met.
- Change the responsibilities for herd owners participating in the program to require that they report animal deaths and make the carcasses available for testing for all animals 12 months and older, rather than 16 months as proposed. Also require herd owners to report any animals that escape or disappear.
- Change the inventory requirements for participating herds to specify that the "physical herd inventory with verification reconciling animals and identifications with the records maintained by the owner" must be conducted annually, rather than "upon request" as we proposed. Also change the inventory requirements to make it clear that the owner must present the

entire herd for inspection under conditions where the APHIS employee or State representative can safely read all identification on the animals. The owner will be responsible for assembling, handling and restraining the animals and for all costs and liabilities incurred to present the animals for inspection.

- Add a requirement that cervids held for research purposes may only be moved interstate under a USDA permit. In the proposal, such animals were completely exempt from the requirements of the rule.
- Make minor changes to improve clarity in other sections of the rule.

Comments on Definitions in the Proposed Rule

Approved State CWD Herd Certification Program

One commenter noted that although the term Approved State CWD Herd Certification Program appears in the regulations its meaning is not defined and must be derived from context. In response we have added a definition of this term that reads "A program operated by a State government for certification of cervid herds with respect to CWD that the Administrator has determined to meet the requirements of § 55.23(a)."

Definition of Farmed or Captive

Several commenters stated that when referring to cervids, the term "captive" should be changed to "privately owned," "domestic," or "farmed." They stated that the term captive implies the animal was captured from the wild, but cervid ranches and farms primarily contain animals born on a commercial premises. Some commenters stated that the words "captive" or "captured" have a negative connotation about the cervid industry.

We understand that producers that maintain herds of cervids that were born in captivity and do not deal in animals captured from the wild believe that their industry is properly associated with other livestock industries, and that there may be negative connotations in any term that associates them with the capture of wild cervids. However, some herds of domesticated elk or deer do in fact contain some animals captured from the wild. While this is becoming less common, if our certification program only addressed herds in which all animals were born into captivity, the program would exclude too many herds, reducing the program's effectiveness in controlling CWD. Many State CWD regulations and programs recognize the fact that a "captive" cervid may be either born into a herd or introduced into it from the wild. Some States, in their requirements for allowing cervids to enter the State, require that the cervid must come from a herd that has been monitored for CWD for at least 5 years under a State program, but do not require that the cervid must have been born into a captive herd; instead, they require that all animals in the source herd must be either natural additions or have been in the herd for at least 1 year.

We believe that to effectively control CWD our certification program must address not only cervid herds containing solely domesticated cervids born into herds, but also must address herds that contain one or more animals introduced from the wild, cervids captured from the wild and temporarily maintained in captivity, and cervids maintained by zoos and other exhibitors. Also, the term captive cervids is already in use in a number of other Federal regulations (e.g., 9 CFR Part 77—Tuberculosis, 9 CFR Part 50—Animals Destroyed Because of Tuberculosis, and 9 CFR Part 91—Inspection and Handling of Livestock For Exportation). It is also used in several State laws, regulations, and policy statements. Using an alternate term such as "domestic cervid" or "farmed cervid" in our certification regulations would be inconsistent and could cause confusion.

However, we do agree that incorporating the term "farmed" along with the term "captive" would emphasize the fact that many cervids are domestic animals born in captivity. Therefore, we are replacing the term "captive" with the term "farmed or captive" throughout the regulations. We are making no change to the definition itself, so in this final rule, the term *farmed or captive* will read as follows: "Privately or publicly maintained or held for economic or other purposes within a perimeter fence or confined area, or captured from a free-ranging population for interstate movement and release."

Definition of Commingled, Commingling

Several commenters stated that there is no scientific evidence supporting the idea that animals are commingled to the extent that disease transmission is possible when the animals are separated by less than 30 feet. These commenters stated that CWD transmission at this distance would be possible only through aerosol routes, and no evidence has ever been found that CWD passes via an aerosol spray from animal to animal. Commenters also stated that regulations for control of other diseases, e.g., tuberculosis, require separation of only 10 feet to prevent commingling.

Several commenters asked for clarification of how the commingling definition would apply to perimeter fencing issues, and whether a certified herd would lose its status (become an exposed herd) if its premises does not have a double fence with at least 30 feet between the fences and a wild cervid in the area is diagnosed with CWD. One commenter suggested that perimeter fences that maintain 30 feet of separation from wild animals should be clearly required for all farmed or captive cervid premises, because, otherwise, commingling with native animals could not be avoided, increasing both the risk that captive animals would contract CWD from free-ranging animals and the risk that farmed or captive animals would spread CWD to free-ranging native animals.

The term commingling is used in the regulations in two distinct contexts—that of temporary contact between animals (e.g., during sale or transport or at shows) and more long-term contact between animals (e.g., when an owner maintains two or more separate herds on one premises, in accordance with § 55.23(b)(5)). The criteria used to determine that commingling has occurred are especially important because if a herd was commingled with a CWD-positive animal, it can be declared to be a CWD-exposed herd.

We agree with the points made by several commenters that it would be both unnecessary and burdensome to say that animals are commingled if there is not a 30-foot buffer zone between animals at all times. We are changing this requirement in the definition of commingling to 10 feet of separation, and will make it clear that this separation distance is adequate for situations where animals are in temporary association, such as at auctions or during movement. We are making this change because our level of knowledge concerning transmission of CWD from animal to animal has increased since the proposed rule was written. In the proposed rule we stated "A buffer zone of 30 feet was chosen because in other APHIS disease control programs this distance has been shown to be effective in preventing aerosol transmission of infective agents from one animal to another. Because there is not yet a detailed model of how TSE's are transmitted, APHIS believes it is prudent to assume that they might spread short distances as aerosols, rather than only through more direct contact." Currrent evidence indicates that transmission is most likely to occur via an oral-fecal route, and that a 10-foot

buffer zone should prevent this. A buffer zone of 10 feet will prevent nose-to-nose contact, make accidental fecal contamination and transfer less likely, and is the standard distance we use to prevent ectoparasite transfer of other diseases. Ten to 12 feet is also the standard distance used for construction of alleyways on farms and animal holding facilities, so it will be relatively easy to comply with this standard when a producer needs to prevent commingling of animals.

However, we also believe that it is necessary for separate herds to have a buffer zone of more than 10 feet between them because risks of cross-herd contamination are increased when different herds are in close association for long periods. Therefore, in addition to changing "30 feet" to "10 feet" in the definition of *commingled, commingling*, we are also adding the following italicized words to the paragraph describing conditions for maintaining separate herds, § 55.23(b)(5): "If an owner wishes to maintain separate herds, he or she must maintain separate herd inventories, records, working facilities, water sources, equipment, and land use. There must be a buffer zone of at least 30 feet between the perimeter fencing around separate herds, and no commingling of animals may occur. Movement of animals between herds must be recorded as if they were separately owned herds."

Readers should note that this requirement that herds must be separated by 30 feet applies to cases where a single owner maintains separate herds, as well as to cases where different owners have adjacent herds.

Several commenters stated that since current scientific information indicates CWD is transmitted laterally, animal to animal, there is no basis for the "48-hour exemption." One commenter stated that all animals grouped together even briefly at a sale or auction should assume the status of the lowest program status animal in the group. Some commenters stated that the definition's exemption for animals commingled for less than 48 hours at sales or auctions is arbitrary, but if used, it should also apply to short-term commingling of animals outside sales or auction premises, when the owner can document that the commingling was for less than 48 hours.

A zoo association requested that APHIS establish an exemption similar to the 48-hour exemption for auctions and sales for zoo animals that briefly share holding or hospital pens for the purpose of cleaning enclosures or shifting animals.

The "48 hour exemption" exists in various forms in several other animal disease control programs, and is based on an assumption that transmission of disease between animals is most likely during periods of prolonged close contact. APHIS has reexamined this assumption with regard to CWD transmission, and has found that there are no completed studies of CWD transmission rates that definitively settle the question of what length of time contact between animals is needed before there is a significant risk of CWD transmission. Therefore, we are removing the "48 hour exemption" from the definition of *commingling*. We may address the risks associated with brief contacts again in future rulemaking if new studies of CWD transmission provide relevant data.

Commenters also noted that the rule did not clearly describe the actions APHIS would take to reduce a herd's program status if its animals commingled with animals from a lower-status herd. This reclassification of herd status becomes even more important now that we have eliminated the "48 hour exemption" for sales and auctions, where commingling is likely to occur. We agree that § 55.24, *Herd status*, does not sufficiently describe APHIS or State actions that may reduce herd status as a result of commingling. Therefore, we are adding a new paragraph § 55.24(b)(3) that reads: "If an APHIS or State representative determines that animals from a herd enrolled in the program have commingled with animals from a herd with a lower program status, the herd with the higher program status will be reduced to the status of the herd with which its animals commingled."

We expect the two changes discussed above—removing the "48 hour exemption" and adding an explicit process to reduce the status of commingled herds—will result in operational changes at sales, auctions, and other sites where animals are at risk of commingling. Owners will probably find it useful to plan animal grouping at such sites so that only animals with equal program status are grouped together.

Based on some of the comments about commingling, some readers appear not to understand that the term is used in the regulations for distinct and limited purposes related to contact with other farmed or captive cervids, and not related to exposure to wild cervids in a farm's vicinity. The concept of commingling is used when determining whether groups of animals on a single premises qualify as separate herds or not, when determining whether animals have been exposed to animals from a herd with a lower program status, and when determining whether animals in a suspect herd commingled with a CWD-positive animal, in which case the suspect herd will lose its program status and will be designated as a CWD-exposed herd. However, as discussed above regarding perimeter fence issues, there is nothing in the regulations that would reduce a herd's program status based on the lack of a 30-foot (10-foot, under this final rule) physical separation from animals in the wild. Although APHIS encourages double perimeter fencing, the requirement in the regulations is for single-fencing. In individual cases a herd plan developed to eradicate CWD from a CWD-positive herd, to control the risk of CWD in a suspect herd, or to prevent introduction of CWD into another herd, may specify double perimeter fencing for a particular herd, for example, when there is known CWD infection in adjacent captive or wildlife populations.

Definitions of CWD-Exposed Animal and CWD-Exposed Herd

One commenter pointed out that the defined terms for exposed animals and herds omitted cases where the exposure was not to a CWD-positive animal, but to a CWD-exposed animal (which may later prove to be CWD-positive). The commenter suggested creating and defining a term to cover such "exposed to exposed" contacts for epidemiology purposes.

We agree with the commenter that awareness of "exposed-to-exposed" contacts can help epidemiologic investigations and long-term tracking of patterns of CWD transmission. However, exposed animals and herds are already subject to restrictions under the regulations, and we do not believe that the regulations should impose any additional restrictions on "exposed-to-exposed" animals. We do plan to emphasize the importance of investigating "exposed-to-exposed" contacts in our nonregulatory guidance to APHIS and State veterinarians conducting epidemiologic investigations.

Definitions of CWD-Positive Animal and CWD-Positive Herd

Several commenters questioned the definition of a CWD-positive animal as one that "has had a diagnosis of CWD confirmed by means of an official CWD test." These commenters stated that at least two positive results from certified laboratories are needed to reliably identify a positive animal. The commenters said two tests should be required because they believe that errors in samples collected for CWD programs

have been found (e.g., mislabeling or collection of the wrong tissues) and that current CWD tests require evaluation of results in a manner that is subjective and may be subject to error. Some commenters stated that, after an animal tests positive, the owner should have the opportunity to have the sample's DNA matched to DNA from the owner's animal to prove that the correct sample was tested. One commenter added that a positive result on a CWD test is a major crisis to any deer farmer, and the expense of a second test and DNA verification is a small price to pay to ensure that the process has been free of human or other error.

We agree with the comments suggesting that a determination that an animal is CWD-positive should not be based on a single positive test result. We are amending the definition of *CWD-positive animal* to read: "An animal that has had a diagnosis of CWD confirmed by means of two official CWD tests." We expect that, in most cases, the first test would be conducted by a State, Federal, or university laboratory approved to conduct CWD official tests in accordance with § 55.8, and the second, confirmatory test would be conducted at the National Veterinary Services Laboratories (NVSL). In some cases, both the initial and confirmatory test may be conducted at NVSL.

With regard to DNA matching to confirm that positive samples are indisputably associated with the correct animal, we plan to allow such confirmation, at the owner's expense, when the owner of the CWD-positive animal requests it. DNA verification will be possible because our instructions on how to collect and submit tissue samples will require submission of all manmade identification devices on the animal, with part of the ear or skin to which they are attached, in a manner that preserves the chain of custody.

Definition of CWD-Suspect Animal and CWD-Suspect Herd

Several commenters suggested that it was not clear whether the phrase "laboratory evidence or clinical signs suggest a diagnosis of CWD" in the definitions of CWD-suspect animal and CWD-suspect herd meant that an animal or herd could be found to be CWD-suspect based on the results of unofficial CWD tests.

We planned to include unofficial CWD test results as an indicator in this definition. To clarify this, we are changing the relevant phrase in both definitions to read "unofficial CWD test results, laboratory evidence, or clinical signs suggest a diagnosis of CWD."

One commenter pointed out that the definition of *CWD-suspect herd* in § 55.1 said the determination could be made by "an APHIS employee or State representative," but the definition of *CWD-suspect animal* in § 81.1 mentions only "an APHIS employee." This was an inadvertent omission, and we have added "or State representative" to the definition of *CWD-suspect animal.*

Definitions of Deer, Elk, and Moose

Some commenters noted that the proposed definitions of deer and elk were imprecise or incomplete, and there was some confusion about when hybrid animals would be considered deer and when they would be considered elk. Several commenters asked why certain species were not included in either definition when there is no conclusive scientific evidence that the species are not susceptible to CWD. Commenters asked in particular about sika deer (Cervus nippon), sambar (Cervus unicolor), rusa deer (Cervus timorensis), barasingha (Cervus duvauceli), and Pere David's deer (Elaphurus davidiensis). Several commenters suggested that the definitions be expanded to include more deer and elk or other cervids.

We agree, and are replacing the term "deer and elk" with "deer, elk, and moose" and are defining the term to mean "all animals in the genera Odocoileus, Cervus, and Alces and their hybrids." This change expands coverage to all species of concern. This final definition was developed by identifying the species known to be susceptible to natural spread of CWD and then expanding coverage to the complete genera that include these species, under the assumption that related animals in a genus may share similar susceptibility to CWD even when all species in the genus have not been shown to be susceptible. We have expanded coverage to include moose (genus Alces) because CWD was recently diagnosed in a moose for the first time. We have not expanded coverage to genera in which no species has demonstrated susceptibility via natural routes of transmission. To do so would extend the requirements of this rule without a sound basis, unnecessarily increasing the burden on regulated parties, especially zoos with large and varied animal collections. We are prepared to extend the definition in the future if new research demonstrates additional species in other genera are susceptible to CWD by natural routes of transmission. This change should make it clear that the same program requirements apply to deer, elk, moose, and any hybrids of these animals.

Definition of Herd Plan

Several commenters addressed the part of the herd plan definition that said a herd plan, among other things, will specify "the time for which a premises must not contain cervids after CWD-positive, -exposed, or -suspect animals are removed from the premises." These commenters stated that there should be a permanent ban on raising cervids on any property that once contained CWD-positive animals, due to risks of environmental transmission of CWD.

We do not agree with these comments. The definition's language will allow a herd plan to prohibit cervids from a premises for an appropriate period based on the specific risks and conditions of the individual herd. Ongoing and future research may help resolve many questions about environmental transmission of CWD and establish reasonable standards for when it is safe to repopulate a previously contaminated premises. Establishing permanent restrictions on repopulating premises with cervids would be unnecessarily broad and harsh when, in most cases, tailored herd plans can be used to minimize both the risk of CWD transmission and the financial burden on owners of premises. The length of a ban on restocking may be stated as an actual time period in months or years, or it may be condition-dependent, e.g., a herd plan might prohibit restocking based on the presence or levels of CWD in surrounding herds or wildlife.

Some commenters suggested that the definition of a herd plan in part 55 should state that it must be approved and signed by all three involved parties—APHIS, the State, and the herd owner. As proposed, it seemed that the document was executed between APHIS and the State but affected the herd owner.

As described in the proposal, the herd plan will be developed with extensive input from the herd owner, because it will include procedures developed to address the particular risks and situation of a herd. We agree that, although the APHIS Administrator has the ultimate authority to determine that a herd plan is adequate, all three involved parties should approve and sign the herd plan. Therefore we have changed the language in the definition to state that a herd plan will become effective after "it has been reviewed and signed by the Administrator, the State representative, and the herd owner."

One commenter stated that the herd plan definition's requirement for "regular examination of animals in the herd by a veterinarian for clinical signs

of disease" was vague, and could mean veterinarians must examine animals once a year, every month, or any other frequency.

We intend to establish the frequency of veterinary examination for each herd in the body of the herd plan developed specifically for the herd. We did not specify a frequency in the rule because it will be set based on the particular circumstances and risk conditions associated with each herd.

A zoological association commented that the herd plan definition could impose a tremendous burden on zoos with its requirement for "reporting to a State or APHIS representative of any clinical signs of a central nervous system disease or chronic wasting condition in the herd." The association interpreted this to mean that zoo veterinarians would have to report every cervid that exhibits chronic weight loss or an unsteady gait, both of which are common in older animals.

We believe this commenter did not take into account that this requirement applies only to herds that are under a herd plan, and that most zoos will not be subject to herd plans. A zoo, like any herd, would become subject to a herd plan only after it is found to be CWD-positive, CWD-exposed, or CWD-suspect. This should happen to zoos only rarely, but when it does, it is important that all clinical signs that may indicate CWD be reported and investigated.

Consistency Between CWD Regulations and Other TSE Regulations

Several commenters stated that the regulations for CWD, BSE, and scrapie should have similar structures, accepted risk levels, and effects. They stated that TSE causal agents for each disease and their effects on ruminants are sufficiently similar to demand virtually complete compatibility between regulations. They said that the continuing risk of cross contamination between species also requires regulatory consistency. Another reason they provided for consistency between CWD, BSE, and scrapie regulations is that, without it, cervid producers may be subject to discriminatory, anti-farming regulatory pressures. Some commenters suggested that farmed or captive deer, and elk generally should be treated the same as other domestic livestock. Some commenters questioned why owners of farmed or captive cervids are expected to test 100 percent of on-farm mortalities, while owners of cattle (potentially affected by BSE) test very few on-farm mortalities and a fraction of downer animals sent to slaughter, and owners of sheep (potentially affected by scrapie) usually test only animals exhibiting clinical signs of scrapie.

In responding to these comments, we emphasize that the TSE diseases that affect different species of domestic livestock are not all the same disease. They have different modes of transmission and different pathogenicity, and taking these facts into account means that we cannot have the same approaches for all of our TSE programs and still attain our goals. At this point in time, the BSE program is a surveillance and prevention program, not a disease control program like the CWD certification program, and, as such, requires completely different standards and testing levels. The scrapie program, like the CWD program, is a certification program for an endemic disease. Where possible, we have tried to make the CWD program consistent with the scrapie certification program. However, several factors make it necessary that participants in the CWD program, unlike the scrapie program, must make all herd mortalities (over 12 months of age) and all animals sent to slaughter available for sample collection and testing. The most obvious reason for this difference is that two powerful surveillance tools are available to the scrapie program that are not available to the CWD program, a live animal test for scrapie and scrapie susceptibility genotyping.

The 5-Year Standard

Many commenters addressed the provisions of the rule that use a 5-year standard regarding risks of CWD. Some commenters questioned the part of these definitions that would classify an animal or herd as exposed based on contact with a CWD-positive animal anytime within the preceding 5 years. These commenters stated that including exposure that occurred 5 years before is not based on known risk or scientific fact, and suggested that a 3-year limit would be sufficient.

The 5-year standard is used in the definitions of *commingled, CWD-exposed animal,* and *CWD-exposed herd,* and the progress of a herd to "Certified" status also requires 5 years of monitoring without evidence of CWD. All of these uses assume that a cervid that contracts CWD will develop signs of the disease—in fact will almost certainly die from the disease—in less than 5 years. Based on that assumption, the rule requires investigation of an animal or herd's exposure to incidents within the past 5 years and, if a herd is continually monitored for CWD for 5 years without positive test results, the CWD risk in the herds is considered low.

All commenters agreed that the incubation period for CWD is less than 5 years. The key question for many commenters is, how much less? The expense of participating in the CWD program increases incrementally with the length of time required to reach "Certified" status. Also, with regard to exposure to CWD, many more animals and herds must be considered exposed if we consider exposure that happened 5 years ago than if we consider only exposures that happened in the past 2 or 3 years.

Many commenters suggested that a 3-year standard for exposure and for reaching "Certified" status is adequate and is justified by scientific research on the CWD incubation period. A few commenters also suggested either shorter or longer periods than 3 years for this standard. In addition to citing scientific research that supported an incubation period of from 24 to 34 months, some commenters also referred to State animal health agency records as supporting a 3-year standard. They stated that records of trace-back and trace-forward investigations of animals associated with CWD-positive herds did not show any cases where a CWD-positive animal acquired the disease more than 30 months prior to diagnosis. Some commenters stated that using a 5-year standard is arbitrary and simply incorporates a 2-year safety margin. Some commenters stated that certain existing State CWD programs allow animals to move into their States after only 3 years of monitoring for CWD.

We are not changing the 5-year standard in response to these comments. The choice of 5 years was made based on several factors, including the probable maximum incubation time for CWD and program design decisions about time spans realistically needed for all the participants in a herd certification program (Federal and State animal health personnel, cervid producers, laboratories, and others) to perform all the duties required of them.

The goal of the CWD certification program is to rapidly eliminate a disease that is not currently widespread in the farmed cervid industries. It will take much longer to achieve this goal if the program standards are set too low at the outset and must be made more stringent later; if, for example, we applied a 3-year standard at the outset only to find that it allowed CWD-positive animals to further spread CWD without being detected. Until there is definitive data to allow for less stringent measures, we must use a conservative approach based on current knowledge.

We agree that many studies suggest an average incubation period for CWD of

no more than 36 months. For example, a study [1] in captive elk at the Colorado Division of Wildlife, Foothills Wildlife Research facility, found that the average incubation period for elk in its herd that were naturally exposed to CWD in a contaminated environment was 26 months (range 18–36 months). However, in this same group of elk and in the same pens, there was a case of CWD in an individual animal that occurred 5 years after the last CWD death in the herd. This could have been the result of a later environmental exposure or it could represent a 5-year incubation period.[2] Preliminary reports from an ongoing APHIS and Agricultural Research Service research project in Ames, IA have also identified animals that did not show signs of disease until at least 4 years after infection, and animals that do not show signs of disease 4 years after infection but that test positive for CWD through unofficial tests such as rectal biopsy and the third eyelid test.

In pathogenesis studies [3] in mule deer and elk at the University of Wyoming, high dose oral inoculation produced an average incubation (from exposure to onset of clinical disease) of 23 months (range 15 months to >25 months) in mule deer. Similar work in elk showed the range of incubation was 12–34 months. The researchers acknowledged that experimental infections (single dose oral exposure to brain material) probably underestimates natural incubation times as it is likely that greater exposure results in shorter duration of incubation. In other words, experimental infections most likely represent the range of minimum incubation times. Maximum incubation times are not known but most likely exceed 25 months for mule deer and 34 months for elk.

For these reasons, we believe that incubation periods for low dose natural exposures may be longer than incubation periods for high dose oral inoculations used in most research. Based on the information we have now, the longest incubations likely fall between 3 and 5 years. This supports establishing the program with a 5-year timeframe for tracing animals and certifying herds to ensure the program locates CWD-positive animals.

We anticipate that research, monitoring, and surveillance will reveal more precise data about CWD transmission over the next few years. If new data support changing the 5-year standard, APHIS will initiate rulemaking to modify it.

Animal Identification

Many commenters addressed the proposed animal identification requirements. Some requested more flexibility in the type of approved identification so that producers could make better economic decisions about what type of identification worked best for their herds. We agree, and have added the phrase "or other device approved by APHIS" to the lists of approved identification devices (electronic implant, flank tattoo, ear tattoo, or tamper-resistant ear tag) in § 55.25, *Animal identification* and § 81.2, *Identification of deer, elk, and moose in interstate commerce.* We will approve alternative identification on a case-by-case basis as the program is implemented. The criteria for approving identification devices will be whether they provide permanent, secure identification, are cost effective, and are practical for those who must apply and read the devices.

Many cervid producers commented that the proposal to require two forms of official identification would be very burdensome, due to the expense and difficulty of assembling and restraining an entire herd to apply the devices. This involves high labor costs, risks of harming the animals, and, if tranquilizer darts are used, dart drug costs of $30 to $35 per animal. Some commenters suggested that APHIS could mitigate this burden by phasing in the two identification requirements over the first 2 or 3 years of program participation. Some commenters also suggested that a second form of official identification should only be required when animals are moved from an owner's premises, not for every animal in the herd.

We are making several changes to the animal identification requirements, discussed below, in response to these comments. We also intend to work with producers when they enroll in the program to allow them to apply the required animal identification at a time and in a manner that minimizes the burden on the producer, who is responsible for ensuring that animals are identified when required and for the costs associated with identifying the animals.

When applying identification devices, producers may be able to schedule identification activities at a time when they already need to restrain animals, such as the annual physical inventory, or may be able to apply identification to a few animals at a time over extended periods, or may find other ways to economize on the process. More information is being developed on flexible alternatives for accomplishing program requirements, including application of animal identification devices required by the program, and this information will be made available to the public when it is ready.

We are not eliminating the requirement for a second form of animal identification because accurate identification is a critical element of the program, and loss or obliteration of identification devices is quite common with cervids. A producer who can't logistically meet the identification and inventory standards will be unable to participate in the CWD Herd Certification Program. Participation must be contingent on ability to meet the requirements, or the program will lose effectiveness and industry confidence. Producers who want their herds to achieve "Certified" status may need to alter their management practices in order to meet program requirements.

However, we are changing the identification requirement so that only one of the two required identification devices attached to the animal must have a nationally unique animal identification number that is linked to that animal in the CWD National Database, where information on the animal's current herd may be cross-referenced. The other animal identification device need only be unique within the animal's herd; that is, it does not need a nationally unique number, but may instead merely identify the herd and distinguish different animals in the herd. Since the second means of animal identification is only required to be unique for the individual animal within its herd, this should allow continued use of most existing forms of animal identification as the required second means of identification.

To accomplish this change, we are separating the proposed defined term *official identification* into two new defined terms, *animal identification* and *official animal identification.* We are also retitling § 55.25, *Official identification,* as *Animal identification,* and are changing it as described below.

We define *animal identification* as a device or means of animal identification approved by APHIS for use under 7 CFR part 55. The definition also notes that examples of animal identification devices that APHIS has approved are listed in § 55.25.

We define *official animal identification* to mean devices or means of animal identification approved by

[1] Miller *et al.*, 1998 Epidemiology of Chronic Wasting Disease in Captive Rocky Mountain Elk, Journal of Wildlife Diseases, 34:532–538.

[2] Miller, personal communication.

[3] Williams et al. 2002. Chronic Wasting Disease of Deer and Elk. A Review With Recommendations for Management. Journal of Wildlife Management 66(3): 551–563.

APHIS to uniquely identify individual animals, with examples provided in § 55.25. The definition states that official animal identification must include a nationally unique animal identification number that adheres to either the National Uniform Eartagging System, the AIN (Animal identification number) system, a premises-based numbering system that uses an official premises identification number (PIN), or another numbering system approved by the Administrator for the identification of animals in commerce.

Revised § 55.25, *Animal identification,* now says that each animal required to be identified must have at least two forms of animal identification attached to the animal, that the means of animal identification must be an electronic implant, flank tattoo, ear tattoo, tamper-resistant ear tag, or other device approved by APHIS. The revised section states that one of the animal identifications must be official animal identification as defined, with a nationally unique animal identification number that is linked to that animal in the CWD National Database. The second animal identification must be unique for the individual animal within the herd and also must be linked to that animal and herd in the CWD National Database.

The nationally unique identification number and all the animal's identification data from the second form of identification will be entered into the CWD National Database. This will allow an authorized user of the CWD National Database to use either identification number to retrieve all information on the animal and its herd and premises.

The nationally unique identification number approach is consistent with the national animal identification system (NAIS) that APHIS is in the process of developing and implementing in cooperation with States and animal industries. The NAIS is intended to be an effective, uniform, consistent, and efficient national animal identification system. An overview of the NAIS is available at *http://animalid.aphis.usda.gov/nais/index.shtml.*

To make our CWD regulations consistent with the NAIS approach that is under development, we are also adding a definition recently added to other APHIS domestic livestock regulations. On November 8, 2004, we published in the **Federal Register** an interim rule concerning livestock identification and the use of numbering systems for identification devices (69 FR 64644–64651; Docket No. 04–052–1). The interim rule amended the APHIS regulations that address interstate movement of livestock (9 CFR parts 71, 77, 78, 79, 80, and 85). One purpose of the interim rule was to authorize use of an alternative numbering system for individual animal identification that assigns a unique number to each animal identified under the system, to encourage consistency with the NAIS. The interim rule included definitions of *animal identification number (AIN)* and *premises identification number (PIN),* which we are adding to the CWD regulations in 9 CFR parts 55 and 81. The definition of *animal identification number (AIN)* reads: "A numbering system for the official identification of individual animals in the United States. The AIN contains 15 digits, with the first 3 being the country code (840 for the United States), the alpha characters USA, or the numeric code assigned to the manufacturer of the identification device by the International Committee on Animal Recording." The definition of *premises identification number* reads: "Premises identification number (PIN). A unique number assigned by a State or Federal animal health authority to a premises that is, in the judgment of the State or Federal animal health authority, a geographically distinct location from other livestock production units. The premises identification number is associated with an address or legal land description and may be used in conjunction with a producer's own livestock production numbering system to provide a unique identification number for an animal. The premises identification number may consist of: (1) The State's two-letter postal abbreviation followed by the premises' assigned number; or (2) A seven-character alphanumeric code, with the right-most character being a check digit. The check digit number is based upon the ISO 7064 Mod 36/37 check digit algorithm."

This definition of AIN is added to clarify the sentence in the new definition of *official animal identification* that reads: "The official animal identification for an animal must include a nationally unique animal identification number, such as an AIN number." While the rule does not require use of an AIN—other nationally unique identification numbers can meet the requirement—we wanted to make it clear, in preparation for implementation of the NAIS, that NAIS-compliant individual animal identification will also meet the requirements of this CWD rule.

Some commenters suggested that the regulations should specifically "grandfather in" as animal identification any form of identification that is currently accepted by a State CWD program.

We are not giving blanket approval to all forms of identification currently used by a State CWD program because we may not be aware of the characteristics of all such devices in use, and a few may not be adequate for program purposes. We do expect to approve most, if not all, identification devices in use by State CWD programs, under the provision we are adding (discussed above) to allow identification by "any other device approved by APHIS."

Some commenters suggested that cervids captured from a free-ranging population for interstate movement and release should also be required to have two forms of animal identification because such animals are not regularly observed and hence are more likely to lose one form of identification between extended observation periods.

We agree, and we are changing the requirements for animal identification to require that free-ranging animals captured for interstate movement and release, like other farmed or captive cervids, must have two forms of animal identification, one of which must be official animal identification. We are making this change by removing the phrase "except for free-ranging animals captured for interstate movement and release in accordance with § 81.3(b), which must have at least one form of identification" from § 81.2, *Identification of deer, elk, and moose in interstate commerce,* and revising the phrase "has at least one form of official identification" in § 81.3(b) to read, "has two forms of animal identification, one of which is official animal identification."

Several commenters asked whether there was a specific age before which animals in participating herds must be officially identified.

The proposed rule did not establish a specific age by which animals must be identified. We did not do so because local herd conditions will affect both when identification is needed, and when it is practical to apply it. However, the commenters are correct that the rule should be more specific about when identification must be applied, both to help herd owners comply with the requirement and to ensure that the animals are officially identified before certain events that present risks of spreading CWD can take place, such as interstate or intrastate movement of the animal from the premises, which may result in exposure to other animals.

Therefore, we are adding the following sentences to paragraph (b)(1) of § 55.23, *Responsibilities of herd owners:* "All animals in an enrolled herd must be identified before reaching

12 months of age. In addition, all animals of any age in an enrolled herd must be identified before being moved from the herd premises. In addition, all animals in an enrolled herd must be identified before the inventory required under paragraph (b)(4) of this section, and animals found to be in violation of this requirement during the inventory must be identified during or after the inventory on a schedule specified by the APHIS employee or State representative conducting the inventory." We are using 12 months as the age by which animals must be identified because that age has been suggested before by industry members as a reasonable standard, and because the seasonal nature of livestock management means that herd management events where applying identification is feasible are likely to repeat on a 12-month cycle.

We expect that many herd owners will use the annual inventory process as an opportunity to apply animal identification to animals born into the herd in the prevous year. The Uniform Methods and Rules for the Chronic Wasting Disease Herd Certification Program (UM&R) describes other situations where owners may wish to apply identification at other times.

APHIS Authority To Regulate Wild Cervid Capture and Release

Several commenters stated that APHIS is overstepping its authority by regulating interstate movement of cervids captured and released from a free-ranging population. The commenters believe that any regulation of such movement should be under the authority of the respective State wildlife agencies. The commenters did not oppose requiring animal identification and documentation that such animals are free from CWD for such movements, but they did oppose including such requirements in APHIS regulations.

APHIS works cooperatively on CWD issues with many State wildlife agencies and will continue to do so. We rely on these agencies to apply and administer their State authorities over wildlife in support of mutual State-Federal goals for CWD control. We will work cooperatively with these agencies to achieve safe, low-risk movement of cervids captured and released from a free-ranging population. APHIS shares with State wildlife agencies the goal of avoiding the establishment of CWD in wildlife in new areas.

APHIS does not agree that we are exceeding our authority in applying regulatory requirements in an APHIS rule to the capture and release of cervids from a free-ranging population. The Animal Health Protection Act of 2002 ("the Act") grants the Secretary of Agriculture (and by delegation of authority, the Administrator of APHIS) ample authority to do so. Under the Act, the Secretary may prohibit or restrict the movement in interstate commerce of any animal if the Secretary determines that it is necessary to prevent the introduction or dissemination of any pest or disease of livestock.

Under the Act's definitions, it is clear that this authority extends to regulating the interstate movement of cervids captured from one free-ranging population for release in another such population. The Act broadly defines *animal* as "any member of the animal kingdom (except a human)," which includes wild cervids. The Act broadly defines *interstate commerce* to include "trade, traffic, or other commerce" between or through U.S. States, territories, and possessions. The act of capturing animals, moving them interstate, and releasing them falls within this scope. The Act's definition of *move* specifically covers, among other things, the act of transporting, and the act of releasing into the environment; both apply to the translocation of captured cervids. It is not uncommon for multiple governmental agencies to have authority over the same things or transactions for similar or different purposes. One agency having authority to regulate a thing or transaction for one purpose does not preclude another agency from having authority over the same thing for a similar or different purpose. This is especially true when dealing at different levels of government, but is also true when dealing within the Federal government or within a State's or other jurisdiction's regulatory scheme. Nothing precludes such multiple authorities over the same thing or transaction, if each agency exercising authority with regard to the thing or transaction in question has the requisite jurisdiction to do so. The Secretary (and by delegation of authority, the Administrator of APHIS) has clearly been granted that authority under the Animal Health Protection Act.

Applicability To Hunting Operations

Several commenters suggested that hunting ranches should be regulated in an alternate manner that recognizes the constraints that exist for these farms. According to the commenters, most hunting operations are very large premises that do not normally restrain their animals' movements within the premises, making identification and inventory very difficult. Commenters said that detection of incidental mortalities throughout the year in order to make tissues available for testing would be difficult and that dead animals in such facilities might not be located quickly enough to obtain samples suitable for testing. Commenters said that hunting operations are also seasonal, meaning that the requirement that all animals that die on the premises must be made available for testing would mean a flood of sampling for 4 to 5 months each year when hunters kill animals on the premises. They said that the volume of work during this period could adversely affect the quality of tissue collection, recordkeeping, and laboratory analysis. These commenters suggested that instead of the CWD Certification program as proposed, hunting operations could participate in a surveillance and monitoring program that was harvest-based, without strict animal identification and inventory requirements but including testing a statistical sample of each year's harvest for 3 to 5 years.

APHIS is willing to work with hunting premises owners and States to consider and evaluate suggested alternative approaches for hunting premises to meet program requirements. However, none of the approaches suggested in comments would be adequate to detect the presence of CWD with sufficient confidence to allow certification of the herd or to control the spread of CWD in hunting premises effectively. We believe that identification of all animals, an annual herd inventory, and extensive testing are the keystones of an effective CWD program, and these are the requirements that hunting premises owners asked us to reduce or eliminate. Alternative surveillance programs that sample a percentage of animals in hunting herds and that do not include identifying and inventorying all animals might ameliorate some concern about the presence of CWD, but we do not believe such an approach could provide the same degree of confidence that the CWD certification program requirements provide. If hunting premises owners want their herds to be certified, they must meet the requirements for the certification program.

Eligibility of Cervid Owners To Participate in the Program and Enrollment Dates

Some commenters suggested that CWD Certification Program participation should be limited to herd owners with no prior violations of State laws and regulations for livestock and animal care.

We agree with the spirit of this comment but believe that banning producers with "any violation" would

be too severe and could unnecessarily reduce participation in the program and program effectiveness. While sometimes APHIS officials may have information about relevant violations by applicants, we believe the enforcement and recordkeeping activities of State governments usually make them the best level to address questions about when particular producers have committed violations that indicate they are unlikely to comply with CWD Certification Program requirements fully and honestly. State veterinarians and other officials can address this question when deciding whether to admit a herd to their Approved State CWD Herd Certification Program or, in cases where there is no approved State program, the State veterinarians can still advise APHIS officials about violations by applicants applying to enter the Federal program directly. If an applicant has committed relevant violations, this may be cause to refuse consideration of the application if the violations are known at the time of application, or to deny the application if the violations are discovered later during evaluation of the application. To make this clear, we are adding the following sentence to § 55.22, *Participation and enrollment:* "An application for participation may be denied if APHIS or the State determines that the applicant has previously violated State or Federal laws or regulations for livestock, and that the nature of the violation indicates that the applicant may not faithfully comply with the requirements of the CWD Herd Certification Program."

Several commenters addressed procedures for "grandfathering" herds already in State CWD programs into the APHIS CWD Certification Program. Some believe that herds that have complied with a State program should be grandfathered in with the status they have achieved, even if their State program has not been designated as an Approved State CWD Herd Certification Program under APHIS regulations. Commenters stated that producers should not be penalized simply because their State, for whatever reason, did not, does not, or will not cooperate to get Federal recognition for the State program. Commenters also addressed the problem of "grandfathered" credit for herd owners who wish to enroll directly in the Federal CWD program because there is no State program available to them. Such owners may have maintained their herds for some time, in some type of voluntary individual or other non-State program, under conditions equivalent to the Federal program standards (animal identification, monitoring, testing of suspect animals, restrictions on animals added to the herd, etc.), and should receive some sort of credit for this.

We generally agree that herd owners should be given appropriate credit for time their herds were maintained under restrictions equivalent to those in the Federal CWD program, whether that time was spent enrolled in a State program that later becomes an Approved State CWD Herd Certification Program, in a State program that does not choose to apply to be approved, or in some other program that nevertheless applied the same sort of herd maintenance conditions. Whenever we evaluate an existing State CWD program that has applied for approval and participation in the National CWD Program, we will carefully compare the requirements of the program as followed by that State to determine that the State, and thus herds in good standing in the State's program, have met the minimum standards of our program. For herds in States that have not applied to become Approved State CWD Herd Certification Programs, appropriate credit will be granted for periods when the herd was complying with standards equivalent to the APHIS CWD Certification Program requirements, regardless of whether or not there is a State CWD program or whether the relevant State has formally requested status as an Approved State CWD Herd Certification Program.

However, we are imposing one limit on credit for herds that enroll directly in the Federal CWD program and have not participated in a State CWD program. If APHIS determines that the owner of such a herd has maintained the herd in a manner that substantially meets the conditions specified in § 55.23(b), the owner will be granted up to a maximum of 2 years' credit. That is, in cases where a herd directly enrolls in the Federal CWD program and the herd is given credit for participation in an individual or other non-State CWD program, the herd's enrollment date may not be set at a date more than 2 years prior to the date that APHIS approves enrollment of the herd.

We are prepared to grant unlimited credit for time spent in certain Approved State CWD programs but only a maximum of 2 years for time spent in an individual or other non-State CWD programs because State programs have the extensive infrastructure, enforcement mechanisms, and record systems that verify participation and support reasonable confidence that herds in these programs can fully meet the program requirements over long periods of time. While individual herd owners may also devise or join non-State programs that meet the necessary animal identification, monitoring, and other requirements, and their compliance may be documented through herd records and animal records in various State and market records collections, it is simply harder to establish with confidence that such herds comply with requirements over lengthy periods. We have chosen to limit the credit granted to such herds to 2 years because such a policy also has been used in the Canadian program for granting credit to herds.

One commenter stressed the importance of requiring that enrolling herds with pre-existing State status levels into the Federal program should be done only after inventory reconciliation with death records and review of mortalities and test results by APHIS to ensure that these "grandfathered" herds do, in fact, meet the same regulatory standards as the Federal program. We agree and intend to carefully evaluate existing State CWD programs and carefully compare the requirements of the program to the requirements of this rule before establishing herd enrollment dates and determining if herds may be enrolled at an advanced status.

Some commenters suggested that the granting of "grandfathered" credit should be something that occurs only during the early stages of program implementation. They suggested that it would be unwise to allow herds to enter the Federal program several years from now and to grant them credit for time the herds spent in some other type of CWD program, while at the same time the Federal CWD program existed and was available.

We agree. We have always intended that "grandfathered" credit be a transitional tool used in early stages of program implementation. Once the Federal CWD program and Approved State CWD Herd Certification Programs are fully implemented, they should be the only way to accrue program status because they will have the most extensive and reliable enforcement and records systems. To make this intent clear, we are stating in paragraph (a)(1)(i) of § 55.22, *Participation and enrollment*, that constructed enrollment dates (grandfathering) will be unavailable for herds that apply to enroll more than 1 year after the effective date of this rule, and the enrollment date for herds that apply after that date will be the date APHIS approves the herd participation.

In an issue similar to the grandfathering policy, the proposed rule did not clearly state how the enrollment date or the herd status would be set

when a newly-formed herd enrolls and the herd contains only animals from herds that were already enrolled in the Program. Throughout this rule a guiding principle is that the status of herds is determined by the lowest status animal contained in the herd. To make it clear that this also applies in situations where herds are formed using animals from herds that have already achieved some status in the program, we are adding the following language to the sections addressing enrollment dates and herd status.

In § 55.22(a)(1), *Participation and enrollment*, we are adding a new paragraph (ii) to read "For new herds that were formed from and contain only animals from herds enrolled in the CWD Herd Certification Program, the enrollment date will be the latest enrollment date for any source herd for the animals."

In § 55.24(a), *Initial and subsequent status*, we are adding the phrase "except that; if the herd is comprised solely of animals obtained from herds already enrolled in the Program, the newly enrolled herd will have the same status as the lowest status of any herd that provided animals for the new herd."

One comment noted that the proposal said a CWD-positive or -exposed herd may not apply to enroll, and suggested that it would be better to allow these herds to apply and develop a herd plan than to have them remain unmonitored and outside the system.

We agree that it would benefit program goals to include such herds. To do so, we are revising paragraph (a) of § 55.22, *Participation and enrollment.* The proposed first sentence of this paragraph read "Any owner of a captive deer or elk herd (except for CWD-positive herds, CWD-exposed herds, and CWD-suspect herds) may apply to enroll in the CWD Herd Certification Program by sending a written request to the State animal health agency, or to the veterinarian in charge if no Approved State CWD Herd Certification Program exists in the herd's State." We are removing the phrase "(except for CWD-positive herds, CWD-exposed herds, and CWD-suspect herds)." We are also adding the following sentence later in the paragraph: "If the enrolling herd is a CWD-positive herd or CWD-exposed herd, immediately after enrollment it must begin complying with a herd plan developed in accordance with § 55.24."

A zoological association recommended that those zoological institutions that possess reliable traceback capabilities on cervid necropsy samples should be grandfathered into the certification program with an enrollment date set at the date in which the first samples (if properly saved, stored, and representative of all cervid deaths in the collection) were obtained and archived.

We believe that the regulations as proposed will allow us to take such necropsy sampling evidence and other zoo disease control program activities into account when setting the enrollment date for zoos and similar institutions. There are several problems associated with enrolling zoos into the certification program, and the special circumstances associated with zoos may be the subject of future rulemaking addressing the certification program. For example, many zoos have not been considered eligible to enroll in State CWD programs and, consequently, there may be few State records documenting CWD monitoring at zoos. On the other hand, the records maintained by individual zoos for their disease control programs may sometimes provide documentation equivalent to State CWD program records. APHIS recognizes that most zoos have very active programs to prevent the spread of diseases such as CWD within their animal collections and to prevent the spread of disease to other sites when animals are removed from the zoo. If other program requirements have been met and documented by a zoo through appropriate recordkeeping, up to 2nd year status in the CWD Herd Certification Program can be granted.

Economic Effects

Several commenters questioned some of the figures and assumptions in the proposed rule's economic analysis. Most of these commenters expressed concern that the analysis underestimated the degree of adverse impact; some were concerned that the additional costs of program participation would drive many cervid producers out of business. Some commenters suggested the analysis overestimated the price owners can currently get when they sell animals, and underestimated the annual costs of compliance in estimating "increased direct costs totaling about $1,600 annually for the "average" elk herd owner (i.e., one with a herd of 50 elk)." One commenter stated that, based on his experience, it was possible to participate in his State herd surveillance program for CWD at an annual cost of a fraction of $1,600. Several commenters stated that herds participating in the program would be essentially unable to sell animals or do business for 5 years, until the herd achieved "Certified" status, and that herds could not survive without income for this long.

We used the best economic data available at the time the proposed rule was written. The cervid market is volatile, and some cost, price, and inventory data has changed since that time. We have updated the economic analysis for this final rule with data from several sources, including the 2002 Census of Agriculture. While some of the dollar estimates in the analysis have changed, its overall conclusion remains the same. The rule should have a positive economic effect on deer and elk farmers, both large and small, over the long term, with collateral benefits due to a decreased risk of spreading CWD from farmed or captive to wild cervids. There is currently no significant moose farming industry in the United States, and if one develops in the future, the economic effects of this rule on moose farming should be similar to its effects on deer and elk farming. The effects on herd owners will vary depending on their circumstances. In many cases the annual costs for an owner will not increase significantly because the herd is already participating in a State CWD program with similar requirements and costs. It is not true that participating herds will be unable to generate any income until 5 years pass, or until they are certified. First, many herds that participate will enter at a higher herd status than First Year because they retain their status from a State program when such programs are "grandfathered" into the Federal program. Second, participating herds that enroll at the beginning of the program and attain Second Year or above herd status can sell animals interstate to herds of an equal or lower status. Finally, this final rule establishes an exemption (discussed below) from the requirements of § 81.3 for animals moved interstate for slaughter.

Herd Owner Responsibilities

Numerous commenters addressed the description of the responsibilities of enrolled herd owners in § 55.23(b). One commenter stated that the requirement setting the minimum age over which animals that die are subject to testing at 16 months is arbitrary and unscientific. This commenter stated that, since infection seems to predominately emanate from calfhood, a more realistic age estimate is perhaps 9 months, and suggested that younger animals are carrying the disease but are just not being tested for it.

The proposed minimum age of 16 months (which is changed to 12 months in this final rule) was based both on testing practices in most existing State CWD programs and on average minimum incubation times observed in experimental inoculation of elk and deduced from surveillance records.

While we might be able to detect CWD in younger animals if all ages were tested, and while we would like to detect CWD as early as possible, the goals of the program are to control the spread of the disease through consistent and economically practical herd testing and certification over longer periods of time. Testing very young animals imposes additional costs on producers, States, and APHIS in exchange for additional epidemiological information of minimal value to the program goals. However, we agree that the best available scientific knowledge concerning the age when animals may be infected and the age that tests can reveal infection suggest that testing animals somewhat younger than 16 months could provide additional epidemiological data useful to controlling CWD. Therefore, we are changing the rule to require testing of animals 12 months or older. The 12-month standard is based on our best approximation of the point where the value of additional epidemiological information exceeds the costs to producers and to program administration of testing younger animals. We believe this standard will not significantly increase costs for producers. We also note that this change only affects activities after the effective date of this rule—that is, existing State programs that tested animals 16 months and older prior to this date will still be eligible to be "grandfathered in" as Approved State CWD Herd Certification Programs, provided they meet the other eligibility requirements.

One commenter suggested that, in addition to being required to report all deaths of herd animals, the owner should also be required to report all animals that escape or disappear. This would ensure program officials were aware when unusually large losses might indicate either the presence of disease or inaccurate recordkeeping. This would also allow the program to address the risks associated with reintroduction of an accidentally released deer or elk back into the farm. We agree, and have added this requirement to § 55.23(b)(3).

One commenter questioned the requirement that owners must make available for tissue sampling and testing the carcasses of all herd animals that die aged 16 months or older. The commenter stated that there needs to be an allowance for a percentage of mortalities not discovered in time to preserve the carcass. The commenter believes this should be allowed because CWD is highly contagious and missing a percentage of the herd should not result in the overall testing program missing the disease in the herd.

We do not agree with the reasoning of the commenter and do not think it is necessary to make any change to the rule in response to this comment. While a herd owner will be in violation of a requirement if he or she does not provide a carcass for testing, we realize that there may be certain situations where a herd owner will not be able to provide a fresh carcass or a high quality sample. Program officials have ample flexibility to deal with such situations without adversely affecting the enrolled herd's status.

Several commenters questioned the requirement in proposed § 55.23(b)(3) that the owner must "immediately report to an APHIS employee or State representative all animals that escape or disappear, and all deaths of deer, elk, and moose in the herd aged 16 months or older." The commenters suggested that the meaning of "immediately" be clarified, perhaps to mean "within 24 hours," and also asked for further details on what information should be included in such a report. A zoological association and a State agency also noted that hundreds of individual notifications could overwhelm APHIS and State personnel and suggested that, since there are many causes of mortality within farmed or captive cervid populations that involve nervous system complications and chronic weight loss unrelated to CWD, submission of periodic cervid mortality reports might be allowed for herds where CWD is not known to occur.

APHIS deliberately used the word "immediately" for the notification requirement because we want owners to notify the APHIS employee or State representative as soon as possible in every case. Immediate notification is required because the quality of tissue samples and related test results are directly related to the length of time that elapses between death and sample collection, and it takes time to arrange for sample collection after notification. We did not use a standard such as "within 24 hours" because in some cases owners may then wait nearly 24 hours to notify us, even if it was possible to notify us within an hour after the animal's death or disappearance was discovered. In enforcing the "immediately" standard, APHIS will allow for reasonable delays due to such things as the time it takes an owner to consult inventory records to determine the identity of the animal, or the possibility that the APHIS employee or State representative is not available to receive notice when the animal is discovered. For example, if a dead animal is discovered early in the morning, APHIS would expect to be notified that day, not the next; but if the animal were discovered late in the evening, and the APHIS employee or State representative had not supplied the owner a means of giving notice at any time (e.g., a 24-hour telephone number for notifications), then the next morning would be considered soon enough for "immediate notice."

Regarding the comment requesting what information should be contained in the notice, we have added in § 55.23(b)(3) a requirement that the notice must include the identification numbers of the animal involved and the estimated time and date of the death, escape, or disappearance.

In response to the zoological association and State agency's requests that periodic cervid mortality reports might be allowed instead of immediate notification in some cases, we believe that, in a very few situations, such arrangements might work depending on the particular situations of herds (including zoo collections) and their respective APHIS employees or State representatives. In this final rule, § 55.23(b)(3) provides that APHIS employees or State representatives may approve reporting schedules other than immediate notification when herd conditions warrant it in the opinion of both APHIS and the State. We are also willing to receive and evaluate suggestions for how the regulations could be changed in future rulemaking to provide additional flexibilities for cervid herds or collections in special circumstances that justify alternative approaches to issues such as animal mortality reporting.

To accomplish these changes, we are revising proposed § 55.23(b)(3) to read as follows: "The owner must immediately report to an APHIS employee or State representative all animals that escape or disappear, and all deaths (including animals killed on premises maintained for hunting and animals sent to slaughter) of deer, elk, and moose in the herd aged 12 months or older. A herd owner may make arrangements as to what constitutes immediate notification with the APHIS employee or State representative responsible for the herd, who may, at his or her discretion, allow delays in notification caused by extenuating circumstances such as weather or other conditions beyond the control of the herd owner. The report must include the identification numbers of the animals involved and the estimated time and date of the death, escape, or disappearance. For animals that die (including animals killed on premises

maintained for hunting and animals sent to slaughter), the owner must make the carcasses of the animals available for tissue sampling and testing. In cases where animals escape or disappear and thus are not available for tissue sampling and testing, an APHIS representative will investigate whether the unavailability of animals for testing constitutes a failure to comply with program requirements and will affect the herd's status in the CWD Herd Certification Program."

Herd Status, Suspension, and Appeals

Some commenters stated that the proposed procedure to appeal herd status decisions is unfair because the hearing would be held by the Administrator rather than an independent third party. One stated that "the herd plan suspension procedures are an invitation to litigation as the determination and hearing the appeal is made by the undefined Administrator who always has the last word." Commenters stated that this would not be considered fair by any farmer or producer, and suggested that APHIS should use more sophisticated arbitration procedures with independent third parties as judges.

The appeal and hearing provisions in § 55.24(c)(1) are virtually identical to provisions in other APHIS regulations, and meet the legal requirements for appealing decisions at the agency level. We believe that hundreds of previous administrative hearings conducted by APHIS provide ample evidence that the rules of practice employed by the Administrator for hearings provide a fair and impartial hearing opportunity. Herd owners who do not agree with the decision of the Administrator after a hearing can exercise their due process legal rights to pursue redress in Federal court.

One commenter stated that the requirement that herd owners must make their appeal in writing to the Administrator within 10 days does not allow owners sufficient time to gather the information that is required in the formal appeal. The commenter suggested that, after requesting a hearing, the owner should be granted additional time to organize a defense.

We believe that 10 days is sufficient time for herd owners to prepare a simple letter of appeal that states all of the facts and reasons upon which the herd owner relies to show that the reasons for the proposed action are incorrect or do not support the action. The form and content of the appeal letter do not need to follow any requirements for rules of evidence or legal briefs; the letter simply needs to state the basis for the appeal. If the appeal letter also identifies a conflict as to any material fact, then a hearing will be scheduled and the owner will have additional time to prepare for the hearing.

One commenter addressed the proposed requirement in § 55.24(b)(2)(ii) that a suspended herd that is reinstated into the program after a herd plan is developed for it "will be reinstated into the CWD Herd Certification Program at the First Year status level, with a new enrollment date set at the date the herd entered into Suspended status." The commenter stated that setting a new enrollment date for these herds and making them lose their accrued program status would often be unfair, because herds may be placed in Suspended status even if they faithfully comply with program requirements for several years. The commenter believed that time spent complying with program requirements without signs of CWD in the herd decreases the herd risk and should be reflected in the herd status. For example, consider a herd that has spent 3 years in the program and has complied with all identification, testing, and other requirements. Suppose that 6 months before joining the program, the herd acquired an animal from another herd, and the animal died shortly after arriving in the herds and was not tested. Today, APHIS discovers that the source herd for that animal is positive for CWD. Therefore, the herd that received an animal from it, and is now in Fourth Year status in the CWD Herd Certification Program, is suspended. If that herd is reinstated with a new enrollment date and First Year status, that amounts to saying that it has the same risk as a herd that is enrolling for the first time and which has absolutely no previous history of monitoring and testing for CWD. This is inconsistent with the principle in the rest of the rule that regulatory requirements should decrease proportional to the amount of time a herd has spent monitoring and testing for CWD.

We agree and have made corresponding changes to § 55.24(b)(2)(ii). The changes allow reinstatement of a Suspended herd with its original enrollment date if the herd is in good standing in the program and has complied with its requirements. All Suspended herds that are reinstated still must comply with a herd plan developed to address the possible risks that caused their suspension. The relevant new language reads: "the herd will be reinstated to its former program status, and the time spent in Suspended status will count toward its promotion to the next herd status level; Except that, if the epidemiological investigation finds that the herd has not fully complied with program requirements for animal identification, animal testing, and recordkeeping, the herd will be reinstated into the CWD Herd Certification Program at the First Year status level, with a new enrollment date set at the date the herd entered into Suspended status."

Interstate Movement Restrictions

Several commenters stated that it is critical that the regulations establish a consistent nationwide standard for interstate movement that preempts State rules where needed. For example, some States only allow entry of animals that have been monitored for 5 years, regardless of the status of the herd to which the animals are moved. They said that current State-established interstate movement requirements are inconsistent and often not based on science, and that it is difficult to make business plans when movement requirements vary from State to State.

This rule will preempt State requirements for movement of cervids into States to the extent that the State requirements are in conflict with this rule. In addition, we expect that all States with significant cervid industry will develop Approved State CWD Herd Certification Programs, meaning that their requirements will be consistent with those of the Federal program, i.e., that State programs will have similar definitions and applicability and will impose requirements that are consistent with the Federal program. With regard to requirements for moving cervids into a State, we believe the requirements of this rule provide appropriate protection against the risk of spreading CWD through such movements. The gradual increase in program status required by § 81.3 to move cervids interstate will mean that eventually all cervids moved interstate must be from herds that have reached "Certified" status, entailing at least 5 years of monitoring.

One commenter stated that allowing facilities to move animals before reaching "Certified" status will have two negative effects. First, it is a disincentive for herds to reach "Certified" status if they can move animals without doing so. Second, it encourages States to maintain their own, stricter, movement requirements if they believe movements from lower-status herds present risks.

We do not agree and believe the commenter has misstated the effects of the rule. There are significant limits on moving animals before a herd reaches "Certified" status. Animals may not be moved interstate while the herd is in

First Year status, and after that animals may only be moved to herds with equal or lesser status (the receiving herd reverts to the lower status). There is also the gradual escalation of the status required to move animals interstate, so that 63 months after this rule takes effect, only animals from certified herds may move interstate. We also believe that States will find it to their economic benefit to allow movement of cervids into their States as long as they are moving to herds of equal program status and, therefore, similar risk levels.

One commenter suggested that an interstate movement requirement in proposed § 81.3(a)(1)(ii), requiring that "the herd is accompanied by a certificate * * *" should read "the animals are accompanied by a certificate * * *" because whole herds are not usually moved interstate. We agree, and have corrected this misstatement in the final rule. The language is corrected to read "the farmed or captive deer or elk is accompanied by a certificate * * *" and is now located in § 81.3(a)(2).

Interstate Movement Restrictions—Exemption for Slaughter Animals

Many commenters stated that there should be an exemption to interstate movement restrictions to allow any cervid, whether or not enrolled in the program, to move interstate directly to slaughter. Some of these comments compared the risks of CWD to BSE, where younger animals may be moved to slaughter in the traditional feed lot and food chain situation because the age of the animals precludes significant risk.

Several commenters also suggested that cervids moved interstate for placement on a shooting preserve should be exempted from interstate movement restrictions if there were a guarantee that the animal would not come off the preserve alive.

In response to these comments, we have decided to create a partial exemption for animals moved directly to slaughter. We believe that doing so will not significantly increase the risk of spreading CWD since slaughter animals will be removed from contact with other animals, and we understand that increasing the opportunity to move animals to slaughter will provide economic relief for some owners. However, we need to monitor the movement of these animals to ensure that they do, in fact, move only to slaughter. We also wish to be kept informed when farmed or captive deer, elk, and moose are moved to slaughter, especially from herds not in the certification program or from herds that have not yet attained "Certified" status in the program, so we can arrange to collect samples for testing, as appropriate, from these higher-risk animals. Therefore, we are adding a new paragraph § 81.3(c) to the interstate movement restrictions section to allow farmed or captive deer, elk, or moose, regardless of whether or not their herds are enrolled in the certification program, or, if enrolled in the program, regardless of their status relative to movement requirements, to move interstate directly to a recognized slaughtering establishment for slaughter if they have two forms of animal identification and are accompanied by a certificate issued in accordance with § 81.4. The required certificate is similar to the certificate used to move animals in the certification program interstate, in that it states the animal identification numbers of each animal moved, the number of animals covered by the certificate, the purpose of the movement, the points of origin and destination, the consignor, and the consignee. A certificate used to move animals to slaughter differs from the certificate used to move certification program animals interstate in that it does not need to state that the animals are from a herd participating in the CWD Herd Certification Program. Instead, a certificate for movement to slaughter must state that an APHIS employee or State representative has been notified in advance of the date the animals are being moved to slaughter. This requirement will ensure that APHIS or the State can collect samples from these animals at slaughter when needed.

We are not creating an interstate movement exemption for cervids moved interstate for placement on a shooting preserve. Some commenters stated that the risk level of such animals is similar to that of slaughter animals, but the situations and risks are not similar. Animals moved to slaughter are kept from contact with other (nonslaughter) animals, and are slaughtered within a short time following movement. Animals moved to shooting preserves may live for years after movement and may come in contact with other domestic or wild cervids frequently during that time. The strong restrictions on slaughter animals result in lower risk levels than the minimal restrictions on shooting preserve animals. If exempted from the regulations' controls, movement of shooting preserve animals would present a continuing risk because there is no guarantee that the animal would actually be hunted and killed on the new premises—or if the animal has CWD, that it would be killed before spreading the disease. CWD positive animals inadvertently moved to a hunting premises could thus spread the disease to new populations of captive or wild animals, and without the paper trail created by interstate movement restrictions, Federal or State animal health officials would have no opportunity to prevent it, and might be unable to determine the source of the new disease locus.

We did determine, however, that we needed to provide, when the Administrator's evaluation of the specific circumstances of a herd justifies it, greater flexibility in the interstate movement regulations to allow for movement of animals from herds that have not attained "Certified" status but whose surveillance and mitigation procedures are adequate to prevent the spread of CWD. We are, therefore, adding a new § 81.3(e), which states that notwithstanding any other requirements in the rule, interstate movement of farmed or captive deer, elk, and moose may also be allowed on a case-by-case basis under permit as approved by the Administrator, provided that adequate survey and mitigation procedures are in place to prevent dissemination of CWD.

Recordkeeping and Inventory

Several commenters stated that the regulations should clarify how and by whom registration and certification records will be maintained. Some commenters also stated that they understood that an annual physical inventory of herd animals would be required, but they did not see this requirement in the section describing herd owner responsibilities. One commenter stated that, when the proposal discussed the need for a physical inventory of animals, there was no discussion of the owner's responsibility to ensure that State or APHIS representatives could conduct the inventory without substantial risk of injury to animals or workers. The commenter suggested that the final rule clarify the owner's responsibility to gather the herd and sufficiently restrain each animal to allow inventory and verification of identification.

The UM&R includes descriptions of the procedures we expect to employ for recordkeeping and the annual physical inventory. We have also slightly revised § 55.23(b)(4) to clarify the owner's responsibilities for recordkeeping and for the annual physical inventory. As revised, the paragraph reads: "The owner must maintain herd records including a complete inventory of animals that records the age and sex of each animal, the date of acquisition and source of each animal that was not born into the herd, the date of disposal and

destination of any animal removed from the herd, and all individual identification numbers (from tags, tattoos, electronic implants, etc.) associated with each animal. Upon request, the owner must allow an APHIS employee or State representative access to the premises and herd to conduct an annual physical herd inventory with verification reconciling animals and identifications with the records maintained by the owner. The owner must present the entire herd for inspection under conditions where the APHIS employee or State representative can safely read all identification on the animals. The owner will be responsible for assembling, handling, and restraining the animals and for all costs incurred to present the animals for inspection."

Reduced Testing Requirements for Certified Herds

Several commenters suggested that, instead of the proposed herd certification program, APHIS should implement a surveillance program that relies on statistical sampling of a fraction of the cervids that die or are sent to slaughter. Some suggested that this approach, coupled with a requirement that herds maintain good records on animal acquisitions, could be effective and much less burdensome, especially for hunting operations.

We are not making any change based on this comment. Partial surveillance of mortalities in a herd, whether of a portion of the natural mortalities, of slaughtered animals, or of a combination, is not an effective approach for identifying and controlling a very low prevalence disease like CWD. Our epidemiological analyses show that while these surveillance strategies, especially combined with slaughter testing, could identify some affected herds, the disease would likely spread faster than containment resulting from the commenter's proposed surveillance strategy. Effective control requires animal identification, monitoring, recordkeeping, surveillance of all mortalities of animals 12 months and older, and interstate movement restrictions for as many herds as possible.

Surveillance as an Alternative to Herd Certification

Two commenters noted that § 55.24(a) of the proposal stated that, when a herd reaches "Certified" status, testing is no longer required for animals that are sent to slaughter or are killed on the premises of hunting or "shooter" operations. The commenters stated that such testing is good continuing surveillance for CWD and recommended continued testing at a certain percentage.

We are not making any change based on this comment. While such testing is not required for animals in certified herds, the herd owners must still submit samples for all animals that die on the premises (not including animals killed by hunting as part of "shooter" operations or animals sent to slaughter). Testing these animals provides a better basis for continuing monitoring for CWD than would testing a percentage of random animals sent to slaughter or killed by hunters. Studies have shown that, when scrapie is present, it is found in a higher percentage of dead animals than in live animals, and we assume this is also the case with CWD, so testing all animals that die in a certified flock is likelier to disclose an outbreak than testing a percentage of all animals sent to slaughter or killed by hunters.

Perimeter Fencing Requirements

Several commenters asked for clarification regarding perimeter fencing requirements. They were unsure whether APHIS expected single fences, double fences for all herds, double fences in areas where CWD was endemic in wild cervids nearby, or something else.

The basic requirement of the regulation is for a single perimeter fence. As discussed above, two separate fenced areas with at least a 30-foot gap between them would be needed if an owner wanted to maintain two separate herds side-by-side. (See the discussion of the definition of *commingling* above.) Individual herd plans may also specify double perimeter fences for some herds, on a case-by-case basis, to address conditions such as CWD in nearby wild cervids or in farmed or captive cervids on adjacent premises. We plan to develop additional examples and guidance to help herd owners better understand this issue.

Program Administration

One commenter noted that proposed § 55.21, *Administration,* described the CWD Herd Certification Program as "a cooperative effort between APHIS, State animal health agencies, and deer and elk owners." The commenter suggested that State wildlife agencies also be mentioned, since the program involves cooperation with such agencies for the capture and release of wild cervids and other matters.

We agree and have changed § 55.21 accordingly. Cooperation with State wildlife agencies is an important part of the program, as described in the preamble of the proposed rule. We recognize that these agencies have regulatory authority for all or part of the farmed or captive cervids in some States.

Another commenter noted that proposed § 55.21 was the only part of the proposed rule that mentioned certifying herds as "free of CWD" and suggested that, consistent with the rest of the proposal, this reference should be to certifying herds as "low risk for CWD." We agree, and have made the requested change.

Research Animal Exemption

At least 10 commenters stated that the proposed requirements would be incomplete and ineffective if the rule exempted cervids at research facilities from all requirements, which would be the effect of the proposed definition of *captive.* These commenters stated that CWD is known to have spread from research animals to wild cervids, and probably to captive cervids, either through release or escape of research animals or contact between research and wild cervids. Commenters variously suggested that interstate movement of research animals should be "monitored and controlled" or "closely regulated" and that "their destination research facilities should be known." A commenter also stated that "an approval process should be identified" for research animal movement.

Although it is still unproven that CWD has spread from research animals to wild cervids in the past, we agree that research animals should not be totally exempted from movement requirements and have made changes to address this problem. We believe it would be unworkable to simply change the definition of *farmed or captive* to include research animals, and then allow research herds to enroll in the Certification program, due to the different nature and purpose of research herds. However, we can exercise close control over interstate movement of research animals by requiring a USDA permit for their movement. We have added this requirement to new § 81.3(d) of this final rule. We are also removing from the definition of *farmed or captive* the following sentence: "Animals that are held for research purposes by State or Federal agencies or universities are not included."

The new research animal permit requirement in § 81.3(d) states that the Administrator may issue a permit if he or she determines that the movement authorized will not result in the interstate dissemination of CWD, and requires applicants to submit the following information when applying for a permit: The name and address of

the persons seeking the permit, the persons holding the research cervids to be moved interstate, and the person receiving the cervids to be moved interstate; the number and type of cervids; the reason for the interstate movement; any safeguards in place to prevent transmission of CWD during movement or at the receiving location; and the date on which movement will occur. The new requirement also states that a copy of the research animal permit must accompany the cervids moved, and copies must be submitted so that a copy is received by the State animal health official and the veterinarian in charge for the State of destination at least 72 hours prior to the arrival of the cervids at the destination listed on the research animal permit.

State Responsibilities

Several commenters asked whether the scant availability of funds for program activities in various States could keep States from meeting their responsibilities under the proposed program. They stressed that if the program is to succeed, States need adequate funds to enforce quarantines, participate in developing herd plans, and conduct the necessary tracebacks.

We agree that active participation by States is important to the success of the certification program. That is why the description of State responsibilities in § 55.23(a) requires that States must have "effectively implemented" policies and programs to carry out the necessary quarantine enforcement, tracebacks, epidemiologic investigation, and other activities that rely on State involvement. If APHIS determines that a State has not devoted sufficient funds or personnel to perform these activities, APHIS will not be able to certify the State's CWD program as an Approved State CWD Herd Certification Program.

Executive Order 12866 and Regulatory Flexibility Act

This final rule has been reviewed under Executive Order 12866. The rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

For this final rule, we have prepared an economic analysis. The economic analysis provides a cost-benefit analysis as required by Executive Order 12866, as well as an analysis of the potential economic effects of this final rule on small entities, as required under 5 U.S.C. 604. The economic analysis is summarized below. Much of the data regarding the cervid industry was provided by the two major industry associations, the North American Elk Breeders Association (NAEBA) and the North American Deer Farmers Association (NADeFA). See the full analysis for the complete list of references used in this document. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**, or from this final rule's docket at the Federal Rulemaking Portal at *http://www.regulations.gov*.

Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Secretary of Agriculture is authorized to regulate the movement in interstate commerce of any animal if the Secretary determines it necessary to prevent the introduction or dissemination of a livestock pest or disease; to hold, seize, quarantine, treat, destroy, dispose of, or take other remedial action with respect to such animals; to carry out operations and measures to detect, control, or eradicate diseases of livestock; and to cooperate with States or political subdivisions of States in programs to control livestock diseases.

Alternatives Considered

In assessing the need for this final rule, we identified three alternatives. One was to maintain the status quo, where State efforts are supported by Federal technical assistance and compensation programs. We rejected this alternative because it does not fully address disease risk, i.e., the possibility of disease spread through interstate movement. The current patchwork of State regulations hinders movement of animals believed to be at low risk for CWD and hence hinders growth of the industry. Also, this alternative does not give herd owners in States that do not have certification programs the opportunity to participate in such programs if they so desire. The status quo alternative would have no cost effects for APHIS but over time would impose additional costs on herd owners, who would face costs due to loss of animals from increased spread of CWD, loss of interstate and international markets, and possibly increased compliance costs for stricter State CWD programs as States react to CWD spread.

Another alternative was to simply prohibit the interstate movement of deer, elk, and moose altogether, without establishing a Federal herd certification program. This alternative would not significantly increase costs to APHIS, and would help reduce costs due to loss of animals caused by disease spread through interstate movement. However, this alternative does not afford producers the opportunity to seek the best-paying market for their animals in any State. Accordingly, this alternative was rejected.

The third alternative, the one that we chose, was the establishment of a Federal herd certification program with interstate movement of animals contingent on participation in that program (with certain exceptions such as slaughter and research animals). This alternative substantially reduces the risk of exporting CWD from one state to another—because only deer, elk, and moose that have been subject to certain minimum surveillance criteria can be moved interstate—but at the same time allows producers the opportunity to seek the best-paying market for their animals. The costs and benefits of this alternative are discussed below.

Summary of Economic Analysis

This final rule will establish a CWD Herd Certification Program for farmed or captive deer, elk, and moose, and prohibit the interstate movement of deer, elk, and moose that are not enrolled in the program, with certain exceptions such as slaughter and research animals. Herds that participate will have to follow program requirements for animal identification, testing, herd management, and movement of animals to and from herds. Herd owners will be able to enroll in an Approved State CWD Herd Certification Program that meets minimum standards established by APHIS, or enroll directly in the Federal CWD Herd Certification Program if there is no approved State program in their location.

The following analysis is based largely on data collected from industry associations and sources of agricultural statistics, including census data. Prior to this rule, there were no Federal requirements regarding CWD for the interstate movement of deer, elk, and moose. However, at least 23 States have banned cervid introductions from other States, and at least 20 States have formal CWD certification programs for cervids in place, with requirements similar to the Federal requirements in this rule. The Federal program is designed to build on, rather than replace, existing State programs or State programs that are currently being developed. Herd owners in States that do not have an APHIS-approved program will be able to enroll in the Federal program.

This rule is intended to help eliminate CWD from farmed or captive cervids in the United States. It will support an existing APHIS program that pays indemnities to owners of CWD-positive herds who voluntarily depopulate their herds.

The final rule will primarily affect deer and elk farms and other cervid

facilities including zoos. In 2002 in the United States, there were an estimated 97,901 elk on 2,371 farms, and 286,863 deer on 4,901 farms. There are no known commercial moose farming operations, though some may emerge in the future. Without improved CWD control efforts, the disease could eventually infect almost all U.S. farmed or captive elk, deer and moose herds.

The final rule should have a positive economic effect on farmed and captive cervid operations, both large and small, over the long term. In the shorter term, the economic effect on deer and elk facilities will vary depending on the circumstances of each. Some operations, especially those who already participate in State programs and who take advantage of the increased access to out-of-State markets, should benefit immediately. Conversely, some operations could experience a significant adverse effect, especially those who cannot afford to pay the program's annual costs. However, given the available data, there is no basis to conclude that the final rule will have a significant negative economic impact on a substantial number of small entities in the short term.

The economic importance of the farming industries notwithstanding, the rule's primary benefits appear to lie in its ability to reduce the potential for the introduction or spread of CWD. However, it is difficult to translate that reduced potential into a dollar benefit.

The Deer, Elk, and Moose Industries and the Impact of CWD

The number of deer, elk, and moose in the United States that have died as a result of contracting CWD is unknown, largely because there is no way to track deaths among the free-ranging segment of the population. However, sampling has suggested infection rates ranging from less than 1 percent among wild white-tailed deer in Wisconsin to up to 15 percent among wild mule deer in northeastern Colorado. For farmed animals, the number of deaths directly attributed to CWD to date has been relatively low. However, for every infected animal, far more have been exposed to the disease.

Deer and elk are farmed for breeding stock, velvet antler, meat, and sales to game parks, hunting facilities, and exhibits. Velvet antler, considered a medical or dietary aid, is produced primarily for Asian markets. Deer and elk meat is a low-fat, low-cholesterol product, and when it is derived from farmed or captive herds (as opposed to meat harvested directly by hunters from wild populations) it is marketed primarily to gourmet restaurants, for consumption by health-conscious dieters. The breeding stock market satisfies the need for replacement animals.

The most recent census data shows that there were 97,901 elk on 2,371 U.S. farms in 2002. The number of elk per farm varies, from a high of "500 plus" (for commercial farms) to a low of about 10 (for hobby farms). The value of each elk held also varies, depending on the type of animal (e.g., bull, cow, or calf), market conditions, and other factors. The average value of each elk is roughly estimated at $2,000, with the typical high end value at about $5,000. (The more valuable trophy animals hunted on game farms tend to be worth more than this average.) Based on the estimated average of $2,000 per animal, the value of all 97,901 elk on U.S. farms is estimated at about $196 million (97,901 × $2,000). In 2001, gross receipts for members of the North American Elk Breeders Association (NAEBA), an industry group, totaled an estimated $44.3 million.

The most recent census data shows that, in 2002, there were 286,863 deer on 4,901 U.S. farms. The number of deer per farm varies, from a high of about 3,000 (for commercial farms) to a low of about 5 (for hobby farms). The value of each deer also varies, depending on such factors as the type of animal and market conditions. An earlier estimate by the North American Deer Farmers Association put the average per animal value of all deer on member farms at $1,687, which would make the estimated value of all 286,863 deer on U.S. farms about $484 million (286,863 × $1,687). As of January, 2002, capital investment (including land, fencing) in white-tailed deer farms totaled an estimated $2.5 billion.

Benefits of Rule

The final rule will benefit the national cervid industry, cervid product consumers, individual herd owners, and individual States. The effects on each are discussed below, and benefits for small businesses are directly addressed in the section "Analysis of the Economic Effects on Small Entities."

The interstate movement restrictions that allow only "program" deer, elk, and moose to be moved interstate will help to prevent the spread of CWD among both the farmed and wild populations. Participation in a certification program substantially reduces the risk of spreading CWD from one State to another, because only deer, elk, and moose that have been subject to certain minimum surveillance and other criteria can be moved interstate.

Preventing the spread of CWD among deer, elk, and moose benefits entities and individuals that rely on those animals for their income. These include cervid farms, State agencies that sell hunting licenses, and employees of motels and restaurants in hunting areas. It also benefits individuals that rely on those animals for recreation and food. A study by a sociologist in Wisconsin found that when the disease seems contained there is little hunter effect. However, if the disease becomes widespread, data in his study suggest that hunters will abandon the sport. Also, hunters from counties in which CWD-positive animals were found were more likely to skip the 2002 gun season than were hunters from non-CWD counties.

Preventing disease spread also offers the potential for other, more far-reaching benefits. Although there is no known relationship between CWD and other spongiform encephalopathies of animals or humans, bovine spongiform encepalopathy (BSE) has had an immense negative impact upon European livestock systems. Action by USDA on CWD will demonstrate to our trading partners the seriousness with which we view the prevention and control of these types of diseases.

The outbreak of CWD in wildlife and farmed herds has motivated States to restrict the movement of elk and deer into States; and to start programs to control the disease within States. Prior to this rule, the various States did not follow a standard interstate movement policy, nor were there standards to ensure equivalency between State CWD programs. This resulted in a failure to maintain a nationwide marketing system under which healthy farmed elk and deer can be bought and sold throughout the United States. Producers of elk and deer are, therefore, generally limited to sales in their local marketing areas. The lack of a Federal CWD program has also limited U.S. producers' access to international markets for products such as antler velvet.

Based on the rate of increase in the number of infected herds in recent years, it is estimated that, without improved CWD control efforts, the disease could eventually infect almost all U.S. farmed and captive elk herds. Large movements of animals between herds exacerbate risks of disease spread. In Canada, after CWD was discovered in 1996, movements of animals from one herd resulted in the infection of 38 other herds, which caused the Canadian Government to buy and destroy 7,400 animals. While it is risky to extrapolate from limited data covering only a few

years, the few herds studied in detail do suggest that CWD is easily spread through unrestricted commerce in deer and elk, and could readily become established in most U.S. herds. The rule, therefore, could serve to protect substantial cervid industry livestock assets, valued at an estimated $196 million for elk and $484 million for deer.

For farmers with infected cervids, the losses can extend far beyond the direct loss of livestock. They can also incur costs for the disposal of the animal carcasses, as well as costs for cleaning and disinfecting their premises. In some areas, positive animals have to be disposed of through costly incineration or digestion, since even landfills require a negative test before accepting a carcass for disposal. Perhaps most important of all, owners of infected herds may also face State-imposed quarantines and State-imposed restrictions on the subsequent agricultural use of their land, actions which many view as tantamount to closure.

Even farmers with animals that have not been infected or exposed to CWD are affected, as evidenced by recent action taken by the Republic of Korea. That country recently suspended all imports of deer and elk, and their products, from the United States, due to concern that there may be a link between CWD and other transmissible spongiform encephalopathies of animals or humans. The precise impact of Korea's suspension is unknown, because data that are compiled on U.S. exports do not provide the level of detail necessary to identify deer and elk and their products. However, New Zealand is a major competitor to U.S. producers in the area of deer antler exports to Korea, and in 2001 the value of New Zealand antler exports to Korea increased from NZ$34 million to NZ$37 million. In 1998, Canada, another major competitor, sold 100,000 kg. of elk velvet, worth about CA$13 million, to the Republic of Korea; Canada's sales dropped by 80 percent the next year, after CWD was introduced into Korea from Saskatchewan.[4] To the extent that the Federal certification program will reassure foreign trading partners that all State programs meet a standard for effectiveness, increased international sales are likely.

The rule's primary benefits are to help prevent the spread of and eradicate CWD in farmed deer, elk, and moose; assist efficient domestic elk and deer marketing; maintain and enhance export markets of cervid products; protect wildlife resources; and obviate the need for greater public and private expenditures related to CWD in the future. The introduction of an aggressive control program now, when the number of known infected herds is small, reduces the risk of higher future Federal eradication program costs, such as Canada faced in 1996 when it had no certification program and CWD infection in one herd quickly spread to 38 herds, causing 7,400 elk to be destroyed.

The rule also demonstrates to our trading partners that the United States is able and willing to take early and aggressive action to protect the health of its animal and animal industries, making it easier for U.S. exporters to negotiate access to foreign markets.

Costs of Rule

The final rule has cost implications for herd owners, individual States, and APHIS. The impact on each is discussed below, and cost effects for small businesses are directly addressed in the section "Analysis of the Economic Effects on Small Entities."

Cost for Herd Owners

Participation in a State, or Federal, certification program will require that herd owners employ certain minimum disease preventative measures established by APHIS. The cost to comply with these minimum requirements will vary among individual herd owners, depending on the circumstances of each. Many herd owners, especially the larger ones, are likely to already be in at least partial compliance with one or more of the requirements on a voluntary basis, since they constitute sound management practice. Perimeter fencing is a case in point. Most herd owners already have perimeter fencing in place, if for no other reason than to keep animals from escaping.

The certification program requires that herd owners must make available for sample collection and testing the carcasses of all dead deer, elk, and moose 12 months of age or older (including animals killed on hunting premises). Many herd owners will hire an accredited veterinarian to remove and submit the required tissue samples. Collecting a sample and packing it for submission usually takes under an hour. Veterinarians charge herd owners about $100 to collect each sample.

Participating herd owners will have to identify each animal uniquely, using two approved forms of identification, such as tattoos, ear tags, or electronic implants. Although many herd owners already identify their animals, only a few are likely to use two forms of identification. The cost of identifying an animal will vary, depending on the type of identification used and other factors, including any costs associated with "rounding up" the animals for installation of the identification. The rules allow for the multiple use of the same form of identification, so, conceivably, each animal could have two ear tags, potentially the least costly form of identification. Ear tags cost about $2 each. By comparison, veterinarians could be expected to charge herd owners at least about $25 to implant each microchip.

It has been estimated that the program's minimum disease preventative measures will result in increased direct costs totaling about $1,600 annually for the "average" elk herd owner (i.e., one with a herd of 50 elk), exclusive of any costs stemming from a CWD discovery within the herd. It is assumed that deer herd owners would face similar costs. The annual cost of $1,600 includes $1,000 for the annual inventory, $100 for the maintenance of program records, $250 for tagging, and $200 for sample collection by a veterinarian, and $50 for ancillary costs. The annual inventory cost of $1,000 assumes veterinary fees to "read" tags ($500) and hired labor ($500). The sample collection cost of $200 assumes that 2 animals over 12 months of age die per year. It is expected that the cost of sample collection will be less of a burden for hunting premises than for production or breeding herds, because of the relatively high per-animal profit margin for hunting premises, and because these businesses are already organized to pass on fees (e.g., for State-required tagging) to their customers. The price these premises charge to hunt an elk varies with the quality of the animal, and ranges from about $3,000 for a lesser-quality bull elk to about $10,000 for bull elk that score over 375 by the Boone and Crockett scoring system (i.e., an animal with an exceptional antler rack). Because these businesses generally schedule their hunts well in advance, it should be possible for them to schedule a veterinarian to collect samples at appropriate times without disrupting business or customer schedules.

Participating herds that are found to have CWD-positive or CWD-exposed animals will immediately lose their program status, and could reenroll only after entering into a herd plan. (A herd plan is a written herd management agreement, developed by APHIS with input from the herd owner, State

[4] Elk Production; Economic and Production Information for Saskatchewan Producers, Saskatchewan Agriculture and Food, November 2000.

representatives, and other affected parties, which sets forth the steps to be taken to eradicate CWD from a positive herd.) It is estimated that, in about 90 percent of herd plans, herd owners will agree to depopulate their herds, for which APHIS will pay eligible owners indemnities of up to $3,000 per animal. Two likely consequences for a positive herd are State-imposed quarantines that can last several years, and State-imposed restrictions on the repopulation of cervids on the same premises. Fortunately, herd infection is rare. As of October 2005, only 31 farmed elk herds and 8 farmed deer herds have been found positive, representing less than 2 percent of all elk farms and much less than 1 percent of all deer farms. We estimate that 20 currently infected elk herds will be detected over the next 2 years after this rule is adopted.

Finally, the certification program will establish herd status, based on the number of years of enrollment in the program with no evidence of disease. Herd status will affect the movement of animals, since additions from a herd with a later enrollment date will cause the acquiring herd to revert to the status of the herd from which the deer, elk, and moose were acquired. Herd status, therefore, will tend to make animals from lower status herds less valuable than those from higher status herds, due to the reduced marketability of the former. This will be an issue for new (or short-term) participants in a certification program. Because they would have little or no previous surveillance history, their herds would be accorded lower status, an action that would likely cause a decline in the market value of their animals. This effect will decline over time as herds accumulate years in the program. Also, the "grandfather" provision for Approved State CWD programs means that in many cases the time herds spent in a State program, prior to adoption of this rule, will count toward their program status. Herd owners who choose not to participate in a certification program could also face a loss in animal value, since participating herds will be less likely to acquire animals from nonparticipating herds, due to penalties.

Cost for States

After this rule is adopted, we expect that all States which permit cervid farming will participate by developing approved State CWD programs under the regulations. Many of these States will likely make participation mandatory for all in-State herd owners.

States that do establish a certification program will incur the costs of setting up and administering that program, including costs for the development of legislative/regulatory authority, surveillance and monitoring, recordkeeping and data sharing, disease research, and education and outreach to farmers. As a point of reference in this regard, it has been conservatively estimated that such costs for establishing and maintaining a CWD program for farmed elk will amount to $47,000 per State per year.

In addition, States may also incur costs stemming from a possible disease discovery, such as costs for: the maintenance of quarantines, diagnostic testing, disposition of positive/exposed herds, and carcass disposal. The costs associated with a discovery of the disease can vary significantly, depending on the number of animals in an affected herd, the herd plan developed to deal with the disease, the type of carcass disposal, and other factors. Based on the experience of 5 of the States with farmed elk that have tested positive for CWD, the cost of responding to a disease finding is estimated at $20,285 per herd, on average.

APHIS assists the States in their CWD eradication efforts by conducting testing and supporting surveillance and other activities that the States would otherwise have to fund themselves. Through fiscal year 2002, $17.3 million of Commodity Credit Corporation funding was transferred to APHIS for CWD eradication activities. In addition, $0.8 million of APHIS contingency funds were used for CWD eradication efforts. In FY 2003, APHIS received its first appropriated funding for CWD of $14.9 million. That figure was $17.8 million in FY 2004, $17.9 million in FY 2005, and $18.5 million in FY 2006.

Cost for APHIS

The direct costs APHIS will incur from this rule are the costs of approving and monitoring CWD programs established by States and the costs associated with establishing and administering a Federal program for herd owners who wish to participate but who are not located in States with programs. Both costs should be relatively insignificant increases, since APHIS already works closely with States on their CWD programs, and direct enrollment of herds into a Federal program is expected to be needed in no more than a few States with only a few cervid herds in each. APHIS may also incur some costs to the extent that it assists in the design and implementation of State programs that are established (or modified) in response to the rule.

APHIS' liability for indemnities could also be affected, if the newly established State programs result in the detection of more positive animals than would otherwise be the case. To date, APHIS has paid out more than $12.5 million for CWD indemnities.

Cost for Others

It is likely that many hunting operations may elect not to participate in the program, especially those with large premises that do not normally restrain their animals, a situation that makes animal identification and inventory difficult. For hunting operations, any negative impact of not participating in the program should be minimal. First of all, most hunting operations are animal importers, not exporters; hunting operations—as distinct from separate breeding operations located nearby that support the hunting operations—generally do not ship their animals interstate. Second, those who pay thousands of dollars to hunt at hunting premises generally are in search of trophy antlers, not food; accordingly, hunters who patronize hunting premises may not be as concerned about CWD as hunters elsewhere. The fact that hunting operations do not participate in the program, therefore, should not be a significant issue for most prospective hunters at those facilities, especially if the facilities conduct alternative surveillance and monitoring activities or if the States where the hunting operations are located require CWD testing.

The final rule also adds a new requirement that animals moved for research purposes must be moved under a USDA permit. Owners of research animals should be only minimally affected by the rule, since few, if any, research animals are moved interstate. Furthermore, the permit that owners of research facilities would need in order to move their animals interstate should be easily obtainable, since the permit application requires only rudimentary information regarding the movement, i.e., information that should be readily available to animal owners at no cost to them to generate.

Analysis of the Economic Effects on Small Entities

The Regulatory Flexibility Act requires that agencies consider the economic effects of rules on small entities. This final rule primarily affects deer and elk farms, because they are most likely to be affected by the program's requirements and the interstate movement restrictions.

We do not have details about the size of the 2,371 elk farms and 4,901 deer farms in the United States. However, it is reasonable to assume that most are small in size, under the U.S. Small Business Administration's (SBA) standards. This assumption is based on composite data for providers of the same and similar services. In 2002, there were 41,238 U.S. farms in NAICS 11299, a classification comprised solely of establishments primarily engaged in raising certain animals (including deer and elk but excluding cattle, hogs and pigs, poultry, sheep and goats, animal aquaculture, apiculture, horses and other equines, and fur-bearing animals). For all 41,238 farms, the per farm average gross receipts in 2002 was $39,868, well below the SBA's small entity threshold of $750,000 for farms in that NAICS category.

To the extent that the rule prevents the spread of—and perhaps eliminates altogether—CWD in farmed cervids in the United States, small herd owners should benefit over the long term. The rule will also provide herd owners with increased access to potentially better-paying out-of-State markets. By establishing equivalency between State programs, and replacing the current patchwork of State regulations, the rule will reduce the cost of complying with multiple sets of requirements and facilitate the safe movement of animals between States. Even herd owners who sell their animals in-State only stand to benefit, since the program reduces their disease risk when importing animals from other States.

The benefits, however, do not come without a price. As indicated above, it is estimated that the direct cost to satisfy the program's prescribed minimum disease preventative measures will total about $1,600 annually for the average elk herd owner (i.e., one with a herd of 50 elk), exclusive of any costs stemming from a CWD discovery within the herd. However, the annual cost does not appear to be particularly burdensome, since it is equivalent to 4 percent of the 2002 per farm average gross receipts for all U.S. farms in NAICS 11299 ($1,600/$39,868). Those herd owners who have the option and elect not to participate will avoid the program's annual costs but they will see the value of their animals discounted in the marketplace, since "non-program" animals will likely carry a stigma of inferiority. As discussed below, the discount is likely to exceed the program's annual cost for most herd owners, making participation mandatory from a practical economic standpoint for those who are not required by their respective State to participate.

According to NAEBA, all herd owners sell breeding quality animals, and it is not unusual for the average elk herd owner to sell 10 or more breeding quality animals per year, commonly in the range of between $2,500 and $5,000 per animal. NAEBA estimates that, with a Federal certification program in place, non-program breeding quality animals could be sold in-State for breeding purposes, but only at a discount of about 50 percent from their value as program animals. By electing to participate, therefore, the average elk herd owner would more than offset the $1,600 in added program costs with the sale of just 1 high value, or 2 low value, breeding animals per year. From an economic standpoint, therefore, most "elective" herd owners would be better off participating in the program than not participating.

The previous discussion assumes, of course, that the herd owners wished to continue in the cervid business. It is possible that the investment returns experienced by some herd owners are already so low that paying the added costs to join the program would not make economic sense. These herd owners, therefore, would effectively be forced out of the cervid business by the rule. The number of such herd owners is unknown but it is likely to be small, given that the added costs are equivalent to 4 percent of 2002 average annual gross receipts for farms in NAICS 11299, a category that includes deer and elk farms.

The presence of CWD in a herd is more likely to be detected if the herd is a participating herd, given the increased surveillance. For herd owners who are found to have positive animals, the negative impact of State-imposed quarantines and State-imposed restrictions on the repopulation of cervids on the same premises would likely more than offset the benefits of any indemnity payments. Indeed, it is very likely that most would elect to cease cervid production altogether. Fortunately for herd owners, the likelihood of a herd becoming infected has been rare, as only 31 farmed elk herds and 8 farmed deer herds have been found positive as of October 2005, representing less than 2 percent of all elk farms and much less than 1 percent of all deer farms in the United States in 2002. It is estimated that additional CWD-positive deer and elk herds will be detected over the next 2 years, after which a drop off in detection will occur. This drop off will be the result of reduced movement of infected animals between herds due to the program's operations.

All in all, the rule can be expected to have a positive economic effect on deer and elk farmers, both large and small, over the long term. In the shorter term, the economic effect on farmers will vary depending on the circumstances of each. Some farmers, especially those who already participate in State programs and who take advantage of the increased access to out-of-State markets, could benefit immediately. Conversely, a small number of farmers could experience a significant adverse impact, especially any farmers whose revenue is so small they cannot afford to pay the program's annual costs. There is no basis to conclude that the rule will have a significant economic impact on a substantial number of small entities.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are in conflict with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB) under OMB control number 0579–0237.

This final rule includes certain regulatory provisions that differ from those included in the December 2003 proposed rule. Some of those provisions involve minor changes from or additions to the information collection requirements set out in the December 2003 proposed rule. These changes include the following:

Two changes were made regarding animal identification requirements. One change required that free-ranging

animals captured, moved, then released must have two forms, rather than one form, of official animal identification. The other change set a definite age (12 months) by which animals in the certification program must first be officially identified. While the proposed rule required animal identification, these particular changes are new requirements in the final rule.

The final rule also requires a research animal permit for the interstate movement of cervids for research purposes. The permit contains information about the animals, their movement, and their destination and also specifies any special conditions of the movement determined by the Administrator to be necessary to prevent the dissemination of CWD.

Estimate of burden: The public reporting burden for the new or changed collections of information is estimated to average 0.4 hours per response.

Respondents: Federal and State wildlife management agencies, researchers, universities, and any other parties who move and release wild cervids or move cervids for research purposes.

Estimated annual number of respondents: 12.

Estimated annual number of responses per respondent: 15.

Estimated annual number of responses: 180.

Estimated total annual burden on respondents: 72 hours.

Government Paperwork Elimination Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. For information pertinent to GPEA compliance related to this rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

List of Subjects

9 CFR Part 55

Animal diseases, Cervids, Chronic wasting disease, Deer, Elk, Indemnity payments, Moose.

9 CFR Part 81

Animal diseases, Cervids, Deer, Elk, Moose, Quarantine, Reporting and recordkeeping requirements, Transportation.

■ Accordingly, we are amending 9 CFR chapter I as follows:

PART 55—CONTROL OF CHRONIC WASTING DISEASE

■ 1. The authority citation for part 55 is revised to read as follows:

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

■ 2. Section 55.1 is amended as follows:
■ a. By removing the definition of *captive.*
■ b. In the definition of *herd,* by removing the words "A group of animals" and adding in their place the words "One or more animals".
■ c. By revising the definitions of *animal, CWD-exposed animal, CWD-positive animal, CWD-suspect animal,* and *herd plan* to read as set forth below.
■ d. By adding definitions for *animal identification, animal identification number (AIN), Approved State CWD Herd Certification Program, commingled, commingling, CWD-exposed herd, CWD Herd Certification Program, CWD-source herd, CWD-suspect herd, deer, elk, and moose, farmed or captive, herd status, official animal identification, premises identification number (PIN), trace back herd,* and *trace forward herd,* in alphabetical order, to read as set forth below.

§ 55.1 Definitions.

* * * * *

Animal. Any farmed or captive cervid.

* * * * *

Animal identification. A device or means of animal identification approved for use under this part by APHIS. Examples of animal identification devices that APHIS has approved are listed in § 55.25.

Animal identification number (AIN). A numbering system for the official identification of individual animals in the United States. The AIN contains 15 digits, with the first 3 being the country code (840 for the United States), the alpha characters USA, or the numeric code assigned to the manufacturer of the identification device by the International Committee on Animal Recording.

* * * * *

Approved State CWD Herd Certification Program. A program operated by a State government for certification of cervid herds with respect to CWD that the Administrator has determined to meet the requirements of § 55.23(a).

* * * * *

Commingled, commingling. Animals are commingled if they have direct contact with each other, have less than 10 feet of physical separation, or share equipment, pasture, or water sources/watershed. Animals are considered to have commingled if they have had such contact with a positive animal or contaminated premises within the last 5 years.

CWD-exposed animal. An animal that is part of a CWD-positive herd, or that has been exposed to a CWD-positive animal or contaminated premises within the previous 5 years.

CWD-exposed herd. A herd in which a CWD-positive animal has resided within 5 years prior to that animal's diagnosis as CWD-positive, as determined by an APHIS employee or State representative.

CWD Herd Certification Program. The Chronic Wasting Disease Herd Certification Program established by this part. This program includes both herds that are directly enrolled in the CWD Herd Certification Program and herds that are included based on their participation in Approved State CWD Herd Certification Programs.

CWD-positive animal. An animal that has had a diagnosis of CWD confirmed by means of two official CWD tests.

* * * * *

CWD-source herd. A herd that is identified through testing, tracebacks, and/or epidemiological evaluations to be the source of CWD-positive animals identified in other herds.

CWD-suspect animal. An animal for which an APHIS employee or State representative has determined that unofficial CWD test results, laboratory evidence or clinical signs suggest a diagnosis of CWD, but for which official laboratory results have been inconclusive or not yet conducted.

CWD-suspect herd. A herd for which unofficial CWD test results, laboratory evidence, or clinical signs suggest a diagnosis of CWD, as determined by an APHIS employee or State representative, but for which official laboratory results have been inconclusive or not yet conducted.

Deer, elk, and moose. All animals in the genera Odocoileus, Cervus, and Alces and their hybrids.

* * * * *

Farmed or captive. Privately or publicly maintained or held for economic or other purposes within a perimeter fence or confined area, or captured from a free-ranging population for interstate movement and release.

* * * * *

Herd plan. A written herd and/or premises management agreement developed by APHIS in collaboration with the herd owner, State representatives, and other affected parties. The herd plan will not be valid

until it has been reviewed and signed by the Administrator, the State representative, and the herd owner. A herd plan sets out the steps to be taken to eradicate CWD from a CWD-positive herd, to control the risk of CWD in a CWD-exposed or CWD-suspect herd, or to prevent introduction of CWD into that herd or any other herd. A herd plan will require specified means of identification for each animal in the herd; regular examination of animals in the herd by a veterinarian for clinical signs of disease; reporting to a State or APHIS representative of any clinical signs of a central nervous system disease or chronic wasting condition in the herd; maintaining records of the acquisition and disposition of all animals entering or leaving the herd, including the date of acquisition or removal, name and address of the person from whom the animal was acquired or to whom it was disposed; and the cause of death, if the animal died while in the herd. A herd plan may also contain additional requirements to prevent or control the possible spread of CWD, depending on the particular circumstances of the herd and its premises, including but not limited to depopulation of the herd, specifying the time for which a premises must not contain cervids after CWD-positive, -exposed, or -suspect animals are removed from the premises; fencing requirements; selective culling of animals; restrictions on sharing and movement of possibly contaminated livestock equipment; premises cleaning and disinfection requirements; or other requirements. A herd plan may be reviewed and changes to it suggested at any time by any party signatory to it, in response to changes in the situation of the herd or premises or improvements in understanding of the nature of CWD epidemiology or techniques to prevent its spread. The revised herd plan will become effective after it is reviewed by the Administrator and signed by the Administrator, the State representative, and the herd owner.

Herd status. The status of a herd assigned under the CWD Herd Certification Program in accordance with § 55.24, indicating a herd's relative risk for CWD. Herd status is based on the number of years of monitoring without evidence of the disease and any specific determinations that the herd has contained or has been exposed to a CWD-positive, -exposed or -suspect animal.

* * * * *

Official animal identification. A device or means of animal identification approved for use under this part by APHIS to uniquely identify individual animals. Examples of approved official animal identification devices are listed in § 55.25. The official animal identification must include a nationally unique animal identification number that adheres to one of the following numbering systems:

(1) National Uniform Eartagging System.

(2) Animal identification number (AIN).

(3) Premises-based number system. The premises-based number system combines an official premises identification number (PIN), as defined in this section, with a producer's livestock production numbering system to provide a unique identification number. The PIN and the production number must both appear on the official tag.

(4) Any other numbering system approved by the Administrator for the identification of animals in commerce.

* * * * *

Premises identification number (PIN). A unique number assigned by a State or Federal animal health authority to a premises that is, in the judgment of the State or Federal animal health authority, a geographically distinct location from other livestock production units. The premises identification number is associated with an address or legal land description and may be used in conjunction with a producer's own livestock production numbering system to provide a unique identification number for an animal. The premises identification number may consist of:

(1) The State's two-letter postal abbreviation followed by the premises' assigned number; or

(2) A seven-character alphanumeric code, with the right-most character being a check digit. The check digit number is based upon the ISO 7064 Mod 36/37 check digit algorithm.

* * * * *

Trace back herd. A herd in which a CWD-positive animal formerly resided.

Trace forward herd. A herd that has received exposed animals from a CWD-positive herd within 5 years prior to the diagnosis of CWD in the positive herd or from the identified date of entry of CWD into the positive herd.

* * * * *

■ 3. In part 55, a new subpart B is added to read as follows:

Subpart B—Chronic Wasting Disease Herd Certification Program

Sec.

Subpart B—Chronic Wasting Disease Herd Certification Program

§ 55.21 Administration.

The CWD Herd Certification Program is a cooperative effort between APHIS, State animal health and wildlife agencies, and deer, elk, and moose owners. APHIS coordinates with these State agencies to encourage deer, elk, and moose owners to certify their herds as low risk for CWD by being in continuous compliance with the CWD Herd Certification Program standards.

§ 55.22 Participation and enrollment.

(a) *Participation by owners.* Any owner of a farmed or captive deer, elk, or moose herd may apply to enroll in the CWD Herd Certification Program by sending a written request to the appropriate State agency, or to the veterinarian in charge if no Approved State CWD Herd Certification Program exists in the herd's State. APHIS or the State will determine the herd's eligibility, and if needed will require the owner to submit more details about the herd animals and operations. An application for participation may be denied if APHIS or the State determines that the applicant has previously violated State or Federal laws or regulations for livestock, and that the nature of the violation indicates that the applicant may not faithfully comply with the requirements of the CWD Herd Certification Program. If the enrolling herd is a CWD-positive herd or CWD-exposed herd, immediately after enrollment it must begin complying with a herd plan developed in accordance with § 55.24. After determining that the herd is eligible to participate in accordance with this paragraph, APHIS or the appropriate State agency will send the herd owner a notice of enrollment that includes the herd's enrollment date. Inquiries regarding which herds are participating in the CWD Herd Certification Program and their certification should be directed to the State representative of the relevant State.

(1) *Enrollment date.* With the exceptions listed in this paragraph, the enrollment date for any herd that joins the CWD Herd Certification Program after the effective date of this rule will be the date the herd is approved for participation.

(i) For herds already participating in State GWD programs, the enrollment date will be the first day that the herd participated in a State program that APHIS subsequently determines

qualifies as an Approved State CWD Herd Certification Program in accordance with § 55.23(a) of this part. This type of constructed enrollment date will be unavailable for herds that apply to enroll after October 19, 2007, and herds that apply to enroll after that date will have an enrollment date of the date APHIS approves the herd participation.

(ii) For herds that enroll directly in the Federal CWD Herd Certification Program, which is allowed only when there is no Approved State CWD Herd Certification Program in their State, the enrollment date will be the earlier of:

(A) The date APHIS approves enrollment; or

(B) If APHIS determines that the herd owner has maintained the herd in a manner that substantially meets the conditions specified in § 55.23(b) for herd owners, the first day that the herd participated in such a program. However, in such cases the enrollment date may not be set at a date more than 2 years prior to the date that APHIS approved enrollment of the herd. This type of constructed enrollment date will be unavailable for herds that apply to enroll after October 19, 2007, and herds that apply to enroll after that date will have an enrollment date of the date APHIS approves the herd participation.

(iii) For new herds that were formed from and contain only animals from herds enrolled in the CWD Herd Certification Program, the enrollment date will be the latest enrollment date for any source herd for the animals.

(2) *[Reserved]*

(b) *Participation by States.* Any State that operates a State program to certify the CWD status of deer, elk, or moose may request the Administrator to designate the State program as an Approved State CWD Herd Certification Program. The Administrator will approve or disapprove a State program in accordance with § 55.23(a) of this subpart. In States with an Approved State CWD Herd Certification Program, program activities will be conducted in accordance with the guidelines of that program as long as the State program meets the minimum requirements of this part. A list of Approved State CWD Herd Certification Programs may be obtained by writing to the National Center for Animal Health Program, VS, APHIS, 4700 River Road Unit 43, Riverdale, MD 20737–1235.

(Approved by the Office of Management and Budget under control number 0579–0237)

§ 55.23 Responsibilities of States and enrolled herd owners.

(a) *Approval of State programs and responsibilities of States.* In reviewing a State program's eligibility to be designated an Approved State CWD Herd Certification Program, the Administrator will evaluate a written statement from the State that describes State CWD control and deer, elk, and moose herd certification activities and that cites relevant State statutes, regulations, and directives pertaining to animal health activities and reports and publications of the State. In determining whether the State program qualifies, the Administrator will determine whether the State:

(1) Has the authority, based on State law or regulation, to restrict the intrastate movement of all CWD-positive, CWD-suspect, and CWD-exposed animals.

(2) Has the authority, based on State law or regulation, to require the prompt reporting of any animal suspected of having CWD and test results for any animals tested for CWD to State or Federal animal health authorities.

(3) Has, in cooperation with APHIS personnel, drafted and signed a memorandum of understanding with APHIS that delineates the respective roles of the State and APHIS in CWD Herd Certification Program implementation.

(4) Has placed all known CWD-positive, CWD-exposed, and CWD-suspect animals and herds under movement restrictions, with movement of animals from them only for destruction or under permit.

(5) Has effectively implemented policies to:

(i) Promptly investigate all animals reported as CWD-suspect animals;

(ii) Designate herds as CWD-positive, CWD-exposed, or CWD-suspect and promptly restrict movement of animals from the herd after an APHIS employee or State representative determines that the herd contains or has contained a CWD-positive animal;

(iii) Remove herd movement restrictions only after completion of a herd plan agreed upon by the State representative, APHIS, and the owner;

(iv) Conduct an epidemiologic investigation of CWD-positive, CWD-exposed, and CWD-suspect herds that includes the designation of suspect and exposed animals and that identifies animals to be traced;

(v) Conduct tracebacks of CWD-positive animals and traceouts of CWD-exposed animals and report any out-of-State traces to the appropriate State promptly after receipt of notification of a CWD-positive animal; and

(vi) Conduct tracebacks based on slaughter or other sampling promptly after receipt of notification of a CWD-positive animal at slaughter.

(6) Effectively monitors and enforces State quarantines and State reporting laws and regulations for CWD.

(7) Has designated at least one State animal health official, or has worked with APHIS to designate an APHIS official, to coordinate CWD Herd Certification Program activities in the State.

(8) Has programs to educate those engaged in the interstate movement of deer, elk, and moose regarding the identification and recordkeeping requirements of this part.

(9) Requires, based on State law or regulation, and effectively enforces identification of all animals in herds participating in the CWD Herd Certification Program;

(10) Maintains in the CWD National Database administered by APHIS, or in a State database approved by the Administrator as compatible with the CWD National Database, the State's:

(i) Premises information and assigned premises numbers;

(ii) Individual animal information on all deer, elk, and moose in herds participating in the CWD Herd Certification Program in the State;

(iii) Individual animal information on all out-of-State deer, elk, and moose to be traced; and

(iv) Accurate herd status data.

(11) Requires that tissues from all CWD-exposed or CWD-suspect animals that die or are depopulated or otherwise killed be submitted to a laboratory authorized by the Administrator to conduct official CWD tests and requires appropriate disposal of the carcasses of CWD-positive, CWD-exposed, and CWD-suspect animals.

(b) *Responsibilities of enrolled herd owners.* Herd owners who enroll in the CWD Herd Certification Program agree to maintain their herds in accordance with the following conditions:

(1) Each animal in the herd must be identified using means of animal identification specified in § 55.25 of this subpart. All animals in an enrolled herd must be identified before reaching 12 months of age. In addition, all animals of any age in an enrolled herd must be identified before being moved from the herd premises. In addition, all animals in an enrolled herd must be identified before the inventory required under paragraph (b)(4) of this section, and animals found to be in violation of this requirement during the inventory must be identified during or after the inventory on a schedule specified by the APHIS employee or State representative conducting the inventory;

(2) The herd premises must have perimeter fencing adequate to prevent ingress or egress of cervids. This fencing

must also comply with any applicable State regulations;

(3) The owner must immediately report to an APHIS employee or State representative all animals that escape or disappear, and all deaths (including animals killed on premises maintained for hunting and animals sent to slaughter) of deer, elk, and moose in the herd aged 12 months or older; *Except that,* APHIS employees or State representatives may approve reporting schedules other than immediate notification when herd conditions warrant it in the opinion of both APHIS and the State. The report must include the identification numbers of the animals involved and the estimated time and date of the death, escape, or disappearance. For animals that die (including animals killed on premises maintained for hunting and animals sent to slaughter), the owner must inform an APHIS or State representative and must make the carcasses of the animals available for tissue sampling and testing in accordance with instructions from the APHIS or State representative. In cases where animals escape or disappear and thus are not available for tissue sampling and testing, an APHIS representative will investigate whether the unavailability of animals for testing constitutes a failure to comply with program requirements and will affect the herd's status in the CWD Herd Certification Program;

(4) The owner must maintain herd records that include a complete inventory of animals that states the age and sex of each animal, the date of acquisition and source of each animal that was not born into the herd, the date of disposal and destination of any animal removed from the herd, and all individual identification numbers (from tags, tattoos, electronic implants, etc.) associated with each animal. Upon request, the owner must allow an APHIS employee or State representative access to the premises and herd to conduct an annual physical herd inventory with verification reconciling animals and identifications with the records maintained by the owner. The owner must present the entire herd for inspection under conditions where the APHIS employee or State representative can safely read all identification on the animals. The owner will be responsible for assembling, handling and restraining the animals and for all costs incurred to present the animals for inspection;

(5) If an owner wishes to maintain separate herds, he or she must maintain separate herd inventories, records, working facilities, water sources, equipment, and land use. There must be a buffer zone of at least 30 feet between the perimeter fencing around separate herds, and no commingling of animals may occur. Movement of animals between herds must be recorded as if they were separately owned herds;

(6) New animals may be introduced into the herd only from other herds enrolled in the CWD Herd Certification Program. If animals are received from an enrolled herd with a lower program status, the receiving herd will revert to that lower program status. If animals are obtained from a herd not participating in the program, then the receiving herd will be required to start over in the program.

(Approved by the Office of Management and Budget under control number 0579–0237)

§ 55.24 Herd status.

(a) *Initial and subsequent status.* When a herd is first enrolled in the CWD Herd Certification Program, it will be placed in First Year status, except that; if the herd is comprised solely of animals obtained from herds already enrolled in the Program, the newly enrolled herd will have the same status as the lowest status of any herd that provided animals for the new herd. If the herd continues to meet the requirements of the CWD Herd Certification Program, each year, on the anniversary of the enrollment date the herd status will be upgraded by 1 year; i.e., Second Year status, Third Year status, Fourth Year status, and Fifth Year status. One year from the date a herd is placed in Fifth Year status, the herd status will be changed to "Certified", and the herd will remain in "Certified" status as long as it is enrolled in the program, provided its status is not lost or suspended in accordance with this section. Once the herd has received "Certified" status, slaughter surveillance and surveillance of animals killed in shooter operations will no longer be required, but other requirements of the program will remain in force.

(b) *Loss or suspension of herd status.* (1) If a herd is designated a CWD-positive herd or a CWD-exposed herd, it will immediately lose its program status and may only reenroll after entering into a herd plan.

(2) If a herd is designated a CWD-suspect herd, a trace back herd, or a trace forward herd, it will immediately be placed in Suspended status pending an epidemiologic investigation by APHIS or a State animal health agency. If the epidemiologic investigation determines that the herd was not commingled with a CWD-positive animal, the herd will be reinstated to its former program status, and the time spent in Suspended status will count toward its promotion to the next herd status level.

(i) If the epidemiologic investigation determines that the herd was commingled with a CWD-positive animal, the herd will lose its program status and will be designated a CWD-exposed herd.

(ii) If the epidemiological investigation is unable to make a determination regarding the exposure of the herd, because the necessary animal or animals are no longer available for testing (i.e. a trace animal from a known positive herd died and was not tested) or for other reasons, the herd status will continue as Suspended unless and until a herd plan is developed for the herd. If a herd plan is developed and implemented, the herd will be reinstated to its former program status, and the time spent in Suspended status will count toward its promotion to the next herd status level; *Except that,* if the epidemiological investigation finds that the owner of the herd has not fully complied with program requirements for animal identification, animal testing, and recordkeeping, the herd will be reinstated into the CWD Herd Certification Program at the First Year status level, with a new enrollment date set at the date the herd entered into Suspended status. Any herd reinstated after being placed in Suspended status must then comply with the requirements of the herd plan as well as the requirements of the CWD Herd Certification Program. The herd plan will require testing of all animals that die in the herd for any reason, regardless of the age of the animal, may require movement restrictions for animals in the herd based on epidemiologic evidence regarding the risk posed by the animals in question, and may include other requirements found necessary to control the risk of spreading CWD.

(3) If an APHIS or State representative determines that animals from a herd enrolled in the program have commingled with animals from a herd with a lower program status, the herd with the higher program status will be reduced to the status of the herd with which its animals commingled.

(c) *Cancellation of enrollment by Administrator.* The Administrator may cancel the enrollment of an enrolled herd by giving written notice to the herd owner. In the event of such cancellation, the herd owner may not reapply to enroll in the CWD Herd Certification Program for 5 years from the effective date of the cancellation. The Administrator may cancel enrollment after determining that the herd owner failed to comply with any requirements

of this section. Before enrollment is canceled, an APHIS representative will inform the herd owner of the reasons for the proposed cancellation.

(1) Herd owners may appeal cancellation of enrollment or loss or suspension of herd status by writing to the Administrator within 10 days after being informed of the reasons for the proposed action. The appeal must include all of the facts and reasons upon which the herd owner relies to show that the reasons for the proposed action are incorrect or do not support the action. The Administrator will grant or deny the appeal in writing as promptly as circumstances permit, stating the reason for his or her decision. If there is a conflict as to any material fact, a hearing will be held to resolve the conflict. Rules of practice concerning the hearing will be adopted by the Administrator. However, cancellation of enrollment or loss or suspension of herd status shall become effective pending final determination in the proceeding if the Administrator determines that such action is necessary to prevent the possible spread of CWD. Such action shall become effective upon oral or written notification, whichever is earlier, to the herd owner. In the event of oral notification, written confirmation shall be given as promptly as circumstances allow. This cancellation of enrollment or loss or suspension of herd status shall continue in effect pending the completion of the proceeding, and any judicial review thereof, unless otherwise ordered by the Administrator.

(2) [*Reserved*]

(d) *Herd status of animals added to herds.* A herd may add animals from herds with the same or a higher herd status in the CWD Herd Certification Program with no negative impact on the certification status of the receiving herd.[2] If animals are acquired from a herd with a lower herd status, the receiving herd reverts to the program status of the sending herd. If a herd participating in the CWD Herd Certification Program acquires animals from a nonparticipating herd, the receiving herd reverts to First Year status with a new enrollment date of the date of acquisition of the animal.

(Approved by the Office of Management and Budget under control number 0579–0237.)

§ 55.25 Animal identification.

Each animal required to be identified by this subpart must have at least two forms of animal identification attached to the animal. The means of animal identification must be approved for this use by APHIS, and must be an electronic implant, flank tattoo, ear tattoo, tamper-resistant ear tag, or other device approved by APHIS. One of the animal identifications must be official animal identification as defined in this part, with a nationally unique animal identification number that is linked to that animal in the CWD National Database. The second animal identification must be unique for the individual animal within the herd and also must be linked to that animal and herd in the CWD National Database.

(Approved by the Office of Management and Budget under control number 0579–0237)

■ 4. A new part 81 is added to read as follows:

PART 81—CHRONIC WASTING DISEASE IN DEER, ELK, AND MOOSE

Sec.

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

§ 81.1 Definitions.

Animal. Any farmed or captive deer, elk, or moose.

Animal and Plant Health Inspection Service (APHIS). The Animal and Plant Health Inspection Service of the United States Department of Agriculture.

Animal identification. A device or means of animal identification approved for use under this part by APHIS. Examples of animal identification devices that APHIS has approved are listed in § 55.25 of this chapter.

Animal identification number (AIN). A numbering system for the official identification of individual animals in the United States. The AIN contains 15 digits, with the first 3 being the country code (840 for the United States), the alpha characters USA, or the numeric code assigned to the manufacturer of the identification device by the International Committee on Animal Recording.

APHIS employee. Any individual employed by the Animal and Plant Health Inspection Service who is authorized by the Administrator to do any work or perform any duty in connection with the control and eradication of disease.

Cervid. All members of the family Cervidae and hybrids, including deer, elk, moose, caribou, reindeer, and related species.

Chronic wasting disease (CWD). A transmissible spongiform encephalopathy of cervids. Clinical signs in affected animals include, but are not limited to, loss of body condition, behavioral changes, excessive salivation, increased drinking and urination, depression, and eventual death.

CWD-exposed animal. An animal that is part of a CWD-positive herd, or that has been exposed to a CWD-positive animal or contaminated premises within the previous 5 years.

CWD Herd Certification Program. The Chronic Wasting Disease Herd Certification Program established in part 55 of this chapter.

CWD-positive animal. An animal that has had a diagnosis of CWD confirmed by means of two official CWD tests as defined in § 55.1 of this chapter.

CWD-suspect animal. An animal for which an APHIS employee or State representative has determined that unofficial CWD test results, laboratory evidence, or clinical signs suggest a diagnosis of CWD.

Deer, elk, and moose. All animals in the genera Odocoileus, Cervus, and Alces and their hybrids.

Farmed or captive. Privately or publicly maintained or held for economic or other purposes within a perimeter fence or confined area, or captured from a free-ranging population for interstate movement and release.

Official animal identification. A device or means of animal identification approved for use under this part by APHIS to uniquely identify individual animals. Examples of approved official animal identification devices are listed in § 55.25 of this chapter. The official animal identification must include a nationally unique animal identification number that adheres to one of the following numbering systems:

(1) National Uniform Eartagging System.

(2) Animal identification number (AIN).

(3) Premises-based number system. The premises-based number system combines an official premises identification number (PIN), as defined in this section, with a producer's livestock production numbering system to provide a unique identification number. The PIN and the production number must both appear on the official tag.

(4) Any other numbering system approved by the Administrator for the identification of animals in commerce.

Premises identification number (PIN). A unique number assigned by a State or Federal animal health authority to a premises that is, in the judgment of the

[2] Note that in addition to this requirement, § 81.3 of this chapter restricts the interstate movement of farmed and captive deer, elk, and moose based on their status in the CWD Herd Certification Program.

State or Federal animal health authority, a geographically distinct location from other livestock production units. The premises identification number is associated with an address or legal land description and may be used in conjunction with a producer's own livestock production numbering system to provide a unique identification number for an animal. The premises identification number may consist of:

(1) The State's two-letter postal abbreviation followed by the premises' assigned number; or

(2) A seven-character alphanumeric code, with the right-most character being a check digit. The check digit number is based upon the ISO 7064 Mod 36/37 check digit algorithm.

§ 81.2 Identification of deer, elk, and moose in interstate commerce.

Each animal required to be identified by this subpart must have at least two forms of animal identification attached to the animal. The means of animal identification must be approved for this use by APHIS, and must be an electronic implant, flank tattoo, ear tattoo, tamper-resistant ear tag, or other device approved by APHIS. One of the animal identifications must be an official animal identification as defined in this part, with a nationally unique animal identification number that is linked to that animal in the CWD National Database. The second animal identification must be unique for the individual animal within the herd and also must be linked to that animal and herd in the CWD National Database.

(Approved by the Office of Management and Budget under control number 0579–0237)

§ 81.3 General restrictions.

No farmed or captive deer, elk, or moose may be moved interstate unless it meets the requirements of this section.

(a) *Animals in the CWD Herd Certification Program.* The captive deer, elk, or moose is:

(1) Enrolled in the CWD Herd Certification Program and:

(i) If the movement occurs between October 19, 2006 and January 19, 2009, the herd has achieved at least Second Year status in accordance with § 55.24 of this chapter;

(ii) If the movement occurs between January 19, 2009 and January 19, 2010, the herd has achieved at least Third Year status in accordance with § 55.24 of this chapter;

(iii) If the movement occurs between January 19, 2010 and January 19, 2011, the herd has achieved at least Fourth Year status in accordance with § 55.24 of this chapter;

(iv) If the movement occurs between January 19, 2011 and January 19, 2012, the herd has achieved at least Fifth Year status in accordance with § 55.24 of this chapter;

(v) If the movement occurs after January 19, 2012, the herd has achieved Certified status in accordance with § 55.24 of this chapter; and

(2) The farmed or captive deer, elk, or moose is accompanied by a certificate issued in accordance with § 81.4 of this part that identifies its herd of origin and its herd's CWD Herd Certification Program status, and states that it is not a CWD-positive, CWD-exposed, or CWD-suspect animal.

(b) *Animals captured for interstate movement and release.* If the captive deer, elk, or moose was captured for interstate movement and release from a free-ranging population, each animal must have two forms of animal identification, one of which is official animal identification, and a certificate accompanying the animal must document the source population to be low risk for CWD, based on a CWD surveillance program that is approved by the State Government of the receiving State and by APHIS.

(c) *Animals moved to slaughter.* The farmed or captive deer, elk, or moose must be moved directly to a recognized slaughtering establishment for slaughter, must have two forms of animal identification, one of which is official animal identification, and must be accompanied by a certificate issued in accordance with § 81.4.

(d) *Research animal movements and permits.* A research animal permit is required for the interstate movement of cervids for research purposes. The permit will specify any special conditions of the movement determined by the Administrator to be necessary to prevent the dissemination of CWD. The Administrator may, at his or her discretion, issue the permit if he or she determines that the destination facility has adequate biosecurity and that the movement authorized will not result in the interstate dissemination of CWD.

(1) To apply for a research animal permit, contact an APHIS employee or State representative and provide the following information:

(i) The name and address of the person to whom the special permit is issued, the address at which the research cervids to be moved interstate are being held, and the name and address of the person receiving the cervids to be moved interstate;

(ii) The number and type of cervids to be moved interstate;

(iii) The reason for the interstate movement;

(iv) Any safeguards in place to prevent transmission of CWD during movement or at the receiving location; and

(v) The date on which movement will occur.

(2) A copy of the research animal permit must accompany the cervids moved, and copies must be submitted so that a copy is received by the State animal health official and the veterinarian in charge for the State of destination at least 72 hours prior to the arrival of the cervids at the destination listed on the research animal permit.

(e) *Interstate movements approved by the Administrator.* Notwithstanding any other provision of this part, interstate movement of farmed or captive deer, elk, and moose may be allowed on a case-by-case basis when the Administrator determines that adequate survey and mitigation procedures are in place to prevent dissemination of CWD and issues a permit for the movement.

§ 81.4 Issuance of certificates.

(a) *Information required on certificates.* A certificate must show any official animal identification numbers of each animal to be moved. A certificate must also show the number of animals covered by the certificate; the purpose for which the animals are to be moved; the points of origin and destination; the consignor; and the consignee. The certificate must include a statement by the issuing accredited veterinarian, State veterinarian, or Federal veterinarian that the animals were not exhibiting clinical signs associated with CWD at the time of examination and that the animals are from a herd participating in the CWD Herd Certification Program, and must provide the herd's program status; *Except that,* certificates issued for animals moved directly to slaughter do not need to state that the animals are from a herd participating in the CWD Herd Certification Program and must state that an APHIS employee or State representative has been notified in advance of the date the animals are being moved to slaughter.

(b) *Animal identification documents attached to certificates.* As an alternative to typing or writing individual animal identification on a certificate, another document may be used to provide this information, but only under the following conditions:

(1) The document must be a State form or APHIS form that requires individual identification of animals;

(2) A legible copy of the document must be stapled to the original and each copy of the certificate;

(3) Each copy of the document must identify each animal to be moved with the certificate, but any information pertaining to other animals, and any unused space on the document for recording animal identification, must be crossed out in ink; and

(4) The following information must be typed or written in ink in the identification column on the original and each copy of the certificate and must be circled or boxed, also in ink, so that no additional information can be added:

(i) The name of the document; and

(ii) Either the serial number on the document or, if the document is not imprinted with a serial number, both the name of the person who issued the document and the date the document was issued.

(Approved by the Office of Management and Budget under control number 0579–0237)

Done in Washington, DC, this 14th day of July 2006.

Charles D. Lambert,

Acting Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 06–6367 Filed 7–20–06; 8:45 am]

BILLING CODE 3410–34–P

Federal Register

Friday,
July 21, 2006

Part VI

Securities and Exchange Commission

17 CFR Part 242
Amendments to Regulation SHO; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 242

[Release No. 34–54154; File No. S7–12–06]

RIN 3235–AJ57

Amendments to Regulation SHO

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is proposing amendments to Regulation SHO under the Securities Exchange Act of 1934 (Exchange Act). The proposed amendments are intended to further reduce the number of persistent fails to deliver in certain equity securities, by eliminating the grandfather provision and narrowing the options market maker exception. The proposals also are intended to update the market decline limitation referenced in Regulation SHO.

DATES: Comments should be received on or before September 19, 2006.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–12–06 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–12–06. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549–1090. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: James A. Brigagliano, Acting Associate Director, Josephine J. Tao, Branch Chief, Joan M. Collopy, Special Counsel, Lillian S. Hagen, Special Counsel, Elizabeth A. Sandoe, Special Counsel, Victoria L. Crane, Special Counsel, Office of Trading Practices and Processing, Division of Market Regulation, at (202) 551–5720, at the Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

SUPPLEMENTARY INFORMATION: The Commission is requesting public comment on proposed amendments to Rules 200 and 203 of Regulation SHO [17 CFR 242.200 and 242.203] under the Exchange Act.

I. Introduction

Regulation SHO, which became fully effective on January 3, 2005, provides a new regulatory framework governing short sales.[1] Among other things, Regulation SHO imposes a close-out requirement to address problems with failures to deliver stock on trade settlement date and to target abusive "naked" short selling (*e.g.*, selling short without having stock available for delivery and intentionally failing to deliver stock within the standard three-day settlement period) in certain equity securities.[2] While the majority of trades settle on time,[3] Regulation SHO is intended to address those situations where the level of fails to deliver for the particular stock is so substantial that it might harm the market for that security. These fails to deliver may result from either short sales or long sales of stock.[4]

The close-out requirement, which is contained in Rule 203(b)(3) of Regulation SHO, applies only to broker-dealers for securities in which a substantial amount of fails to deliver have occurred (also known as "threshold securities").[5] As discussed more fully below, Rule 203(b)(3) of Regulation SHO includes two exceptions to the mandatory close-out requirement. The first is the "grandfather" provision, which excepts fails to deliver established prior to a security becoming a threshold security;[6] and the second is the "options market

[1] *See* Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004) ("Adopting Release"), available at *http://www.sec.gov/rules/final/34-50103.htm*. For more information on Regulation SHO, *see* "Frequently Asked Questions" and "Key Points about Regulation SHO" (at *http://www.sec.gov/spotlight/shortsales.htm*).

A short sale is the sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller. In order to deliver the security to the purchaser, the short seller may borrow the security, typically from a broker-dealer or an institutional investor. The short seller later closes out the position by purchasing equivalent securities on the open market, or by using an equivalent security it already owns, and returning the security to the lender. In general, short selling is used to profit from an expected downward price movement, to provide liquidity in response to unanticipated demand, or to hedge the risk of a long position in the same security or in a related security.

[2] Generally, investors must complete or settle their security transactions within three business days. This settlement cycle is known as T+3 (or "trade date plus three days"). T+3 means that when the investor purchases a security, the purchaser's payment must be received by its brokerage firm no later than three business days after the trade is executed. When the investor sells a security, the seller must deliver its securities, in certificated or electronic form, to its brokerage firm no later than three business days after the sale. The three-day settlement period applies to most security transactions, including stocks, bonds, municipal securities, mutual funds traded through a brokerage firm, and limited partnerships that trade on an exchange. Government securities and stock options settle on the next business day following the trade. Because the Commission recognized that there are many legitimate reasons why broker-dealers may not deliver securities on settlement date, it designed and adopted Rule 15c6–1, which prohibits broker-dealers from effecting or entering into a contract for the purchase or sale of a security that provides for payment of funds and delivery of securities later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction. 17 CFR 240.15c6–1. However, failure to deliver securities on T+3 does not violate the rule.

[3] According to the National Securities Clearing Corporation (NSCC), on an average day, approximately 1% (by dollar value) of all trades, including equity, debt, and municipal securities, fail to settle. In other words, 99% (by dollar value) of all trades settle on time. The vast majority of these fails are closed out within five days after T+3.

[4] There may be many reasons for a fail to deliver. For example, human or mechanical errors or processing delays can result from transferring securities in physical certificate rather than book-entry form, thus causing a failure to deliver on a long sale within the normal three-day settlement period. Also, broker-dealers that make a market in a security ("market makers") and who sell short thinly-traded, illiquid stock in response to customer demand may encounter difficulty in obtaining securities when the time for delivery arrives.

[5] A threshold security is defined in Rule 203(c)(6) as any equity security of an issuer that is registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78l) or for which the issuer is required to file reports pursuant to section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) for which there is an aggregate fail to deliver position for five consecutive settlement days at a registered clearing agency of 10,000 shares or more, and that is equal to at least 0.5% of the issue's total shares outstanding; and is included on a list disseminated to its members by a self-regulatory organization ("SRO"). 17 CFR 242.203(c)(6). This is known as the "threshold securities list." Each SRO is responsible for providing the threshold securities list for those securities for which the SRO is the primary market.

[6] The "grandfathered" status applies in two situations: (1) to fail positions occurring before January 3, 2005, Regulation SHO's effective date; and (2) to fail positions that were established on or after January 3, 2005 but prior to the security appearing on the threshold securities list. 17 CFR 242.203(b)(3)(i).

maker exception," which excepts any fail to deliver in a threshold security resulting from short sales effected by a registered options market maker to establish or maintain a hedge on options positions that were created before the underlying security became a threshold security.[7]

At the time of Regulation SHO's adoption in August 2004, the Commission stated that it would monitor the operation of Regulation SHO, particularly whether grandfathered fail positions were being cleared up under the existing delivery and settlement guidelines or whether any further regulatory action with respect to the close-out provisions of Regulation SHO was warranted.[8] In addition, with respect to the options market maker exception, the Commission noted that it would take into consideration any indications that this provision was operating significantly differently from the Commission's original expectations.[9]

Based on examinations conducted by the Commission's staff and the SROs since Regulation SHO's adoption, we are proposing revisions to Regulation SHO. As discussed more fully below, our proposals would modify Rule 203(b)(3) by eliminating the grandfather provision and narrowing the options market maker exception. Regulation SHO has achieved substantial results. However, some persistent fails to deliver remain. The proposals are intended to reduce the number of persistent fails to deliver attributable primarily to the grandfather provision and, secondarily, to reliance on the options market maker exception. The proposals also would include a 35 settlement day phase-in period following the effective date of the amendment. The phase-in period is intended to provide additional time to begin closing out certain previously-excepted fail to deliver positions. Our proposals also would update the market decline limitation referenced in Rule 200(e)(3) of Regulation SHO. We also seek comment about other ways to modify Regulation SHO.

II. Background

A. Rule 203(b)(3)'s Close-Out Requirement

One of Regulation SHO's primary goals is to reduce fails to deliver.[10] Currently, Regulation SHO requires certain persistent fail to deliver positions to be closed out. Specifically, Rule 203(b)(3)'s close-out requirement requires a participant of a clearing agency registered with the Commission to take immediate action to close out a fail to deliver position in a threshold security in the Continuous Net Settlement (CNS)[11] system that has persisted for 13 consecutive settlement days by purchasing securities of like kind and quantity.[12] In addition, if the failure to deliver has persisted for 13 consecutive settlement days, Rule 203(b)(3)(iii) prohibits the participant, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity.[13]

B. Grandfathering Under Regulation SHO

Rule 203(b)(3)'s close-out requirement does not apply to positions that were established prior to the security becoming a threshold security.[14] This is known as grandfathering. Grandfathered positions include those that existed prior to the effective date of Regulation SHO and positions established prior to a security becoming a threshold security.[15] Regulation SHO's grandfathering provision was adopted because the Commission was concerned about creating volatility through short squeezes[16] if large pre-existing fail to deliver positions had to be closed out quickly after a security became a threshold security.

C. Regulation SHO's Options Market Maker Exception

In addition, Regulation SHO's options market maker exception excepts from the close-out requirement of Rule 203(b)(3) any fail to deliver position in a threshold security that is attributed to short sales by a registered options market maker, if and to the extent that the short sales are effected by the registered options market maker to establish or maintain a hedge on an options position that was created before the security became a threshold security.[17] The options market maker exception was created to address concerns regarding liquidity and the pricing of options. The exception does not require that such fails be closed out within any particular timeframe.

D. Regulation SHO Examinations

Since Regulation SHO's effective date in January 2005, the Staff and the SROs have been examining firms for compliance with Regulation SHO, including the close-out provisions. We have received preliminary data that indicates that Regulation SHO appears to be significantly reducing fails to deliver without disruption to the market.[18] However, despite this positive

---

[7] 17 CFR 242.203(b)(3)(ii).

[8] *See* Adopting Release, 69 FR at 48018.

[9] *See id.* at 48019.

[10] *Id.* at 48009.

[11] The majority of equity trades in the United States are cleared and settled through systems administered by clearing agencies registered with the Commission. The NSCC clears and settles the majority of equity securities trades conducted on the exchanges and over the counter. NSCC clears and settles trades through the CNS system, which nets the securities delivery and payment obligations of all of its members. NSCC notifies its members of their securities delivery and payment obligations daily. In addition, NSCC guarantees the completion of all transactions and interposes itself as the contraparty to both sides of the transaction. While NSCC's rules do not authorize it to require member firms to close out or otherwise resolve fails to deliver, NSCC reports to the SROs those securities with fails to deliver of 10,000 shares or more. The SROs use NSCC fails data to determine which securities are threshold securities for purposes of Regulation SHO.

[12] 17 CFR 242.203(b)(3).

[13] 17 CFR 242.203(b)(3)(iii). It is possible under Regulation SHO that a close out by a broker-dealer may result in a failure to deliver position at another broker-dealer if the counterparty from which the broker-dealer purchases securities fails to deliver. However, Regulation SHO prohibits a broker-dealer from engaging in "sham close outs" by entering into an arrangement with a counterparty to purchase securities for purposes of closing out a failure to deliver position and the broker-dealer knows or has reason to know that the counterparty will not deliver the securities, and which thus creates another failure to deliver position. 17 CFR 242.203(b)(3)(v); Adopting Release, 69 FR at 48018 n. 96.

[14] 17 CFR 242.203(b)(3)(i).

[15] *See* Adopting Release, 69 FR at 48018. However, any new fails in a security on the threshold list are subject to the mandatory close-out provisions of Rule 203(b)(3).

[16] The term short squeeze refers to the pressure on short sellers to cover their positions as a result of sharp price increases or difficulty in borrowing the security the sellers are short. The rush by short sellers to cover produces additional upward pressure on the price of the stock, which then can cause an even greater squeeze. Although some short squeezes may occur naturally in the market, a scheme to manipulate the price or availability of stock in order to cause a short squeeze is illegal.

[17] 17 CFR 242.203(b)(3)(ii).

[18] For example, in comparing a period prior to the effectiveness of the current rule (April 1, 2004 to December 31, 2004) to a period following the effective date of the current rule (January 1, 2005 to May 31, 2006) for all stocks with aggregate fails to deliver of 10,000 shares or more as reported by NSCC:

- The average daily aggregate fails to deliver declined by 34.0%;
- The average daily number of securities with aggregate fails for at least 10,000 shares declined by 6.5%;
- The average daily number of fails to deliver positions declined by 15.3%;
- The average age of a fail position declined by 13.4%;
- The average daily number of threshold securities declined by 38.2%; and
- The average daily fails of threshold securities declined by 52.4%.

Continued

impact, we continue to observe a small number of threshold securities with substantial and persistent fail to deliver positions that are not being closed out under existing delivery and settlement guidelines.

Based on these examinations and our discussions with the SROs and market participants, we believe that these persistent fail positions may be attributable primarily to the grandfather provision and, secondarily, to reliance on the options market maker exception. Although high fails levels exist only for a small percentage of issuers,[19] we are concerned that large and persistent fails to deliver may have a negative effect on the market in these securities. First, large and persistent fails to deliver can deprive shareholders of the benefits of ownership, such as voting and lending. Second, they can be indicative of manipulative naked short selling, which could be used as a tool to drive down a company's stock price. The perception of such manipulative conduct also may undermine the confidence of investors. These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to such manipulative conduct.

Allowing these persistent fails to deliver to continue runs counter to one of Regulation SHO's primary goals of reducing fails to deliver in threshold securities. While some delays in closing out may be understandable and necessary, a seller should deliver shares to the buyer within a reasonable time period. Thus, we believe that all fails in threshold securities should be closed out after a certain period of time and not left open indefinitely. As such, we believe that eliminating the grandfathering provision and narrowing the options market maker exception is necessary to reduce the number of fails to deliver.

Although we believe that no failure to deliver should last indefinitely, we note that requiring delivery without allowing flexibility for some failures may impede liquidity for some securities. For instance, if faced with a high probability of a mandatory close out or some other penalty for failing to deliver, market makers may find it more costly to accommodate customer buy orders, and may be less willing to provide liquidity for such securities. This may lead to wider bid-ask spreads or less depth. Allowing flexibility for some failures to deliver also may deter the likelihood of manipulative short squeezes because manipulators would be less able to require counterparties to purchase at above-market value.

Regulation SHO's close-out requirement is narrowly tailored in consideration of these concerns. For instance, Regulation SHO does not require close outs of non-threshold securities. The close-out provision only targets those securities where the level of fails is very high (0.5% of total shares outstanding and 10,000 shares or more) for a continuous period (five consecutive settlement days), and where a participant of a clearing agency has had a persistent fail in such threshold securities for 13 consecutive settlement days. Requiring close out only for securities with large, persistent fails limits the market impact. While some reduction in liquidity may occur as a result of requiring close out of these limited number of securities, we believe this should be balanced against the value derived from delivery of such securities within a reasonable period of time. We also seek specific comment on whether the proposed close-out periods are appropriate in light of these concerns.

III. Discussion of Proposed Amendments to Regulation SHO

A. Proposed Amendments to the Grandfather Provision

To further reduce the number of persistent fails to deliver, we propose to eliminate the grandfather provision in Rule 203(b)(3)(i). In particular, the proposal would require that any previously-grandfathered fail to deliver position in a security that is on the threshold list on the effective date of the amendment be closed out within 35 settlement days [20] of the effective date of the amendment.[21] If a security becomes a threshold security after the effective date of the amendment, any fails to deliver in that security that occurred prior to the security becoming a threshold security would become subject to Rule 203(b)(3)'s mandatory 13 settlement day close-out requirement, similar to any other fail to deliver position in a threshold security.

The amendment would help prevent fails to deliver in threshold securities from persisting for extended periods of time. At the same time, the amendment would provide participants flexibility and advance notice to close out the originally grandfathered fail to deliver positions.

Request for Comment

- The grandfather provision of Regulation SHO was adopted because the Commission was concerned about creating volatility from short squeezes where there were large pre-existing fail to deliver positions. The Commission intended to monitor whether grandfathered fail to deliver positions are being cleaned up to determine whether the grandfather provision should be amended to either eliminate the provision or limit the duration of grandfathered fail positions. Is the elimination of the grandfather provision from the close-out requirement in Rule 203(b)(3) appropriate? Should we consider instead providing a longer period of time to close out fails that occurred before January 3, 2005 (the effective date of Regulation SHO),[22] or

Fails to deliver in the six securities that persisted on the threshold list from January 10, 2005 through May 31, 2006 declined by 68.6%.

[19] The average daily number of securities on the threshold list in May 2006 was approximately 298 securities, which comprised 0.38% of all equity securities, including those that are not covered by Regulation SHO. Regulation SHO's current close-out requirement applies to any equity security of an issuer that is registered under Section 12 of the Exchange Act, or that is required to file reports pursuant to Section 15(d) of the Exchange Act. NASD Rule 3210, which became effective on July 3, 2006, applies the Regulation SHO close-out framework to non-reporting equity securities with aggregate fails to deliver equal to, or greater than, 10,000 shares and that have a last reported sale price during normal trading hours that would value the aggregate fail to deliver position at $50,000 or greater for five consecutive settlement days. See Securities Exchange Act Release No. 53596 (April 4, 2006), 71 FR 18392 (April 11, 2006) (SR–NASD–2004–044). If the proposed amendments to Regulation SHO are adopted, we anticipate NASD Rule 3210 will be similarly amended.

[20] If the security is a threshold security on the effective date of the amendment, participants of a registered clearing agency must close out that position within 35 settlement days, regardless of whether the security becomes a non-threshold security after the effective date of the amendment.

We chose 35 settlement days because 35 days is used in the current rule, and to allow participants additional time to close out their previously-grandfathered fail to deliver positions, given that some participants may have large previously-excepted fails with respect to a number of securities.

Only previously-grandfathered fail to deliver positions in securities that are threshold securities on the effective date of the amendment would be subject to this 35 settlement day phase-in period. For instance, any previously-grandfathered fail position in a security that is a threshold security on the effective date of the amendment that is removed from the threshold list anytime after the effective date of the amendment but that reappears on the threshold list anytime thereafter would no longer qualify for the 35 day phase-in period and would be required to be closed out under the requirements of Rule 203(b)(3) as amended, *i.e.*, if the fail persists for 13 consecutive settlement days.

[21] In addition, similar to the pre-borrow requirement in current Rule 203(b)(3)(iii), if the fail to deliver position has persisted for 35 settlement days, the proposal would prohibit a participant, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity.

[22] Between the effective date of Regulation SHO and March 31, 2006, 99.2% of the fails that existed on Regulation SHO's January 3, 2005 effective date

fails that occur before a security becomes a threshold security, or both? (*e.g.*, 20 days)? Please explain in detail why a longer period should be allowed.

• Should we provide a longer (or shorter) phase-in period (*e.g.*, 60 days instead of 35), or no phase-in period? What are the economic tradeoffs associated with a longer or shorter phase-in period? How much do these tradeoffs matter?

• Is a 35 settlement day phase-in period necessary as firms will have been on notice that they will have to close out previously-grandfathered fails following the effective date of the amendment? Should we consider changing the phase-in period to 35 calendar days? If so, would this create systems problems or other costs? Would a phase-in period create examination or surveillance difficulties?

• Would the proposed amendments create additional costs, such as costs associated with systems, surveillance, or recordkeeping modifications that may be needed for participants to track fails to deliver subject to the 35 day phase-in period from fails that are not eligible for the phase-in period? If there are additional costs associated with tracking fails to deliver subject to the 35 versus 13 settlement day requirements, do these additional costs outweigh the benefits of providing firms with a 35 settlement day phase-in period?

• Please provide specific comment as to what length of implementation period is necessary to put firms on notice that positions would need to be closed out within the applicable timeframes, if adopted?

• Current Rule 203(b)(3) and the proposal to eliminate the grandfather provision are based on the premise that a high level of fails to deliver for a particular stock might harm the market for that security. In what ways do persistent grandfathered fails to deliver harm market quality for those securities, or otherwise have adverse consequences for investors?

• To what degree would the proposed amendments help reduce abusive practices by short sellers? Conversely, to what degree will eliminating the grandfather provision make it more difficult for short sellers to provide market discipline against abusive practices on the long side?

• To what extent will eliminating the grandfather provision affect the potential for manipulative activity? For instance, could it increase the potential for manipulative short squeezes?

• How much would the amendments affect the specific compliance costs for small, medium, and large clearing members (*e.g.*, personnel or system changes)?

• What are the benefits of allowing fails of a certain duration, and what is the appropriate length of time for which a fail could have such a benefit?

• Should we consider changing the period of time in which any fail is allowed to persist before a firm is required to close out that fail (*e.g.*, reduce the 13 consecutive settlement days to 10 consecutive settlement days)?

• What are the economic costs of eliminating the grandfather provision? How will eliminating the grandfather provision affect the liquidity of equity securities? Are there any other costs associated with this proposal?

• Should grandfathering be eliminated only for those threshold securities where the highest levels of fails exist? If so, how should such positions be identified? What criteria should be used? What time period, if any, would be appropriate to grandfather threshold securities with lower levels of fails? Is there a *de minimis* amount of fails that should not be subject to a mandatory close out? If so, what is that amount?

• Should the Commission consider granting relief to allow market participants to close out fails in threshold securities that occurred because of an obvious or inadvertent trading error? If so, what factors should the Commission consider before granting the request? What documentation should market participants be required to create and maintain to demonstrate eligibility for relief? Should the cost of closing out the fail be a part of the economic cost of making a trading error? How would the proposed amendments affect price efficiency for fails resulting from trading errors?

• Some market participants have suggested that delivery failures in certain structured products, such as exchange traded funds (ETFs) do not raise the same concerns as fails in securities of individual issuers. We also understand that there may be particular difficulties in complying with the close-out requirements because of the structure of these products. Are there unique challenges associated with the clearance and settlement of ETFs? If so, what are these unique challenges? Should ETFs or other types of structured products be excepted from being considered threshold securities? If so, what reasons support excepting these securities?

• We understand that deliveries on sales of Rule 144 restricted securities are sometimes delayed through no fault of the seller (*e.g.*, to process removal of the restrictive legend). Should the current close-out requirement of 13 consecutive settlement days for Rule 144 restricted threshold securities be extended, *e.g.*, to 35 settlement days? Please identify specific delivery problems related to Rule 144 restricted securities. Should the current close-out requirement of 13 consecutive settlement days be similarly extended for any other type of securities and, if so, why?

• We solicit comment on any legitimate reason why a short or long seller may be unable to deliver securities within the current 13 consecutive settlement day period of Rule 203(b)(3), or within any other alternative timeframes.

• The current definition of a "threshold security" is based, in part, on a security having a threshold level of fails that is "equal to at least one-half of one percent of an issuer's total shares outstanding."[23] Is the current threshold level (one-half of one percent) too low or too high? If so, how should the current threshold level be changed?

• When Regulation SHO was proposed, commenters noted difficulties tracking individual accounts in determining fails to deliver.[24] However, we understand that some firms now track internally the accounts responsible for fails. Should we consider requiring customer account-level close out? Should firms be required to prohibit all short sales in that security by an account if that account becomes subject to close out in that security, rather than requiring that account to pre-borrow before effecting any further short sales in the particular threshold security?

• Should we impose a mandatory "pre-borrow" requirement (*i.e.*, that would prohibit a participant of a registered clearing agency, or any broker-dealer for which it clears transactions, from accepting any short sale order or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security) for all firms whenever there are extended fails in a threshold security regardless of whether that particular firm has an extended fail position in that security? If so, how should we identify such securities? What criteria should be used to identify an extended fail? Should this alternative apply to all threshold securities? What are the costs and benefits of imposing

have been closed out. This calculation is based on data, as reported by NSCC, that covers all stocks with aggregate fails to deliver of 10,000 shares or more.

[23] *See supra* note 5.

[24] *See* Adopting Release, 69 FR at 48017.

such a mandatory pre-borrow requirement? What percentage of these pre-borrowed shares would eventually be required for delivery?

• Rule 203(b)(1)'s current locate requirement generally prohibits brokers from using the same shares located from the same source for multiple short sales. However, Rule 203(b)(1) does not similarly restrict the sources that provide the locates. We understand that some sources may be providing multiple locates using the same shares to multiple broker-dealers. Thus, should we amend Rule 203(b)(1) to provide for stricter locates? For example, should we require that brokers obtain locates only from sources that agree to, and that the broker reasonably believes will, decrement shares (so that the source may not provide a locate of the same shares to multiple parties)? Would doing so reduce the potential for fails to deliver? Should we consider other amendments to the locate requirement? Would requiring stricter locate requirements reduce liquidity? If so, would the reduction in liquidity affect some types of securities more than others (*e.g.*, hard to borrow securities or securities issued by smaller companies)? Should stricter locate requirements be implemented only for securities that are hard to borrow (*e.g.*, threshold securities)?

• Some people have asked for disclosure of aggregate fail to deliver positions to provide greater transparency. Should we require the amount or level of fails to deliver in threshold securities to be publicly disclosed? Would requiring information about the amount of fails to deliver help reduce the number of persistent fails to deliver? Should such disclosure be done on an aggregate or individual stock basis? If so, who should make this disclosure (*e.g.*, should each broker be required to disclose the aggregate fails to deliver amount for each threshold security or, alternatively, should the SROs be required to post this information)? How should this information be disseminated? In what way would providing the investing public with access to aggregate fails data be useful? Would providing the investing public with access to this information on an individual stock basis increase the potential for manipulative short squeezes? If not, why not? How frequently should this information be disseminated? Should it be disseminated on a delayed basis to reduce the potential for manipulative short squeezes? If so, how much of a delay would be appropriate?

• Are there certain transactions or market practices that may cause fail to deliver positions to remain for extended periods of time that are not currently addressed by Rule 203 of Regulation SHO? If so, what are these transactions or practices? How should Rule 203 be amended to address these transactions or practices?

• Would borrowing, rather than purchasing, securities to close out a position be more effective in reducing fails to deliver, or could borrowing result in prolonging fails to deliver?

• Can the close-out provision of Rule 203(b) be easily evaded? If so, please explain.

• Does allowing some level of fails of limited duration enable market makers to create a market for less liquid securities? How long of a duration is reasonable? Does eliminating the grandfather provision mean fewer market makers will be willing to make markets in those securities, and could this increase costs and liquidity for those securities? Are there any other concerns or solutions associated with the effect of the amendment on market makers in highly illiquid stocks?

• Current Rule 203(a) provides that on a long sale, a broker-dealer cannot fail or loan shares unless, in advance of the sale, it has demonstrated that it has ascertained that the customer owned the shares, and had been reasonably informed that the seller would deliver the security prior to settlement of the transaction. Former NASD Rule 3370 required that a broker making an affirmative determination that a customer was long must make a notation on the order ticket at the time an order was taken which reflected the conversation with the customer as to the present location of the securities, whether they were in good deliverable form, and the customer's ability to deliver them to the member within three business days. Should we consider amending Regulation SHO to include these additional documentation requirements? If so, should any modifications be made to these additional requirements? In the prior SRO rules, brokers did not have to document long sales if the securities were on deposit in good deliverable form with certain depositories, if instructions had been forwarded to the depository to deliver the securities against payment ("DVP trades"). Under Regulation SHO, a broker may not lend or arrange to lend, or fail, on any security marked long unless, among other things, the broker knows or has been reasonably informed by the seller that the seller owns the security and that the seller would deliver the security prior to settlement and failed to do so. Is it generally reasonable for a broker to believe that a DVP trade will settle on time? Should we consider including or specifically excluding an exception for DVP trades or other trades on any rule requiring documentation of long sales?

B. Proposed Amendments to the "Options Market Maker Exception"

We also propose to limit the duration of the options market maker exception in Rule 203(b)(3)(ii). Under the proposed amendment, for securities that are on the threshold list on the effective date of the amendment, any previously excepted fail to deliver position in the threshold security that resulted from short sales effected to establish or maintain a hedge on an options position that existed before the security became a threshold security, but that has expired or been liquidated on or before the effective date of the amendment, would be required to be closed out within 35 settlement days of the effective date of the amendment.[25] However, if the security appears on the threshold list after the effective date of the amendment, and if the options position has expired or been liquidated, all fail to deliver positions in the security that result or resulted from short sales effected to establish or maintain a hedge on an options position that existed before the security became a threshold security must be closed out within 13 consecutive settlement days of the security becoming a threshold security or of the expiration or liquidation of the options position, whichever is later.[26]

Thus, under the proposed amendment, registered options market makers would still be able to continue to keep open fail positions in threshold securities that are being used to hedge

[25] In addition, similar to the pre-borrow requirement of current Rule 203(b)(3)(iii), if the fail to deliver has persisted for 35 settlement days, the proposal would prohibit a participant, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity.

[26] Also, similar to the pre-borrow requirement of current Rule 203(b)(iii), if the options position has expired or been liquidated and the fail to deliver has persisted for 13 consecutive settlement days from the date on which the security becomes a threshold security or the option position expires or is liquidated, whichever is later, the proposal would prohibit a participant, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity.

options positions, including adjusting such hedges, if the options positions that were created prior to the time that the underlying security became a threshold security have not expired or been liquidated. Once the security becomes a threshold security and the specific options position has expired or been liquidated, however, such fails would be subject to a 13 consecutive settlement day close-out requirement.

We understand that, without the ability to hedge a pre-existing options position by selling short the underlying security, options market makers may be less willing to make markets in securities that are threshold securities.[27] This in turn may reduce liquidity in such securities, to the detriment of investors in options. We also understand that additional time may be needed to close out a fail to deliver position resulting from a hedge on an options position that existed before the security became a threshold security. However, once the options position expires or is liquidated, we see no reason for maintaining the fail position. We believe that the 13 consecutive settlement day period provided for in this proposal would be a sufficient amount of time to allow a fail to remain that results from a short sale by an options market maker to hedge a pre-existing options position that has expired or been liquidated. Therefore, once the options position that was being hedged by a short sale in the underlying threshold security expires or is liquidated, reliance on the options market maker exception is no longer warranted and the fail to deliver position associated with that expired options position should be subsequently closed out.[28] In addition, if the proposed amendments are adopted, we anticipate an implementation period that would put the firms on notice that positions need to be closed out within the applicable time frames.

We believe the proposed amendments foster Regulation SHO's goal of reducing fails to deliver while still permitting options market makers to hedge existing options positions until the specific options position being hedged has expired or been liquidated. The 35 settlement day phase-in period also would provide options market makers advance notice to adjust to the new requirement. At the same time, the amendments would limit the amount of time in which a fail to deliver position can persist.

Request for Comment

- The options market maker exception was created to permit options market makers flexibility in maintaining and adjusting hedges for pre-existing options positions. Is narrowing the options market maker exception appropriate? If not, why not? Will narrowing the exception reduce the willingness of options market makers to make markets in threshold securities? Will narrowing this exception reduce liquidity in threshold securities? Should we consider providing a limited amount of additional time for options market makers to close out after the expiration or liquidation of the hedge (*e.g.*, from 13 days to 20 days)? What other measures or time frames would be effective in fostering Regulation SHO's goal of reducing fails while at the same time encouraging liquidity and market making by options market makers?
- Should we narrow the options market maker exception only for threshold securities with the highest level of fails? If so, how should such positions be identified? What criteria should be used? Should we provide a limited exception for threshold securities with a lower levels of fails? If so, how much time should we provide for options market maker fails in those securities (*e.g.*, 20 days)?
- Should we eliminate the options market maker exception altogether? Would this impede liquidity, or otherwise reduce the willingness of options market makers to make markets in threshold securities? Please provide specific reasons and information to support an alternative recommendation.
- After the options position has expired or been liquidated, are there circumstances that might cause an options market maker to need to maintain an excepted fail to deliver position longer than 13 consecutive settlement days? If so, what are those circumstances?
- Is there any legitimate reason an options market maker should be permitted to never have to close out a fail position that is excepted from the close-out requirement of this proposal? If so, what are the reasons?
- Are the terms "expiration" and "liquidation" of an options position sufficiently inclusive to prevent participants from evading the proposed close-out requirements? Are these terms understandable for compliance purposes? If not, what terms would be more appropriate? Please explain.
- Under the current rule a broker-dealer asserting the options market maker exception must demonstrate eligibility for the exception. Some market participants have noted that more specific documentation requirements may make it easier to establish a broker-dealer's eligibility for the exception. Should a broker-dealer asserting the options market maker exception be required to make and keep more specific documentation regarding their eligibility for the exception? Such documentation may include tracking fail positions resulting from short sales to hedge specific pre-existing options positions and the options position. What other types of documentation would be helpful, and why?
- Should Rule 203(b)(3) of Regulation SHO be amended to permit options market makers to move excepted positions to hedge other, or new, pre-existing options positions? If so, please provide specific reasons and information to support your answer.
- Based on current experience with Regulation SHO, what have been the costs and benefits of the current options market maker exception?
- What are the costs and benefits of the proposed amendments to the options market maker exception?
- What technical or operational challenges would options market makers face in complying with the proposed amendments?
- Would the proposed amendments create additional costs, such as costs associated with systems, surveillance, or recordkeeping modifications that may be needed for participants to track fails to deliver subject to the 35 day phase-in period from fails that are not eligible for the phase-in period? If there are additional costs associated with tracking fails to deliver subject to the 35 versus 13 settlement day requirements, do these additional costs outweigh the benefits of providing firms with a 35 settlement day phase-in period? Is a 35 settlement day phase-in period necessary given that firms will have been on notice that they will have to close out these fails to deliver positions following the effective date of the amendment?
- Should we consider changing the proposed phase-in period to 35 calendar days? If so, would this create systems problems or other costs? Would a phase-in period create examination or surveillance difficulties?
- Please provide specific comment as to what length of implementation period is necessary to put firms on notice that positions would need to be closed out

[27] *See* Adopting Release, 69 FR at 48018.

[28] Consistent with the current rule, options market makers would not be permitted to move their hedge on an original options position to another pre-existing options position to avoid application of the proposed close-out requirements. Once the options position expires or is liquidated, the proposed amendment would require closing out the fail that resulted from that original hedge. To clarify this, the proposed rule would amend Rule 203(b)(3)(ii) to refer to "an options position" rather than "options positions."

within the applicable timeframes, if adopted.

IV. Proposed Amendments to Rule 200(e) Exception for Unwinding Index Arbitrage Positions

We also propose to update Rule 200(e) of Regulation SHO to reference the NYSE Composite Index (NYA), instead of the Dow Jones Industrial Average (DJIA), for purposes of the market decline limitation in subparagraph (e)(3) of Rule 200.

A. Background

Regulation SHO provides a limited exception from the requirement that a person selling a security aggregate all of the person's positions in that security to determine whether the seller has a net long position. This provision, which is contained in Rule 200(e), allows broker-dealers to liquidate (or unwind) certain existing index arbitrage positions involving long baskets of stocks and short index futures or options without aggregating short stock positions in other proprietary accounts if and to the extent that those short stock positions are fully hedged.[29] The exception, however, does not apply if the sale occurs during a period commencing at a time when the DJIA has declined below its closing value on the previous trading day by at least two percent and terminating upon the establishment of the closing value of the DJIA on the next succeeding trading day.[30] If a market decline triggers the application of Rule 200(e)(3), a broker-dealer must aggregate all of its positions in that security to determine whether the seller has a net long position.[31]

The reference to the DJIA was based in part on NYSE Rule 80A (Index Arbitrage Trading Restrictions). As amended in 1999, NYSE Rule 80A provided for limitations on index arbitrage trading in any component stock of the S&P 500 Stock Price Index ("S&P 500") whenever the change from the previous day's close in the DJIA was greater than or equal to two percent calculated pursuant to the rule.[32] In addition, the two-percent market decline restriction was included in Rule 200(e)(3) so that the market could avoid incremental temporary order imbalances during volatile trading days.[33] The two-percent market decline restriction limits temporary order imbalances at the close of trading on a volatile trading day and at the opening of trading on the following day, since trading activity at these times may have a substantial effect on the market's short-term direction.[34] The two-percent safeguard also provides consistency within the equities markets.[35]

On August 24, 2005, the Commission approved an amendment to NYSE Rule 80A to use the NYA to calculate limitations on index arbitrage trading as provided in the rule instead of the DJIA.[36] The effective date of the amendment was October 1, 2005. The Commission's approval order notes that, according to the NYSE, the NYA is a better reflection of market activity with respect to the S&P 500 and thus, a better indicator as to when the restrictions on index arbitrage trading provided by NYSE Rule 80A should be triggered.[37] While Rule 200(e)(3) currently does not refer to the basis for determining the two-percent limitation, NYSE Rule 80A provides that the two percent is to be calculated at the beginning of each quarter and shall be two percent, rounded down to the nearest 10 points, of the average closing value of the NYA for the last month of the previous quarter.[38]

B. Proposed Amendments to Rule 200(e)

In order to maintain uniformity with NYSE Rule 80A and to maintain a uniform protective measure, we propose to amend Rule 200(e)(3) of Regulation SHO to: (i) Reference the NYA instead of the DJIA; and (ii) add language to clarify how the two-percent limitation is to be calculated in accordance with NYSE Rule 80A for purposes of Rule 200(e)(3).[39]

Request for Comment

- Are the proposed changes to the market decline limitation appropriate? Would another index be a more appropriate measure for the exception than the NYA?
- Is the proposed clarification language regarding the two-percent calculation useful?
- Does this limitation affect the expected cost of entering into index arbitrage positions? Does the limitation reduce market efficiency by slowing down price discovery? Does the limitation affect only temporary order imbalances or does it also keep prices from fully adjusting to their fundamental value?
- What are the costs and benefits of the proposed amendments to Regulation SHO's exception for unwinding index arbitrage positions?

V. General Request for Comment

The Commission seeks comment generally on all aspects of the proposed amendments to Regulation SHO under the Exchange Act. Commenters are requested to provide empirical data to support their views and arguments related to the proposals herein. In addition to the questions posed above, commenters are welcome to offer their views on any other matter raised by the proposed amendments to Regulation SHO. With respect to any comments, we note that they are of the greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

VI. Paperwork Reduction Act

The proposed amendments to Regulation SHO would not impose a new "collection of information" within the meaning of the Paperwork Reduction Act of 1995.[40] 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.

---

[29] To qualify for the exception under Rule 200(e), the liquidation of the index arbitrage position must relate to a securities index that is the subject of a financial futures contract (or options on such futures) traded on a contract market, or a standardized options contract, notwithstanding that such person may not have a net long position in that security. 17 CFR 242.200(e).

[30] Specifically, the exception under Rule 200(e) is limited to the following conditions: (1) The index arbitrage position involves a long basket of stock and one or more short index futures traded on a board of trade or one or more standardized options contracts; (2) such person's net short position is solely the result of one or more short positions created and maintained in the course of bona-fide arbitrage, risk arbitrage, or bona-fide hedge activities; and (3) the sale does not occur during a period commencing at the time that the DJIA has declined below its closing value on the previous day by at least two percent and terminating upon the establishment of the closing value of the DJIA on the next succeeding trading day. *Id.*

[31] 17 CFR 242.200(e)(3); Adopting Release, 69 FR at 48012.

[32] The restrictions were removed when the DJIA retreated to one percent or less, calculated pursuant to the rule, from the prior day's close.

[33] Adopting Release, 69 FR at 48011.

[34] *Id.*

[35] In 1999, the NYSE amended its rules on index arbitrage restrictions to include the two-percent trigger. The Commission's adoption of the same trigger provided a uniform protective measure. *See* Securities Exchange Act Release No. 41041 (February 11, 1999), 64 FR 8424 (SR–NYSE–98–45) (February 19, 1999).

[36] Securities Exchange Act Relese No. 52328 (Aug. 24, 2005), 70 FR 51398 (Aug. 30, 2005).

[37] *Id.*

[38] *Id. See also* NYSE Rule 80A (Supplementary Material .10).

[39] *Id. See also* Proposed Rule 200(e)(3). In addition, because the NYA is already posted with this calculation, the amendment would make this reference point more easily accessible to market participants.

[40] 44 U.S.C. 3501 *et seq.*

VII. Consideration of Costs and Benefits of Proposed Amendments to Regulation SHO

The Commission is considering the costs and the benefits of the proposed amendments to Regulation SHO. The Commission is sensitive to these costs and benefits, and encourages commenters to discuss any additional costs or benefits beyond those discussed here, as well as any reductions in costs. In particular, the Commission requests comment on the potential costs for any modification to both computer systems and surveillance mechanisms and for information gathering, management, and recordkeeping systems or procedures, as well as any potential benefits resulting from the proposals for registrants, issuers, investors, brokers or dealers, other securities industry professionals, regulators, and other market participants. Commenters should provide analysis and data to support their views on the costs and benefits associated with the proposed amendments to Regulation SHO.

A. Proposed Amendments to Rule 203(b)(3)'s Delivery Requirements

1. Amendments to Rule 203(b)(3)(i)'s Grandfather Provision

a. Benefits. The proposed amendments would eliminate the grandfather provision in Rule 203(b)(3)(i) of Regulation SHO. In particular, the proposal would require that any previously-grandfathered fail to deliver position in a security that is on the threshold list on the effective date of the amendment be closed out within 35 settlement days. If a security becomes a threshold security after the effective date of the amendment, any fails to deliver that occurred prior to the security becoming a threshold security would become subject to Rule 203(b)(3)'s mandatory 13 settlement days close-out requirement, similar to any other fail to deliver position in a threshold security. We have observed a small number of threshold securities with substantial and persistent fail to deliver positions that are not being closed out under existing delivery and settlement guidelines. We believe that these persistent fail positions are attributable primarily to the grandfather provision. We believe that the proposal to eliminate the grandfather provision would further reduce the number of persistent fails to deliver. We believe the proposed amendments to Rule 203(b)(3)(i) will protect and enhance the operation, integrity, and stability of the market.

Consistent with the Commission's investor protection mandate, the proposed amendment will benefit investors. The proposed amendments would facilitate receipt of shares so that more investors receive the benefits associated with share ownership, such as the use of the shares for voting and lending purposes. The proposal may alleviate investor apprehension as they make investment decisions by providing them with greater assurance that securities will be delivered as expected. It should also foster the fair treatment of all investors.

The proposed amendments should also benefit issuers. A high level of persistent fails in a security may be perceived by potential investors negatively and may affect their decision about making a capital commitment. Thus, the proposal may benefit issuers by removing a potential barrier to capital investment, thereby increasing liquidity. An increase in investor confidence in the market by providing greater assurance that trades will be delivered may also facilitate investment. In addition, some issuers may believe they have endured reputational damage if there are a high level of persistent fails in their securities as a high level of fails is often viewed negatively. Eliminating the grandfather provision may be perceived by these issuers as helping to restore their good name. Some issuers may also believe that they have been the target of potential manipulative conduct as a result of failures to deliver from naked short sales. Eliminating the grandfather provision may remove a potential means of manipulation, thereby decreasing the possibility of artificial market influences and, therefore, contributing to price efficiency.

We believe the 35 day phase-in period should reduce disruption to the market and foster greater market stability because it would provide time for participants to close out grandfathered positions in an orderly manner. In addition, this proposed amendment would put market participants on notice that the Commission is considering this approach.

The proposed amendment would provide flexibility because it gives a sufficient length of time to effect purchases to close out in an orderly manner. We are seeking comment on an appropriate length of implementation period that should provide sufficient notice. Market participants may begin to close out grandfathered positions at anytime before the 35 day phase-in period may be adopted.

We solicit comment on any additional benefits that may be realized with the proposed amendment, including both short-term and long-term benefits. We solicit comment regarding other benefits to market efficiency, pricing efficiency, market stability, market integrity, and investor protection.

b. Costs. In order to comply with Regulation SHO when it became effective in January 2005, market participants needed to modify their systems and surveillance mechanisms. Thus, the infrastructure necessary to comply with the proposed amendments should already be in place. Any additional changes to the infrastructure should be minimal. We request specific comment on the system changes to computer hardware and software, or surveillance costs that might be necessary to comply with this rule. We solicit comment on whether the costs will be incurred on a one-time or ongoing basis, as well as cost estimates. In addition, we seek comment as to whether the proposed amendment would decrease any costs for any market participants. We seek comment about any other costs and cost reductions associated with the proposed amendment or alternative suggestion. Specifically:

- What are the economic costs of eliminating the grandfather provision? How will this affect the liquidity of equity securities? Are there any other costs associated with the proposal?
- How much would the amendments to the grandfather provision affect the compliance costs for small, medium, and large clearing members (*e.g.*, personnel or system changes)? We seek comment on the costs of compliance that may arise as a result of these proposed amendments. For instance, to comply with the proposed amendments, will broker-dealers be required to:
- Purchase new systems or implement changes to existing systems? Will changes to existing systems be significant? What are the costs associated with acquiring new systems or making changes to existing systems? How much time would be required to fully implement any new or changed systems?
- Change existing records? What changes would need to be made? What are the costs associated with any changes? How much time would be required to make any changes?
- Increase staffing and associated overhead costs? Will broker-dealers have to hire more staff? How many, and at what experience and salary level? Can existing staff be retrained? What are the costs associated with hiring new staff or retraining existing staff? If retraining is required, what other costs might be incurred, *i.e.*, would retrained staff be unable to perform existing duties in order to comply with the proposed

amendments? Will other resources need to be re-dedicated to comply with the proposed amendments?

• Implement, enhance or modify surveillance systems and procedures? Please describe what would be needed, and what costs would be incurred.

• Establish and implement new supervisory or compliance procedures, or modify existing procedures? What are the costs associated with such changes? Would new compliance or supervisory personnel be needed? What are the costs of obtaining such staff?

• Are there any other costs that may be incurred to comply with the proposed amendments?

• In connection with error trades, should the cost of closing out the fail be a part of the economic cost of making a trading error? What costs may be involved with trading errors under the proposed amendments? How would price efficiency be effected for fails resulting from trading errors under the proposed amendments?

• Does eliminating the grandfather provision mean fewer market makers will be willing to make markets in those securities, and could this increase transaction costs and liquidity for those securities? Would such an effect be more severe for liquid or illiquid securities?

• Are there any costs that market participants may incur as a result of the proposed 35 day phase-in period? Would the costs of a phase-in period outweigh the costs of not having one? Would a phase-in create examination or surveillance difficulties?

• What are the costs and economic tradeoffs associated with longer or shorter phase-in periods? How much do these costs and tradeoffs matter?

• Similar to the pre-borrow requirements of current Rule 203(b)(iii), we are including a pre-borrow requirement for previously grandfathered fail positions when they become subject to either the proposed 35-day phase-in period or the 13-day close-out requirement. Thus, the proposal would prohibit a participant, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity. What are the costs associated with including the pre-borrow requirement for the proposed amendments to the grandfather provision? What are the costs of excluding a pre-borrow requirement for these proposals?

• We ask what length of implementation period is necessary to put firms on notice that positions would need to be closed out within the applicable timeframes, if the proposed amendments are adopted. What are the costs associated with providing a lengthy implementation period?

In addition, in Section III.A., we ask whether we should consider amendments to other provisions of Regulation SHO. We also solicit comment on the costs associated with these proposals. Specifically:

• We ask whether we should consider imposing a mandatory pre-borrow requirement in lieu of a locate requirement for threshold securities with extended fails. What are the costs and benefits of such a proposal?

• We ask whether the current close-out requirement of 13 consecutive settlement days for Rule 144 restricted threshold securities or other types of threshold securities should be extended. Are there costs associated with extending the current close-out requirement for these, or other types of threshold securities? Who would bear these costs?

• What would be the costs of excepting ETFs or other types of structured products from the definition of threshold securities? Who would bear these costs?

• We ask whether we should consider tightening the locate requirements. For instance, should we consider requiring that brokers obtain locates only from sources that agree to, and that the broker reasonably believes will, decrement shares (so that the source may not provide a locate of the same shares to multiple parties)? What are the costs associated with such a proposal? Would it hinder liquidity, or raise the cost of borrowing? What would be the costs associated with other proposals to strengthen the locate requirements?

• What are the costs associated with dissemination of aggregate fails data or fails data by individual security?

• We ask whether allowing some level of fails of limited duration enables market makers to create a market for less liquid securities, or whether eliminating the grandfather provision means fewer market makers will be willing to make markets in those securities, and could this increase costs and liquidity for those securities. Are there any other costs associated with the effect of the amendments on market makers in highly illiquid stocks?

• What are the potential costs of requiring additional specific documentation of long sales? Are there systems costs, personnel costs, recordkeeping costs, etc? What costs could be saved by specifically excluding DVP trades? What costs may be incurred by excluding DVP trades from long sale documentation requirements?

2. Amendments to Rule 203(b)(3)(ii)'s Options Market Maker Exception

a. Benefits. The proposed amendments also would limit the duration of the options market maker exception in Rule 203(b)(3)(ii) of Regulation SHO. In particular, the proposal would require firms, within specified timeframes, to close out all fail to deliver positions in threshold securities resulting from short sales that hedge options positions that have expired or been liquidated and that were established prior to the time the underlying security became a threshold security. In the Regulation SHO Adopting Release, the Commission acknowledged assertions by options market makers that, without the ability to hedge a pre-existing options position by selling short the underlying security, options market makers may be less willing to make markets in threshold securities.[41] We also understand that additional time may be needed in order to close out a previously-excepted fail to deliver position resulting from a hedge on an options position that existed before the security became a threshold security. However, once the options position expires or is liquidated, we see no reason for maintaining the fail position or for allowing continued reliance on the options market maker exception. We believe the proposal promotes Regulation SHO's goal of reducing fails to deliver without interfering with the purpose of the options market maker exception. Further, the amendments would provide participants and options market makers that have been allocated the close-out obligation flexibility and advance notice to close out the fail to deliver positions. We believe the proposed amendments to Rule 203(b)(3)(ii) will protect and enhance the operation, integrity, and stability of the market.

b. Costs. Broker-dealers asserting the options market maker exception under Regulation SHO should already have systems in place to close out non-excepted fails to deliver. Broker-dealers may, however, need to modify their systems and surveillance mechanisms to track the fails to deliver and the options positions to ensure compliance with the proposed amendments. In addition, broker-dealers may need to put in place mechanisms to facilitate

[41] *See* Adopting Release, 69 FR at 48018.

communications between participants and options market makers. We request specific comment on the systems changes to computer hardware and software, or surveillance costs necessary to implement this rule. Specifically:

- What are the costs and benefits of the proposed amendments to the options market maker exception? For instance, what are the costs associated with narrowing the exception if the amendments reduce the willingness of options market makers to make markets in threshold securities?
- We ask whether we should consider providing a limited amount of additional time for options market makers to close out after the expiration or liquidation of the hedged options position (*e.g.*, from 13 days to 20 days). What costs would be associated with such a proposal? What costs might be saved by allowing additional time?
- Similar to the pre-borrow requirements of current Rule 203(b)(iii), if the options position has expired or been liquidated and the fail to deliver has persisted for 13 consecutive settlement days from the date on which the security becomes a threshold security or the option position expires or is liquidated, whichever is later (or 35 settlement days from the effective date of the amendment if the phase-in period applies), the proposal would prohibit a participant, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity. What are the costs associated with including the pre-borrow requirement for the proposed amendments to the options market maker exception? What are the costs of excluding a pre-borrow requirement for these proposals?
- We ask whether we should eliminate the options market maker exception altogether. What costs might be associated with such a proposal?
- What costs would be associated with requiring options market makers to make and keep more specific documentation of fail positions resulting from short sales to hedge specific pre-existing options positions?
- Based on the current requirements of Regulation SHO, what have been the costs and benefits of the current options market maker exception?
- What are the specific costs associated with any technical or operational challenges that options market makers face in complying with the proposed amendments?
- Would the proposed amendments create additional costs, such as costs associated with systems, surveillance, or recordkeeping modifications that may be needed for participants to track fails to deliver subject to the 35 versus 13 settlement days requirements? If there are additional costs associated with tracking fails to deliver would these additional costs outweigh the benefits of providing firms with a 35 settlement day close-out requirement? Is a 35 settlement day close out period necessary as firms will have been on notice that they will have to close out these fails to deliver positions following the effective date of the amendment?
- How much would the amendments to the options market maker exception affect compliance costs for small, medium, and large clearing members (*e.g.*, personnel or system changes)? We seek comment on the costs of compliance that may arise. For instance, to comply with the proposed amendments regarding the options market maker exception, will broker-dealers be required to:
- Purchase new systems or implement changes to existing systems? Will changes to existing systems be significant? What are the costs associated with acquiring new systems or making changes to existing systems? How much time would be required to fully implement any new or changed systems?
- Change existing records? What changes would need to be made? What are the costs associated with any changes? How much time would be required to make any changes?
- Increase staffing and associated overhead costs? Will broker-dealers have to hire more staff? How many, and at what experience and salary level? Can existing staff be retrained? What are the costs associated with hiring new staff or retraining existing staff? If retraining is required, what other costs might be incurred, *i.e.*, would retrained staff be unable to perform existing duties in order to comply with the proposed amendments? Will other resources need to be re-dedicated to comply with the proposed amendments?
- Implement, enhance or modify surveillance systems and procedures? Please describe what would be needed, and what costs would be incurred.
- Establish and implement new supervisory or compliance procedures, or modify existing procedures? What are the costs associated with such changes? Would new compliance or supervisory personnel be needed? What are the costs of obtaining such staff?
- Are there any other costs that may be incurred to comply with the proposed amendments?
- Are there any costs that market participants may incur as a result of the proposed 35 day phase-in period? Would the costs of a phase-in period outweigh the costs of not having one? Would a phase-in create examination or surveillance difficulties?
- What are the economic tradeoffs associated with longer or shorter phase-in periods? How much do these tradeoffs matter?
- We ask what length of implementation period is necessary to put firms on notice that positions would need to be closed out within the applicable timeframes, if adopted. What are the costs associated with providing a lengthy implementation period?

B. Proposed Amendments to Rule 200(e)(3)

1. Benefits

The proposed modification to Rule 200(e) of Regulation SHO would reference the NYA, instead of the DJIA, for purposes of the market decline limitation in subparagraph (e)(3) of Rule 200. The reference to the DJIA was based in part on NYSE Rule 80A, which provided for limitations on index arbitrage trading in any component stock of the S&P 500 Stock Price Index (S&P 500) whenever the change from the previous day's close in the DJIA was greater than or equal to two-percent calculated pursuant to the rule. We also propose to add language to clarify that the two-percent limitation is to be calculated in accordance with NYSE Rule 80A for purposes of Rule 200(e)(3). On August 24, 2005, the Commission approved an amendment to NYSE Rule 80A to use the NYA to calculate limitations on index arbitrage trading as provided in the rule instead of the DJIA.[42] According to the NYSE, the NYA is a better reflection of market activity with respect to the S&P 500 and thus, a better indicator as to when the restrictions on index arbitrage trading provided by NYSE Rule 80A should be triggered.[43] We believe the amendment is appropriate in order to maintain uniformity with NYSE Rule 80A and to maintain a uniform protective measure. We also believe that, because the NYA is already posted with the two-percent calculation, the proposed amendment

[42] Securities Exchange Act Release No. 52328 (Aug. 24, 2005), 70 FR 51398 (Aug. 30, 2005).

[43] *Id.*

would make this reference point more easily accessible to market participants.

2. Costs

We do not anticipate that this proposed amendment will impose any significant burden or cost on market participants. Indeed, the proposed amendment may save costs by promoting uniformity with NYSE Rule 80A so that broker-dealers will need to refer to only one index with respect to restrictions regarding index arbitrage trading.

- Does this limitation affect the expected cost of entering into index arbitrage positions? Does the limitation reduce market efficiency by slowing down price discovery? Does the limitation affect only temporary order imbalances or does it also keep prices from fully adjusting to their fundamental value?
- What are the costs and benefits of the proposed amendments to Regulation SHO's exception for unwinding index arbitrage positions?

VIII. Consideration of Burden and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and whenever it is required to consider or determine if an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation.[44] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[45] Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

We believe the proposed amendments may promote price efficiency. The proposed amendments to Regulation SHO are intended to promote efficiency by reducing persistent fails to deliver securities that have the potential to disrupt market operations and pricing systems. To the extent that the proposed amendments increase the cost of market making, the proposed amendments may impact liquidity in some threshold securities. We believe that these concerns are mitigated by the scope and flexibility of the proposed amendments. We seek comment on whether the proposals promote price efficiency, including whether the proposals might impact liquidity and the potential for manipulative short squeezes.

In addition, we believe that the proposals may promote capital formation. Large and persistent fails to deliver can deprive shareholders of the benefits of ownership, such as voting and lending. They can also be indicative of manipulative conduct. The deprivation of the benefits of ownership, as well as the perception that manipulative naked short selling is occurring in certain securities, may undermine the confidence of investors. These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to such manipulative conduct. We solicit comment on whether the proposed amendments would promote capital formation, including whether the proposed increased short sale restrictions would affect investors' decisions to invest in certain equity securities.

The Commission also believes the proposed amendments may not impose any burden on competition not necessary or appropriate in furtherance of the Exchange Act. By eliminating the grandfather provision and narrowing the options market maker exception, the Commission believes the proposed amendments to Regulation SHO would promote competition by requiring similarly situated market participants to close out fails to deliver in threshold securities within the same timeframe. We solicit comment on whether the proposed amendments would promote competition, including whether investors are more or less likely to choose to invest in foreign markets with more relaxed short selling restrictions.

The Commission requests comment on whether the proposed amendments would promote efficiency, competition, and capital formation.

IX. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA,"[46] we must advise the Office of Management and Budget as to whether the proposed regulation constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effect on competition, investment or innovation.

If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review. We request comment on the potential impact of the proposed amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

X. Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA), in accordance with the provisions of the Regulatory Flexibility Act (RFA),[47] regarding the proposed amendments to Regulation SHO, Rules 200 and 203, under the Exchange Act.

A. Reasons for the Proposed Action

Based on examinations conducted by the Commission's staff and the SROs since Regulation SHO's adoption, we are proposing revisions to Rules 200 and 203 of Regulation SHO. The proposed amendments to Rule 203(b)(3) of Regulation SHO are designed to reduce the number of persistent fails to deliver. We are concerned that large and persistent fails to deliver may have a negative effect on the market in these securities. Although high fails levels exist only for a small percentage of issuers, they could potentially impede the orderly functioning of the market for such issuers, particularly issuers of less liquid securities. The proposed amendment to update the market decline limitation referenced in Rule 200(e)(3) would maintain uniformity with NYSE Rule 80A and would promote a uniform protective measure.

B. Objectives

Our proposals are intended to further reduce the number of persistent fails to deliver in threshold securities, by eliminating the grandfather provision and narrowing the options market maker exception to the delivery requirement. The proposed amendments are designed to help reduce persistent, large fail positions, which may have a negative effect on the market in these securities and also may be used to facilitate some manipulative strategies. Although high fails levels exist only for a small percentage of issuers, they could impede the orderly functioning of the market for such issuers, particularly issuers of less liquid securities. A

[44] 15 U.S.C. 78c(f).

[45] 15 U.S.C. 78w(a)(2).

[46] Pub. L. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

[47] 5 U.S.C. 603.

significant level of fails to deliver in a security also may have adverse consequences for shareholders who may be relying on delivery of those shares for voting purposes, or could otherwise affect an investor's decision to invest in that particular security. To allow market participants sufficient time to comply with the new close-out requirements, the proposals include a 35 settlement day phase-in period following the effective date of the amendment. The phase-in period is intended to provide market participants flexibility and advance notice to begin closing out originally grandfathered fail to deliver positions. The proposed amendments to Rule 200(e)(3) are intended to update the market decline limitation referenced in the rule in order to maintain uniformity with the NYSE Rule 80A and to maintain uniform protective measures.

C. Legal Basis

Pursuant to the Exchange Act and, particularly, Sections 2, 3(b), 9(h), 10, 11A, 15, 17(a), 19, 23(a) thereof, 15 U.S.C. 78b, 78c, 78i, 78j, 78k–1, 78o, 78q, 78s, 78w(a), the Commission is proposing amendments to Regulation SHO, Rules §§ 242.200 and 242.203.

D. Small Entities Subject to the Rule

Paragraph (c)(1) of Rule 0–10[48] states that the term "small business" or "small organization," when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to § 240.17a–5(d); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. As of 2005, the Commission estimates that there were approximately 910 broker-dealers that qualified as small entities as defined above.[49] The Commission's proposed amendments would require all small entities to modify systems and surveillance mechanisms to ensure compliance with the new close-out requirements.

E. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed amendments may impose some new or additional reporting, recordkeeping, or compliance costs on broker-dealers that are small entities. In order to comply with Regulation SHO when it became effective in January, 2005, small entities needed to modify their systems and surveillance mechanisms. Thus, the infrastructure necessary to comply with the proposed amendments regarding elimination of the grandfather provision should already be in place. Any additional changes to the infrastructure should be minimal. In addition, small entities engaging in options market making should already have systems in place to close out non-excepted fails to deliver as required by Regulation SHO. These small entities, however, may need to modify their systems and surveillance mechanisms to track the fails to deliver and the options positions to ensure compliance with the proposed amendments. These entities may also need to put in place mechanisms to facilitate communications between participants and options market makers. We solicit comment on what new recordkeeping, reporting or compliance requirements may arise as a result of these proposed amendments.

F. Duplicative, Overlapping or Conflicting Federal Rules

The Commission believes that there are no federal rules that duplicate, overlap or conflict with the proposed amendments.

G. Significant Alternatives

The RFA directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small issuers and broker-dealers. Pursuant to Section 3(a) of the RFA,[50] the Commission must consider the following types of alternatives: (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the rule, or any part thereof, for small entities.

The primary goal of the proposed amendments is to reduce the number of persistent fails to deliver in threshold securities. As such, we believe that imposing different compliance requirements, and possibly a different timetable for implementing compliance requirements, for small entities would undermine the goal of reducing fails to deliver. In addition, we have concluded similarly that it would not be consistent with the primary goal of the proposals to further clarify, consolidate or simplify the proposed amendments for small entities. The Commission also preliminarily believes that it would be inconsistent with the purposes of the Exchange Act to use performance standards to specify different requirements for small entities or to exempt broker-dealer entities from having to comply with the proposed rules. We seek comment on alternatives for small entities that conduct business in threshold securities.

H. Request for Comments

The Commission encourages the submission of written comments with respect to any aspect of the IRFA. In particular, the Commission seeks comment on (i) the number of small entities that would be affected by the proposed amendments; and (ii) the existence or nature of the potential impact of the proposed amendments on small entities. Those comments should specify costs of compliance with the proposed amendments, and suggest alternatives that would accomplish the objective of the proposed amendments.

XI. Statutory Authority

Pursuant to the Exchange Act and, particularly, Sections 2, 3(b), 9(h), 10, 11A, 15, 17(a), 17A, 23(a) thereof, 15 U.S.C. 78b, 78c, 78i, 78j, 78k–1, 78o, 78q, 78q–1, 78w(a), the Commission is proposing amendments to § 240.200 and 203.

Text of the Proposed Amendments to Regulation SHO

List of Subjects 17 CFR Part 242

Brokers, Fraud, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, Title 17, Chapter II, part 242, of the Code of Federal Regulations is proposed to be amended as follows.

PART 242—REGULATIONS M, SHO, ATS, AC, NMS, AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

1. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l*, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

2. Section 242.200 is proposed to be amended by revising paragraph (e)(3) to read as follows:

[48] 17 CFR 240.0–10(c)(1).

[49] These numbers are based on the Commission's Office of Economic Analysis's review of 2005 FOCUS Report filings reflecting registered broker-dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings.

[50] 5 U.S.C. 603(c).

§ 242.200 Definition of "short sale" and marking requirements.

* * * * *

(e) * * *

(3) The sale does not occur during a period commencing at the time that the NYSE Composite Index has declined by two percent (as calculated pursuant to NYSE Rule 80A) or more from its closing value on the previous day and terminating upon the establishment of the closing value of the NYSE Composite Index on the next succeeding trading day.

* * * * *

3. Section 242.203(b)(3) is proposed to be amended by:

a. Revising paragraphs (b)(3)(i) and (b)(3)(ii);

b. Redesignating current paragraphs (b)(3)(iii), (b)(3)(iv), and (b)(3)(v), as (b)(3)(v), (b)(3)(vi), and (b)(3)(vii);

c. Adding new paragraphs (b)(3)(iii) and (b)(3)(iv).

The proposed revisions read as follows:

§ 242.203 Borrowing and delivery requirements.

* * * * *

(b) * * *

(3) * * *

(i) *Provided, however,* that a participant that has a fail to deliver position at a registered clearing agency in a threshold security on the effective date of this amendment and which, prior to the effective date of this amendment, had been previously grandfathered from the close-out requirement in this paragraph (b)(3) (*i.e.*, because the participant of a registered clearing agency had a fail to deliver position at a registered clearing agency on the settlement day preceding the day that the security became a threshold security), shall immediately close out that fail to deliver position within thirty-five settlement days of the effective date of this amendment by purchasing securities of like kind and quantity;

(ii) The provisions of this paragraph (b)(3) shall not apply to the amount of the fail to deliver position in the threshold security that is attributed to short sales by a registered options market maker, if and to the extent that the short sales are effected by the registered options market maker to establish or maintain a hedge on an options position that were created before the security became a threshold security;

(A) *Provided, however,* if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in a threshold security that is attributed to short sales by a registered options market maker, if and to the extent that the short sales are effected by the registered options market maker to establish or maintain a hedge on an options position that was created before the security became a threshold security, if the options position has expired or been liquidated and the participant has had such fail to deliver position in the threshold security for thirteen consecutive settlement days from the date on which the security became a threshold security or the date of expiration or liquidation of the options position, whichever is later, the participant must immediately close out the fail to deliver position by purchasing securities of like kind and quantity;

(B) *Provided, however,* that a participant that has a fail to deliver position at a registered clearing agency in a threshold security on the effective date of this amendment which, prior to the effective date of this amendment, had been previously excepted from the close-out requirement in this paragraph (b)(3) (*i.e.*, because the participant of a registered clearing agency had a fail to deliver position in the threshold security that is attributed to short sales by a registered options market maker, if and to the extent that the short sales are effected by the registered options market maker to establish or maintain a hedge on an options position that was created before the security became a threshold security) and where such options position has expired or been liquidated on or prior to the effective date of the amendment, shall close out that fail to deliver position within thirty-five settlement days of the effective date of this amendment by purchasing securities of like kind and quantity;

(iii) If a participant of a registered clearing agency entitled to rely on the thirty-five settlement day close out requirement contained in paragraphs (b)(3)(i) and (b)(3)(ii) of this section has a fail to deliver position at a registered clearing agency in the threshold security for thirty-five settlement days, the participant and any broker or dealer for which it clears transactions, including any market maker, that would otherwise be entitled to rely on the exception provided in paragraph (b)(2)(ii) of this section, may not accept a short sale order in the threshold security from another person, or effect a short sale in the threshold security for its own account, without borrowing the security or entering into a bona-fide arrangement to borrow the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity;

(iv) If a participant of a registered clearing agency entitled to rely on the thirteen consecutive settlement day close out requirement contained in paragraph (b)(3)(ii) of this section has a fail to deliver position at a registered clearing agency in a threshold security for thirteen consecutive settlement days following the expiration or liquidation of the options position, the participant and any broker or dealer for which it clears transactions, including any market maker that would otherwise be entitled to rely on the exception provided in paragraph (b)(2)(ii) of this section, may not accept a short sale order in the threshold security from another person, or effect a short sale in the threshold security for its own account, without borrowing the security or entering into a bona-fide arrangement to borrow the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity;

* * * * *

Dated: July 14, 2006.

By the Commission.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 06–6386 Filed 7–20–06; 8:45 am]

BILLING CODE 8010–01–P

Reader Aids

Federal Register

Vol. 71, No. 140

Friday, July 21, 2006

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	202–741–6000
Laws	741–6000
Presidential Documents	
Executive orders and proclamations	741–6000
The United States Government Manual	741–6000
Other Services	
Electronic and on-line services (voice)	741–6020
Privacy Act Compilation	741–6064
Public Laws Update Service (numbers, dates, etc.)	741–6043
TTY for the deaf-and-hard-of-hearing	741–6086

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **http://www.gpoaccess.gov/nara/index.html**

Federal Register information and research tools, including Public Inspection List, indexes, and links to GPO Access are located at: **http://www.archives. gov/federal_register/**

E-mail

FEDREGTOC-L (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, 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.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC-L and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documentsor regulations.

FEDERAL REGISTER PAGES AND DATE, JULY

37807–38052 3
38053–38258 5
38259–38510 6
38511–38752 7
38753–38978 10
38979–39202 11
39203–39510 12
39511–40002 13
40003–40382 14
40383–40636 17
40637–40874 18
40875–41090 19
41091–41344 20
41345–41722 21

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.

3 CFR

Proclamations:
7758 (See 8033) 38255
8033 38255
8034 38509
8035 40383
8036 41091
Executive Orders:
13348 (See Notice of July 18, 2006) 41093
13381 (Amended by 13408) 37807
13408 37807
13409 38511
Administrative Orders:
Presidential Determinations:
No. 2006-17 of June 30, 2006 39511
Notices:
Notice of July 18, 2006 41093

5 CFR

534 38753
724 41095
Proposed Rules:
553 41376
1630 40034
1651 40034
1653 40034
1690 40034

7 CFR

210 39513
215 39513
220 39513
225 39513
226 39513
235 39513
301 ..... 40875, 40879
319 40875
625 38053
916 41345
917 41345
922 40637
948 40639
1402 40641
1900 38979
Proposed Rules:
52 39017
205 ..... 37854, 40624
319 38302
457 40194
916 38115
917 38115
925 39019
944 39019
1421 37857

9 CFR

55 41682
81 41682
94 38259

10 CFR

72 39520
110 40003
727 40880
Proposed Rules:
20 37862
32 37862
430 41320
431 38799

11 CFR

104 38513

12 CFR

201 39520
915 40643
Proposed Rules:
41 40786
222 40786
308 40938
328 40440
334 40786
364 40786
563 37862
563b 41179
571 40786
575 41179
615 39235
717 40786
1750 39399

14 CFR

23 ..... 39203, 41099, 41101, 41104
25 ..... 38513, 40648
39 ..... 37980, 38053, 38054, 38059, 38062, 38515, 38979, 39521, 40385, 40387, 40389, 40391, 40886, 40888, 41109, 41113, 41116, 41118, 41121
71 ..... 38516, 40394, 40651, 40652, 40653
91 40003
97 ..... 38064, 39522, 39523, 41353, 41355
121 ..... 38517, 40003
125 40003
135 40003
Proposed Rules:
23 ..... 38539, 40443
25 ..... 38539, 38540, 38541, 38542, 39235
33 ..... 40675, 41184
39 ..... 37868, 38304, 38311, 39020, 39023, 39025, 39237, 39242, 39244, 39593, 39595, 39597, 39600, 40940, 40942, 40945, 40948
71 ..... 39247, 40444, 40445, 40447, 40448

91.....38118, 38542
121.....38540, 38541, 38542
125.....38542
129.....38540, 38541, 38542

15 CFR

700.....39526

Proposed Rules:

740.....38313, 39603
742.....38313, 39603
744.....38313
748.....38313, 39603
754.....39603
764.....38321
766.....38321
772.....39603

16 CFR

1031.....38754

Proposed Rules:

311.....38321
681.....40786
1119.....39248
1500.....39249
1507.....39249

17 CFR

1.....37809
15.....37809
16.....37809
17.....37809
18.....37809
19.....37809
21.....37809
30.....40395
37.....37809
41.....39534
240.....39534

Proposed Rules:

38.....38740
240.....40866
242.....41710

18 CFR

284.....38066

Proposed Rules:

35.....39251
37.....39251
366.....39603
367.....39603
368.....39603
369.....39603
375.....39603
803.....38692
804.....38692
805.....38692

19 CFR

Proposed Rules:

4.....40035
122.....40035

20 CFR

422.....38066

21 CFR

73.....41125
520.....38071, 38072, 39203, 39543, 40010
522.....39204, 39544, 39545, 39547
524.....38073, 38261
526.....39544
556.....39545
558.....39204

23 CFR

1350.....40891

25 CFR

Proposed Rules:

171.....40450

26 CFR

1.....38074, 38261, 38262, 39548, 41357
301.....38262, 38985

Proposed Rules:

1.....38322, 38323, 39604, 40458
301.....38323, 41377
602.....38323

27 CFR

9.....40397, 40400, 40401

Proposed Rules:

9.....37870, 40458, 40465

28 CFR

58.....38076

Proposed Rules:

511.....38543

29 CFR

1910.....38085
1915.....38085
1926.....38085, 41127
1928.....41127
2520.....41359
2700.....40654
4022.....40011
4044.....40011
4281.....39205

Proposed Rules:

2201.....41384
2520.....41392

30 CFR

250.....40904
251.....40904
280.....40904

Proposed Rules:

202.....41516
206.....38545, 41516
210.....38545, 41516
216.....38545
217.....41516
218.....38545, 41516
250.....37874

31 CFR

103.....39554
Ch. V.....39708

Proposed Rules:

103.....39606

32 CFR

43.....38760
50.....38760
54.....40656
78.....40656

Proposed Rules:

310.....40282

33 CFR

1.....39206
64.....39206
72.....39206
81.....39206
89.....39206
100.....38517, 38520, 38522, 39206, 39561, 39563, 40012, 40914
101.....39206
104.....39206
117.....38524, 38988, 38989, 38990, 39563, 40418, 40916
120.....39206
135.....39206
146.....39206
148.....39206
151.....39206
153.....39206
154.....39206
155.....39206
156.....39206
157.....39206
160.....39206
164.....39206
165.....37822, 37824, 37825, 37827, 37829, 37831, 37833, 37835, 37837, 38087, 38089, 38526, 38528, 38530, 38532, 38534, 39206, 39565, 39567, 40918, 40920

Proposed Rules:

100.....38561, 39609, 39611, 39613, 41407
117.....39028

34 CFR

300.....41084
668.....37990
674.....37990
675.....37990
676.....37990
682.....37990
685.....37990
690.....37990
691.....37990

36 CFR

Proposed Rules:

1193.....38324
1194.....38324
1195.....38563

37 CFR

Proposed Rules:

1.....38808

38 CFR

Proposed Rules:

3.....39616

39 CFR

111.....38537, 38966

40 CFR

51.....40420
52.....38770, 38773, 38776, 38990, 38993, 38995, 38997, 39001, 39570, 39572, 39574, 40014, 40023, 40922, 41162
60.....38482, 39154
63.....39579, 40316
70.....38776, 38997
81.....39001, 39574, 40023
82.....41163
85.....39154
89.....39154
93.....40420
94.....39154
174.....40427, 40431
180.....39211
260.....40354
261.....40254
262.....40254
264.....40254
265.....40254
266.....40254
267.....40254
268.....40254
270.....40254
271.....40254
273.....40254
279.....40254
281.....39213
1039.....39154
1065.....39154
1068.....39154

Proposed Rules:

50.....41409
52.....38824, 38831, 39030, 39251, 39259, 39618, 40048, 40951, 40952
63.....40679
70.....38831
81.....39618, 40952
82.....38325, 41192
122.....37880
141.....40828
180.....38125, 40051
300.....39032
412.....37880
721.....39035

41 CFR

101-48.....41369
102-41.....41369

42 CFR

413.....38264
435.....39214
436.....39214
440.....39214
441.....39214
457.....39214
483.....39214

43 CFR

4100.....39402

Proposed Rules:

3200.....41542
3280.....41542

44 CFR

64.....38780, 41172
67.....40925
206.....40025

Proposed Rules:

67.....40955, 40978, 40980

45 CFR

Proposed Rules:

1356.....40346

46 CFR

Proposed Rules:

401.....39629

47 CFR

1.....38091, 38781, 39592
15.....39229
22.....38091
24.....38091
54.....38266, 38781
64.....38091, 38268
73.....39231, 39232, 39233, 40927

Proposed Rules:

1.....38564

2.....38564
4.....38564
6.....38564
7.....38564
9.....38564
11.....38564
13.....38564
15.....38564
17.....38564
18.....38564
20.....38564
22.....38564
24.....38564
25.....38564
27.....38564
52.....38564
53.....38564
54.....38564, 38832
63.....38564
64.....38564
68.....38564
73.....38564, 39278, 40981
74.....38564
76.....38564
78.....38564
79.....38564
90.....38564
95.....38564
97.....38564
101.....38564

48 CFR

Ch. 1.....38238, 38250
2.....38238
7.....38238
18.....38247
34.....38238
52.....38238
Ch. 2.....39004
208.....39004
212.....39005
216.....39006
219.....39008
225.....39004, 39005, 39008
239.....39009, 39010
252.....39004, 39005, 39008, 39010
253.....39004
652.....41177
904.....40880
952.....40880

Proposed Rules:

2.....40681
7.....40681
12.....40681
25.....40681
52.....40681

49 CFR

574.....39233

Proposed Rules:

571.....40057

50 CFR

17.....40657
91.....39011
216.....40928
223.....38270
226.....38277
300.....38297, 38298
622.....38797, 41177
648.....40027, 40436
660.....37839, 38111
679.....38797, 39015, 40028, 40029, 40934, 40935, 40936, 41178
680.....38112, 38298, 40030

Proposed Rules:

17.....37881, 38593, 40588, 41410
300.....39642
648.....38352
679.....39046

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT JULY 21, 2006

AGRICULTURE DEPARTMENT
Agricultural Marketing Service
Olives grown in California; published 6-21-06
DEFENSE DEPARTMENT
Civilian health and medical program of uniformed services (CHAMPUS):
TRICARE program—
Reserve Select; requirements and procedures revision; published 6-21-06
FEDERAL COMMUNICATIONS COMMISSION
Common carrier services:
Broadcasting satellite service allocation; frequency bands above 28 MHz; partial reconsideration petition denied; published 6-21-06
FEDERAL HOUSING FINANCE BOARD
Federal home loan bank system:
Data reporting requirements; published 6-21-06
GENERAL SERVICES ADMINISTRATION
Federal Management Regulation:
Disposition of seized, forfeited, voluntarily abandoned, and unclaimed personal property; published 7-21-06
HOMELAND SECURITY DEPARTMENT
U.S. Citizenship and Immigration Services
Immigration:
Affidavits of support on behalf of immigrants; published 6-21-06
JUSTICE DEPARTMENT
Executive Office for Immigration Review
Immigration:
Affidavits of support on behalf of immigrants; published 6-21-06
TRANSPORTATION DEPARTMENT
Federal Aviation Administration
Airmen certification:
Airman and medical certificate holders; disqualification based on alcohol violations and refusals to submit to drug or alcohol testing; published 6-21-06
Correction; published 7-7-06
Airworthiness directives:
Airbus; published 6-16-06
Boeing; published 6-16-06
Bombardier; published 6-16-06
General Electric Co.; published 6-16-06
Short Brothers; published 6-16-06
Standard instrument approach procedures; published 7-21-06
TREASURY DEPARTMENT
Internal Revenue Service
Income taxes:
Employees of 501(c)(3) organizations in 401(k) and 401(m) plans; exclusion; published 7-21-06

RULES GOING INTO EFFECT JULY 22, 2006

COMMERCE DEPARTMENT
National Oceanic and Atmospheric Administration
Fishery conservation and management:
Caribbean, Gulf, and South Atlantic fisheries—
Tilefish; published 7-20-06
HOMELAND SECURITY DEPARTMENT
Coast Guard
Ports and waterways safety; regulated navigation areas, safety zones, security zones, etc.:
Three Mile Harbor, East Hampton, NY; published 7-7-06

RULES GOING INTO EFFECT JULY 23, 2006

HOMELAND SECURITY DEPARTMENT
Coast Guard
Drawbridge operations:
New York; published 7-24-06

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT
Agricultural Marketing Service
Raisins produced from grapes grown in—
California; comments due by 7-24-06; published 5-23-06 [FR 06-04747]
Spearmint oil produced in Far West; comments due by 7-25-06; published 5-26-06 [FR E6-08105]
AGRICULTURE DEPARTMENT
Animal and Plant Health Inspection Service
Plant-related quarantine, domestic:
Emerald ash borer; comments due by 7-24-06; published 5-24-06 [FR 06-04812]
Pine shoot beetle; comments due by 7-24-06; published 5-24-06 [FR 06-04810]
Plant-related quarantine, foreign:
Fruits and vegetables import regulations; revision; comments due by 7-26-06; published 4-27-06 [FR 06-03897]
Fruits and vegetables imported in passenger baggage; phytosanitary certificates; comments due by 7-24-06; published 5-24-06 [FR E6-07923]
COMMERCE DEPARTMENT
International Trade Administration
Antidumping and countervailing duties:
Emergency relief work supplies; importation procedures; comments due by 7-24-06; published 6-22-06 [FR 06-05612]
COMMERCE DEPARTMENT
National Oceanic and Atmospheric Administration
Fishery conservation and management:
Alaska; fisheries of Exclusive Economic Zone—
Gulf of Alaska groundfish; comments due by 7-24-06; published 6-7-06 [FR 06-05104]
Caribbean, Gulf, and South Atlantic fisheries—
Snapper-grouper; comments due by 7-24-06; published 6-9-06 [FR E6-09028]
ENERGY DEPARTMENT
Energy Efficiency and Renewable Energy Office
Energy conservation:
Commercial and industrial equipment, energy efficiency program—
Refrigerated bottled or canned beverage vending machines; meeting and framework document availability; comments due by 7-27-06; published 6-28-06 [FR 06-05838]
Renewable energy production incentives; comments due by 7-26-06; published 6-26-06 [FR E6-09998]
Weatherization Assistance Program for low-income persons; renewable energy technologies and systems; comments due by 7-24-06; published 6-22-06 [FR E6-09858]
ENVIRONMENTAL PROTECTION AGENCY
Air programs; State authority delegations:
Arizona, California, and Nevada; comments due by 7-28-06; published 6-28-06 [FR 06-05841]
Air quality implementation plans; approval and promulgation; various States:
Alabama; comments due by 7-24-06; published 6-22-06 [FR 06-05597]
Kansas; comments due by 7-26-06; published 6-26-06 [FR 06-05623]
Missouri; comments due by 7-26-06; published 6-26-06 [FR 06-05625]
Protection of human subjects:
Pesticides research involving intentional exposure—
Nursing women and nursing infants; additional protections; comments due by 7-24-06; published 6-23-06 [FR 06-05649]
Nursing women and nursing infants; additional protections; comments due by 7-24-06; published 6-23-06 [FR 06-05648]
Superfund program:
National oil and hazardous substances contingency plan priorities list; comments due by 7-24-06; published 6-22-06 [FR E6-09748]
HEALTH AND HUMAN SERVICES DEPARTMENT
Centers for Medicare & Medicaid Services
Medicare:
Ambulance services fee schedule; payment policies revisions; comments due by 7-25-06; published 5-26-06 [FR E6-07929]

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html.*

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html.* Some laws may not yet be available.

S. 3504/P.L. 109–242

Fetus Farming Prohibition Act of 2006 (July 19, 2006; 120 Stat. 570)

Last List July 14, 2006

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.

Public Laws

109th Congress

Pamphlet prints of public laws, often referred to as slip laws, are the initial publication of Federal laws upon enactment and are printed as soon as possible after approval by the President. Legislative history references appear on each law. Subscription service includes all public laws, issued irregularly upon enactment, for the 109th Congress.

Individual laws also may be purchased from the Superintendent of Documents, U.S. Government Printing Office. Prices vary. See Reader Aids Section of the Federal Register for announcements of newly enacted laws or access the online database at http://www.gpoaccess.gov/plaws/index.html

---

Superintendent of Documents **Subscriptions** Order Form

Order Processing Code:
* 6216

☐ **YES**, enter my subscription(s) as follows:

Charge your order. It's Easy! MasterCard VISA

To fax your orders (202) 512–2250
Phone your orders (202) 512–1800

_____ subscriptions to **PUBLIC LAWS** for the 109th Congress for $317 per subscription.

The total cost of my order is $ _____. **Price includes regular domestic postage and handling** and is subject to change. International customers please add 25%.

Company or personal name (Please type or print)

Additional address/attention line

Street address

City, State, ZIP code

Daytime phone including area code

Purchase order number (optional)

May we make your name/address available to other mailers? YES ☐ NO ☐

Please Choose Method of Payment:

☐ Check Payable to the Superintendent of Documents
☐ GPO Deposit Account ☐☐☐☐☐☐☐ – ☐
☐ VISA ☐ MasterCard Account
☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐
☐☐☐☐ (Credit card expiration date)

Thank you for your order!

Authorizing signature 6-05

Mail To: Superintendent of Documents
P.O. Box 371954, Pittsburgh, PA 15250–7954

Printed on recycled paper